BLUEPRINT: A BDO SERIES

# A Guide to Going Public

Updated April 2025

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# BACKGROUND

The decision to become a public company involves consideration of various advantages, disadvantages, costs and alternatives to going public. This Guide provides stakeholders with some considerations to help the decision-making process. Further, it is intended to summarize key financial reporting, accounting and auditing considerations to help companies prepare an initial public offering (IPO) registration statement and become a public company.

This Guide provides only general information and is not a substitute for specific legal, accounting and financial advice from qualified professionals on the application of the laws and regulations discussed. Please consult those advisors to obtain that guidance. Finally, the rules discussed here are subject to change.

# 1 MAKING THE DECISION

If your privately held company is successful and expects to grow, you may already be thinking about entering the public market. This guide discusses the process of going public by offering debt or equity securities.

Your goals for your business are key in making the decision to go public. The founders of a privately owned business have individual preferences and goals that motivated their previous investments of time, money and energy in the company. However, business and personal goals often change. For example, obtaining capital to expand the business and to provide personal liquidity may now be among your top priorities.

If you are seriously considering going public, first carefully weigh both the advantages and disadvantages of the process. You will need to rely on trusted professional advisors to help you through the process. Among them, your independent registered public accounting firm should be able to help you determine if a public offering is feasible and desirable in your circumstances. It can also help explain other financing options such as: bank loans, private placements of debt or equity, venture capital investments or small unregistered public offerings.

This Guide is designed to introduce you to the process and key considerations to going public; other financial alternatives are discussed in Appendix II.

## 1.1 Weighing the Key Factors

The opportunities for a public company to maximize the equity of the founders and to use this equity as a base for later public offerings and bank borrowings are compelling. However, there are certain disadvantages associated with becoming a public company. This section describes some of the advantages and disadvantages you can encounter in the process.

## 1.2 What Are the Advantages of an IPO?

**Stronger financial base**: A major benefit of an initial public offering is the substantial permanent capital it provides to meet your company's immediate and long-term objectives. This new capital base can dramatically increase your company's ability to expand its current product line, engage in new businesses, expand to other geographic markets or achieve other goals for your company.

**Better financing prospects**: Equity raised through an IPO may help your company obtain debt financing. Returning to the market for additional capital through later offerings (e.g., additional primary equity offerings, debt offerings, etc.) may also be easier once your company's stock is favorably viewed by the investing public.

**Stronger position for acquisitions, creating new currencies**: In an acquisition, the selling shareholders often accept the publicly traded stock of the acquiring company in lieu of cash. In fact, a stock deal may be more attractive than a cash acquisition, after considering the income tax implications of such transactions.

**Ability to attract and retain talent**: Your company will have a wider range of options for executive or employee compensation in the form of stock options or stock purchase plans that it can use to attract and retain talented leadership and employees. The marketability and potential appreciation of publicly traded stock is appealing to executives and employees alike.

**An available market**: Shares owned in a public company are much more liquid than if your company remains private, although they are subject to certain resale limitations imposed by the Securities and Exchange Commission (SEC).

**Increased prestige for the company and management**: The status of being a public company is generally recognized as an important credential by lenders, investors, suppliers and customers.

## 1.3 What Are the Disadvantages of an IPO?

**Pressure to maintain earnings growth**: The SEC requires public companies to file quarterly and annual financial statements. Since stock prices are generally based on the company's recent results and prospects, management is under pressure to steadily grow earnings. This pressure sometimes leads management to make decisions that conflict with sound long-range business strategies. For example, a company may forego a needed research and development (R&D) project because of the immediate effect on earnings, regardless of potential long-term revenue opportunities.

**Disclosure of corporate and personal information**: Public companies are required to regularly disclose sales, profit, net income, earnings per share (EPS) and other financial information. Disclosure requirements also include officers and director compensation, major customers, strategic plans and related party transactions. Management might be required to disclose information that it otherwise would have preferred to keep private.

**Costs**: While the costs of going public can be substantial, they are usually only a relatively small portion of the final offering proceeds. However, once your company is public, it will incur significant ongoing legal and accounting fees, independent directors' fees, periodic filing fees, directors and officer's liability insurance and other fees to comply with listing requirements. These additional costs might also include the costs of expanding your internal accounting staff, IT systems, processes and controls to produce required management and financial information and to comply with the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), Section 404 on internal control over financial reporting.

**Loss of control**: As a public company, you are now accountable to the shareholders, board of directors, regulatory agencies and financial analysts when making important business decisions. Your compensation decisions also will be subject to shareholder scrutiny due to SEC rules mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which requires companies to provide shareholders with the ability to vote on executive compensation programs and golden parachute arrangements. While the votes are non-binding and advisory in nature, they increase scrutiny over the nature and amount of executive compensation.

**Enhanced corporate governance**: You will need to meet the corporate governance and disclosure requirements of Sarbanes-Oxley and those of the exchange on which your securities are traded. Officers and directors will be held to higher corporate governance standards than in the past and will face a greater risk of personal liability.

**Loss of personal benefits**: You may need to reduce business with related companies, move relatives off the payroll or reduce other "perks" to executives or employees to remove appearance of any favors to insiders or others at the company's expense.

**Principal executive officer and principal financial officer acceptance of personal responsibility for periodic reports**: The principal executive officer and principal financial officer, typically the Chief Executive Officer (CEO) and Chief Financial Officer (CFO), will need to certify responsibility for the financial statements, disclosure controls and internal control over financial reporting in the company's quarterly and annual reports. These certifications expose these officers to both civil and criminal liability.

**Trading restrictions and fair disclosure rules**: A variety of trading restrictions limit the sale of unregistered stock, and prohibit trading on inside information, recapture of short-swing profits on securities sales, and disclosure of non-public information to selected individuals such as analysts.

## 1.4 What Are the Alternatives?

Companies typically consider a variety of financing options before deciding to go public, including commercial bank loans, asset-based financing, private placements, Regulation A+ offerings of shares, extended terms with suppliers, and other financing arrangements. Companies should explore these sources before deciding to go public. See Appendix II for further discussion on these alternatives.

## 1.5 Will My Public Offering Succeed?

If you believe that going public is to your company's advantage, the next major question to ask is "will the offering succeed in the marketplace?" The climate for IPOs can fluctuate dramatically, both in the long- and short-term. The climate must be carefully evaluated to project the stock price and number of shares that can be absorbed by the market at any given time. Underwriters are familiar with what determines the success or failure of an offering in the IPO market and can advise you on timing.

Companies and authorized persons (including the underwriters) may communicate with qualified institutional buyers or institutional accredited investors before or after the initial filing of the registration statement. This opportunity to

"test the waters" and communicate with potential investors before the traditional IPO road show may help evaluate the potential success of your offering.

Another factor to consider in reaching your decision is whether the proceeds from the offering are fair compensation for giving up part of your business to outsiders. The size of the IPO depends on what your business is worth and what percentage will be sold to the public. The offering price is determined through negotiations with the underwriter and is based primarily on the following:

- A comparison of your company's price-to-earnings ratio and other key performance indicators to other companies in the industry
- An evaluation of your company's future prospects, management team and quality of earnings
- Current stock market conditions

The gross proceeds from the offering are reduced by the underwriter's commission, which, depending on the offering size, will generally range between 3.5% and 7% of the proceeds, plus out-of-pocket expenses. Other costs of an IPO, including attorney, accountant, financial printers, registration, listing and filing fees, vary widely, often running into several hundred thousand dollars. In addition, some underwriters negotiate for warrants to purchase the company's stock, usually exercisable at the public offering price, which will result in additional dilution if exercised. Although the total underwriter's fee is negotiated, the range of fees among underwriters is narrow.

One thing that may give you comfort: Companies may confidentially submit certain IPO registration statements to the SEC. Should you decide to abandon the offering for any reason prior to the public filing, this confidential submission process allows your information to remain private.

### 1.6 Is Going Public the Right Decision?

After seriously considering the advantages and disadvantages of an IPO and the potential size of an offering, you still need to understand the process of going public from the preliminary stages to life as a public company. The rest of this Guide describes this complex process to help you make your final decision with confidence.

## 2 GETTING READY

The process of going public can be a long one, where periods of round-the-clock activity alternate with slow spells when you can re-focus on your daily business activities. It is important to set up and follow a strategy to help you anticipate issues and prepare a variety of solutions. Preparing for the transition should begin early since responsibilities, financial structure and management policies are fundamentally different before and after an IPO.

The following are some of the issues you will need to consider during the planning stage:

### 2.1 Audited Financial Statements and Other Financial Information

You will need two or three years of the company's audited financial statements, depending on your reporting status (see determination in section **4.3**). If you have significant acquisitions in the past or have significant equity investments, then audited financial statements of the acquiree or investee and pro forma information may be required under certain circumstances. Preparing this financial information just before going public can be time-consuming, costly and sometimes impossible because information is not available or audit procedures (e.g., physical inventory observations) were not performed historically.

A timely audit of your financial statements provides several benefits. First, it increases the credibility of your financial statements, which can help you obtain financing or bring in more private investors. It also gives you a clearer picture of your operating results and how they appear to investors. The ability to generate accurate and timely information is important not only for your internal finance functions (i.e., accounting, financial reporting, financial planning and analysis, risk management), but also for generating quarterly and annual reports and certifications required by the SEC and Sarbanes-Oxley. Such information is also needed by investors and analysts reviewing your company.

You should consult with your accountants and attorneys to identify any information needed for disclosure that is not readily available. Preparing information such as audited financial statements of any predecessor, acquired companies or significant equity method investees may be time consuming. By planning in advance to obtain this information, you may avoid costly delays in the IPO process or a possible termination of the offering.

It is best to bring in qualified independent registered public accountants to work with you as soon as the decision to go public appears likely. The accountants should be familiar with the requirements necessary to maintain their

independence in fact and in appearance and they should determine if they are independent in each of the periods to be presented in the registration statement. Providing certain non-auditing services, such as bookkeeping or executive searches for the company may preclude the accountant from being considered independent and therefore associated with the financial statements in an SEC filing. Auditors must comply with independence standards in Rule 2-01 of Regulation S-X (S-X) in its entirety in the current period presented in an initial registration statement, whereas compliance with local independence standards (e.g., AICPA standards) and the general independence standard within S-X Rule 2-01 is required in "lookback" periods (i.e., years prior to the most recently audited period). The general independence standard provides guiding principles as to whether a relationship or a provision of a service:

- Creates a mutual or conflicting interest between the accountant and the audit client
- Places the accountant in the position of auditing his or her own work
- Results in the accountant acting as management or an employee of the audit client
- Places the accountant in a position of being an advocate for the audit client

It is a high hurdle to conclude that an auditor was objective and impartial under the general standard when the auditor provided services that contradict these guiding principles during an audit period. Additionally, the accountants must be registered with the Public Company Accounting Oversight Board (PCAOB).

## 2.2 Corporate Governance

If you are planning to list the company's stock on a U.S. stock exchange, your company must also meet certain corporate governance standards. Your company must have a board of directors comprised primarily of independent outside directors. Governance requirements resulting from Sarbanes-Oxley and the Dodd-Frank Act must also be met. Collectively, these requirements include:

- Your audit committee, compensation committee and nominating committee – the "standing committees" of the board – must be comprised of independent outside directors
- One member of the audit committee must be a "financial expert"
- Your principal executive officer and principal financial officer must certify the financial statements
- Your independent accountants are prohibited from providing certain non-audit services (see further discussion earlier in section **2.1**)

U.S. stock exchanges allow companies going public to phase in compliance with independent committee requirements. Consideration to the construct of the board is also important, and if done properly as part of the going public process, it will enhance the value of the organization.

For example:

- Governance structure: consider how the board leadership will be structured – e.g., will there by a dual CEO/Chair with an Independent Lead Director or will the role of CEO and Chair be split? Will there be terms for directors?
- Size of board: newer organizations may be resource constrained and often begin with smaller boards that expand as the company grows and maintain balance with independent directors.
- Key attributes of directors:
  - Professionalism: individuals with experience (industry, operational, leadership, governance, public entities) complimented with other technical skillsets, diversity and areas of expertise with respect to key risks for the organization.
  - Questioning mindset: exercise skepticism, encourage but challenge management, oversee strategy and execution but not try and manage operations.
  - Engagement: collegial yet able to engage in robust discussions with fellow directors and be able to articulate differing perspectives.
  - Oversight: oversee corporate strategy and execution by management.
  - Continual learners: individuals who keep themselves appraised of risks and opportunities impacting the organization.

### 2.3 Management Team

Your management team should be appealing to public investors. Registration statements must identify senior executives, including a five-year work history for each individual. The capital markets view a strong management team, one that can maximize a company's potential, as a major selling point. Similar to the considerations of the board, discussed above, this group should have:

- Professionalism: individuals with experience in your industry are essential; family members without proper credentials are not suitable.
- Depth: key management functions must be adequately staffed; one entrepreneur is not enough to run an entire business.
- Sensitivity to shareholders' goals: management should consider how business decisions will be viewed by investors.

### 2.4 Executive Compensation

You will need a reasonable executive compensation program designed to attract and retain executives while avoiding any sign of overcompensation or favoritism. Compensation specialists can help structure compensation packages based on their broad knowledge of the tax, financial and business implications of different strategies and their experience with similar companies.

### 2.5 Public and Investor Relations

A public and investor relations program for your company should begin at an early stage. For a successful IPO and continued market strength, your company should maintain visibility and a positive image with the financial community and business press. The public relations program should consider that name recognition takes time to develop and begins at the onset of the IPO process.

### 2.6 Related Party Transactions

It will be necessary to clearly document the business purpose for related party transactions. Arrangements and transactions between your company and affiliates and others, such as officers, directors or major shareholders must be disclosed in the registration statement. Therefore, such transactions should be identified, documented and reviewed with your attorney, lead underwriter and independent accountants to anticipate problems that could delay the SEC registration process, make the shares unattractive or affect the financial statements.

## 3 ASSEMBLING THE TEAM

During the IPO process, you are likely to spend more time with the group of people involved in your offering than with your family, friends or employees. Not only is it essential for this group to be qualified from a professional standpoint, but the group also needs a high level of trust and communication to accomplish your objectives.

Keep in mind that the four major goals in an IPO are to:

1. Complete the registration process without major delays
2. Time the offering so it reaches the market at the best moment
3. Obtain the best price
4. Establish a strong market for the shares after the IPO

To achieve these goals, you need a team of knowledgeable and experienced financial and legal advisors, including independent accountants, attorneys and the underwriter and its attorneys.

### 3.1 Selecting Your Financial and Legal Advisors

Select a law firm based on its current and relevant experience in meeting the technical and legal requirements of initial securities filings, as well as subsequent reporting. Your lawyers should also be capable of evaluating whether your corporate documents and agreements - such as articles of incorporation and bylaws, codes of conduct and ethics, as well as board and committee charters - are appropriate for a public company. You should select a firm that has adequate resources to perform the tasks required by you and your lead underwriter. Your law firm should have experience in your industry and understand your business.

Your independent accountant plays a key role in the IPO process. It will be responsible for auditing the financial statements that will be included in the registration statement, issuing comfort letters to the underwriters, assisting in organizing and participating in any pre-filing conferences with the SEC staff on financial statement matters, and reviewing your responses to SEC staff comments on financial statements issues.

Select your independent registered public accounting firm based on its knowledge of your industry and experience in the IPO process and on-going SEC matters. SEC rules require that your independent accountant be registered with the PCAOB to serve as your auditor before you can include your financial statements in an IPO filing. That is, once you plan to file a registration statement, your financial statements must be audited by a firm registered with the PCAOB.

## 3.2 Choosing the Underwriter

The lead underwriter is one of the most essential elements of a successful offering. The underwriter will help you prepare your offering, create a market for your stock, support the "aftermarket" to ensure that the price of your stock remains strong, and keep you informed of market perceptions.

Furthermore, the lead underwriter is the primary source of advice on marketing and pricing your shares and deciding when to approach the market. Look for a respected lead underwriter who is knowledgeable in your industry and has handled IPOs for similar companies. Your accountants, consultants and attorneys are good referral sources, as are other companies in your industry that recently went public. Ask the following questions in the selection process:

**Reputation**: Does the firm have a compelling reputation in the financial community? The underwriter's reputation affects the degree of confidence that investors have in your stock.

**Distribution network**: Does the firm have the kind of distribution network you are interested in? Match your needs with the firm's ability to manage your offering. For example, if your regional company is looking for individual long-term investors in your geographic area, you probably do not need an investment banking firm with a global client base of institutional investors and speculators.

**Industry experience**: Does the firm have experience with companies in your industry? This experience directly affects the underwriter's ability to price your stock accurately and find the best time to approach the market.

**Aftermarket support**: Will the firm provide support in the "aftermarket," including supporting the price of your company's shares after the IPO by making a market in the stock and advising you on how the market views your company and its industry. For larger offerings, consider whether the underwriter has respected analysts on staff to generate research on your company and its industry.

**Pricing record**: Does the firm have recent market experience and a good track record in pricing IPOs? Having the right price when you reach the market is crucial to the success of an offering and the strength of the aftermarket. It may be tempting to select the underwriter with the highest preliminary pricing estimate. However, an unrealistically high initial price may decrease in the aftermarket, which could negatively affect the investing public's perception of your company.

## 3.3 What the Underwriter Will Look For

The lead underwriter will study your company closely before agreeing to take it public and will carefully examine the following key areas:

- The health of your industry, the quality of your products or services, the strength of your market position and your potential for growth
- Your supply sources, distribution channels and types and number of customers
- The stability of your company's financial position, including its capital structure and asset utilization
- Your earnings record and prospects for future growth
- The strength of your business plan
- Your ability to plan and manage operations, including your ability to prepare and meet budgets
- The experience and leadership of your management team and board of directors
- Your reputation with customers, suppliers and competitors

When assessing your company, the underwriter will interview management, your independent accountants and your attorneys. You can expect this interview process to be rigorous, because the underwriter assumes substantial risk in taking your company public, which necessitates skepticism during the investigation.

Underwriters will also be concerned if existing shareholders plan to sell a significant portion of their shares in the offering. Rather, they generally prefer that the IPO consists primarily of newly issued shares, with the proceeds going to the company. Otherwise, there may be a market perception that current shareholders are selling shares due to their lack of faith in the company.

### 3.4 Types of Underwriting Arrangements

Once you have chosen an underwriter, you generally will sign a letter of intent outlining the terms of the underwriting agreement, such as compensation and estimated price. The draft underwriting agreement outlines these terms in detail. It also may require your independent accountants to perform a variety of procedures for the benefit of the underwriter. Therefore, it should be reviewed by both your accountants and attorneys. The final underwriting agreement itself usually is not signed until just before the stock can be sold to the public, which means that the underwriter can change their mind if the stock market declines, or the company's fortunes change.

The two basic types of underwriting arrangements are:

- The firm commitment, where the underwriter agrees to buy all shares offered and resell it to the public at the underwriter's own risk
- The best-efforts agreement, where the underwriter has no obligation to buy any shares that the public does not buy, and the underwriter may agree that if all or a minimum number of shares are not sold, the offering will be cancelled

From the company's standpoint, the firm commitment is the most desirable arrangement. However, in small IPOs, a best-efforts agreement is sometimes used.

You can also structure your offering using the Dutch auction process where the underwriter bases the public offering price and the allocation of shares on an auction. Investors, both large and small, receive their "place in line" to buy shares based on the number and price they bid in an auction conducted by the underwriters. That is, the investors with the highest bids for the greatest number of shares receive the best place in the buying line. The underwriters then determine the actual public offering price based on the clearing price, which is the highest price at which all shares in the offering can be sold.

## 4 THE REGISTRATION PROCESS

Once your team is assembled, the registration process can begin. The timetable, from the first all-hands meeting with the IPO team to the day your stock is sold to the public, (the effective date) usually takes four to six months.

Generally speaking, your company becomes "public" when the SEC permits it to sell stock by means of a registration statement. The process for reaching this goal is complex and often exasperating. This section provides an overview of what to expect.

### 4.1 Drafting the Registration Statement

Throughout the process, the registration statement is frequently modified and thoroughly analyzed to determine whether company information is presented factually and fairly and meets all SEC disclosure requirements. Each member of your team is responsible for providing specific information during the drafting process. For example:

**Attorneys**: Your attorneys are often in charge of preparing the nonfinancial sections of the registration statement.

**Company management**: The CFO and other key personnel provide detailed financial and analytical information about the company, with the CEO providing an overview of the company's business plans.

**Underwriter**: The underwriter and its attorneys critique the information in the registration statement.

### 4.2 What Is in the Registration Statement?

The registration statement consists of a prospectus that is distributed to potential investors and supplemental information. The supplemental information is available for public inspection at the SEC's main office in Washington,

D.C., but is not distributed to potential investors. Registration statements can also be accessed online at both the SEC's website: **www.sec.gov/edgar/searchedgar/webusers.htm** and the company's website.

Although the prospectus is a selling document, it is also a legal disclosure document, therefore requires a delicate balance in the drafting process. From a marketing standpoint, you will be eager to describe your company's unique advantages over the competition, and your bright future. However, from a legal standpoint, you are required to fully disclose all material negative information and the major risks of investing in your company and the company's securities. Consequently, the registration statement should not contain any laudatory phrases that could mislead the investing public.

The registration statement may be confidentially submitted for the SEC staff's review. A confidential submission allows the company to respond to SEC comments and update the draft registration statement (DRS) non-publicly, while continuing to assess market conditions. Any delay in or withdraw of the IPO is not subject to public scrutiny. All previously submitted draft registration statements must be publicly filed at least 15 days prior to the IPO roadshow (or at least 15 days prior to the effective date of the registration statement if no roadshow) but are not made public if the company withdraws its IPO.

## 4.3 Reporting Status – IPO

Companies generally file IPOs on the SEC's Form S-1. The cover page of Form S-1 requires the company to determine its reporting status. This step is important because the company may benefit from reduced regulatory and reporting requirements, depending on its ability to qualify as an Emerging Growth Company (EGC), Smaller Reporting Company (SRC), or both.

### 4.3.1 Emerging Growth Companies

A private company will generally qualify as an EGC in its IPO if the following criteria are met:

- It has total annual gross revenues of less than $1.235 billion during its most recently completed fiscal year; and
- It has not issued more than $1 billion of non-convertible debt during the three years before the IPO.

For the revenue test, the most recently completed fiscal year is the most recent annual period completed, regardless of whether that period is included in the registration statement.

**EXAMPLE 4-1: EGC STATUS**

**FACTS**

Company A, who has a December 31 year-end, is conducting its IPO in January 20X5. Company A has not issued more than $1 billion of non-convertible debt during the three years before January 20X5. Company A's total revenues were $1 billion for fiscal year 20X3 and $1.3 billion for fiscal year 20X4.

The IPO registration statement will include the most recent audited financial statements for the fiscal year ending December 31, 20X3 as audited financial statements for the fiscal year ending December 31, 20X4 are not required at the filing date in January 20X5. Company A must determine whether it qualifies as an EGC.

**CONCLUSION**

Company A does not qualify as an EGC because its revenues exceed $1.235 billion for the fiscal year ending December 31, 20X4. 20X4 is the most recently completed fiscal year, even though audited financial statements for that year are not yet required to be included in the filing.

Non-convertible debt means any non-convertible security that constitutes indebtedness (whether public or private). Bank debt (like term debt and revolving loans) generally does not constitute a debt security. The three-year period is rolling, and therefore not limited to period ends. Additionally, the measurement includes all non-convertible debt issued within the preceding three-years, regardless of whether the debt is outstanding.

Sometimes, a company loses its status as an EGC before the effective date of the IPO. The loss of EGC status may occur if:

- A fiscal year is completed after the initial submission or filing for which the company has revenues in excess of $1.235 billion.
- During any period before effective date, the nonconvertible debt issued over the preceding three-year period exceeds $1 billion.

If the company qualified as an EGC when it submitted its draft registration statement, or publicly filed a registration statement, the company may continue to be treated as an EGC for purposes of the disclosure accommodations until the earlier of the date the IPO is consummated, or one year from the date the company ceased to qualify as an EGC.

After the IPO, additional criteria must be met to retain EGC status. These criteria are discussed in the section **6.2**.

**4.3.2 Smaller Reporting Companies**

A registrant may qualify as an SRC on the basis of either a public float test or a revenue test. The thresholds for qualification as an SRC are as follows:

- Public Float Test - less than $250 million of public float as of the last business day of the registrant's second fiscal quarter; or
- Revenue Test - less than $100 million of revenue as of the most recently completed fiscal year for which audited financial statements are available and no public float or public float of less than $700 million as of the last business day of the registrant's second fiscal quarter.

Often, a company conducting an IPO does not have a public float because it has no public common shares outstanding, or because there is no market price for its common shares. As such, a company with less than $100 million of revenue typically qualifies as an SRC in the initial registration statement. Public float is determined within 30 days of the filing of the registration statement and is calculated using the aggregate worldwide number of shares of common equity held by non-affiliates multiplied by the market price, and in the case of a Securities Act registration statement, adding to that figure the product of the common shares registered in the IPO multiplied by the estimated offering price.

The revenue test in an initial registration statement is based on the audited financial statements for the most recent completed fiscal year included in filing. However, if after giving pro forma effect to a business acquired during the latest fiscal year, and, if applicable, the consummation of an acquisition of a business deemed probable at the time of the filing, revenues exceed $100 million, the Company would not qualify as an SRC.

**4.3.3. Financial Statements Include in the IPO**

The registration statement must include the most recent audited annual financial statements and footnote disclosures for the registrant and any predecessor entities. The financial statements must not be more than 134 days old. As such, unaudited interim financial statements may also be required depending on the length of time elapsed between the most recent fiscal year-end and the filing of the registration statement. However, third quarter financial statements are considered timely through the 45th day after the most recent fiscal year-end, after which the audited financial statements for the most recent fiscal year are required.

The following table provides the periods required to be presented in the registration statement for both the annual and interim financial statements:

| FINANCIAL STATEMENT REQUIREMENTS | EGC | SRC | ALL OTHER FILERS |
|---|---|---|---|
| **Audited Annual Financial Statements** | | | |
| Balance sheet | 2 years | 2 years | 2 years |
| Income statement, comprehensive income, cash flows and changes in shareholders' equity | 2 years | 2 years | 3 years |
| **Unaudited Interim Financial Statements** | | | |
| Balance sheet | As of the end of the most recent interim period after the latest fiscal year. | | |
| Income statement, comprehensive income, cash flows and changes in shareholders' equity | The period from the latest fiscal year-end to the interim balance sheet date and the corresponding period in the prior fiscal year. | | |

In certain circumstances, a company may omit historical financial statements that are otherwise required in the registration statement. The omission of such information depends on whether (1) the registrant is an EGC, (2) the financial statements are annual or interim financial statements and (3) the document is a draft registration statement or a publicly filed registration statement.

| | DRAFT REGISTRATION STATEMENTS | PUBLICLY FILED REGISTRATION STATEMENTS |
|---|---|---|
| **EGCs** | May omit annual and interim periods that will not be required to be presented separately at the time of the offering | May omit annual periods that will not be required at the time of the offering<br>May **not** omit interim periods that relate to longer historical periods required at the time of the offering |
| **Non-EGCs** | May omit annual and interim periods that will not be required to be presented separately at the time of the public filing | May **not** omit annual or interim periods at the time of the public filing |

**EXAMPLE 4-2: OMITTING FINANCIAL STATEMENTS IN A DRAFT REGISTRATION STATEMENT (EGC)**

**FACTS**

Company A, a December 31, year-end EGC, submits a draft registration statement in December 20X5 and reasonably believes that it will commence its offering in April 20X6 (when annual financial statements for 20X5 will be required).

**CONCLUSION**

Company A may omit its 20X3 annual financial statements and the nine-month interim financial statements for 20X5 and 20X4 because this information will not be required at the time of the offering in April 20X6 (as an EGC, Company A may present two years of audited annual financial statements rather than three years).

**EXAMPLE 4-3: OMITTING FINANCIAL STATEMENTS IN A PUBLICLY FILED REGISTRATION STATEMENT (EGC)**

**FACTS**

Assume the same fact as Example 4-2. Company A publicly files a registration statement in January 20X6.

**CONCLUSION**

Company A must include the nine-month interim financial statements for 20X5 and 20X4 because they relate to annual periods that will be required at the time of the offering. Company A may omit its 20X3 annual financial statements because this information will not be required at the time of the offering in April 20X6 (as an EGC, Company A may present two years of audited annual financial statements rather than three years).

**EXAMPLE 4-4: OMITTING FINANCIAL STATEMENTS IN A DRAFT REGISTRATION STATEMENT (NON-EGG)**

**FACTS**

Company A, a December 31, year-end non-EGC, submits a draft registration statement in January 20X6 and reasonably believes it will first publicly file in April 20X6 (when annual financial statements for 20X5 will be required).

**CONCLUSION**

Company A may omit from its draft registration statements its 20X2 annual financial information and nine-month interim financial statements for 20X5 and 20X4 because this information will not be required at the time of its first public filing in April 20X6 (as a non-EGC, Company A must present three years of audited annual financial statements).

### 4.3.4 Evaluation of Subsequent Events

A non-SEC filer evaluates subsequent events for the period from the latest balance sheet date to the date the financial statements are available for issuance. A company conducting its IPO typically does not meet the definition of an "SEC filer" until the initial registration statement is effective, at which point the company has a reporting obligation. As such, a company conducting its IPO should typically disclose the date through which subsequent events were evaluated, which is the date the financial statements were available for issuance.

The initial registration statement is often amended several times before the effective date. With each amendment, the financial statements included in the registration statement are reissued.

**SEC REGULATIONS AND STAFF GUIDANCE**

Section 4710 and Topic 13 of the **Financial Reporting Manual (FRM)**

There are certain events that may occur after the date of the latest balance sheet included registration statement but before the effective date of the registration statement that require retrospective revision in the financial statements. These events include stock splits and combinations of entities under common control.[1] For example, if a stock split occurs before the registration statement is effective, the financial statements included in the registration statement

[1] In certain cases, the SEC staff may accept the presentation of a component as a discontinued operation in the financial statements, even when the disposal event occurs after the date of the latest balance sheet included in the registration statement. See section 4710 of the FRM and June 25, 2014 CAQ SEC Regulations Committee Highlights, Topic VIII.C.

must be retrospectively revised to reflect the stock split. In these circumstances, the SEC staff may accept a "to-be-issued" or "legend" auditor's report to be provided in the registration statement before the date the stock split occurs and before the effective date of the registration statement. Under this approach, instead of providing a signed auditor's report, an auditor provides a report with a signed legend, which states that the auditor expects to sign the report in the form set forth following the legend after the event has occurred. The SEC staff requires that the legend be removed, and the signed report be filed in a pre-effective amendment before it will declare the registration statement effective. As such, the stock split must be completed before effectiveness in order to be reflected in the historical financial statements. In other words, it cannot happen simultaneous with effectiveness or at the closing of the offering. Events that occur simultaneous with effectiveness or after will not be historical events at the time the auditor signs its report, so they cannot be reflected in historical financial statements. They can only be reflected in pro forma financial information.

Certain events that occur after the latest fiscal year-end may be reflected in the interim financial statements included in the registration statement. These events may also require retrospective revision in the pre-event financial statements. Such events include a change in segments, discontinued operations, and a change in accounting principle applied retrospectively.

When the pre-event financial statements are retrospectively revised to reflect these events, the company discloses (1) the date through which subsequent events were evaluated (the date the financial statements were available for issuance), and (2) the date evaluated with respect to the event that is given retroactive effect in the revised financial statements. The auditor's report is also dual dated for the event.

Some subsequent events may not require retrospective recognition in the financial statements but, absent disclosure, would render the financial statements materially misleading. When interim financial statements are included in the registration statement, we believe it is appropriate to disclose such events in the interim financial statements. If interim financial statements are not included in the registration statement, such events may be disclosed in a separate unaudited note to the annual financial statements.[2] In these circumstances, the company must continue to disclose the date through which subsequent events were evaluated (the date the financial statements were available for issuance), and the date of the auditor's report remains unchanged.

#### 4.3.5 Other Content

Form S-1 provides investors with a broad view of the company, its operations and its finances. Some of the key disclosures in the registration statement, as required under Regulation S-K, include the following information:

| | |
|---|---|
| **Information about your business** | ▶ This information could include products, market factors, competition, industry trends that may influence your company's future prospects, significant business segments (i.e., separate lines of business) and financial information about operations in geographic areas. See section **5** for further detail on segment reporting.<br>▶ Some companies might not want to disclose segment information if the information was previously considered confidential, but it may be required.<br>▶ If your company must disclose financial information about segments, your accounting systems should be able to generate the required information.<br>▶ Companies also should include information about the availability of raw materials; patents, trademarks and licenses; seasonal cycles; concentration of customer base; government contracts; factors influencing working capital requirements; human capital; foreign operations; and historic growth factors. |
| **Company background** | ▶ Include information about predecessor companies and mergers |
| **Risk factors** | ▶ Both business and financial factors need to be covered |

[2] PCAOB AS 3110.08.

| | |
|---|---|
| | ▶ Some of these risk factors include volatile industry conditions, an unproven product line, a highly leveraged capital structure, dilution in book value per share to public shareholders or the lack of operating history<br>▶ Disclosures should focus on material risks to investing in the company<br>▶ Avoid generic or boilerplate disclosures |
| **Offering proceeds** | ▶ How the proceeds of the offering will be used when new shares are to be sold by the company itself (in a "primary" offering)<br>• Examples include repayment of debt, expansion of product lines and purchase of additional facilities<br>▶ The use of proceeds is not relevant when shares will be sold by existing shareholders (i.e., in a "secondary" offering) |
| **Company officers and directors** | ▶ Identity and experience of the company's directors and officers, including their age, five-year employment history, compensation, business experience, family relationships among them and any involvement in legal proceedings<br>▶ A compensation discussion and analysis that analyzes material factors underlying compensation policies and decisions for company officers |
| **Related party transactions** | ▶ Any related-party transactions between the company and its officers, directors or major shareholders and their immediate families |
| **Shareholders** | ▶ The identity of principal shareholders and management who own stock and the number of shares owned |
| **Management's discussion and analysis (MD&A)** | ▶ Management's discussion and analysis of financial condition and results of operations for the number of years covered by the financial statements<br>▶ MD&A should summarize in plain English, by business segments and in total, the trends in important financial areas such as the company's liquidity, operating results, capital structure, commitments and future sources and use of capital<br>▶ Discussion of critical accounting estimates that involve a significant level of uncertainty and have had or are reasonably likely to have a material impact on the financial condition and results of operations |
| **Financial information** | ▶ Audited financial statements of significant acquired companies, joint ventures/equity investees or predecessors<br>▶ EGCs and/or SRCs are only required to present two years of audited financial statements<br>▶ Timely interim financial information<br>▶ Supporting schedules |
| **Dilution** | ▶ The dilution to public shareholders, which will occur because the IPO price per share is higher than the book value per share |

## 4.4 Due Diligence

Under the Securities Act of 1933 (the "Securities Act"), the company and its expert advisors, including independent accountants, attorneys and underwriters, are generally liable for any material omissions and misstatements in the registration statement. While the liability standard differs for each group, it generally follows the following guidelines:

**Company**: The company's liability is absolute and cannot be avoided with defenses such as good faith error. Historically, companies insured their officers and directors to protect them from being personally liable for actions taken on behalf of the company, although the premiums for this insurance may be expensive or difficult to obtain.

**Team of advisors**: The liability of the team of independent accountants and the underwriter can be avoided with the defense that they exercised due diligence. This means they acted responsibly in attempting to make sure the registration statement contained appropriate information.

Attorneys for the company and the underwriter will normally require officers and directors to complete written questionnaires confirming information in the registration statement. They will also interview them to make sure that they understand the questionnaires. This also serves to verify business-related disclosures, such as product descriptions, manufacturing, distribution and marketing activities.

Independent accountants perform subsequent events procedures after the report date through the filing date. This is done to determine whether their report on the financial statements is still appropriate, or whether the financial statements or disclosures need to be changed. They will also review the registration statement for any inconsistencies between the financial and nonfinancial portions.

The underwriter relies on the independent accountants to help ensure the adequacy of financial disclosures and may request comfort letters at various stages of the IPO process. Generally, a comfort letter in draft form is furnished early in the offering process. Once the underwriting contract is signed but before the point of sale, the first comfort letter, covering the preliminary prospectus, may be issued. After the final prospectus is filed, an updated comfort letter may be issued covering the final prospectus. This letter is updated at closing when the net proceeds are remitted to the company (the closing date). The comfort letter discusses the results of the accountants' inquiries regarding financial information that became available after the last audit, and describes the results of special procedures that the underwriter requested them to perform on other data in the prospectus.

## 4.5 Quiet Period

The SEC does not define the term "quiet period" that historically extended from the time a company begins substantive discussions with investment bankers regarding the offering until the SEC staff declares the registration statement effective. During that period, SEC rules limited what information the company and related parties could release to the public. However, all companies have a 30-day safe harbor before filing a registration statement in which they can communicate information regarding anything other than the securities offering. Additionally, all issuers may engage in test-the-waters communications with certain potential institutional investors before and after the filing of the initial registration statement. Regardless, during the quiet period, it is generally advisable for all communications to be reviewed by your attorneys.

## 4.6 SEC Review

When the team is satisfied with the draft of the registration statement, it is filed with the SEC. All companies conducting an initial public offering of their common equity securities can submit their IPO registration statements on a confidential basis with the SEC. All confidential submissions must be filed publicly no later than 15 days before (1) a road show or (2) the requested effective date of the registration statement if no road show is planned.

Registration statements are generally reviewed by the staff of the SEC's Division of Corporation Finance, which includes accountants, financial analysts, valuation experts, attorneys and engineers. The initial filing review generally takes about 30 days. The SEC's review focuses on whether the registration statement contains adequate disclosures, complies with the SEC's rules and regulations and includes financial statements, and related disclosures required by generally accepted accounting principles (GAAP). The filing is analyzed, not only for the information it contains, but also in the context of current business developments, business practices and accounting policies prevailing in the company's industry and specific economic environment.

At the end of the review process, the company receives a comment letter from the SEC that may request changes in, or clarification of, information contained in the registration statement. The SEC staff's comments generally are resolved through a response letter that provides supplemental information to the staff. You may find a telephone conference with the SEC staff helpful in resolving more complex issues.[3] You and your legal counsel usually prepare responses to the SEC comments on legal and other matters. Your independent accountants will generally request to

[3] The SEC staff provides advice on interaction with the SEC staff at: **www.sec.gov/ info/accountants/ocasubguidance.htm**.

review your responses to the comments on accounting and financial reporting matters. All SEC comments require a written response. Your response to the SEC comments will be either to change the filing or to obtain the staff's acceptance of your written response. The staff informally acknowledges acceptance by letting your filing proceed. If you change the filing due to the comment letter, the registration statement will be amended and resubmitted or refiled. Minor changes will generally not result in changes to the registration timetable; however, extensive changes may delay the offering. The extent of SEC comments can be minimized if potential accounting, disclosure or other problems are anticipated and dealt with in advance of the filing.

After the SEC staff's final review, the registration statement will be declared effective. SEC rules allow the registration statement to become effective without the actual price of the shares to the public, the expenses of the offering and the net proceeds to the company. This information is then inserted when the final prospectus is printed.

## 4.7 State "Blue Sky" Laws

The SEC is not the only regulatory agency to review your filing. Public offerings also must qualify under the "Blue Sky" laws governing the sale of securities in every state where they are to be sold. The purpose of these laws is to prevent the sale of securities that have no more basis than "blue sky." Blue Sky qualification is generally handled by the company's attorneys when you file with the SEC. Companies that list on a national securities exchange are exempt from Blue Sky laws.

The requirements of Blue Sky laws vary from state to state. While the regulations of individual states vary, almost half the states have adopted the Uniform Securities Act or have based their laws on that Act. In some states, notifying state regulatory authorities of the intention to sell securities in that state is sufficient; in others, it is necessary to file a separate registration statement. Unlike the SEC reviews, Blue Sky reviews consider the merits of the offering, and states have their own acceptance parameters about such matters as dilution, voting rights and cheap stock sold to corporate insiders.

## 4.8 Listing the Securities

While you are registering your securities with the SEC, you must also decide where you would like them to be traded after the offering and submit a listing application. This decision should be based on several factors, including comparing the access and visibility your securities will need to that provided by each market, and considering the relative costs. You should consult with your underwriter in selecting a market.

The largest U.S. securities trading markets are the New York Stock Exchange (NYSE) and Nasdaq Stock Market (Nasdaq). The stock exchanges each have requirements that a company must meet for its securities to be listed. The initial listing requirements for these exchanges are both quantitative (such as minimum shareholders' equity, profitability and market capitalization requirements) and qualitative (such as corporate governance requirements).

## 4.9 The Road Show

While the registration statement is under review by the SEC, the underwriter may decide to arrange a "road show". This is a tour of various target cities and is designed to give financial analysts, major investors and others the opportunity to question management.

Your presentation to the financial community at road show meetings is critical to generate interest in your company. You work closely with your attorneys, the lead underwriter and possibly a public relations advisor to prepare your presentation and anticipate the nature of questions that will be asked. This presentation should help create a favorable impression for financial analysts and prospective investors. You should guard against making misleading statements, which could later result in litigation. You should be just as cautious about what you say in public as you are in drafting the registration statement.

## 4.10 The Finale

Just after the registration statement becomes effective, the underwriting agreement is signed. After that, the final prospectus which indicates the actual offering price of the securities is printed and distributed to the members of the underwriting syndicate for distribution to prospective investors who received a copy of the preliminary prospectus (red herring). In addition, a tombstone ad may be published to let investors know where to get a copy of the prospectus.

The closing takes place a week or so after the effective date. At the closing the underwriters receive funds from their customers, and the company in turn receives the net proceeds after the underwriters' compensation. However, if the

underwriting agreement required a minimum level of shares to be sold and that level was not reached, the offering period may be extended or the offering withdrawn.

# 5 PUBLIC COMPANY ACCOUNTING

A public company files registration statements with the SEC that include financial statements, which must comply with public-entity accounting principles and disclosure requirements.

## 5.1 Accounting Topics

There are several particularly challenging public company accounting topics that are oftentimes the source of SEC staff comments. Unless otherwise indicated, the topics discussed below may be applicable to all registrants, regardless of their filing status. However, you should be aware that the JOBS Act provided registrants that qualify as emerging growth companies with temporary relief from new accounting standards by allowing them to elect to adopt any new accounting standards using the effective dates applicable to nonpublic companies. The phase-in period will provide these companies additional time to comply with new standards that may be complex or require additional compliance personnel.

### 5.1.1 Private Company Alternatives

Any private company accounting alternatives (i.e., private company council, or "PCC" alternatives) the entity previously applied must be unwound and historical financial statements must be retrospectively adjusted. Examples of common PCC alternatives include:

- Amortizing goodwill, evaluating triggering events for goodwill impairment as of the end of the reporting period (rather than throughout the reporting period), testing goodwill impairment at the entity-wide level (rather than the reporting unit level)
- Not recognizing certain customer-related intangible assets and noncompetition agreements separately from goodwill in a business combination
- Using the settlement value, rather than fair value when applying hedge accounting
- Not applying the variable interest entity consolidation guidance to certain entities that are under common control

Unwinding these alternatives can be time consuming, challenging and costly, and may not be limited to the periods presented in the registration statement.

### 5.1.2 Earnings Per Share

A public company is required to disclose its basic and diluted earnings per share (EPS) calculations. EPS is a metric reviewed by the financial community when analyzing a public company. The calculation requires the company to consider common shares plus all its securities that are potentially convertible to common shares, including financial instruments such as options, warrants, convertible debt and convertible preferred shares. Basic EPS is computed by dividing income available to common shareholders by the weighted-average number of common shares outstanding for the period. Diluted EPS is computed by dividing adjusted income available to common shareholders by the weighted-average number of potential common shares outstanding for the period computed as if convertible securities and contracts to issue common shares were converted into common shares, unless the effect is anti-dilutive. A company with a complex equity structure that includes multiple classes of securities may find it challenging to calculate EPS. Additional EPS complexities may arise in IPOs structured as umbrella partnership C corporations (Up-Cs) or for entities that have undergone a recapitalization, reorganization, spin-off, carve-out or other common control transaction.

### 5.1.3 Revenue Recognition

Revenue recognition is central to many of the metrics evaluated by financial analysts and investors. Registrants may be required to make significant estimates and judgments to determine when revenue can be recognized. The accounting rules are complex and changes to arrangements can have a material impact on the timing of revenue recognition. Consequently, revenue recognition errors are one of the leading causes of restatements and a key focus area of the SEC staff.

Registrants may be asked to present disaggregated revenue within MD&A or other sections of the registration statement in such a way it has not historically presented this information in its financial statements. As such, companies should work with their independent accountants, attorneys, advisors and other parties involved in the IPO to determine what level of disclosure will be required.

### 5.1.4 Liability vs. Equity Classification

Registrants that are in the early operating stage and have capital needs may be overwhelmed by the complexities associated with the liability versus equity classification requirements of certain previously issued financial instruments, such as warrants and redeemable preferred stock. These companies commonly raise funds from venture capital funds, investment companies or "angels." Registrants may be required to classify financial instruments as liabilities for accounting purposes (including certain legal form equity instruments such as mandatorily redeemable preferred stock). Also, if an equity or debt instrument issued is not remeasured at fair value each reporting period with changes reflected in earnings, there may be embedded features that must be accounted for separately from the host instrument. Terms of instruments that may result in liability classification or separation of embedded features include redemption features, net cash settlement features and other features that prevent equity-linked instruments or embedded features from being considered indexed to the company's own stock. Classification as liabilities typically leads to the recognition of changes in fair value of these instruments, or separated features, in the income statement in each reporting period.

Additionally, in some cases, embedded features that were not required to be accounted for separately from the host instrument prior to the public offering may be required to be separated once your company is public. As such, you should reassess the accounting for any financial instruments that will remain outstanding after the IPO.

See our Blueprint, **Accounting for Complex Financial Instruments**, for more guidance.

### 5.1.5 Business Combinations

Business combination accounting requires companies to recognize the assets acquired (both tangible and intangible assets), the liabilities assumed, and any noncontrolling interest in the acquiree at their fair value at the acquisition date. Further, acquisitions costs and many restructuring costs are expensed, in-process R&D costs are capitalized as an indefinite-lived intangible asset and even development stage entities must apply the business combination rules under current accounting requirements. Registrants should expect the SEC to scrutinize the accounting for and disclosure of business combinations.

See our Blueprint, **Business Combinations**, for more guidance.

### 5.1.6 Fair Value Measurements

Registrants can find it difficult to determine valuation techniques and inputs and develop valuations for fair value measurements. When relying on third party valuations, companies still need to understand, validate and "own" the valuation. It can be challenging for a company to determine valuations when market participants are difficult to identify or if the market is distressed. In these circumstances, registrants should use reasonable judgment and document their assumptions and conclusions.

### 5.1.7 Consolidation Issues

Certain registrants or potential registrants are operating companies that enter into arrangements with other entities that are under common control. For example, it is common for operating companies to rent real estate or equipment from lessor entities owned by related parties. Typically, these leasing entities are structured as partnerships, trusts, limited liability companies or corporations. Current U.S. accounting standards applicable to public entities potentially require operating companies to consolidate certain of these common control arrangements, including, in many cases, the affiliated lessor entities. An entity's election of PCC alternatives may have led to a different consolidation conclusion. As private company accounting alternatives are not permissible in the IPO, additional analysis may be required, and the SEC staff may challenge registrants to provide support for their consolidation conclusions. The consolidation requirements are complex, and final conclusions depend heavily on each registrant's specific facts and circumstances.

See our Blueprint, **Control and Consolidation**, for more guidance.

### 5.1.8 Derivatives and Hedge Accounting

The accounting for derivatives and hedging transactions can be complex. Derivatives accounting requires companies to evaluate whether certain instruments or embedded features should be accounted for at fair value through earnings each reporting period. To avoid this fair value accounting, companies must meet strict conditions and companies may encounter problems because the financial instruments, transactions and accounting requirements are all complex.

Furthermore, to meet the criteria for hedge accounting, the registrant must meet strict conditions, which if not met, prohibit hedge accounting.

### 5.1.9 Share-Based Compensation

Registrants are required to measure and report share-based compensation based on the grant date fair value of each equity-classified award or the settlement date for each liability-classified award. The calculations necessary to measure this compensation include assumptions about the company's share price volatility, interest rates, future dividends and expected term. As a result, many registrants use advisors to assist in the determination of the value of the stock compensation grants.

Registrants may issue equity securities in the form of stock, warrants or options in the 12 months preceding the IPO. Awards granted during this period with a fair value substantially below the IPO price may be presumed to be compensatory (i.e., "cheap stock"). Objective evidence that may rebut the presumption includes contemporaneous valuations that reflect management's knowledge at the time the award was granted or contemporaneous transactions involving third parties. Companies generally have contemporaneous valuations performed, primarily for income tax purposes (i.e., 409A valuations). In an IPO, such valuations are often used to support the fair values ascribed to shares granted during the pre-IPO period.

However, other transactions may occur during this period. Preferred shares may be repurchased or sold, and employee options may be sold to outside third parties (a secondary market). The prices paid in such transactions may create a price discrepancy that suggests common shares were granted at a substantial discount. Based on the specific facts and circumstances, recognition of compensation expense or a deemed dividend may be required. Registrants should not place undue reliance on a 409A valuation since it does not provide a safe harbor for U.S. GAAP purposes.

Maintaining proper documentation and support for the fair values of share-based compensation awards and clear disclosure on the methods used to determine fair value, material assumptions made and estimates that have high estimation uncertainty is critical. The disclosures should also address any material changes in price over time, including a description of actions or events that led to an increase, or significant volatility, in the valuation.

See our Blueprint, **Share-Based Payments**, for more guidance.

**SEC REGULATIONS AND STAFF GUIDANCE**

Sections 7520 and 9520 of the **Financial Reporting Manual (FRM)**

### 5.1.10 Segment Reporting

Registrants are required to report financial and descriptive information about operating segments and to disclose information about operations by geographic area and by products or services based on their internal reporting structure. The SEC staff has stressed repeatedly in comment letters and speeches the importance of avoiding improper aggregation of operating segments into reporting segments and appropriate, consistent segment disclosures. The staff's comments have focused on consistency of the reportable segments and the way management reviews the operations internally and discusses those operations elsewhere in the document, in investor presentations, on the corporate website and other available materials.

See our publication, **New Segment Reporting Disclosures**, for more guidance.

## 5.2 Regulation S-X

In addition to the accounting topics above, registrants are required to comply with Regulation S-X, including:

- Rule 5-03 requires revenues or sales, as well as cost of revenues or sales, to be presented separately for tangible products, rentals, services and operating revenues of public utilities or others in the statements of comprehensive income.
- Rule 4-08 requires related party transactions to be stated on the face of the balance sheet, statement of comprehensive income and statement of cash flows, as applicable, as well as a reconciliation of income tax expense reported to the income tax expense computed when applying the federal income tax rate to income or loss before taxes.

Smaller reporting companies may follow the rules in Article 8 of Regulation S-X.

# 6 LIFE AS A PUBLIC COMPANY

## 6.1 Periodic Reporting Requirement

After the registration statement is declared effective, the registrant is subject to the periodic reporting requirements and is required to file its quarterly reports on Form 10-Q, and annual reports on Form 10-K. The following is a brief summary of each:

**Form 10-Q**: The quarterly financial statements in this report do not have to be audited, but must be reviewed by the company's independent accountant before filing and may be condensed in accordance with Article 10 of Regulation S-X, or for smaller reporting companies, Article 8 of Regulation S-X.

**Form 10-K**: The annual report contains much of the same content to that in the initial registration statement, including audited financial statements. If the company continues to qualify as a smaller reporting company or emerging growth company, it may use the scaled financial and non-financial disclosures available to such companies.

The first Form 10-Q is due the later of 45 days following the effective date of the registration statement, or the date for which the Form 10-Q would otherwise be due. A registrant that just completed its IPO is typically a nonaccelerated filer,[4] and therefore the Form 10-Q would otherwise be due 45 days after the fiscal quarter-end.

**EXAMPLE 6-1: FIRST FORM 10-Q DUE DATE AFTER IPO**

**FACTS**

Company A is a nonaccelerated filer with a December 31 year-end. Company A's registration statement was declared effective on August 8, 20X5 and the first quarter, March 31, 20X5, interim financial statements were included in the filing.

**CONCLUSION**

The second quarter, June 30, 20X5, Form 10-Q is required to be filed 45 days after the effective date of the registration statement because this date is later than the date the Form 10-Q would otherwise be due.

[4] In order to be considered an accelerated or large accelerated filer, a registrant must have filed at least one annual report, and been subject to the requirements of Section 13(a) and 15(d) of the 1934 Act for a minimum of 12 months. This does not apply to reverse mergers or mergers with SPACs as the filer status of the legal acquirer is generally retained.

**EXAMPLE 6-2: FIRST FORM 10-Q DUE DATE AFTER IPO**

**FACTS**

Company A is a nonaccelerated filer with a December 31 year-end. Company A's registration statement was declared effective on June 15, 20X5 and the first quarter, March 31, 20X5, interim financial statements were included in the filing.

**CONCLUSION**

The second quarter, June 30, 20X5, Form 10-Q is required to be filed 45 days after June 30, 20X5 (the date the Form 10-Q would otherwise be due as Company A is a nonaccelerated filer) because this date is later than 45 days after the effective date of the registration statement.

The effective date of the registration statement generally does not affect the due date of the Form 10-K.[5] The Form 10-K due date is dependent on filer status, and as a company that just completed its IPO is generally a nonaccelerated filer, the first Form 10-K is due 90 days after its fiscal year-end.

## 6.2 Emerging Growth Company Status – Post-IPO

An EGC must reassess its EGC status at the end of each fiscal year and continuously monitor for any disqualifying triggers that may occur prior to the end of each fiscal year. A registrant will retain its EGC status until the last day of the fiscal year following the fifth anniversary of its IPO (or other applicable first sale of common equity securities pursuant to an effective registration statement) unless one of the following disqualifying triggers occurs first:

- Annual gross revenues are $1.235 billion or more, as determined on the last day of the fiscal year
- The registrant has issued more than $1 billion in non-convertible debt in the previous rolling three-year period, as assessed throughout the fiscal year
- The registrant becomes a large accelerated filer, as determined on the last day of the fiscal year

When an entity loses EGC status, it is generally not eligible to regain it. Moreover, it may no longer apply EGC disclosure accommodations in the periodic filing for the period in which EGC status was lost.

**EXAMPLE 6-3: REASSESSMENT OF EGC STATUS**

| FACTS | CONCLUSION |
|---|---|
| Registrant A completes an IPO of its common equity securities on February 15, 20X2 and has no revenue or issuances of debt securities until 20X8. Registrant A is not a large accelerated filer. | Registrant A will lose EGC status effective December 31, 20X7, the last day of the fiscal year following the fifth anniversary of its IPO. Five years is the maximum number of years a registrant can qualify as an EGC, and no other disqualifying criteria were met during the five-year period. |

[5] See Section 1330.5 of the **FRM** for further details.

| | |
|---|---|
| Registrant B has revenues of more than $1.235 billion beginning August 20, 20X5. | Registrant B will lose EGC status effective December 31, 20X5 as revenue will exceed $1.235 billion as of December 31, 20X5, the last day of the fiscal year. |
| Registrant C issued non-convertible debt securities on June 15, 20X5. Total issuances in the rolling three-year period now exceed $1 billion. | Registrant C will lose EGC status effective June 15, 20X5 as that is the date it exceeded the rolling three-year period of $1 billion non-convertible debt issuances (the rolling three-year period is assessed throughout the fiscal year). |
| Registrant D has public float of more than $700 million as of June 30, 20X5 (and otherwise meets the criteria for large accelerated filer status). | Registrant D will lose EGC status effective December 31, 20X5, the last day of its fiscal year, as it became a large accelerated filer as of that date. |

An EGC is not required to obtain an independent auditor attestation over internal controls over financial reporting (ICFR), and as previously noted, a registrant generally does meet the criteria as an accelerated or large accelerated filer in its first Form 10-K following the IPO. However, regardless of status, management's assertion on the effectiveness of disclosure controls and procedures is required in the quarterly and annual reports following the IPO, and management's assertion on the effectiveness of ICFR is required in its second Form 10-K filed following the IPO. In practice, management will continue to report material weaknesses previously reported in the registration statement.

## 6.3 Focusing On Share Price

Once a company is publicly held, management focuses on shareholders' expectations of higher share prices. Their expectations usually depend on a consistently improving earnings trend, backed by a well-planned investor relations program. The latter keeps investors aware of the company and its prospects for the future.

Public companies are required to make timely disclosures related to material events. This disclosure goes beyond financial data and includes information such as entry into or termination of material contracts, creation of material direct or off balance-sheet debt, disposal of or exit from a business, material charge for impairment of assets, material acquisitions and dispositions and key management changes. In addition, a successful investor relations program establishes a policy for communications with investors. Under Regulation Fair Disclosure (FD), publicly traded companies are required to disclose material information to all investors at the same time.

The stock market dislikes surprises – particularly negative surprises. Consequently, companies must have reliable information to direct and control the business and to use for reliable forecasting and timely communication with investors. An understanding of the company's business planning and resiliency in coping with changing conditions can help the financial community better interpret facts and figures contained in required disclosures. For example, the impact of one poor quarterly earnings report may be cushioned when the public already has a clear understanding of the company's business cycle and its future plans.

## 6.4 Coping With the Federal Securities Laws

Public companies listed on a U.S. Exchange must comply with SEC regulations. They are required to comply with numerous legal and reporting provisions of the federal securities laws, particularly the Securities Exchange Act of 1934 (Exchange Act). Periodic reports on Form 10-K and Form 10-Q are discussed earlier in section **6.1**. Other notable reporting requirements include:

**Form 8-K**: **A** public company must disclose material developments, favorable or unfavorable, as they occur on Form 8-K. This information must be available publicly to all investors. This form is used to report special events, within four business days of their occurrence, including:

- Entry into or termination of material contracts
- Occurrence of an event that accelerates or increases the on- or off-balance sheet debt
- Creation of material on- or off-balance sheet debt
- Disposal of or exit from a business

- Material charge for impairment of assets
- Bankruptcy
- Auditor changes
- Sales of unregistered securities
- Changes in articles of incorporation or by laws
- Acquisitions (required financial statements for significant acquired entities have extended due dates)
- Changes in control of the company
- Dispositions
- Resignations of directors
- Change in fiscal year end
- Material cybersecurity incidents
- Inability to rely on previously issued financial statements or the associated audit report

**Financial statements of other entities potentially, including:** Predecessors, businesses or real estate operations acquired or to be acquired, significant unconsolidated subsidiaries or 50%-or-less owned entities, guarantors, affiliates whose securities serve as collateral for the company's securities, and the parent company.

**Proxy solicitations**: A proxy statement is mailed to shareholders in connection with the annual shareholders' meeting. It includes descriptions of the matters to be voted on (including the reasons why management seeks approval of the matter), the identification and qualifications of officers and directors, and extensive information regarding the compensation of the CEO and other top officers. The proxy statement is accompanied or preceded by an annual report to shareholders. Proxy statements are also required when shareholders' votes are needed for mergers and changes in capital structure. Additional information on the SEC's proxy rules can be found on their website at: **https://www.sec.gov/education/smallbusiness/goingpublic/annualmeetings**.

**Tender offers**: The procedures for making tender offers are regulated, as are the steps a company may take to resist the offer. Complex disclosure requirements must also be met.

**Insider stockholdings**: Officers, directors and holders of more than 10% of the company's registered stock are required to report their holdings and any changes within prescribed time limits.

**Disclosure controls and procedures**: SEC rules require the registrant's management, with the participation of its principal executive and principal financial officers, to evaluate the effectiveness of its disclosure controls and procedures quarterly as well as annually. The term "disclosure controls and procedures," as defined in Rules 13a-15(e) and 15d-15(e) under the Exchange Act means controls and other procedures of a company that are designed to make sure information required to be disclosed by a company in the reports that it files or submits under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms. Disclosure controls and procedures include controls and procedures designed to make sure that information required to be disclosed by a company in the reports that it files or submits under the Exchange Act is accumulated and communicated to the company's management, including its principal executive and principal financial officers, as appropriate to allow timely decisions regarding required disclosure. Quarterly evaluations should focus on developments since the most recent evaluation, areas of weakness or continuing concern or other aspects of disclosure controls and procedures that merit attention.

**Internal control over financial reporting**: Management is responsible for establishing and maintaining adequate internal control over financial reporting. A company's internal control over financial reporting is a process designed by, or under the supervision of, its principal executive and principal financial officers, and effected by a company's board of directors, management and other personnel to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP and includes those policies and procedures that:

- Pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company
- Provide reasonable assurance that transactions are recorded as necessary to permit preparation of consolidated financial statements in accordance with GAAP, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company
- Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the company's assets that could have a material effect on the financial statements

SEC rules mandated by Sarbanes-Oxley require the registrant's management, with the participation of its principal executive and principal financial officers, to evaluate and provide an annual assessment of the effectiveness of internal control over financial reporting. Proper planning and a well-designed system of internal control are critical prior to and

immediately subsequent to an IPO. The rules also require the independent public accountant for accelerated registrants that are not EGCs to attest on an annual basis on management's assessment of the effectiveness of the company's internal controls over financial reporting.

As noted in section **6.2**, EGC designation provides relief from independent auditor attestation requirements related to internal controls over financial reporting, allowing sufficient time for the registrant to formalize its system of internal control prior to when independent auditor attestation requirements take effect.

Additionally, SEC rules require management, with the participation of the principal executive and financial officers, to evaluate and disclose any change in the company's internal control over financial reporting (as defined in Rules 13a-15(f) and 15d-15(f) under the Exchange Act) that occurred during a fiscal quarter that has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting.

A public company and its shareholders also must deal with several other regulations, including:

- **Sale of unregistered stock**: For shares to be tradable publicly without restrictions, they must be issued in a registered offering or meet other requirements. Shares held by controlling shareholders and stock acquired in private placements may be sold in small quantities only on the open market subject to meeting Rule 144 restrictions, including holding period and volume limitations.
- **Short swing profits**: Any profits officers, directors or holders of 10% or more of the company's stock earn by buying and selling (or selling and then buying) a company's stock within any six-month period may have to be turned over to the company. This rule is intended to prevent trading on inside information and is invoked even when the shareholder does not actually have this knowledge.
- **Prohibition against insider trading**: Federal securities laws prohibit insider trading, and the penalties can be severe, even resulting in prison sentences in egregious cases. As a corporate insider, you will always be privy to company information before it is released to the public. Consequently, corporate insiders may be accused of trading on inside information any time their stock transactions are followed by a major change in share price.
- **Regulation FD**: The FD rules require that whenever a registrant discloses material nonpublic information that may influence investment decisions, the company must make that information publicly available.
- **Auditor Independence**: As previously discussed in section **Audited Financial Statements and Other Financial Information**, your external auditors are prohibited from providing certain non-audit services such as internal audit, valuation, financial system implementation, services associated with certain types of potentially abusive tax transactions and other non-audit services.

## 6.5 Establishing An Appropriate Corporate Governance Function

Establishing a high functioning public company board of directors is a critical component of the IPO process. The following highlights certain significant responsibilities of the board and its standing committees.

### 6.5.1 Audit Committee

The SEC's rules require audit committees to:

- Appoint, compensate, retain and oversee the work of any public accounting firm engaged to audit the registrant. The public accounting firm must report directly to the audit committee
- Approve all audit and non-audit services performed by the public accounting firm
- Establish procedures for handling complaints regarding accounting, internal accounting controls or auditing matters.
- Have the authority and funding to compensate outside auditors, engage independent counsel and other advisors and fund expenses in carrying out its duties

Under national stock exchange rules, registrants are required to disclose whether they have at least one "audit committee financial expert" serving on their audit committee. Registrants must disclose the name of the expert and whether the expert is independent of management. If registrants do not have an audit committee financial expert, they must disclose this fact and explain why they have no such expert.

### 6.5.2 Compensation Committee

Listing exchanges require companies to have a compensation committee that is generally responsible for the determination of compensation and performance of the CEO and compensation of other executive officers of the

company.[6] Compensation committees may be subject to additional fiduciary responsibilities, including those under the Employee Retirement Income Security Act of 1974 (ERISA) for certain broad-based employee benefit plans. Similar to the audit committee, the compensation committee must have adequate funding to retain compensation consultants, independent legal counsel or other advisors.

Under the SEC's rules, compensation committees are required to state whether they have reviewed and discussed the Compensation Disclosure and Analysis (CD&A) with company management, whether they recommended to the board of directors that the CD&A be included in the company's annual report on Form 10-K, and, if applicable, the company's proxy or information statement.

#### 6.5.3 Nomination and Governance Committee

Listing exchanges require companies to have a nomination and governance committee that is generally responsible for:

- Overseeing the identification and recommendation for shareholder approval of qualified board of director candidates
- Developing the company's corporate governance policies, procedures and guidelines
- Determining director compensation
- Constructing the committee composition and structure and periodically reviewing in light of challenges and needs of the board
- Overseeing the evaluations of the board, the committee and management
- Overseeing CEO (and key executive) succession planning

Similar to the other standing committees of the board, the nomination and governance committee should have adequate funding to retain compensation consultants, independent legal counsel or other advisors.

The SEC rules and certain listing exchanges mandate additional disclosures of the nomination and governance committee with respect to policies and processes established by the committee as well as certain information about individual directors. For example, disclosure is required as to whether or not the committee has policies with respect to shareholder recommended board candidates or how diversity is considered in identifying candidates.

#### 6.5.4 Board Oversight of Risk Management

Another aspect of corporate governance as a new public company is identifying and managing risk across the entire organization. Risk management is the process by which management, subject to board oversight, assesses the nature and scope of risks applicable to the company, designs and applies appropriate process, policies and controls to minimize risks and monitors the controls to make sure they are working effectively. Major categories of risk include:

- Operational risk around infrastructure
- Financial risk around high-quality financial reporting
- Strategic risk around executing new initiatives and reinforcing good governance
- Compliance risk with respect to following new rules and reinforcing effective controls

Fiduciary duties, state and federal laws and regulations, along with exchange listing and other regulatory requirements establish the board's risk oversight responsibilities. The board sets the tone, appetite and tolerance for risk. Risks may be "owned" by the full board or be allocated to certain committees of the board. Regardless, risk oversight requires a framework that provides clarity of roles and responsibilities, consideration as to the capacity of the committee relative to the magnitude and likelihood of the risk, as well as integration within the strategy of the company.

### 6.6 Executive Compensation

Public companies subject to the SEC's proxy rules are required to provide shareholders with an advisory vote on executive compensation and golden parachute arrangements. The outcome of this vote must then be disclosed in Form 8-K and the registrant's consideration of the vote's results must be disclosed in CD&A. While smaller reporting companies are exempt from providing CD&A disclosures, they are not exempt from the requirement to hold the votes.

[6] In recent years, the purview of the Compensation Committee has expanded to incorporate a broader human capital management remit and many companies are expanding the roles, charters and titles of this committee to reflect such responsibilities.

Those companies that qualify as emerging growth companies benefit from a provision in the JOBS Act, which exempts them from the shareholder advisory votes for up to five years.

Pay versus performance disclosures are required in a proxy or information statement to provide information about the relationship between executive compensation paid and the financial performance of the registrant. They are not required in a registration statement or in annual reports on Form 10-K. Emerging growth companies, registered investment companies and foreign private issuers are exempt from compliance with the pay versus performance rule. Although smaller reporting companies are not exempt, they are permitted to scale their disclosures.

See our publication, **Pay Versus Performance Disclosures**, for more guidance on pay versus performance disclosures.

Registrants listed on the New York Stock Exchange (NYSE) or Nasdaq Stock Market (Nasdaq) ("issuers") must have policies in place to provide for the recovery of erroneously awarded incentive compensation (the "clawback" rules). The rules require issuers to file their clawback policies as an exhibit to their annual reports and make several disclosures in annual reports and proxy and information statements.

See our publication, **SEC Clawback Rules**, for more guidance on the clawback disclosure requirements.

### 6.7 Code Of Ethics

Disclosures are required regarding the company's code of ethics:

- Whether they have adopted a code of ethics that applies to the company's principal executive officer, principal financial officer, principal accounting officer, controller or persons performing similar functions
- If it is not adopted, disclose this fact and explain why it is not adopted
- Any amendments to or waivers of the code of ethics

### 6.8 Living In the Public Eye

The most dramatic change in your company's life after the IPO will be a feeling that you are operating before a much larger audience. This new awareness will pervade virtually all aspects of your activities, from drawing up new employment contracts to planning mergers to considering R&D projects. You will be concerned not only with achieving your goals for the company, but also with how the means to achieve those goals and even the goals themselves will be viewed by your shareholders and the investment community at large.

## IT'S YOUR MOVE

The decision to take your company public will be among the most difficult in your business experience. It is a highly personal decision, requiring an exhaustive analysis of all relevant factors, including the opportunities and drawbacks of a public offering and whether your company can fulfill the responsibilities of a public company and the expectations of the market. Because preparation is the key to a successful IPO, we at BDO hope this Guide gives you a clear overview of the process and places some of the more significant factors in proper perspective. Regardless of your ultimate decision, we would be pleased to assist you during this most critical time for you and your company.

# APPENDIX I — GLOSSARY

| TERM | DEFINITION |
|---|---|
| **Acceleration** | A procedure where the SEC may declare a registration statement effective before waiting the normal 20 days after the final amendment is filed. |
| **All Hands Meeting** | A meeting attended by representatives of those involved in the registration statement process (i.e., management, company's counsel, underwriter, underwriter's counsel, independent accountants). |
| **Blue Sky Laws** | State laws that govern the registration and sale of securities within that state. |
| **Capitalization Table** | Sometimes called a "cap table." This table presents, in tabular form, the capital structure of the company both before the offering and after, assuming all the securities being offered are sold. Generally, cap tables are included in registration statements at the request of the underwriter. |
| **Cheap Stock** | Common stock sold before a public offering at a price which is less than the public offering price. Often, the stock is sold to company insiders. |
| **Closing Date** | The date on which the underwriter or escrow agent releases the cash received from subscribers, and the company issues securities to the underwriter for delivery to the subscribers. |
| **Comfort Letter** | Letter written by the independent accountants for the underwriters which serves to give them "comfort" and helps them establish that they have performed a reasonable investigation of certain financial and accounting data |
| **Comment Letter** | A letter from the SEC to the company which communicates the SEC's comments regarding a registration statement, proxy statement or Exchange Act filing. This letter may also be referred to as a deficiency letter. |
| **Condensed Financial Statements** | Financial statements in which only major captions are included without a complete set of footnotes. Quarterly financial statements on Form 10-Q, and pro forma financial information may be presented in a condensed format. |
| **Consent** | A written document signed by the independent accountant or other experts and filed with the registration statement indicating that the experts consent to the use of their reports and to the use of their names in the registration statement. |
| **Corporation Finance** | The Division of Corporation Finance at the SEC is responsible for reviewing the filings of registrants and issuing comment letters. |
| **Declared Effective** | When the SEC has cleared the registration statement and indicated that the prospectus may be used to offer and sell the securities. |

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| **Dilution** | The amount by which the offering price exceeds the company's tangible net book value per share after an offering. Dilution also refers to the decline in ownership percentage that occurs to existing shareholders when a company issues shares of stock to new shareholders. |
| **Due Diligence** | The process in which those involved in the preparation of the registration statement make a reasonable investigation to ensure accuracy and completeness of disclosures. |
| **EDGAR** | The SEC's Electronic Data Gathering, Analysis and Retrieval system. Registrants are required to make SEC filings using this system. |
| **Effective Date** | The date the securities are permitted to be sold. |
| **Escrow Account** | An account in which all funds received from subscribers are deposited. |
| **Experts** | Independent accountants, lawyers, engineers, valuation experts and others who, because of their expertise in a particular matter, may be relied on as experts in their fields. |
| **Firm Commitment** | An agreement where the underwriter agrees to purchase the entire block of securities being offered. |
| **Greenshoe** | The name for the underwriter's option to acquire and resell additional securities at the offering price to cover overallotments to customers. This feature received its name from the Green Shoe Company, the first company with an overallotment option. |
| **Incorporation by Reference** | A method by which, under certain circumstances, certain materials previously filed with the Commission may be referred to rather than included. |
| **Independent Outside Director** | Under Section 301 of the Sarbanes Oxley Act (the Act), which codifies the SEC and U.S. stock exchange rules, an independent director is defined as one:<br>a) Who does not accept any compensation from the company (other than as a director)<br>b) Is not an "affiliated person" of the company or any subsidiary. |
| **Insider** | Officers, directors and holders of more than 10% of any class of equity security registered under the Exchange Act. |
| **Letter of Intent** | A non-binding letter from the underwriter to the company confirming the intent to proceed with an offering and stating the general terms of the underwriting. |
| **Letter Stock** | Unregistered, and therefore restricted, stock. The name is derived from the fact that generally in a sale of this kind of security the issuer receives a letter from the purchaser indicating that the purchase is for investment only, not for resale. |
| **Listing Application** | An application to be listed on a national securities exchange that generally contains information similar to that contained in a registration statement. |

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| **Lock-Up Agreement** | An agreement by company directors, officers and major shareholders to refrain from selling securities of the company for a defined time-period after the IPO. |
| **Market Maker** | A broker/dealer that stands ready to buy and sell a company's stock. |
| **"No Action" Letters** | Letters requested from the SEC staff indicating that the staff would not object to the company's proposed course of action (e.g., an approach for complying with a filing requirement). |
| **Non-GAAP Financial Measures** | A numerical measure of historical or future financial performance, financial position or cash flows that:<br>▶ Excludes amounts or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet or statement of cash flows (or equivalent statements).<br>▶ Includes amounts or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable GAAP measure. |
| **OCA** | The Office of the Chief Accountant (OCA) of the SEC is responsible for establishing accounting policy in the preparation of financial statements filed with the SEC. Registrants, auditors, as well as the other divisions of the SEC consult with the OCA regarding the application of accounting standards and financial statement disclosures. |
| **Offering Circular** | A document substantially similar to a prospectus used for offerings that are exempt from registration. |
| **Over Allotment Option** | See GREENSHOE |
| **Post-Effective Amendment** | An amendment to a registration statement that is filed after its effective date. |
| **Prefiling Conference** | A conference scheduled by a registrant with the SEC staff (OCA and Division of Corporation Finance) to discuss the staff's views on an accounting or disclosure matter before the filing of a registration statement. |
| **Primary Offering** | A registrant's offer to sell newly issued securities to the public. Primary securities can be offered either by a company that is already public or in an initial public offering. |
| **Private Placement** | An offering which is exempt from the registration provisions of the Securities Act of 1933. |
| **Pro Forma Financial Information** | Financial statements intended to provide investors with information about the continuing impact of a transaction by illustrating how the transaction might have affected historical financial statements. |

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| **Prospectus** | A part of a registration statement, generally describing the company issuing the securities and the securities being sold.<br>▶ Bring-up Prospectus: The Securities Act of 1933 provides that when a prospectus is used for more than nine months after the effective date of the registration statement, the information contained in it should be as of a date not more than 16 months before such use. This often requires an updated prospectus which is referred to as a "bring-up" prospectus, "nine-month" prospectus or a "Section 10(a)(3)" prospectus.<br>▶ Final Prospectus: A document that must be circulated to all prospective purchasers of an initial offering disclosing material facts about the company's operations, its financial status and the details of the offering. It is preceded by a preliminary prospectus or red herring.<br>▶ Preliminary Prospectus: A prospectus relating to a registration statement, which has not yet become effective, also known as a "red herring." |
| **Proxy Statement** | A statement required to be submitted to shareholders in connection with the solicitation of their vote on a proposed transaction or course of action. If the proxy statement solicits votes on matters other than the election of directors or the appointment of the auditors, preliminary proxy materials must be submitted to the SEC for review before being sent to the shareholders. The final proxy statement, mailed to the shareholders, is called the "definitive proxy." |
| **Public Float** | The market value of shares held by non-affiliates. Affiliates are generally officers, directors and owners of 10% or more of the company's stock. In an IPO, the market value is based on the estimated IPO price. |
| **Quiet Period** | The SEC rule that restricts publicity about a company and its offering during a certain time period. |
| **Red Herring** | See Prospectus |
| **Releases** | A method by which the SEC communicates information to interested parties. There are various forms of releases; however, the ones ordinarily of greatest concern are Financial Reporting Releases, 1933 Act Releases and 1934 Act Releases. |
| **Secondary Offering** | An offering by a selling securityholder of a company, the proceeds from which go to the selling securityholder. |
| **Selected Financial Data** | A table that presents financial data of the registrant may be included in the front part of the registration statement. |
| **Shelf Registration** | Generally, a registration statement is considered effective only as long as there is a bona fide public offering. However, there are certain circumstances where the SEC will permit deliberately delayed or extended offerings. These are referred to as shelf registrations. |
| **Stop Order** | An order issued by the SEC suspending the effectiveness of a registration statement. |

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| **Summary Financial Data** | Financial data that summarizes financial information of the registrant that is generally found in the front part of the registration statement. The summary financial data is requested by the underwriters and is not required by SEC rules. |
| **Tender Offer** | An offer made to the securityholders of a company to purchase their securities. |
| **Test-the-Waters Communications** | Oral or written communications with potential investors to gauge interest in a registered offering. Securities Act Rule 163B allows the company or its representative to engage in such communications with investors that are, or reasonably believed to be, qualified institutional buyers or institutional accredited investors. |
| **Tombstone AD** | A newspaper advertisement or other form of communication related to a security. The content of tombstone ads is strictly regulated by the SEC. |
| **Underwriting Agreement** | An agreement by which an underwriter, generally a brokerage firm, agrees to purchase securities for resale to investors.<br>▶ All or Nothing Underwriting: A form of "best efforts" underwriting where interim proceeds of sales are generally placed in escrow pending the final results. If the sales do not meet a specified amount, they are cancelled, and the funds returned to the buyers. In some instances, the specified minimum amount is less than the total amount of securities being offered - called a "min/max" underwriting.<br>▶ Best Efforts Underwriting: An arrangement where the underwriter is under no obligation to purchase the securities but must use of its best efforts to complete the sale of the securities.<br>▶ Firm Commitment Underwriting: An agreement where the underwriter agrees to purchase the entire block of securities to be offered. |
| **Underwriting Discount** | The commission received by the underwriter as compensation for services. |
| **Unit** | A combination of two securities sold for one price, usually consisting of common stock and warrants or common stock and debt. |
| **Window** | The period during which the market is receptive to a particular type of offering. |

# APPENDIX II — ALTERNATIVES TO AN INITIAL PUBLIC OFFERING

This Guide focuses on only one means of financing – an IPO that is registered with the SEC. Deciding whether this course of action is best for your company, though, should only be made after carefully evaluating alternative means of financing. You should consider the advantages and drawbacks of each and the effects they could have on your company.

## Bank Loans

Bank loans are by far the most widely used means of financing. For mature companies, this type of funding is usually the most flexible and easiest to obtain. It also allows you to retain control over your company and to maintain substantial confidentiality of company information. However, bank loans do not provide the long-term equity base your company may need as a foundation for growth since repayment of principal and interest will put pressure on future cash flow. Moreover, depending on your company's financial history and prospects, bankers may require substantial pledging of company assets; various operating restrictions, such as limitations on dividends, capital expenditures and business acquisitions; maintenance of specific financial ratios; and, in many instances, your personal guarantee.

## SPAC Transaction

A Special Purpose Acquisition Company (SPAC) is a newly formed company that raises cash in a traditional IPO and uses that cash or the equity of the SPAC, or both, to fund the acquisition of a private operating company that wants to become a public company. After a SPAC IPO, the SPAC's management sets out to complete an acquisition of a target within a specified time period. SPAC transactions are less dependent on market conditions than an IPO. However, these are highly regulated and complex transactions that require experience and intensive preparation.

## Regulation A Offerings

Regulation A is a small issues exemption and governs public offerings not exceeding $75 million in a 12-month period. Although Regulation A is technically an exemption from registration under the 1933 Act, an offering statement which is less extensive than most 1933 Act filings still must be filed and "qualified" by the SEC staff. In addition, the offering statement is distributed to investors. The requirements for raising capital under Regulation A depend on the amount of securities offered.

Under a Tier 1 offering, companies can raise up to $20 million in a 12-month period but are still subject to state-level registration and qualification requirements in addition to the SEC's requirements.

Under a Tier 2 offering, companies can raise up to $75 million in a 12-month period. State securities law requirements are preempted for Tier 2 offerings. However, because Tier 2 offerings generally involve larger dollar amounts and less state regulation, they are subject to more stringent requirements than Tier 1 offerings. Generally, the Tier 2 offering process and ongoing reporting requirements are scaled down versions of the offering and ongoing reporting processes used during and after registered offerings.

## Private Placements

Private placements of debt or equity securities are exempt from registration if they are offered in small issues or to a limited number of specially defined investors. Regulation D provides a safe harbor; companies that meet its requirements have certainty that an offering is a private offering that is exempt from registration. The various underlying rules are complex, and you should consult your independent accountants and attorneys in considering this financial alternative.

A private placement is generally less expensive than an IPO and does not require as much disclosure or preparation time. It also does not require periodic reporting to regulatory agencies. However, there are restrictions on subsequent resale of the securities sold, so the proceeds will typically be at a lower value than in a registered offering.

Different levels of disclosures to investors are required by Regulation D, based on the size of the offering and the nature of the purchasers, as follows:

- Rule 504: Relates to offerings not over $10 million in a 12-month period. No specific disclosures are required by the SEC, although they may be required by state law.
- Rule 506: Permits offerings of an unlimited amount to no more than 35 purchasers meeting various financial "sophistication" standards, and an unlimited number of accredited investors in any 90-calendar-day period.

Disclosures generally would be similar to those in an IPO. However, if only accredited investors are involved, there are no SEC required disclosures, although, again, state laws may require certain information.

### Venture Capital

For those companies seeking funds during their development stage, venture capital financing may be particularly appropriate. This is designed to give investors the possibility of significant appreciation in their investment, often in the form of an eventual IPO, in return for taking the high risk of investing in a new company. Venture capital can be expensive since it requires giving up a substantial part of your company's equity. Furthermore, venture capital comes at the price of a certain amount of control, as venture capitalists will want an influential voice in the company's affairs. They usually require membership on the board of directors and will closely monitor the company's progress.

### Direct Listings

A direct listing allows existing shareholders to sell shares listed on a stock exchange directly to the public without a primary or secondary underwritten offering.

## APPENDIX III – SAMPLE OF TIMELINE OF EVENTS

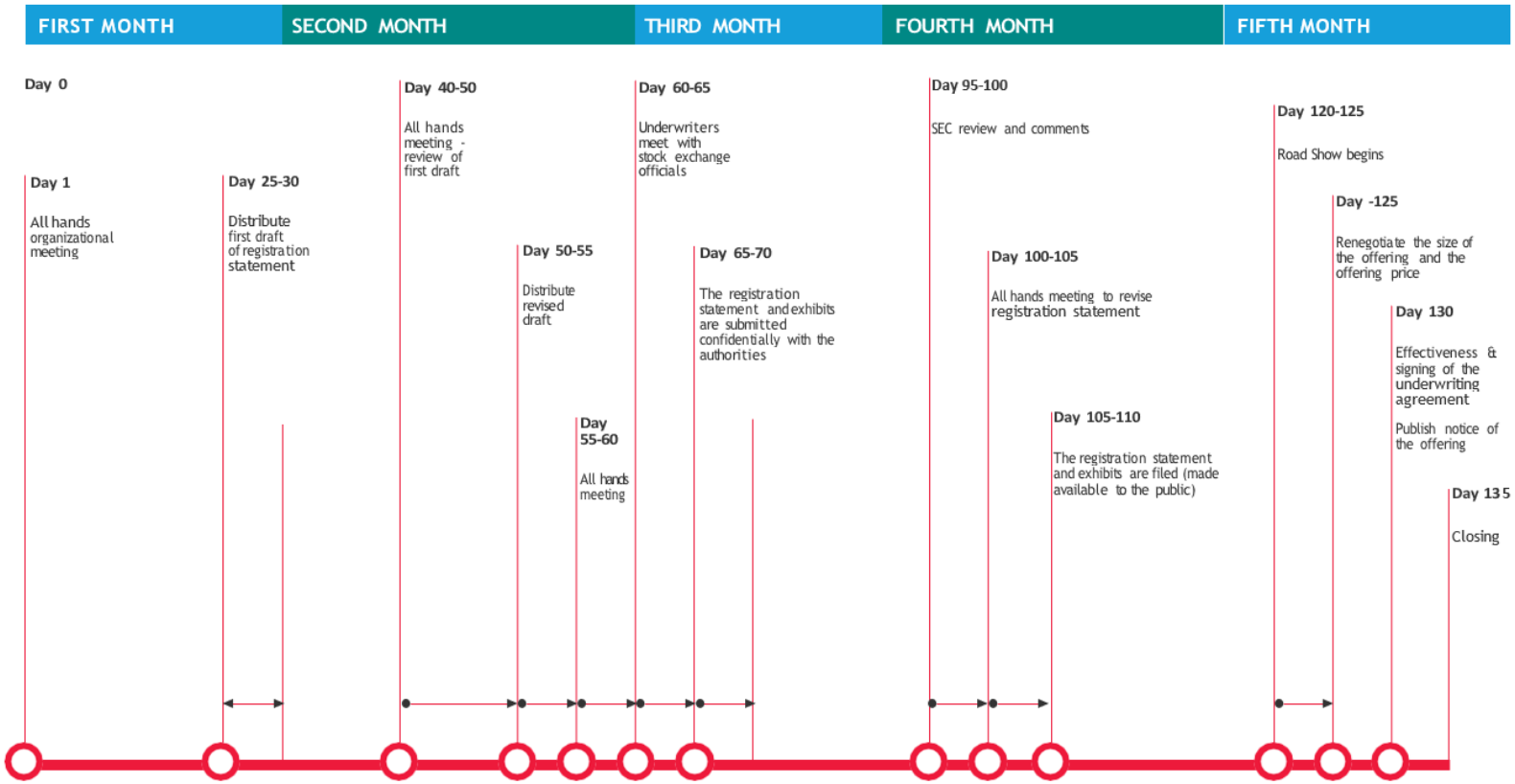
### Sample Timeline of Events

Before all hands organizational meeting, the following should be completed:

- Feasibility study
- Audit of financial statements
- Selection of underwriter
- Selection of public relations firm/investor relations

The length of the process of going public depends on numerous factors, including the size the of the company, the complexity of its organization, the number of comments and letters that the company receives from the SEC staff, the number of drafts that it confidentially submits and/or files and renegotiations with underwriters. Therefore, the time period between the first all hands organizational meeting and the "closing" of the IPO may run from four to seven months and possibly even longer. The following timeline assumes that the Company has elected to submit its registration statement confidentially with the SEC before it is officially filed. The timeline also assumes that the company going public is an average company with no complex accounting issues that will finish the process in five months.

## The IPO Timetable by Months



## The IPO Timetable by Months - Comprehensive Explanation

| DAY | ACTIVITY | PARTICIPANTS |
|---|---|---|
| Prior to all hands organization meeting firm/investor relations | ▶ Feasibility study<br>▶ Audit of financial statements<br>▶ Selection of underwriter<br>▶ Selection of public relations | Management or board of directors, consultants, and independent auditor |
| Day 1 | All hands organizational meeting that includes the company's representatives, underwriters, legal counsel and independent accountants. Review Officers' and Directors' questionnaires and SEC requirements and begin draft of registration statement. | Everyone, specifically management, the legal counsel, and the independent accountant |
| Days 25-30 | Distribute first draft of registration statement for reviews. | |
| Days 40-50 | All hands meeting – The first draft is reviewed. Additional drafts are circulated to the working group. Due diligence sessions are held. Meet with printer to plan printing of the registration statement. | Everyone |
| Days 50-55 | Distribute revised draft of registration statement. | |
| Days 55-60 | All hands meeting – final revisions to registration statement. Discuss and draft comfort letter. | IPO team. Underwriters, management, and independent accountant. |
| Days 60-65 | If appropriate, the underwriters meet with stock exchange officials to discuss listing requirements and procedures. | Underwriters |
| Days 65-70 | The registration statement and exhibits are confidentially submitted with the SEC, state securities commissions, and the National Association of Securities Dealers. | Underwriters and management |
| Days 95-100 | Usually within 30-45 days after the registration statement has been filed, the SEC issues its comments. | |
| Days 100-105 | All hands meeting to revise registration statement and respond to SEC comments. | Everyone |
| Days 105-110 | The pre-effective registration statement and exhibits are filed with the SEC. At this time, all information is a matter of public record. Red Herring (the preliminary prospectus) is distributed. (In most situations, there will be a second round of comments from the SEC, which might defer the rest of the timetable.) | Underwriters and management |
| Days 120-125 | Road Show begins. | Management, PR firm and underwriters |

| | | |
|---|---|---|
| Around day 125 | The company and the underwriters might renegotiate on the size of the offering as well as the offering price. | Management and underwriters |
| Around day 130 | The SEC declares the registration “effective,” the company and the underwriters execute the underwriting agreement (and agree on the size of the offering as well as the offering price), the independent accountants issue the comfort letter, and the public offering begins. | |
| Around day 131 | A published notice of the offering is placed in U.S. financial newspapers and journals (tombstone ads). | Management |
| Around day 136 | Issuance of the final comfort letter (often referred to as the “bringdown” letter). A “closing” takes place at which time the proceeds of the offering are transferred to the company. | Independent accountant, management, underwriter and legal counsel |

# Contacts

**TIMOTHY KVIZ**
National Managing Principal, SEC Services
703-245-8685 / tkviz@bdo.com

**PAULA HAMRIC**
Professional Practice Principal, SEC Services
312-616-3947 / phamric@bdo.com

**BRANDON LANDAS**
Professional Practice Principal, SEC Services
312-233-1887 / blandas@bdo.com

**MEGHAN DEPP**
Professional Practice Principal, SEC Services
248-688-3368 / mdepp@bdo.com