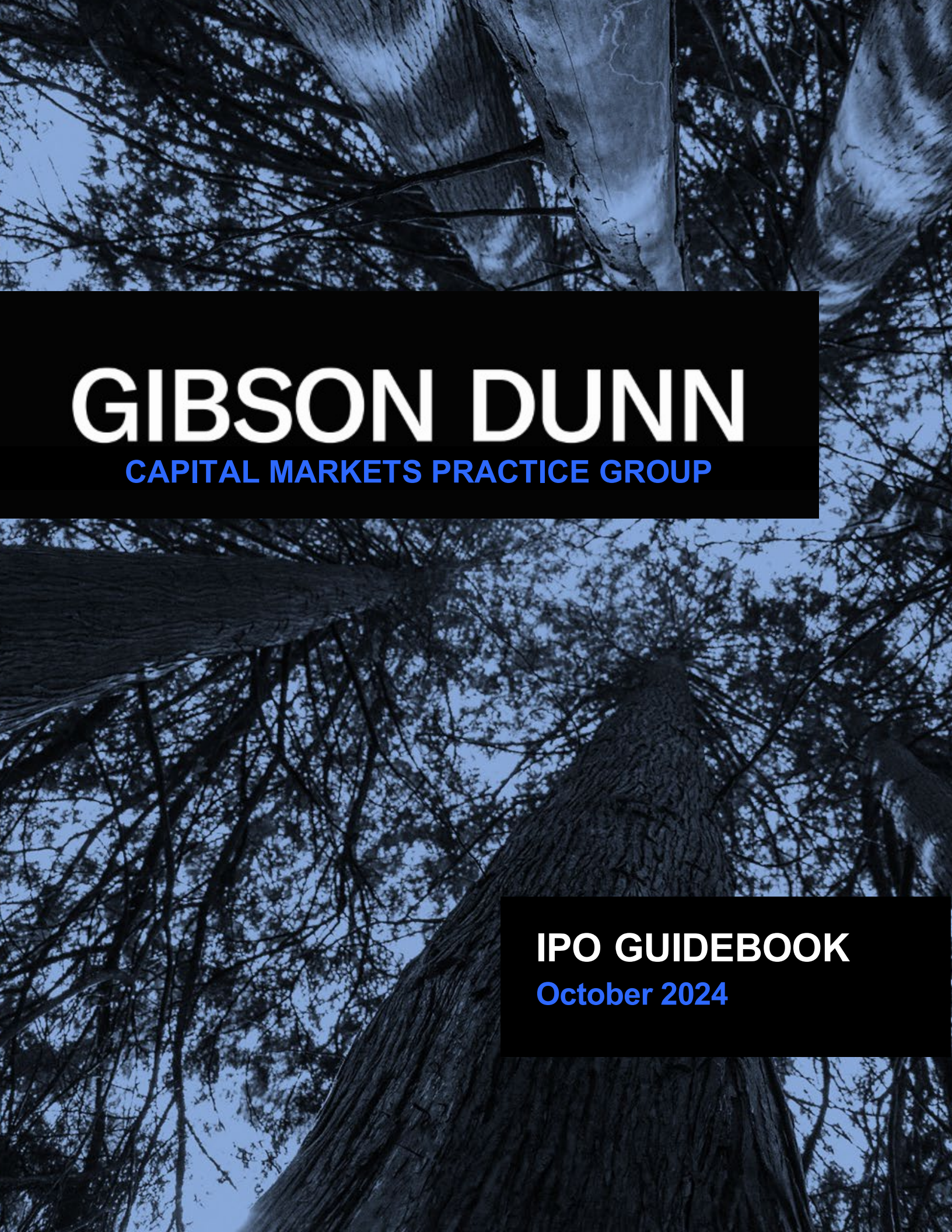

GIBSON DUNN

CAPITAL MARKETS PRACTICE GROUP

IPO GUIDEBOOK

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Introduction

Completing an initial public offering is a significant milestone for many business owners, executives, directors and stockholders. However, the journey towards going public can be fraught with complexities and unexpected challenges. For companies seeking to raise capital, whether through an IPO or other alternatives, it is critical to understand the road ahead. This guidebook offers an overview of the numerous decision points, procedures and vital considerations a company should contemplate before, during and after the IPO process.

The insights in this guidebook are derived from Gibson Dunn's vast experience representing clients across various sectors in many IPOs over the years. We capitalize on our representation of large and seasoned public companies to implement leading-edge corporate governance and public reporting practices. Moreover, the involvement in the IPO process of our unmatched Securities Regulation and Corporate Governance team is core to the IPO process and enables our IPO teams to anticipate potential problems in drafting the registration statement and to reach key decision-makers at the SEC on an expedited basis to seek tailored guidance, waivers, or resolution of challenging comments. Please reach out to us for more information on how we can assist in navigating your journey to going public.

I. Initial Public Offerings—First Steps

Preparing for an IPO can be an arduous task. Subject to market, regulatory and other factors, the ultimate timing of an IPO largely turns on the readiness of the company. Taking the correct preliminary steps to position the company for an IPO can significantly enhance the company's ability to access IPO market windows without delay. This section outlines key factors a company should consider before pursuing an IPO, certain advantages and disadvantages of going public and important action items that companies should take to bolster pre-IPO readiness.

Key Self-Evaluation Factors

Companies contemplating an IPO should consider the following questions:

Is the business positioned to be well received by public investors?

- Does the company demonstrate the potential for positive long-term performance?
- Will the company be positioned with a focus on growth or stockholder returns?

Does the company project a "clean" story with a compelling marketing narrative?

- Do the financial statements provide an accurate representation of the business and are those financials audited at a public company standard? Does the company have reliable financial reporting systems?
- Does the company have a history of predictable earnings and meeting forecasts?
- Are all essential members of management and finance teams in place? Does the company have appropriate board composition and corporate governance practices to facilitate the execution of its long-term strategy?

What is the optimal IPO structure for the company?

- Is only a segment of the company going public (e.g., spin-off transaction)?
- Is there any internal restructuring needed to prepare the company for an IPO?
- What, if any, relationship will the company maintain with a sponsor?
- What are the tax implications of conducting an IPO? Are there tax-optimized structures that should be implemented prior to the IPO?
- What should the company's capital structure look like? Should there be multiple classes of equity to preserve sponsor control?

Which securities exchange is most suitable for the company?

Going Public: Advantages & Potential Disadvantages

Going public presents numerous positive opportunities for companies and their investors, but also comes at a cost. A company considering an IPO should be aware of both the advantages and disadvantages of going public, including the following:

Advantages of Going Public

- Potential to Raise Significant Capital
  - In addition to the capital raised in an IPO, going public provides the company with access to the public capital markets for future financings, including for debt and hybrid securities.
  - Once a company becomes eligible to use a shelf registration statement, it can quickly and cost-effectively access the public markets.
  - Improved access to capital markets can facilitate the retirement of debt and strengthening of a company's balance sheet.
- Greater Liquidity for Investors
  - Going public offers pre-IPO investors the opportunity to register for sale company shares that otherwise would be subject to holding periods, volume restrictions and other impediments to resale.
  - Public trading establishes a liquid market for investors to buy and sell shares, as well as to quickly and easily ascertain the market value of a company's equity.
- Creation of a Liquid Equity "Currency"
  - A public company can use its publicly traded shares as a substitute for cash for various purposes, such as acquisitions, strategic transactions and employee compensation.
- Enhanced Prestige
  - Going public augments a company's visibility and corporate image, which can facilitate dealings with customers, suppliers, financing sources, etc. and attract top-tier management and other employees.
  - Ability to benchmark operations against other public companies within the same industry.

Potential Disadvantages of Going Public

- Intensive Legal Compliance Requirements
  - Public companies face substantial ongoing public reporting and governance obligations under SEC and securities exchange rules. Regulatory changes have increased, not decreased, these burdens over time.
- Litigation Risk
  - The risk of securities litigation increases for public companies, escalating the costs of legal defense and internal compliance.
- Increased Expenses
  - In addition to the direct costs of completing an IPO, maintaining operations as a public company requires a significantly more costly internal administrative and audit function.
- Disclosure Obligations
  - Mandatory filings may force the company to publicly disclose its objectives and/or strategic transactions earlier than the company desires.
  - Public company financial statements are easily accessible to competitors, customers and suppliers.
- Loss of Control by Pre-IPO Stockholders
  - The dilution of stockholder equity interests during and after an IPO increases the risk of a takeover or change in control bid, which pre-IPO stockholders may oppose.
- Management Distraction
  - A typical IPO can take four to six months (or longer) to complete, during which time the focus of management and other key employees may be significantly diverted.
- Impact on Management Decisions
  - Management in a public company may have different incentives compared to a privately held company, including a focus on stock price as a measure of company performance. This could risk shifting the strategic emphasis to short-term stock price performance at the expense of building long-term value.

Pre-IPO Action Items

Proactively addressing these items can bolster a company's ability to access its desired IPO market windows without delay:

Business	Financials	Governance	Communication
Assess strategic and timing goals of IPO. Confirm preliminary timeline.	Meet with the internal finance team and external auditors to assess timing and status of PCAOB audit.	Review current governance structure, including board structure and existing stockholder agreements.	Review existing and planned communication strategies and goals.
Compile corporate records for data room. Documents reviewed for diligence and future public disclosure obligations.	Assess independence of external auditors for purposes of audit.	Assess needs for new board members and, if appropriate, initiate search for independent and qualified directors.	Inventory and adjust internal financial and other communications.
Analyze current corporate structure and consider structural changes (e.g., tax, jurisdiction and legal).	Confirm whether pro forma or acquisition financial statements are needed for registration statement.	Recommend updates to or draft governance documents for post-IPO company and consider anti-takeover protections.	Strategize with underwriters to identify IPO selling points and peer company comparisons.
Complete pre-IPO internal restructuring, key acquisitions or dispositions.	Assess current staffing for internal financial reporting team and determine whether additional resources are needed for public company management.	Review and restructure any related party transactions, build internal processes for tracking such transactions, conduct independence assessments and prepare board, committee and SEC calendars.	Craft narrative of the company's story, strengths and strategies.
Preliminary drafting of registration statement based on diligence and structure discussions.	Work with internal financial reporting team to prepare for public company reporting obligations and cadence.	Deliver board and management trainings on fiduciary duties and SEC compliance/ governance.	Conduct board, management and employee trainings on "gun-jumping," Reg FD and company communications policies.

II. Timing Overview

The process of taking a company public involves a series of carefully timed steps, each with its own set of considerations and requirements. This section provides an overview of the three main phases in the journey to going public—the Pre-Filing Period, the Waiting Period and the Post-Effective Period—as well as an indicative timeline for a standard IPO:

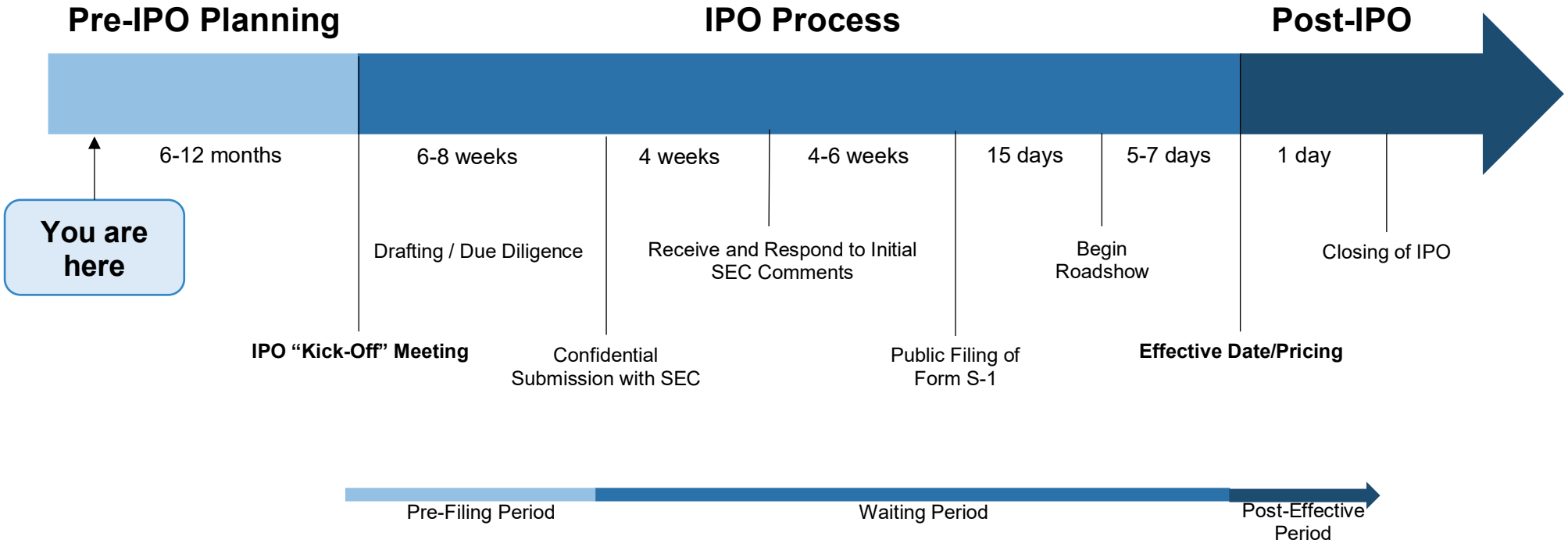
Going Public: Three Main Phases

- **Pre-Filing Period**
  - This phase commences when the issuer seriously considers a public offering, typically when bankers are appointed in preparation for the organizational meeting, and continues until the first public filing of a registration statement with the SEC. (**Note**: Confidential submissions under the JOBS Act are not considered public filings.)
  - During this phase, offers to sell and solicitations of offers to buy are generally prohibited (known as "gun jumping").
  - Companies do have the opportunity to "test-the-waters" by conducting meetings with Qualified Institutional Buyers (QIBs) and accredited investors before or after the filing of a registration statement.
  - Ordinary course press releases about factual business/financial developments, advertisements and stockholder communications are generally permitted.
- **Waiting Period**
  - This phase begins with the first public filing of a registration statement with the SEC and continues to effectiveness of the registration statement.
  - The issuer and underwriters may solicit offers to buy with a preliminary prospectus that includes a price range, but no sales may occur.
  - Written materials, other than the preliminary prospectus, must be preceded or accompanied by a statutory prospectus that includes a price range and must be filed as free writing prospectuses.
  - Certain limited press releases/statements are allowed; media interviews are permitted but generally must be filed as media free writing prospectuses.
- **Post-Effective Period**

- This phase extends from the effectiveness of the registration statement to the completion of the distribution of the securities.

- Offers and sales of securities are permitted; a full and final prospectus must precede or accompany the delivery of the security or confirmation of the sale.

Going Public: Offering Timeline*



* Timing above is for illustrative purposes only. Market, regulatory and other factors will impact actual timing.

III. Liability in Public Offerings

In the process of going public, companies face potential liability under a variety of securities laws and regulations. Understanding these provisions is crucial for companies to navigate the complex landscape of public offerings. This section outlines the specific legal provisions and potential liabilities under Sections 11 and 12 of the Securities Act of 1933 (the Securities Act), Rule 10b-5 under the Securities Exchange Act of 1934 (the Exchange Act) and the Sarbanes-Oxley Act of 2002 (SOX) that apply to public offerings, including IPOs:

Specific Provisions of the Law

Sections 11 and 12 of the Securities Act

- Sections 11 and 12 bear similarities to Rule 10b-5, but the protections they provide apply only to buyers in the offering.
- These are strict liability statutes—they require no showing of "scienter" (an intent to deceive, manipulate or defraud) by the issuer or other parties involved in the offering on behalf of the issuer, nor any showing that the purchaser relied on the misstatement.
- The remedies available under these sections include rescission of the securities purchased and damages based on loss of market value.

Rule 10b-5 under the Exchange Act

- Rule 10b-5 is the fundamental disclosure rule at the core of the U.S. securities laws that makes it illegal to:
  - employ any device, scheme or artifice to defraud;
  - make any untrue statement of a material fact, or fail to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
  - engage in any act, practice or course of business that operates or would operate as a fraud or deceit upon any person in connection with the purchase of any security.
- In private actions, possible remedies consist of rescission of the securities purchased and damages based on loss of market value.
- In civil or administrative actions, the SEC may obtain money penalties, disgorgement and injunctions, cease-and-desist orders or consent decrees

obligating the defendant to undertake specified changes in conduct.

- In criminal prosecutions, the DOJ may obtain penalties that include imprisonment, fines and disgorgement.

SOX

- SOX requires, among other things, the CEO & CFO to "certify" the contents of each Exchange Act periodic report and the accompanying financial statements; separate certifications are required under Sections 302 and 906 of SOX.

- Criminal penalties for certifying misleading fraudulent financial reports can reach up to $5,000,000 and 20 years imprisonment.

- Accounting restatements due to material noncompliance with securities laws because of misconduct will require the CEO and CFO to reimburse the company for all bonus, incentive-based and equity-based compensation received from the issuer and all profits on sales of securities, during the 12-month period after the non-complying disclosure or filing.

IV. Considerations for Emerging Growth Companies

Emerging Growth Companies (EGCs) represent a unique category of issuers that enjoy exemptions from, or reduced burdens with respect to, certain SEC rules and other regulatory requirements under U.S. securities laws. This section outlines the benefits of being an EGC, including aspects related to research reports, financial information, accounting standards, audit firm rotation, disclosure requirements, say-on-pay/say-on-frequency votes and auditor attestation on internal controls.

Overview

- An EGC is defined as a company with less than $1.235 billion in annual gross revenues in its most recently completed fiscal year that has not sold common equity securities under a registration statement. EGC status offers benefits both during the IPO "on-ramp" and for up to five fiscal years post-IPO.

Benefits of Being an Emerging Growth Company

- **Research Reports and Public Appearances by Research Analysts**
  - EGC status permits the publication and distribution by brokers or dealers of research reports about an EGC that is the subject of a public offering, even if the brokers or dealers are participating in the offering.
    - Investor protections, such as Section 501 of SOX regarding potential conflicts of interest, remain in effect.
    - Pre-offering research has not been widely adopted by investment banks due to liability concerns and the terms of a prior legal settlement that affects the largest banks. Post-offering blackout periods for research have been shortened but not eliminated for the same reasons.
    - Most large banks still impose a blackout period for 25 days following the IPO pricing on the syndicate in IPOs in which they are bookrunners.
- **Less Required Annual Financial Information**
  - EGCs are allowed to provide only two years of audited financial statements, as opposed to three years for non-EGCs.

- **Accounting Standards**
  - EGCs may elect not to comply with new financial accounting standards until such standards apply to private non-reporting companies (one-time binding election).
  - EGCs may choose to comply fully with non-EGC accounting standards but may not selectively comply.
- **Audit Firm Rotation and Potential Other Future PCAOB Rules**
  - EGCs are exempt from any PCAOB mandatory audit firm rotation requirements and PCAOB rules relating to supplements to the auditor's report in which the auditor would be required to provide additional information. The PCAOB has not yet adopted any rules that are affected by this provision.
- **EGCs May Comply with Certain Smaller Reporting Company Disclosure Requirements**
  - EGCs have reduced executive compensation disclosure requirements, including no narrative compensation discussion and analysis (CD&A) section. Disclosure for only CEO and two other most highly paid executive officers is required.
  - Only two required tables—summary compensation table and outstanding equity awards table.
  - No quantification of termination/change-of-control benefits is required.
  - Internal pay comparison and pay versus performance disclosures are not required.
  - Reduced disclosure has been widely adopted by EGCs, with some variation in the amount of voluntary information provided.
- **Say-on-Pay/Say-on-Frequency Votes**
  - EGCs are exempt from the requirement to hold nonbinding advisory stockholder votes on executive compensation arrangements and related stockholder votes on the frequency of such "say-on-pay" votes (i.e., every one, two or three years). The utilization of this exemption has been widely adopted among EGCs.
- **Auditor Attestation on Internal Controls**
  - EGCs are exempt from auditor attestation requirements relating to internal controls for as long as the issuer is an EGC.

Cessation of EGC Status

For a company that no longer meets the criteria to be an EGC, it is crucial to strategically prepare for the expiration of the exemptions and reduced compliance obligations that EGC status provides. Consequently, understanding when a company ceases to qualify as an EGC is of paramount importance.

WHEN DOES A COMPANY STOP BEING AN EMERGING GROWTH COMPANY?

A company loses its EGC status at the earliest occurrence of the following events:

- The last day of the first fiscal year in which the company's total annual gross revenues exceed $1.235 billion. If an EGC surpasses this limit before completing the IPO process, it can maintain its benefits until the completion of the IPO or up to one year, whichever comes first.
- The last day of the fiscal year that is five years after date of first public equity sale.
- The date on which the company has issued more than $1 billion in nonconvertible debt within the preceding three-year period.
- The last day of the fiscal year in which the company becomes a large accelerated filer, which requires:
  - having equity held by non-affiliates of $700 million or more (measured as of the last business day of the issuer's most recently completed second fiscal quarter);
  - being subject to reporting requirements for 12 calendar months;
  - having filed at least one annual report; and
  - not being classified as a smaller reporting company.

V. Becoming IPO-Ready

Positioning a company for an IPO is a complex and demanding process that requires substantial involvement of multiple stakeholders across the company, including the accounting, HR / compensation and management functions. This section offers an overview of the key considerations and steps involved in this process, emphasizing the importance of advanced planning and the time-consuming nature of the work required, particularly for the company's finance and accounting staff.

Overview

- The IPO process requires significant planning and preparation, including:
  - Extensive company effort to draft the registration statement, prepare financial statements (which is often the reason for a delay in the IPO timeline), collect documentary diligence materials and implement governance and other changes required for public company status.
  - Careful coordination among management, investment bankers, auditors, legal counsel and others.
- Anticipating and addressing issues prior to "kick-off" can improve execution:
  - Completing IPO readiness initiatives early allows for greater optionality with respect to market windows and minimizes the distraction of management and disruption of the underlying business.
  - Issues to consider and address in advance include accounting practices, financial statements, internal controls, compensation and corporate governance.

Accounting/Financial Statement Issues

The IPO process and the reporting obligations applicable to public companies results in intense and ongoing scrutiny of financial statements. Accounting issues that arise during the IPO process can add considerable time to preparation of the financial statements and SEC review and can also result in unfavorable accounting treatment of financial results. Below are steps that a pre-IPO company should take to ensure that its financial statements are IPO-ready:

- **Meet with outside auditors and attorneys** to review and formulate a plan to address issues, including:
  - Auditors' Experience: Evaluate auditors' public company experience and independence; ensure access to auditors' specialized national SEC practice group.
  - Non-GAAP Financial Measures: Discuss expectations regarding use of non-GAAP financial measures post-IPO.
    - SEC rules limit use of non-GAAP financial measures and this remains an area of focus for the SEC.
    - Underwriters will provide guidance with respect to how industry-specific non-GAAP financial metrics are generally derived.
  - Critical Accounting Policies and Estimates: Benchmark against comparable public companies and review industry-specific challenges.
    - Revenue recognition remains an area of focus for the SEC.
  - Acquisitions: Assess the impact of completed and planned acquisitions, including the accounting treatment for any predecessors, acquired companies or probable acquisitions; analyze need for audited financial statements of the target and pro forma financial statements.
  - Segment Reporting: Review appropriate segment reporting practices.
    - SEC frequently examines determination of segments and may seek to require disclosure more detailed than a company is comfortable making public.
- Determine **which financial statements are required.**
  - Ensure adherence to "age of financial statements" requirements under SEC rules.
  - Refer to Gibson Dunn's Financial Statements Staleness Calendar (Link).

  - EGCs may omit financials that will not be included in the registration statement at the time of the launch of the offering.
  - Non-EGCs may omit financials that will not be included in the registration statement at the time of public filing.
  - Older financials may be desired for roadshow, testing the waters or other purposes such as showing financial trends.

- Plan for an **accelerated schedule for preparation of financial statements** during the IPO process and post-IPO.
  - Evaluate the adequacy of finance and accounting staff well in advance of the IPO.
  - Ensure that required annual and quarterly financial statements will be available in a timely manner (with audits / reviews completed by auditors).
  - Underwriters may suggest preparation and review of historical quarterly financial information (covering six to eight quarters) for marketing purposes.
  - The timeline for quarterly close and availability of financial information will accelerate as the launch of the IPO nears, as investors will demand information regarding recently completed fiscal periods before investing in the IPO.
    - Disclosure of estimates of quarterly results (referred to as “flash” numbers) will be necessary if complete financial information regarding a recently completed period is not available.
  - Companies will need to be prepared for financial forecasting and guidance process.
  - Evaluate whether financial / accounting and other information reporting systems should be updated or outsourced in advance of IPO.

Internal Controls

Ensuring robust internal controls is crucial for regulatory compliance and investor confidence. Below are key considerations and requirements for internal controls, especially in the context of an IPO.

- **Section 404 of SOX:**
  - Requires executives and auditors to attest to the adequacy of internal controls.
  - Under the JOBS Act, a company is exempt from the auditor attestation requirement while it is an EGC.
- **Attestations for Non-EGCs:**
  - Required for first complete fiscal year following an IPO, but preparation should start well in advance of the first filing of registration statement.
  - Early compliance is important to ensure accuracy of the IPO offering document, as implementation of internal control procedures may reveal material information and affect reporting compliance post-IPO.
  - Implementation costs are considerable and should be reflected in finance and legal department budget forecasts.
- **Internal Controls Diligence:**
  - Due diligence of internal controls during the IPO should cover:
    - Tone at the top.
    - Risk assessment procedures.
    - Policies and procedures relating to authorization, approval and access.
    - Information gathering, reporting and retention systems.
    - Ongoing monitoring and evaluation processes.
- **Disclosure of Material Weakness:**
  - A “material weakness” in internal controls and plans for its remediation will be disclosed in registration statement or future SEC reports and may harm the company’s reputation among investors.

Compensation

When preparing for an IPO, it is essential to review and adjust compensation programs to ensure compliance with securities laws and align with investor expectations. Below are key considerations for managing equity grants and executive compensation disclosures:

- **Reviewing the Company's past and future equity grants is critical:**
  - Ensure compliance with securities laws and any reporting obligations for prior grants; confirm due authorization and proper documentation of all grants.
  - Consider suspending or modifying any grants that include an IPO-vesting trigger.
  - Obtain private company stockholder approval for incentive plans and future pools.
  - Consider timing of potential future grants in light of recently adopted SEC accounting guidance and insider trading rules.
- **SEC requires detailed disclosure and analysis of compensation programs (Non-EGCs):**
  - For non-EGCs, compensation of CEO, CFO and three other most highly compensated officers will be publicly disclosed, including itemization of perks in excess of $10,000 as well as CEO pay ratio and pay-for-performance disclosures.
- **EGCs may comply with smaller reporting company disclosure requirements:**
  - Reduced executive compensation disclosure requirements, including no narrative CD&A section.
  - Disclosure for only CEO and two other most highly compensated executive officers.
  - Only two required tables (summary compensation table and outstanding equity awards table).
  - No quantification of termination/change-of-control benefits.
  - CEO pay ratio and pay-for-performance disclosure not required.
  - Widely adopted by EGCs, with some variation in amount of voluntary information included.

Cheap Stock

Addressing potential "cheap stock" issues is crucial before and during the SEC review process to ensure accurate financial reporting and compliance. Below are key considerations for managing stock options and share-based grants:

- The issuance of stock options or other share-based grants is generally required to be treated as compensation expense.
- The SEC scrutinizes stock and option grants in the period leading up to an IPO and typically asks companies to justify the fair market value determination used.
- "Cheap stock" issues arise from recent option grants or other share-based grants at valuations below the expected IPO valuation:
  - If options or other share-based grants are subsequently viewed to have been issued below the fair market value at the time of issuance, the corresponding compensation expense reflected in the financial statements may be understated. This understatement can result in a need to revise upward the amount of recorded compensation expense and correspondingly reduce recorded net income and EPS in the period in which the issuance was made and may require the restatement of previously issued financial statements.
  - If the fair market value determination for prior grants is called into question, employees whose options (or other share-based grants) were issued below fair market value may be subject to additional taxes under Section 409A.
- Companies should carefully consider fair market value in making stock and options grants pre-IPO, including, as noted below, through the engagement of an independent third-party valuation consultant, and consult with their outside auditors both when making the grants and when reporting the grants in the financial statements.
- The "cheap stock" issue is generally addressable in a timely manner with proper planning; however, there is a possibility of delay in deal timing if the issue is not addressed early:
  - Be prepared to provide support to the SEC regarding valuations: contemporaneous independent third-party valuations are the "gold standard" to support a valuation.
  - File a confidential side letter with the SEC providing the expected IPO range before the public filing that includes the price range, which will allow the SEC to evaluate potential "cheap stock" issues prior to public disclosure of the range.

Management and Board of Directors

Effective management and a well-structured board are essential for a successful IPO process and life as a public company. Below are key considerations for allocating duties, addressing, hiring needs and ensuring compliance with regulatory requirements:

- **Allocation of Duties and Hiring Needs**
  - Identify public company experience among current management.
  - Plan to hire investor relations and SEC reporting staff, including accounting personnel.
- **Director Independence**
  - General rules: Stock exchanges generally require a majority of the board to be independent and all members of key committees to be independent no later than one year after the IPO (unless the issuer is a controlled company as addressed below).
  - IPO phase-in rules: A company listing in connection with an IPO generally must have:
    - at least one independent member on its audit committee by the effective date of the registration statement (Nasdaq) or the listing date (NYSE);
    - at least one independent member on each of its compensation and nominating committees by the listing date (Nasdaq) or the earlier of the date the IPO closes and five business days from the listing date (NYSE);
    - a majority of independent members on each committee within 90 days of (i) the effective date of the registration statement for the audit committee and (ii) the listing date for each of compensation and nominating committees;
    - fully independent (i) audit committee within one year of the effective date of the registration statement and (ii) compensation and nominating committees within one year of the listing date; and
    - majority of independent board members within one year of the listing date.
  - Investment bank preferences: From a marketing perspective, some investment banks may prefer that the company not rely on the phase-in rules and establish a majority independent board and fully independent committees at the time of the IPO.
  - Controlled company exemption: Allows a company to delay compliance with independence requirements, other than with respect to the audit committee, if a person or group owns more than 50% of the voting securities.

- **General Board Considerations**
  - Board and Committee Candidates: Identify potential candidates early, including an audit committee financial expert. The search may be lengthy due to proxy advisory firm and investor focus on overboarding (i.e., simultaneous service on an excessive number of public company boards) and the complexity of independence analysis given stock exchange, SEC (Section 16 and Rule 10A-3), proxy advisory firm and sponsor affiliation considerations.
  - Audit Committee: Failure to have strong audit committee member(s) at the IPO can negatively affect investor perception.
  - Board Diversity: Increasingly important to investors and policymakers, as reflected in Nasdaq's board diversity rule, the underwriting requirements of certain investment banks and the policies of proxy advisory firms and institutional investors.
- **Additional Considerations (Interlocks and Insurance)**
  - Section 8 of the Clayton Act: Analyze director and officer interlocks between competitors.
  - Insurance Needs: Evaluate needs for "errors and omissions" liability insurance, D&O insurance and indemnification agreements with directors and officers. Note that D&O insurance costs have increased significantly in recent years, so budget accordingly.

Related Person/Related Party Transactions

Addressing related person and related party transactions before an IPO is crucial both for regulatory compliance and maintaining investor confidence. Below are key considerations and actions to take regarding these transactions:

- **Disclosure Requirements:** SEC rules mandate the disclosure in the registration statement of related person transactions (including loans that have been repaid) as defined under Item 404 of Regulation S-K within the three years prior to the effectiveness of the registration statement (or two years for smaller reporting companies). This lookback period is longer than that for proxy statements that will be filed following the IPO. Additionally, outside auditors will focus on "related party" transactions as defined under accounting rules, which can be broader than "related person" transactions under SEC rules (although only material "related party" transactions need to be disclosed in the notes to the financial statements).

- **Repayment of Loans:** Any loans to officers must be repaid prior to the initial filing of the registration statement unless such loans were outstanding as of, and not modified since, July 30, 2002.

- **Eliminate or Modify Transactions:** Where practical, eliminate related person transactions, especially any that are not on standard terms. If related person/related party transactions cannot be terminated, consider modifying their terms.

- **Director Independence:** Consider the impact of related person transactions on director independence, particularly in light of the more stringent independence standards used by proxy advisory firms.

Organization & Capitalization

When preparing for an IPO, a company should carefully evaluate its organizational structure and capitalization to ensure a clean, clear story and maximize investor appeal. This process should include the following actions and analyses:

- **Evaluate Corporate Structure:** Simplify the corporate structure where possible to enhance investor understanding and valuation.
  - Consider reincorporation in another state (Delaware is most common), if necessary.
  - Determine if stock split or reverse stock split is needed to achieve an appropriate price per share; typically, a decision regarding final numbers is made near the end of the IPO process when the proposed valuation is determined.
  - Evaluate the capital structure to decide whether to reduce outstanding classes and securities or implement multi-class arrangements in advance of IPO.
- **Review Registration and Other Investor Rights:**
  - Determine which stockholders, if any, have the right to participate in the IPO and on what terms. Obtain advice from underwriters about the inclusion of selling stockholders and whether the company can impose terms on them, including lock-up agreements and the execution of a customary underwriting agreement.
  - Examine the conversion and anti-dilution rights of existing notes, preferred stock and warrants to buy shares; note that warrants often survive an IPO.
  - Consider whether certain stockholders have a veto right over any deal under a specific size and valuation, which is common in tech and biotech companies with venture investors. Some veto rights may continue post-IPO, subject to any applicable limitations under state law.

Environmental, Social and Governance (ESG)

"ESG" encompasses a broad range of topics, from traditional corporate governance to climate change, greenhouse gas emissions, employee health and safety, employee benefits and welfare, diversity, equity & inclusion measures, community impact, cybersecurity risks and more. A company preparing for an IPO should consider the following:

- **ESG Disclosure Rules:** The SEC has heightened its focus on ESG disclosures through rulemaking, enforcement actions and comment letters, including:
  - Human capital: Implemented in August 2020, the human capital provisions of Item 101 of Regulation S-K require IPO prospectuses to discuss human capital resources to the extent material to an understanding of the company's business taken as a whole. Additional and more prescriptive human capital disclosure is under consideration by the SEC, but has not yet been adopted.
  - Climate: Adopted in March 2024, the SEC's new climate disclosure rules will mandate the inclusion of certain climate-related disclosures in registration statements. These rules are subject to a phase-in period, with certain requirements becoming effective for EGCs beginning in 2028.
  - Cybersecurity: Implemented in July 2023, the SEC's cybersecurity rules mandate new specified disclosures, including those related to cybersecurity risk management, governance and incident history.
- **Pre-IPO Considerations**:
  - **Review ESG-Related Disclosures**: Evaluate any existing or proposed ESG-related disclosures and marketing materials, including any standalone "Sustainability Reports" or similar documents.
    - In light of the U.S. Supreme Court's invalidation of universities' race-based affirmative action policies in *Students for Fair Admissions v. University of North Carolina* and *Students for Fair Admissions v. Harvard University*, companies should consider steps to mitigate risk and reinforce existing obligations under federal and state anti-discrimination laws.
  - **Cybersecurity Policies**: Establish or enhance cybersecurity policies and related risk oversight mechanisms. Although not required under the rules, cybersecurity disclosure is frequently included in the IPO prospectus. Once public, the company will be subject to mandatory reporting of material cybersecurity incidents.

Other Housekeeping

Attending to the following pre-IPO housekeeping items will help to mitigate risks and prepare the company for a smooth transition to public company status:

- Consider **settling outstanding litigation** before the IPO to avoid disclosure and reduce opposing party's leverage.
- **Evaluate internal risk management and compliance programs**, including those related to cybersecurity, privacy, export controls, anti-money laundering and anti-corruption.
- **Prepare or update public company documents, policies and procedures**, such as the certificate of incorporation, bylaws, committee charters, governance guidelines, codes of conduct, insider-trading policy, related person transactions policy, whistleblower procedures, public communications policy (Regulation FD) and other audit-related policies.
- **Collect backup support** for qualitative and quantitative statements about the company and its industry that may be included in the registration statement.
- **Identify material contracts and other documents** that may need to be filed and for which confidential treatment may be sought. Note that the company will have limited ability to protect confidential information in such documents; only pinpoint requests for the confidential treatment of immaterial information that the company customarily and actually treats as private or confidential are permitted under SEC guidance.
- **Prepare for due diligence review** by gathering minute books and all material contracts, confirming board actions ratifying all significant transactions, ensuring the stock ledger is complete and current and reviewing compliance with applicable laws in prior securities issuances.

VI. Communications Strategy

Effective communication is essential throughout the IPO process to maintain investor confidence while ensuring legal compliance. This section outlines the key strategies and considerations for managing communications before and during the registration period, as well as during the offering process. By adhering to these guidelines, the company can mitigate risks and facilitate a smooth transition to public company status.

IPO Communications Before and During the Registration Period

To ensure effective and compliant communication before and during the IPO registration period, which commences at least 30 days prior to the first public filing of the registration statement, the company should consider the following:

- Securities laws impose strict limitations on communications during the registration period. Violation of the communications rules (or "gun-jumping") can result in civil liability and significant delay in the IPO.
- Review all current public relations activities in light of these restrictions, including planned speaking engagements, product announcements and communications on the company website.
- **Public relations activities generally should not be more extensive than they were prior to the commencement of the registration process.**
  - **References to the offering are impermissible except in strictly limited communications.**
  - **The release of historic, factual information, consistent with past practice, is permitted.**
  - **Avoid references to the company's growth prospects or using overly "bullish" language.**
- Carefully plan communications with employees, suppliers and customers relating to the IPO, especially at the time of the first public filing.
- Discuss pre-IPO publicity issues with sales, marketing, public relations, social media and executive staff. Avoid talking to the financial press or other mass media, because the Company cannot control the timing of their publications nor prevent statements from being taken out of context.

- Identify investor relations team (internal and external) early in the process.

IPO Communications Before and During the Offering Process

To ensure effective and compliant communication before and during the offering process, which begins with the first public filing of the registration statement and continues through closing, the company should consider the following:

- Written and oral "test-the-waters" communications to institutions that are accredited investors and QIBs are permitted. However, Section 12 liability still applies to these communications.
- The testing-the-waters process has become a crucial part of investor communications in IPOs.
- Testing-the-waters materials should be reviewed with the same level of scrutiny as the registration statement and other IPO materials, and generally serve as a basis for the roadshow presentation.
- Testing-the-waters materials will be submitted to the SEC for review to ensure consistency with the registration statement.
- Initially, testing-the-waters was permitted only for EGCs under the JOBS Act, but this provision has since been extended to all issuers.

VII. Choosing an Exchange

Choosing the correct stock exchange for an IPO is a critical decision that can significantly impact a company's success. This section will describe the major considerations in choosing between Nasdaq and the New York Stock Exchange (NYSE), which are the two largest stock exchanges for IPO transactions globally.

	Nasdaq	NYSE
Overview	• Largest electronic equity securities market in the U.S. in terms of listed companies and traded share volume • Trades are made by multiple market makers through an automated system • Utilized by over 3,000 companies • Market capitalization: $28 trillion as of August 2024	• Largest market globally by dollar volume • Trades are made in a continuous auction format, managed by a Designated Market Maker (DMM) selected by the listing company • Utilized by over 2,000 companies • Market capitalization: $28 trillion as of August 2024
Cost Considerations	• Initial fee: $295,000 (flat fee) for Global Select and Global Market $ 50,000 to $75,000 (TSO based) for Capital Market • Annual fee (TSO based): $52,500 to $182,500 for Global Select and Global Market $49,500 to $85,000 for Capital Market	• Initial fee (flat fee): $300,000 • Annual fee (TSO based): Maximum of $500,000

Advantages	• Fastest average transaction speed for executions • Nasdaq companies generally trade more shares for a given float size • Computerized system facilitates trading and provides price quotations • Less stringent listing standards with more interpretive guidance • Slightly less expensive than NYSE	• Historically regarded as the premier brand name of exchanges • Order-driven process creates pricing transparency • Direct public interaction reduces transaction costs
Disadvantages	• Fragmentation of order flow inhibits competition • Market makers have no obligation to commit capital or provide liquidity to dampen volatility • Generally more volatility than NYSE	• More stringent listing standards • Slightly more expensive than Nasdaq • Less interpretive guidance

VIII. Additional Governance Considerations

When preparing for an IPO, the company will need to address a variety of corporate governance considerations to comply with regulatory requirements and to establish a robust framework for compliance as a public company. This section outlines certain key governance issues that companies must consider, including stock exchange listing requirements and key charter and bylaw provisions (including takeover defenses).

Board of Directors and Committees: Key Listing Exchange Requirements

This section compares the requirements for Nasdaq and NYSE-listed companies pertaining to the composition and structure of the board of directors and its committees, including standards for director independence, audit committees, nominating committees and compensation committees.

	Nasdaq Companies	NYSE Companies
Board Composition [1]	• Majority of directors must be independent [2]	• Majority of directors must be independent [2]
Audit Committee	• All members must be independent in accordance with heightened Audit Committee Standards [3] • No audit committee member can have participated in the preparation of the company's or any subsidiary's financial statements during the past three years • Each member must be able to read and understand fundamental financial statements, including a company's balance sheet, income statement and cash flow statement	• All members must be independent in accordance with heightened Audit Committee Standards [3] • Each member must be "financially literate," as interpreted by the board of directors in its business judgment

Nominating Committee	• Director nominees must be recommended or selected by (a) nominating committee composed solely of independent directors or (b) a majority of the board's independent directors [2]	• All members must be independent [2]
Compensation Committee	• CEO and executive officer compensation must be determined or recommended to board by a compensation committee composed solely of independent directors and having at least two members. CEO may not be present for voting or deliberations regarding his/her pay [2]	• All members must be independent [2]
Committee Charters	• Must certify that audit and compensation committees have written charters that address responsibilities and outline procedures for annual performance evaluation	• All committees must have written charter that addresses committee's purpose and responsibilities and outlines procedure for annual performance evaluation
Board Diversity	• Must have, or explain why it does not have, at least two members of its board of directors who are diverse, including (i) at least one diverse director who self-identifies as female; and (ii) at least one diverse director who self-identifies as an underrepresented minority or LGBTQ+[4]	• Not required
Governance Principles	• Not required (but best practice to adopt)	• Required

[1] Nasdaq director independence standards require more monitoring of directors' investments
[2] Subject to one-year phase-in for IPO companies—exception for companies using the controlled company exception
[3] Subject to one-year phase-in for IPO companies
[4] Subject to one-year phase-in for IPO companies with respect to having one diverse director and two-year phase-in with respect to having two diverse directors for IPO companies on the Nasdaq Global Select Market or Nasdaq Global Market. Subject to two-year phase-in with respect to having two diverse directors for IPO companies on the Nasdaq Capital Market.

Typical Anti-Takeover and Other Key Charter/Bylaw Provisions for Newly Public Companies

Newly public companies often adopt anti-takeover provisions and other key charter/bylaw provisions to protect against hostile takeovers and to maintain control over corporate governance. This section describes defensive measures and strategies commonly adopted by IPO companies.

Defensive Provision	Description
Classified Board	• Establish a subset of directors to be elected in a given year by dividing directors into classes (typically three). In a three-class staggered board, it would take two election cycles for an activist to gain majority control of the board. This is a common provision for a newly public company. Given investor and proxy advisory firms' policies, some companies are now adopting these provisions with sunsets (typically, three to seven years following the IPO).
Removal of Directors Only for Cause	• Prevents removal of directors for any reason other than fraud, criminal acts, etc. This is the default provision for classified boards under Delaware law. This provision is not available if the board is not classified.
Number of Directors Fixed only by Board / Directors' Right to Fill Vacancies	• Prevents activists from adding directors or "packing" the board by increasing its size. This is a common provision for a newly public company. The charter should make clear that the ability to fix the number of directors and fill vacancies is vested solely with the board.
Voting Standard for Director Elections	• Most companies going public continue to use plurality voting for the election of directors (i.e., directors with the most votes get elected, regardless of whether they receive a majority). Investors and proxy advisory firms have increasingly advocated instead for "majority voting," whereby election of directors requires an affirmative vote of a majority of votes cast. A starting middle ground could be "plurality-plus," i.e., plurality with a resignation policy if majority of votes are not received.
No Cumulative Voting	• Requires stockholders to cast one vote per seat up for election rather than apportion the total number of votes they can cast (such as casting all votes for one director). Newly public companies typically do not allow cumulative voting, which is the default rule under Delaware law.

Defensive Provision	Description
Board Authority to Amend Bylaws	• Allows the board to amend bylaws without stockholder approval. This is a common provision for a newly public company. Under Delaware law, this provision must be included in the certificate of incorporation.
Bar on Action by Written Consent	• Denies stockholders the ability to remove/replace directors or amend bylaws or otherwise act by written consent without a stockholder meeting.
Bar on Stockholder Ability to Call Special Meeting	• Limits the board's "window of vulnerability" to the annual meeting, particularly if in conjunction with a bar on the ability of stockholders to act by written consent.
Advance Notice Provisions	• Gives the board advance notice of an activist's intent to make director nominations and bring other proposals to a stockholder vote.
Supermajority Vote to Amend Charter/Bylaws Provisions	• Limits the ability of stockholders to change company's governing documents.
Dual-Class Stock	• Continuing stockholders will hold a class of stock with higher voting rights versus newer public holders; without support from the holders of the high vote stock, an activist cannot gain control of the company. Dual-class structures are not the norm for newly public companies overall, but are used more frequently in founder-run companies. However, such structures have come under scrutiny from proxy advisory firms and other various market actors. Underwriters should be consulted on marketing prior to the start of the IPO process if dual-class stock is being considered
Blank Check Preferred Stock	• Board authority to issue preferred stock. Can be used in the context of a stockholder rights plan or to place an investment with a friendly third-party investor. This is a common provision for a newly public company.
Exculpation of Officers and Directors	• Eliminates monetary damages for breach of fiduciary duty of care for certain specified claims.

Defensive Provision	Description
Stockholder Rights Plan (Poison Pill)	• Grants stockholders (excluding the triggering party) rights to purchase the stock of company at deep discount upon occurrence of a triggering event, diluting the voting power of the third party that triggered the rights plan. In light of pressure from proxy advisory firms and various investors, most public companies in the last few years have let their rights plans expire, opting instead for an "on the shelf" strategy, whereby a rights plan is prepared but only implemented in response to a specific takeover threat. It is highly unusual for a newly public company to implement a rights plan in connection with its IPO.
State Anti-Takeover Laws	• Delaware General Corporation Law ("DGCL") Section 203 generally prohibits a Delaware corporation from engaging in any business combination with any interested stockholder (those who own 15% or more of the company's voting stock) for a period of three years after the date such stockholder became an interested stockholder, unless the board approved the transaction that resulted in the stockholder initially becoming an interested stockholder. Newly public companies typically choose not to opt out of DGCL 203 (or they opt out and create "synthetic" Sections 203 to exempt certain "interested stockholders" (such as sponsors)).
Exclusive Forum Provision	• Requires that certain stockholder lawsuits against the company be brought in Delaware to limit the plaintiff's ability to forum shop. This is a common provision for a newly public company. Most recently, these provisions are also extended to complaints under the Securities Act with the forum being U.S. federal district courts.

Note: Some of the provisions summarized in the table (e.g., filling vacancies, no stockholder ability to act by written consent, no stockholder right to call special meetings) may be "springing" upon sponsor ownership falling below a certain threshold if it is a sponsor-backed IPO and the company is going to be a controlled company post-IPO.

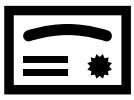
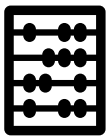
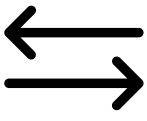
Other provisions imposing restrictions on squeeze-out mergers and other transactions with interested stockholders, are not common among companies going public. Certain additional considerations (e.g., corporate opportunities waiver) apply to controlled companies.

IX. Document Drafting and Filing

The preparation and filing of key documents are fundamental to the IPO process. Any pre-IPO company should be familiar with the essential documentation required for an IPO to facilitate a successful offering.

Initial Public Offering Preparation

Preparing for an IPO involves drafting several critical documents. This section provides an overview of these documents.

 **Registration statement** (including prospectus and audited financial statements)	 **Lock-up agreements**	 **SEC comment letters** and written responses to SEC comments
 **Certificate of incorporation and bylaws**	 **Stock exchange listing application**	 **Investor road show** and **testing the waters presentations**
 **Underwriting agreement**	 **Accountants' comfort letter**	 **Officers' certificates** and other **closing documents**
 **Legal opinion and Rule 10b-5 letters**	 **Transfer agent documentation**	 **Governance documents** and **corporate policies**

Prospectus and Registration Statement

The prospectus and registration statement are central to the IPO process, providing potential investors with detailed information about the company. This section explains the contents of these documents, the process for their preparation and the requirements for their submission to the SEC.

- **Registration Statement and Prospectus**
  - The company must file a Registration Statement on Form S-1 (and amendments) with the SEC, which must be declared effective by the SEC prior to pricing the offering.
  - The registration statement includes the prospectus and a small amount of additional information that is not included in the prospectus (Part II information).
- **Confidential Submission of Draft IPO Registration Statement**
  - Issuers are permitted to submit a draft registration statement (and amendments) for confidential review by the SEC prior to public filing.
  - Most issuers elect to file confidentially.
  - All prior confidential submissions become public at the time of the public filing.
  - All confidential submissions (excluding comment letters) must be publicly filed at least 15 days prior to commencement of the roadshow.
- **Main Sections of an IPO Prospectus**:
  - "Box" – a summary of the prospectus, including an overview of the business, strengths and strategies, summary financials and a summary of the offering terms.
  - Risk Factors – Discussion of potential risks and uncertainties that could negatively impact the company's business and financial condition.
  - Capitalization, Dilution and Use of Proceeds – Information about the company's capital structure, the potential impact of the offering on existing stockholders' ownership percentages and how the company plans to utilize the funds raised from the IPO.
  - Management's Discussion and Analysis of the Financial Statements (MD&A) – Overview of the company's financial performance, key trends and management's perspective on the business's operational results and future outlook.
  - Business Description – Comprehensive overview of the company's operations,

products or services, market position, competitive landscape and strategic objectives.

- Management – Information about the company's executive team and board of directors, including their backgrounds, qualifications and roles within the organization, as well as the composition of board committees and other governance matters.
- "Back Half" sections of the prospectus:
  - Executive Compensation – Description of compensation arrangements for the company's top executives, including salaries, bonuses, stock options and other financial incentives.
  - Related Person Transactions – Disclosure of any transactions between the company and its directors, executive officers, significant stockholders, or their immediate family members, highlighting potential conflicts of interest.
  - Beneficial Ownership Table – Listing of the ownership stakes of significant stockholders, including directors, executive officers and major investors, providing transparency on who holds substantial control or influence over the company, as well as, if applicable, stockholders selling shares in the offering.
  - Description of Capital Stock – Overview of the key features, rights and restrictions of the company's various classes of stock, including common and preferred shares, to inform investors about the characteristics and terms of the securities being offered.
  - Tax – Information about potential tax implications for investors related to the purchase, ownership and sale of the company's securities, helping them understand the tax consequences of their investment.
- Underwriting – Description of the agreements and terms between the company and the underwriters, including the underwriting fees, the allocation of shares and the responsibilities of the underwriters in the offering process.
- Financial Statements – The company's audited historical financial information, including balance sheets, income statements and cash flow statements, together with explanatory notes from the auditor, providing investors with a detailed view of the company's financial health and performance.

- In addition to the IPO Prospectus, the Registration Statement includes:
  - Historical sales of stock, options and other securities;
  - Signatures of the CEO, CFO, CAO and at least a majority of the board of directors

(typically signed by all board members); and

- Exhibits, such as material contracts (which may be redacted to omit immaterial information that the company customarily and actually treats as private or confidential).

- An issuer may omit from an initial submission of the registration statement any financial statements covering historical periods that will not be required at the time of offering (for an EGC) or public filing (for a non-EGC).
  - All required information must be provided to investors at the time a preliminary prospectus is distributed and must be included in registration statement in time for clearance by the SEC prior to launch.
  - This benefit was previously limited to EGCs, but has been extended to all issuers pursuant to SEC guidance.

Lock-Up Agreements

Lock-up agreements are crucial in aligning the interests of company executives, existing stockholders and new public investors. This section outlines the typical structures of IPO lock-ups, their duration and the conditions under which they may be modified or waived.

- Lock-ups are an essential aspect of a successful IPO:
  - Potential investors may have concerns about the potential overhang from future secondary sales by private equity partners, management or other stockholders immediately after the IPO.
  - Lock-up agreements align the interests of company executives, existing stockholders and the new public stockholders in the period immediately after the IPO by restricting secondary sales for a specified time period.
- At the time of an IPO, the company and other pre-IPO stockholders (including officers and directors) will enter into a lock-up agreement with the bookrunning underwriters.
  - The company agrees not to issue any additional equity during the lock-up period.
  - The existing stockholders agree not to sell their shares during the lock-up period.
- Typically, an IPO lock-up lasts 180 days. This time frame can be modified in rare circumstances, depending on the needs of the company and other pre-IPO stockholders, as well as applicable FINRA regulations, with consideration of market impact.
- Recently, many companies have negotiated early lock-up release rights, providing with flexibility to trade ahead of the traditional 180-day expiration date. These rights can be based on earnings dates or blackout periods that are undetermined at the time of the IPO. The release date may also be a moving target, dependent upon the share price hitting a certain threshold.
- Any primary or secondary sales by the Company or other pre-IPO stockholders during the lock-up period require a waiver of the lock-up by the bookrunners. Waivers may need to be announced by press release when granted.
- In some structures such as the “direct listing” process, formal lock-ups may not be required. However, other methods may be employed to restrict the flow of shares to the market post-IPO.

10b-5 Negative Assurance Letter

To mitigate potential liability, underwriters request a Rule 10b-5 negative assurance letter, also known as a disclosure letter, from both the company's and the underwriters' counsel.

- **Potential Liability**: Both issuers and underwriters face potential liability with respect to the registration statement and prospectus.
- **Due Diligence Defense**: To help establish a potential due diligence defense, underwriters request a Rule 10b-5 disclosure letter from both counsel to the company and counsel to the underwriters. This letter is essentially a statement by counsel, based on its participation in the offering process, that nothing has come to its attention that causes it to believe that the prospectus contains a material misstatement or omission.
- **Basis for the 10b-5 Letter**: The due diligence conducted by counsel in an offering, including participation in all meetings and drafting sessions, serves as the basis for delivery of the 10b-5 disclosure letter.

Comfort Letter

A comfort letter from the auditors is a standard part of the due diligence process, providing assurance about the financial statements included in the registration statement.

- Similar to the 10b-5 disclosure letter, a comfort letter pursuant to AS 6101 is a standard part of the due diligence process. Obtaining a comfort letter from the auditors is market standard and helps provide a defense for the underwriters against Section 11 liability.
- The AS 6101 comfort letter supports the financial due diligence defense, just as the 10b-5 disclosure letter supports a due diligence defense for nonfinancial disclosure.
- The AS 6101 comfort letter is provided by the issuers' auditors to the underwriters and the issuer. In the letter, the auditors:
  - State the work they have performed in order to arrive at their audit opinion and describe the other processes they have performed; and
  - Confirm the accuracy of financial statements as reported in the registration statement and prospectus.
- Underwriters will also generally request confirmation that the auditors have performed AS 4105 reviews of all quarterly information included in the registration statement and prospectus.

SEC Filing Requirements

Compliance with SEC filing requirements is essential for a successful IPO. Various forms and reports must be filed with the SEC before, during and after the IPO, ensuring that the company meets all regulatory obligations.

- **SEC filings prior to the IPO**:
  - The Registration Statement on Form S-1 (including the Prospectus): Registers the shares to be sold in the IPO transaction.
- **SEC filings concurrent with an IPO**:
  - Form 8-A: Registers the class of equity to be traded on a national exchange.
  - Initial Form 3 Filings: Due on the day the registration statement is declared effective by the SEC, these forms report stock ownership for all directors, Section 16 officers and 10%+ stockholders.
  - The Final Prospectus: Filed after effectiveness and delivered to purchasers.
- **SEC filings after an IPO (deadlines depend on filer status)**:
  - Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q and Current Reports on Form 8-K
  - Proxy Statement for Annual Stockholders Meeting**:** The specific timing of the first Annual Stockholders Meeting will depend on the listing exchange and the timing of the IPO.
  - Forms 3, 4 and 5:
    - *Form 3*: Must be filed within 10 calendar days of a person becoming an officer, director, or 10% owner (other than in connection with the IPO).
    - *Form 4*: Directors, Section 16 officers and 10%+ stockholders must report transactions in the company's securities on Form 4 by the end of the second business day following the transaction. Note that some Forms 4 may be due in connection with IPO if there are IPO grants or purchases/sales in connection with the IPO.
    - *Form 5*: Must be filed within 45 calendar days after the end of the company's fiscal year to report certain transactions eligible for deferred reporting or transactions that should have been, but were not, reported on an earlier form.

- Form S-8: Registers shares under stock compensation plans.
- Schedules 13G or 13D: Reports ownership and any plans and proposals with respect to control of the company for any holder of 5% or more of a class of listed securities.

- **FINRA Filings**
  - Obligation of underwriters; completed during the registration process.
  - Requires investigation into FINRA-defined affiliations of directors, officers, 5% stockholders and persons who have received issuer's securities in the 180-day period preceding filing.

X. Alternatives to IPOs

When contemplating an initial public offering, a company should carefully weigh, as previously discussed, the advantages and disadvantages of going public in light of the company's particular circumstances. Some opportunities that an IPO presents, such as providing liquidity to investors, can also be realized through strategic alternatives, such as with the sale or private equity recapitalization of the company. This section explores the potential advantages and disadvantages, as compared to completing an IPO, of certain alternatives transactions, including company sales, SPAC transactions and direct listings.

Sale of the Company

Selling the company, either to a strategic buyer or a financial sponsor, is a conventional alternative to an IPO that is often explored at the same time as an IPO in a "dual track" process. A sale can be beneficial for equityholders seeking a complete exit or for companies that are not ready to be a public company.

Advantages and Disadvantages of Selling the Company	
Advantages:	Disadvantages:
• Allows for a full exit for the company's existing investors	• No liquid market for shares, so valuation work by company or its advisors is critical
• Generally faster transaction timeline than an IPO	• Management team may change
• Sponsors typically have more control over sale process and valuation	• Delayed receipt of any proceeds placed in escrow
• No or minimal (if buyer is public company) public reporting obligations	• Risk that competitors only enter bids to determine the company's value or gain access to confidential information

SPACs

Special purpose acquisition companies ("SPACs") are companies that raise capital through an IPO with the objective of utilizing the proceeds to later (generally within 18-24 months to avoid liquidation of the SPAC) complete a business combination with a target company.

Advantages and Disadvantages of SPAC Transactions	
Advantages	Disadvantages
• Potentially faster timeline compared to traditional IPO (assuming some level of public company readiness at the target)	• Business combination transaction subject to SEC review and SPAC stockholder approval
– Note, however, that January 2024 SEC rules have realigned SPAC offering requirements to be closer to traditional IPOs	• Enhanced scrutiny by the SEC on business combinations between SPACs and target companies
• Better ability to go public during periods of market instability	• No PSLRA safe harbor protections for forward-looking statements
• SPAC sponsor may offer operational expertise and investor access	• Section 11 liability for target companies and their officers and directors as co-registrants as compared to sale of company
• Post-combination entity has access to public markets	• SEC disclosure guidance on projections, dilution, sponsors and conflicts apply to SPACs and the target company at the time of the business combination
• Ability to structure transaction in a manner not available in IPO or traditional sale structure, including cash-out of existing owners and earn outs	• Target company's management will need to partner with existing SPAC management and sponsors
	• Due to SPAC's former status as a shell company, post-combination entity subject to SEC rule limitations that may impact future capital raising and monetization of original investor stakes

Direct Listings

A direct listing provides an alternative path for a company to go public without conducting a traditional IPO. The rules governing direct listings differ based on whether the shares offered are previously issued shares being resold by stockholders (a “selling stockholder direct listing”) or newly issued shares being sold by the company (a “primary direct listing”). Although there have been several high-profile selling stockholder direct listings in recent years, no company has completed a primary direct listing since the adoption of the rules permitting them in 2020 and 2021. Direct listings are often conducted by well-known private companies that have the capacity to educate investors without the help of underwriters and a traditional IPO marketing process, little need for additional capital and a sufficiently large stockholder base to provide liquidity for public trading.

Advantages and Disadvantages of Direct Listings[1]	
Advantages	Disadvantages
• Existing stockholders can sell their shares immediately after listing	• Lack of established market practices due to limited history and evolving rule landscape
• No underwriting commission or FINRA filings	• Potential for enhanced scrutiny from the SEC and stock exchanges
• Equal access for all investors, not the just large institutions and other investors given access to traditional IPO shares	• Burden falls primarily on management to conduct investor education and engagement efforts
• Market-driven pricing (based on existing buy and sell orders) helps company and selling stockholders avoid leaving money on the table as compared to the traditional IPO "pop"	• Increased onus on company personnel and advisors to prepare disclosure and conduct due diligence to avoid potential liability
• No required lock-ups for company, officers and directors (although the company may choose to implement some restrictions on selling)	• May not be suitable for companies with relatively limited stockholder base or low public profile or for companies seeking a substantial infusion of capital

[1] Because the mechanics of completing a primary direct listing are substantially similar to those of a traditional IPO (including the requirement for the company to retain an underwriter to perform substantially the same functions as in a traditional IPO), this chart discusses only the relative advantages and disadvantages of selling stockholder direct listings.

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