

IPO Training Camp

The Playbook

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The IPO Journey:

FROM TODAY TO “RINGING THE BELL”



Agenda

- **Coin Toss?:** The Dual Track Process
- **Pre-Game Warmup:** IPO Readiness
- **From Kickoff to Victory:** The IPO Timeline
- **Game Day Program:** The Registration Process and Your Form S-1/F-1
- **Your OC:** Underwriters and the Underwriting Process
- **Your Stats:** Financial Statements
- **The PubCo Rulebook:** Stock Exchanges: Listings, Governance and More
- **Calling Your Plays:** The Do's and Don'ts of Communications
- **Post-Game Celebration?:** What's Next for a New PubCo

The Dual Track Process

IPO vs. M&A Exit

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What is it?

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Why does it matter?

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Selecting Advisors

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The IPO Track

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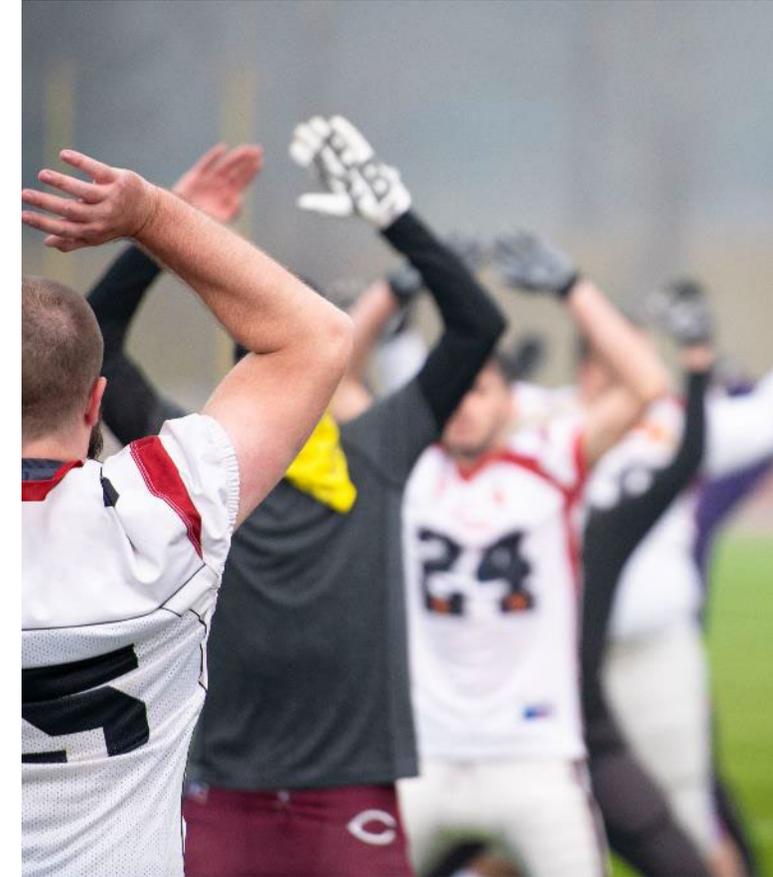
The M&A Track

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Stakeholder Preferences

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Dual Track Advantages and Disadvantages



What and Why

DUAL TRACK: DOUBLE YOUR EXIT OPTIONS

- Pursue IPO and M&A simultaneously for a smarter exit strategy.

EVOLVING LANDSCAPE

- Traditionally, M&A was the backup plan for failed IPOs.
- Now? Companies stay private longer; IPO may not top recent valuations.
- IPO market recovery?

POWER OF PARALLEL PATHS

- Boosts odds of a successful exit.
- Drives higher valuations through competition.

FLEXIBILITY WINS

- = Higher Returns + Lower Risks
- Sellers select the deal that closes fastest and pays best.

Selecting Advisors



STREAMLINED EXPERTISE

- Choose advisors who excel in both IPO and M&A to align efforts and optimize outcomes.

YOUR WINNING LINEUP

- **Investment Bankers:** Navigate markets and deals.
- **Auditors:** Ensure financial accuracy.
- **Legal Counsel:** Guide compliance and strategy.
- **IPO Readiness Firm:** Prep for public life.
- **Investor Relations Firm:** Shape your story for stakeholders.

KEY TO SUCCESS

- Align incentives, leverage expertise, and keep your team focused to drive a seamless dual-track process.

The IPO Track

- Financial Statements
- Underwriting Agreement
- Due Diligence Process with the Underwriters and their Counsel
- Registration Statement (confidential submission/testing the waters/public filing)
- SEC Review and Comment Process
- Roadshow
- Pricing and Closing

The M&A Track

- Auction Process (typically involving multiple strategic and financial bidders)
- Confidential Information Memorandum
- Data Room
- Form of Purchase Agreement
- Bidding Rounds
- Negotiating the Definitive Agreement
- Do bidders know about the IPO?

Conflicting Views of Stakeholders

WHOSE PLAYBOOK?

Stakeholders often pull in different directions:

- **Founders:** Seek control and legacy.
- **Private Equity:** Push for quick, full exits via M&A.
- **Venture Capital:** Favor IPOs for long-term growth.
- **Board & Management:** Balance strategy and stability.
- **Late Investors:** Prioritize high returns.

KEY TENSIONS

- **Control vs. Exit:** M&A may mean losing influence; IPOs lock up shares for 180 days.
- **Common vs. Preferred Stock:** Differing rights create friction.
- **Employees:** Need clarity on rewards and roles.
- **Strategic/Financial Buyers:** Influence deal dynamics.

SOLUTION: ALIGN INTERESTS EARLY TO UNIFY YOUR TEAM FOR A SUCCESSFUL EXIT.

Advantages: Maximize Your Leverage

FLEXIBILITY IN UNCERTAIN MARKETS

- Navigate volatility with parallel IPO and M&A paths.
- Adapt to shifting sector trends, regulatory changes, or market conditions.

BOOST M&A LEVERAGE

- IPO track pressures buyers to offer higher prices and better terms.
- In certain markets, public valuation multiples may exceed private transaction benchmarks, strengthening seller leverage in M&A negotiations.

MITIGATE RISKS, MAXIMIZE RETURNS

- Hedge against IPO challenges like SEC reviews or market swings.
- Counter M&A risks such as industry consolidation or regulatory hurdles.
- Choose the path that delivers the best outcome, faster.

Disadvantages: Weigh the Costs

MANAGEMENT OVERLOAD

- Juggling IPO and M&A strains day-to-day operations.
- Limited internal teams struggle to maintain confidentiality.

TIMING CHALLENGES

- Misaligned IPO (SEC reviews) and M&A (bidding) schedules.
- Financial statements may go stale, delaying progress.

HIGHER COSTS

- Dual advisors mean double fees, increasing expenses.
- Offset by synergies: shared financial models, due diligence, and offering documents.

SOLUTION: PLAN EARLY, ALIGN TEAMS, AND LEVERAGE SYNERGIES TO MINIMIZE DISTRACTIONS AND COSTS.

Advanced Dual Track Considerations

- Revlon duties / enhanced scrutiny
- Deal protection measures
- Fairness opinions
- Management rollover dynamics
- Alternatives: direct listing as pressure tactic, SPAC as exit path (if relevant)
- Impact of market window timing
- Employee retention / compensation impact

IPO Readiness

IPO Prep: Are You Ready?



- Corporate Structure
- Capital Stack
- Corporate Governance/SOX
- Financial Reporting
- Financial Planning & Analysis
- Human Capital
- Information Technology
- Tax
- D&O Insurance

Preseason Predictions: Biggest Keys to Success

GEAR UP FOR SUCCESS

Transform your company into a public-ready powerhouse with these essentials:

- **Financial Precision:** Robust reporting, forecasting, and budgeting for transparency.
- **Swift Close Process:** Streamlined financial close to meet SEC deadlines.
- **Governance & Compliance:** Strong Sarbanes-Oxley controls and corporate governance.
- **Scalable IT:** Systems ready to handle growth and compliance demands.

WINNING STRATEGY

Start early—12-18 months out—assemble a skilled team, and fortify infrastructure to ace your IPO.

Preseason Predictions: Biggest Mistakes

COMMON MISSTEPS

- **Wrong Team:** Lack of IPO experience or bandwidth slows progress.
- **Time Crunch:** Underestimating the 12-18 month prep timeline.
- **Weak Infrastructure:** Inadequate financial reporting or IT systems falter under scrutiny.

WINNING PLAY

- Assemble a seasoned, dedicated team early.
- Prioritize robust financial and IT infrastructure to ensure compliance and scalability.

Corporate Structure and Capital Stack

Keep it Simple

STREAMLINE FOR SUCCESS

- **Structure:** Opt for a Delaware C Corp for clarity (But ... Texas? Nevada?); simplify subsidiaries and intercompany ties.
- **Capital Stack:** Convert complex securities (e.g., preferred stock) at IPO; address rights like registration or anti-dilution.
- **Lock-Ups:** Align existing lock-ups with standard 180-day IPO terms.

GAME PLAN

- Amend documents to ensure sufficient shares and ideal trading range.
- Add anti-takeover protections (e.g., staggered board) for stability.

Corporate Governance

Board Independence Requirements: Building Compliance

CORE STANDARDS

- Majority of board must be independent; audit, compensation, and nominating/corporate governance committees must be fully independent.

IPO TRANSITION RULES

- One independent director per committee at initial listing.
- Majority independence for each committee within 90 days of listing.
- Full committee independence and board majority within one year of listing.

SPECIAL CONSIDERATIONS

- Private equity designees may qualify as independent, with specific audit committee rules applying.

Controlled Company Boards: Tailored Governance

DEFINITION: A “Controlled Company” exists when an individual, group, or entity (e.g., voting agreements designating directors or directing votes) holds >50% voting power for director elections.

EXEMPTIONS

- No majority independent board required.
- Independent compensation and nominating/governance committees not mandated.

REQUIREMENT: Must maintain an independent audit committee.

DISCLOSURE: Must report Controlled Company status and basis in the annual proxy statement.

Board Composition

SKILLS MATRIX

Evaluate specific experience, qualifications, and skills.

ALIGNMENT

Match attributes to the company's unique business context.

EMERGING FOCUS

Prioritize expertise in AI, technology, cybersecurity, digital assets, human capital, and climate, as appropriate.

BROADER PERSPECTIVE AND CAPACITY

Consider directors' service on other boards.

Committees

NYSE REQUIREMENT

- Mandatory audit, compensation, and nominating/corporate governance committees.

NASDAQ REQUIREMENT

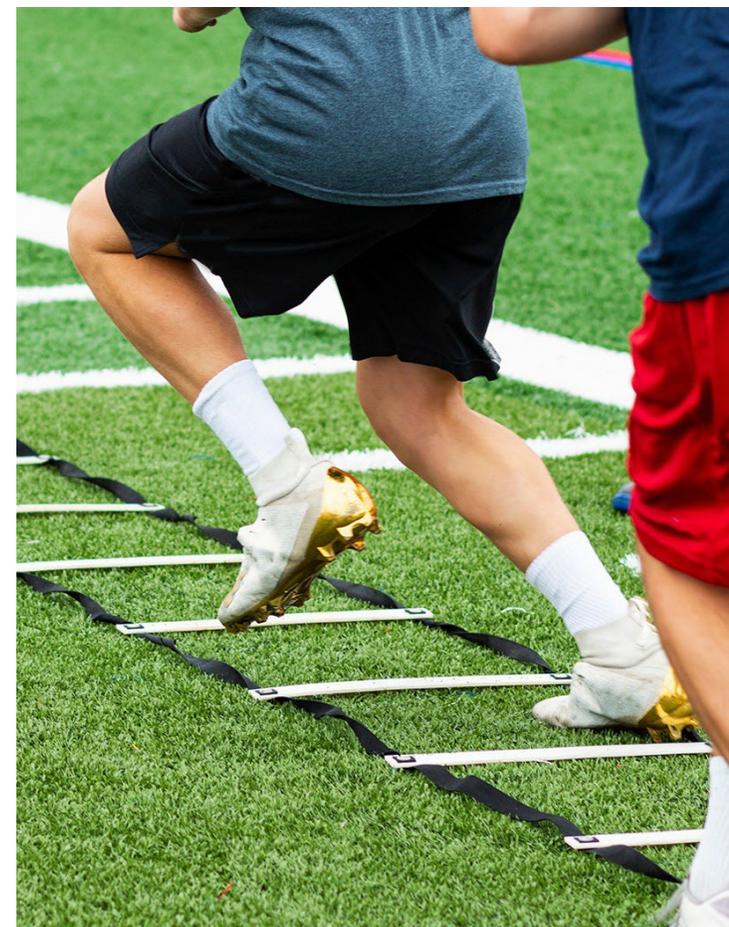
- Audit committee plus independent executive compensation oversight.

INDUSTRY/RISK-SPECIFIC COMMITTEES

- Disclosure, executive, finance, compliance, risk, AI, technology, ESG (as needed).

DOCUMENTATION

- Each committee must have a governing charter.



Committee Charters / Governance Policies

1. DEVELOP AND ADOPT DETAILED CHARTERS FOR EACH BOARD COMMITTEE

2. DEVELOP AND ADOPT GENERAL CORPORATE GOVERNANCE POLICIES, SUCH AS:

- Governance Guidelines
- Code of Conduct
- Financial Code of Ethics
- Audit Committee Pre-Approval Policy
- Whistleblower Policy
- Related Persons Transactions Policy
- Stock Ownership & Retention Guidelines
- Insider Trading Policy
- Short-Swing Trading and Reporting Policy
- Regulation FD Policy
- Document Retention Policy
- Executive Compensation Clawback Policy

SOX



What is SOX?

SARBANES-OXLEY (SOX) ESSENTIALS

- **Purpose:** Ensures accurate financial reporting and strong governance for public companies.
- **Key Requirements:** Robust internal controls, transparent disclosures, and executive accountability.
- **Impact:** Builds investor trust through compliance and reliability.

WHY IT MATTERS

- Prepares your company for SEC scrutiny.
- Drives operational discipline and scalability.

CONTAINS THREE KEY SECTIONS:

- **302** – CEO/CFO certifications on disclosure controls/procedures and statements on ICFR
- **404(a)** – Establish and maintain effective ICFR environment
- **404(b)** – Auditor must audit and opine on ICFR

What is Required?

CORE ACTIONS

- **Establish Controls:** Set up as many as 100-150 controls per entity (approvals, reconciliations, reviews) to prevent or detect financial errors. Tailored to issuer complexity.
- **Test Rigorously:** Independently verify control design and effectiveness yearly, addressing any gaps.
- **Support Audits:** Provide evidence of controls to external auditors.

SCOPE

- **Financial Cycles:** Revenue, financial close, capitalized software, fixed assets, payables, debt, equity, tax, treasury, payroll, and key FSLIs.
- **IT Systems:** General ledger, payroll, stock/equity systems, and supporting infrastructure (security, change control, backups).
- **Entity-Level Controls:** Align with COSO Framework for comprehensive governance.

WHY IT MATTERS

Ensures financial accuracy, regulatory compliance, and investor confidence.

Filing Status and SOX ICFR Requirements

FILER STATUS	FLOAT TO ENTER STATUS	404(A) ¹	404(B) ²
Large accelerated filer	> \$700m	First annual report after IPO	Second annual report after IPO
Accelerated filer	> \$75m but < \$700m	First annual report after IPO	Second annual report after IPO
Non-Accelerated filer	< \$75m	First annual report after IPO	Not required (unless voluntarily provided)
EGC	Varies – up to \$1.235B revenue test	First annual report after IPO	Exempt until EGC status lost

¹SOX Section 404(a) requires management to report on the effectiveness of internal controls over financial reporting

²SOX Section 404(b) requires an auditor attestation with respect to an issuer's internal controls over financial reporting

SOX Roadmap: Your Path to Compliance

ENGAGE EXPERTS

- Identify and hire external advisors to build a comprehensive SOX plan.

ASSESS RISKS

- Conduct SOX risk assessment with gap analysis.
- Evaluate 3rd-party providers for legacy financial systems.

DOCUMENT CONTROLS

- Develop SOX docs: RACM, policies, procedures, manuals, and SOPs.
- Review spreadsheet use in finance and implement controls.
- Optimize processes for improvements and stronger controls.

TRAIN & EQUIP

- Deliver training on SOX documentation.
- Provide tools and ongoing employee training.

ENTITY-LEVEL FRAMEWORK

- Set up internal audit function with a detailed plan.
- Align access rights to financial apps with job roles.
- Formalize board nominations, elections, and committees with charters and checklists.

WHY IT MATTERS

- Ensures robust governance, financial accuracy, and regulatory readiness.

SOX Compliance: Essential Insights



LEAD FROM THE TOP

- Gain CEO, CFO, and CIO commitment to foster a strong compliance mindset.

PREP AHEAD

- Launch SOX efforts 12+ months early to tackle intricate demands.

BUILD EXPERTISE

- Allocate experienced personnel to sidestep the #1 hurdle for most companies: skill shortages.

OPTIMIZE EFFICIENCY

- Adopt a risk-focused strategy to control costs while enhancing operations.

THE PAYOFF

- Proactive prep secures compliance, boosts efficiency, and strengthens your public stance.

SOX Pitfalls: Sidestep these Traps

COMMON HURDLES

- **Weak Expertise:** Insufficient skills for complex accounting (top issue in S-1 filings).
- **System Gaps:** Legacy IT systems fail to scale for public company needs.
- **Policy Shortfalls:** Lack of formalized IT policies and access controls.
- **Risk Oversight:** Inadequate risk assessment for errors or fraud.

PROVEN FIXES

- **Upgrade IT Early:** Implement scalable systems before IPO.
- **Formalize Policies:** Document IT procedures and enforce compliance.
- **Robust Risk Process:** Map risks to financial accounts and IT systems for SOX 404.

THE PAYOFF

- Avoid material weaknesses, ensure compliance, and build investor trust.

SOX Success Summary

OWN THE PROCESS

Assign management leaders to champion SOX compliance as a value driver.

FOSTER A COMPLIANCE CULTURE

Senior leadership must reinforce SOX's importance in strategic discussions.

EMBRACE ONGOING EFFORT

Treat SOX as a continuous process, not a one-time task.

ADAPT TO CHANGE

Build flexibility into your program to handle shifts in people, processes, and tech.

LEVERAGE TECHNOLOGY

Use automated controls to boost reliability, efficiency, and compliance.

WHY IT MATTERS

A strong SOX program ensures compliance, enhances operations, and builds investor confidence.

Financial Reporting



Registration Statement and Accounting Analysis

IDENTIFICATION OF REPORTING PERIODS

- Which Periods to Include/Quarterly or Other Interim Periods
- Staleness
- Uplift Procedures
- Significance of Historical Acquisitions (3-05)

ACCOUNTING POLICY HARMONIZATION

- M&A and Diverse Accounting Policies/Timing Implementation Differences
- Integrate and Harmonize

FINANCIAL STATEMENT CLOSE PROCESS

- Policies and Procedures, IT Systems, Personnel

OTHER REPORTING MATTERS

- Key Metrics and Non-GAAP Financial Measures
- EGC/SRC
- US GAAP vs. IFRS
- Addressing SEC Comments
- Reporting Currency

Staleness Deadlines

<p>LARGE ACCELERATED FILERS</p>	<p>Companies with \geq\$700M public float, reporting under Exchange Act Section 13(a) or 15(d) for \geq12 months, and at least one filed Form 10-K.</p>	<ul style="list-style-type: none"> • Mar. 3*: Q3 2024 (60 days after year end) • May 9: Year-end 2024 (129 days after year end) • Aug. 7: Q1 2025 (129 days after Q1 end) • Nov. 6: Q2 2025 (129 days after Q2 end)
<p>ACCELERATED FILERS</p>	<p>Companies with public float of \$75M+ but $<$\$700M that have reported under Exchange Act Sections 13(a) or 15(d) for \geq12 months and filed \geq1 annual report; or, if previously a large accelerated filer, \$60M+ but $<$\$560M.</p>	<ul style="list-style-type: none"> • Mar. 17*: Q3 2024 (75 days after year end) • May 9: Year-end 2024 (129 days after year end) • Aug. 7: Q1 2025 (129 days after Q1 end) • Nov. 6: Q2 2025 (129 days after Q2 end)
<p>NON-ACCELERATED FILERS AND EGCs</p>	<p>Non-accelerated Filers: Companies with a public float of $<$\$75 million. EGCs: Companies with annual gross revenues of $<$\$1.235 billion during the most recently completed fiscal year.</p>	<ul style="list-style-type: none"> • Mar. 31: Q3 2024 (90 days after year end) • May 14: Year-end 2024 (134 days after year end) • Aug. 12: Q1 2025 (134 days after Q1 end) • Nov. 12*: Q2 2025 (134 days after Q2 end)
<p>LOSS CORPORATIONS, DELINQUENT FILERS, AND INITIAL FILERS</p>	<p>Loss Corporations: A large accelerated filer, accelerated filer, non-accelerated filer, or emerging growth company (EGC) that either (i) does not expect positive income (after taxes and before extraordinary items and the cumulative effect of a change in accounting principle) for the most recently completed fiscal year, or (ii) has reported net losses after taxes in each of the two most recent fiscal years.</p>	<ul style="list-style-type: none"> • Feb. 14: Q3 2024 (45 days after year end) • For Year-end 2024, Q1 2025, and Q2 2025, regular deadlines based on filer type <p>*Extension for Weekend/Holiday</p>



Financial Planning & Analysis

FP&A: Fueling Your IPO Story

BUILD ROBUST MODELS

- Create multi-year projections, budgets, and scenario analyses to drive roadshow success.
- Showcase a clear equity story to attract investors.

TRACK KEY METRICS

- Identify investor-focused KPIs (e.g., revenue growth, margins).
- Stress-test data for accuracy and credibility.

MITIGATE RISKS

- Analyze financial risks and capital needs.
- Optimize debt/equity balance for a strong capital structure.

KEY ACTION: Align FP&A with investor expectations to boost valuation.

Human Capital

Building a Public-Ready Team

ALIGN YOUR PEOPLE STRATEGY FOR IPO SUCCESS

Craft a Competitive Compensation Strategy

- Benchmark total rewards, executive pay, and equity incentives against public company peers.
- Evaluate the impact of IRC Section 162(m) (and evolving “covered employee” rules) on the deductibility of executive compensation and related disclosure/planning.
- Develop a clear compensation philosophy for proxy disclosures.

Strengthen Governance and Structure

- Evaluate compensation committee composition to meet public company standards.
- Assess risks in existing compensation plans to align with investor expectations.

Upskill Your Team

- Conduct a gap analysis of personnel skills to meet public company reporting and control demands.
- Optimize functional structures for efficiency and compliance.

KEY ACTION STEPS

1. Review and refine compensation plans for appropriateness and effectiveness.
2. Build a roadmap to address skill gaps and ensure robust governance.

Information Technology



IT Readiness: Powering a PubCo

BUILD A COMPLIANT, SCALABLE IT FOUNDATION FOR IPO SUCCESS

Assess and Optimize IT Systems

- Review architecture and in-scope applications (e.g., general ledger, payroll) for compliance with SOX and SEC requirements.
- Evaluate functionality and controls to ensure data integrity and security.

Strengthen IT Leadership and Skills

- Interview IT leaders to clarify roles and responsibilities.
- Conduct a gap analysis to identify and address skill shortages for public company demands.

Create a Remediation Roadmap

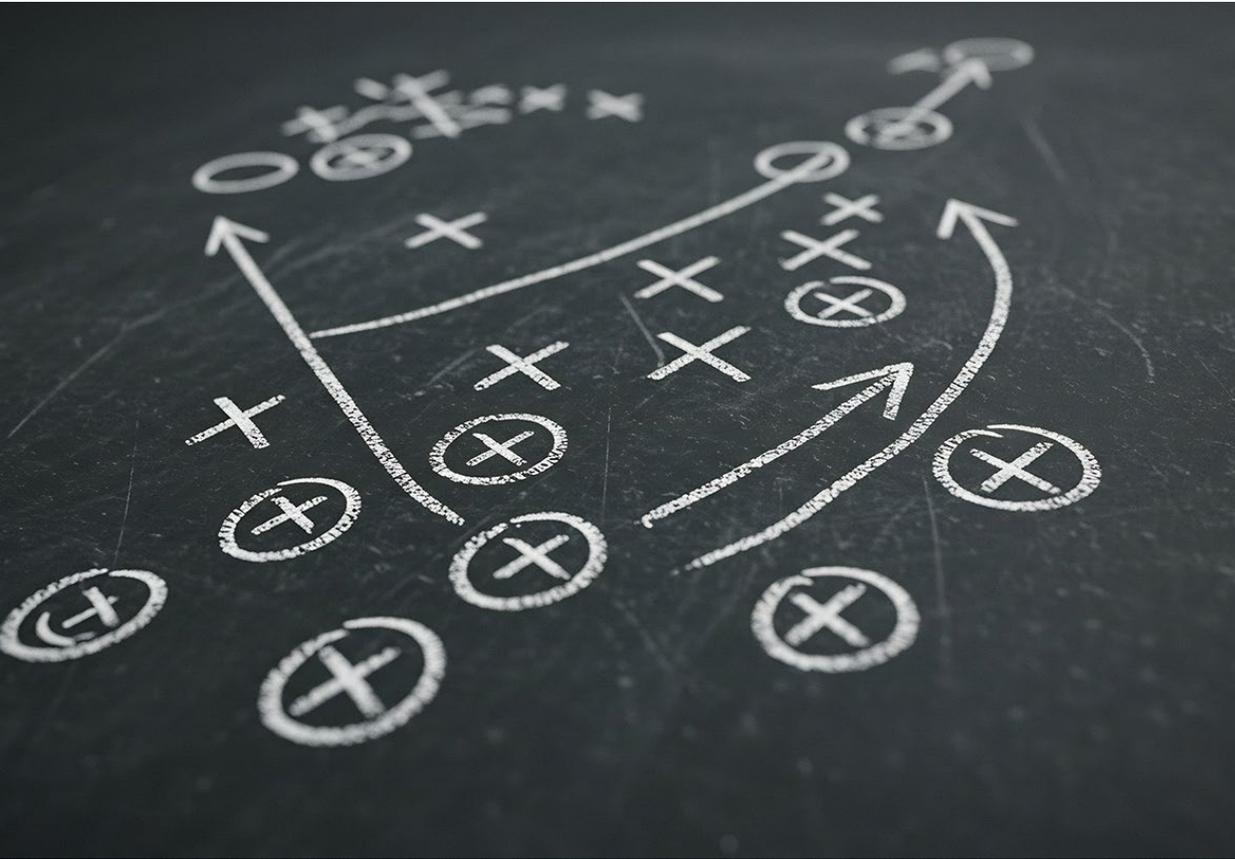
- Assess IT operations and processes against public company expectations.
- Develop actionable recommendations with a clear timeline and resource plan.

KEY ACTION STEPS

1. Prioritize scalable, secure IT systems to support financial reporting.
2. Build a robust IT governance framework to ensure compliance and efficiency.

Tax

Tax: Technical Considerations



- Tax Attributes across all legal entities
- Tax Impact of Alternative IPO Structures
- Tax Reserves Analysis
- “Above the Line” Taxes (sales/use, gross receipts, franchise, escheat, payroll)
- Existing Incentive Based Compensation Arrangements, especially Stock Based Compensation
- Review key implications from recent federal tax reforms (e.g., the One, Big, Beautiful Bill Act and related guidance) and how they affect corporate rate, deductions, incentives, and compensation planning.

Tax: Requirements and Readiness

CONDUCT READINESS ASSESSMENT

- Assess impacts across:
 - **Data:** Validate IPO requirements; ensure quality, consistency, and centralization.
 - **People:** Define new roles and responsibilities for tax personnel.
 - **Process:** Build agile workflows; automate manual tasks.
 - **Technology:** Streamline systems to enhance automation.
 - **Controls:** Fix gaps; implement manual or automated controls.
 - **Reporting:** Meet IPO needs; improve speed, flexibility, modeling, and analytics.

DEVELOP TRANSITION ROADMAP

- Create a plan with dependencies, aligned to the IPO timeline.

D&O Insurance

D&O Insurance: Safeguard Your Leadership



ESSENTIAL TOPICS FOR IPO PROTECTION

- **Evolving Liabilities:** How personal and corporate risks shift in a public company.
- **Market Snapshot:** Current state of the D&O insurance landscape.
- **Litigation Insights:** Key trends in securities claims.
- **Coverage Limits:** Strategies to determine the right protection levels.
- **Underwriting Mastery:** Navigating the IPO process and positioning your company for success.

Fiduciary Duties: Guiding Your Leadership

DUTY OF CARE

Make informed decisions using all reasonably available material information.

DUTY OF LOYALTY

Act in the best interests of the company and shareholders, avoiding conflicts and maintaining independence.

DUTY OF GOOD FAITH

Violated by intentionally disregarding known risks or a knowing failure to apply minimum levels of diligence/oversight

*Delaware corporations may limit monetary liability for certain duty of care claims, **but not** for loyalty, bad faith, intentional misconduct/knowning violations of law, or improper personal benefit*

DUTY OF DISCLOSURE In the context of a public transaction, there is also a duty of disclosure

- Duty to disclose fully and fairly all material information within the board's control when it seeks shareholder approval
- The court may also apply a heightened standard of review due to conflicts of interest

Business Judgment Rule: Your Directors' Shield

EMPOWER INFORMED DECISIONS

- **Core Presumption:** Courts assume directors act on an informed basis, in good faith, and in the company's best interests.
- **Key Protections:** Shields from liability unless there's evidence of conflict, fraud, or gross negligence—no second-guessing by courts.
- **Tie to Fiduciary Duties:** Reinforces care, loyalty, and good faith; essential for D&O insurance coverage.

THE BUSINESS JUDGMENT RULE PROTECTS DIRECTORS & OFFICERS AGAINST HONEST ERRORS OF JUDGMENT

Corporate Indemnification Limits: Protecting Your Leaders Wisely

NAVIGATE BOUNDARIES FOR ROBUST D&O PROTECTION

- **Practical Financial Constraints:** Insolvency or insufficient funds can block indemnification.
- **Derivative Suits:** Limited to good-faith actions; no coverage for judgments without court approval.
- **Loyalty Breaches:** No indemnification for bad faith or conflicts of interest.
- **Federal Violations:** Securities law breaches (e.g., fraud) cannot be indemnified.
- **Takeover Risks:** New ownership may alter indemnity provisions via bylaw changes.
- **Bylaw Flexibility:** Amendments can modify protections unless locked in by contracts.

KEY ACTION: Strengthen bylaws and secure D&O insurance to bridge indemnification gaps.

Different Liability Landscape as a PubCo

Why It Matters: Public companies face Securities Act (1933) and Exchange Act (1934) rules, increasing litigation risks. Even JOBS Act EGCs need robust D&O coverage. Class actions burden directors, officers and the company.

SECURITIES ACT OF 1933 APPLIES TO OFFERINGS

SECTION 11 RISKS

- **Strict liability** for misstatements in IPO registration statements.
- No need for plaintiffs to prove intent or reliance.
- *Cyan* (2018) allows state and federal lawsuits, amplifying exposure
- But see *Slack* (2023) requiring direct tracing to registration statement for standing

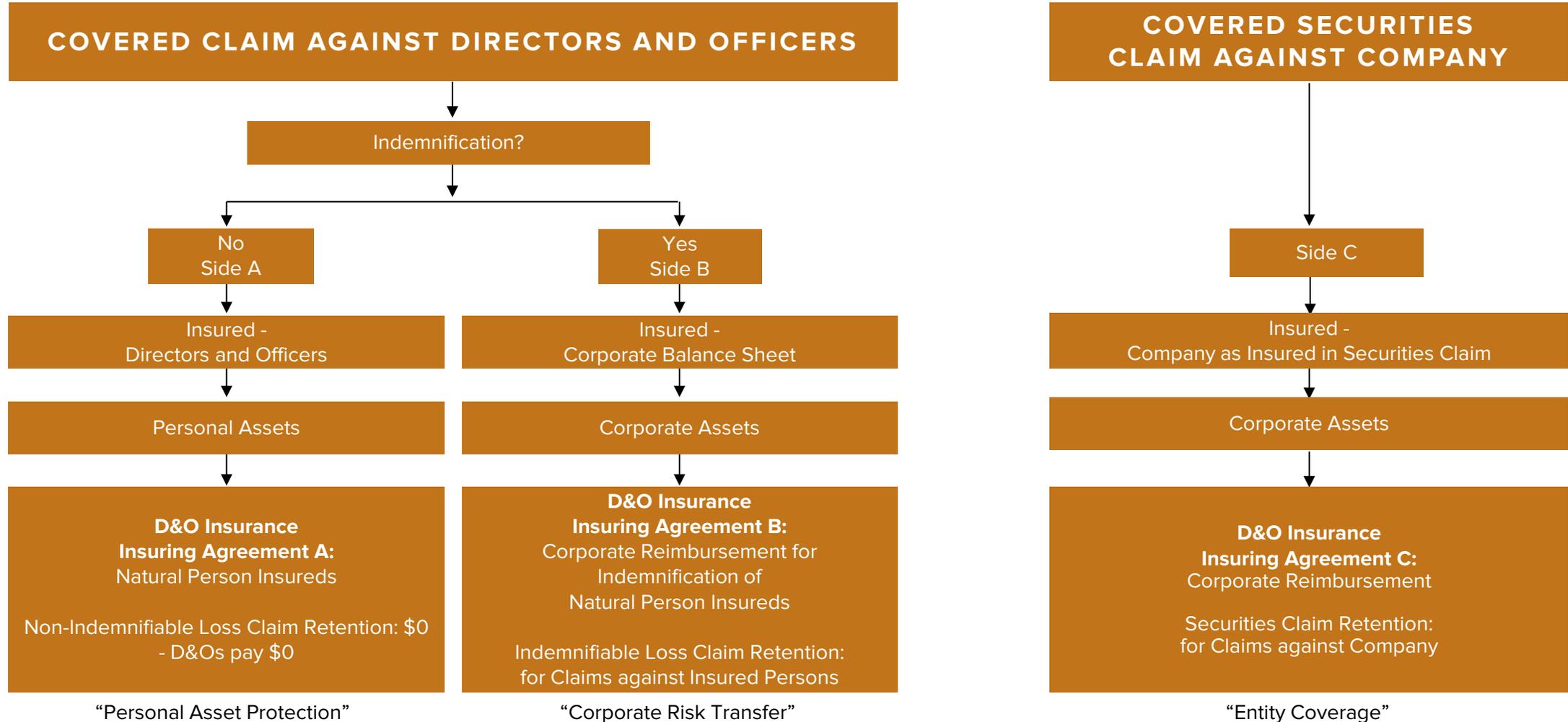
SECURITIES EXCHANGE ACT OF 1934 APPLIES TO ONGOING TRADING

RULE 10B-5 RISKS

- General anti-fraud rule and creates liability for the “maker” of materially misleading statements or omissions (note: liability theories can extend beyond the “maker” concept in some circumstances (e.g., dissemination/scheme theories))
- Requires proof of intent, reliance, and economic loss.

SHIELD YOUR TEAM WITH PROCESS DISCIPLINE, DILIGENCE AND A STRONG D&O PROGRAM

D&O Program Structure



Public Company D&O Program Mechanics

D&O “Tower”

- Built-in layers with excess markets sitting on top of the primary
- Each layer of Full Coverage shares A+B+C components across one limit

SIDE A DIC

Provides excess for non-indemnified loss with a drop-down provision

SIDE A

Provides for directors and officers when indemnification is not provided

No Retention

SIDE B

Reimburses the company for its indemnity obligations to directors and officers

SIDE C

Provides coverage to the entity when named in a securities claim

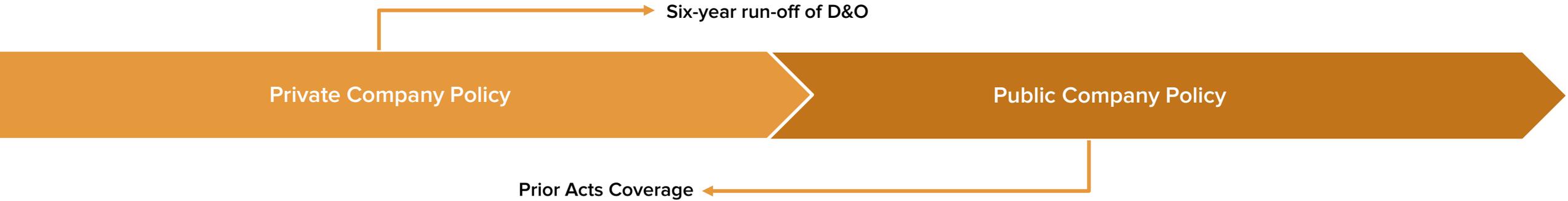
RETENTION

Hypothetical Claim and How Each Coverage Component Responds

Fact Pattern: Company discloses during their 1st public earnings release that they are going to reduce guidance associated with a new product launch and re-state historical earnings - the stock drops 25% in a single trading day

	SIDE-A DIC	SIDE-B	SIDE-C
Securities Class Action brought against a Director or Officer and the Company <u>is not indemnifying</u> them	Covered	N/A	N/A
SEC and DOJ investigation into a Director or Officer and the Company <u>is not indemnifying</u> them	Covered	N/A	N/A
Derivative Action brought against a Director or Officer which ultimately results in a settlement or judgement	Covered	N/A	N/A
Securities Class Action brought against a Director or Officer , the Company <u>is not indemnifying</u> them and the primary insurer wrongfully denies Side-A coverage	Side-A DIC Triggered	N/A	N/A
Securities Class Action brought against a Director or Officer and Company <u>is indemnifying</u> them	N/A	Covered	N/A
SEC and DOJ investigation into a Director or Officer and Company <u>is indemnifying</u> them	N/A	Covered	N/A
Securities Class Action brought against the Company	N/A	N/A	Covered
SEC and DOJ investigation into the Company	N/A	N/A	N/A

D&O Insurance: Private to Public



CONSIDERATIONS FOR PRIVATE D&O PROGRAM

- Add or increase Side A DIC coverage if needed
- Evaluate primary carriers for IPO vs. existing carrier line-up
- Negotiate run-off cost
- Review provisions of policy to ensure private company form will cover pre-combination activity, including any business combination related exposures

PUBLIC COMPANY D&O PROGRAM CONSIDERATIONS:

- Full prior acts coverage secured for pre-IPO activities with broader coverage for Insured Persons
- Public company program is preserved for more severe public company securities claim exposure including Section 11 claims

GENERAL CONSIDERATIONS:

- Companies should strongly consider forum provisions in bylaws, especially DE and CA-based entities
- Public company experience amongst board and/or management teams
- JOBS act filing vs. public prospectus filing
- Potential for direct listing or “de-SPAC” transaction and resulting impact on D&O

Underwriter's Risk Profile Analysis for IPOs

IPO CHARACTERISTICS

- Offering Size
- Expected Market Capitalization
- Selling Shareholders
- Secondary offering within next 12 months
- Lock up duration
- New shares being offered or insiders / sponsors selling
- Classes of stock (voting vs. regular common)
- Makeup of shareholder base
- Float (insiders vs. public shareholders)
- Use of proceeds
- Strength of bankers and outside counsel
- Indemnification obligations to bankers

COMPANY-SPECIFIC ISSUES

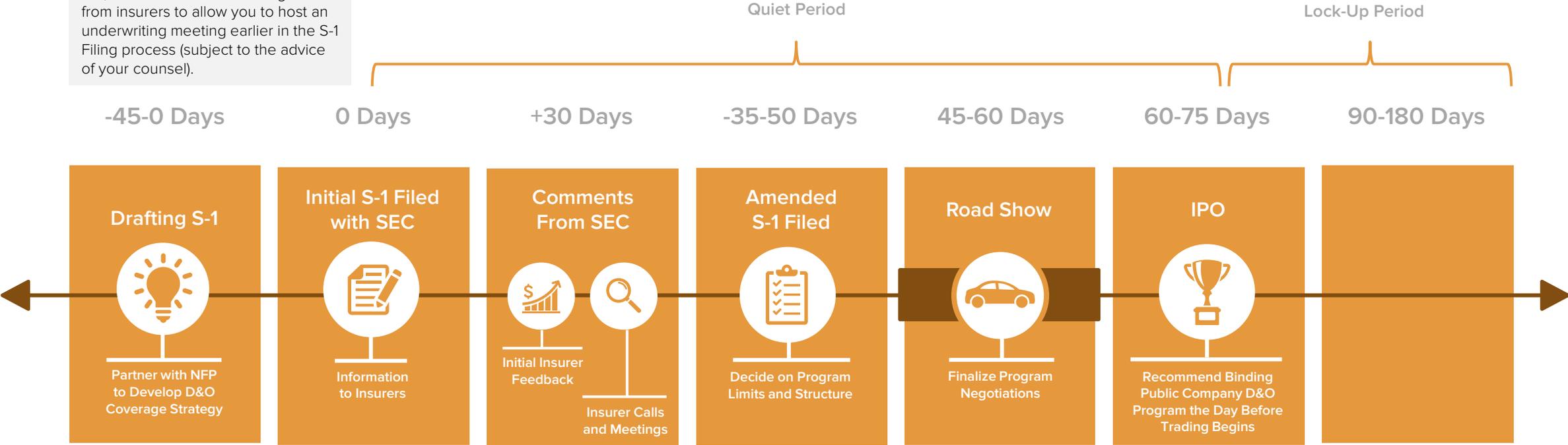
- Financials and access to capital (debt markets)
- Will the Company pursue a credit rating?
- Management's experience, track record and continuity
- Operational differentiators
- Regulatory relationships and track record
- Profitability history
- Revenue diversity
- Industry outlook
- Competitive landscape
- Litigation history
- M&A history and outlook
- Plans to offer guidance
- Exclusive venue in by-laws?

CONTROLS & CORPORATE GOVERNANCE

- Financial controls – Time frame of becoming Sarbanes Oxley compliant
- Internal Audit and relationship with outside auditors
- Disclosure practices
- Insider trading policies – details of any 10(b)5-1 plans
- Ethics policy
- Board composition
- Committee functions
- Outlook for management or board changes
- Compliance program
- Noteworthy related party transactions
- ISS commentary

The IPO Placement Timeline

If filing confidentially under the JOBS Act, we recommend obtaining NDAs from insurers to allow you to host an underwriting meeting earlier in the S-1 Filing process (subject to the advice of your counsel).



PRIVATE COMPANY D&O CONSIDERATIONS

- Discuss Run-off Options or Policy Cancellation

PUBLIC COMPANY D&O CONSIDERATIONS

- Increase Limit
- Expect Significantly Higher Retention and Premium
- Purchase Additional Dedicated Side-A Coverage

The IPO Timeline

IPO Critical Tasks And Timeline Overview

Corporate Structure & Reorganization

- Suitability of current corporate organization
- Tax structuring and implications

Corporate Governance & Board

- Composition of board of directors
- Search for independent directors
- Board committees (audit, compensation, and others)
- Compliance with SOX
- Potential management changes/additions
- Executive compensation analysis

Capital Structure

- Use of proceeds
- Optimize capital structure and financing needs
- Dividend policy
- Elimination of any preferred equity and converts

IPO Prospectus

- Key marketing document
- Bookrunners provide outline/investment highlights
- Company counsel drafts prospectus

Roadshow Slides

- Bookrunners craft slides with company

Executive Compensation

- Determine compensation packages for executive management and board (including stock/options)
- Compensation disclosure in Form S-1 (limited disclosure for EGCs)

Pre-Organization Meeting Preparation

Filing Preparation (6-10 Weeks)

SEC Review (8-10 Weeks)

Marketing & Pricing (2 Weeks)

Hire Advisors

- Bookrunners
- Legal Counsel
- Auditors
- IPO advisor/consultant

Financial Statements

- 2 years audited financials (for EGCs)
- 2 years selected financials (for EGCs)
- SOX and internal controls
- Acquisition financials and pro formas

Organizational Meeting

Due Diligence

- Business
- Financial
- Legal
- Accounting
- Research

Financial Projections

- Develop detailed financial projections (typically 5 years)

Testing The Waters Communications

- Limit discussions to QIBs, IAs
- Clear communication materials with counsel

SEC Review^{1,2}

- SEC reviews prospectus, including financial statements
- Typically, 3-4 rounds of comments for an IPO (8-12 weeks)
- **Exchange Listing** review runs in parallel (conditional approval prior to pricing)
- **FINRA** review runs in parallel ("no objections" letter before effectiveness/pricing)
- Updated financials
- Add co-managers
- File with \$ price-range

Marketing & Pricing

- Investor targeting
- Management dry-run
- UW salesforce presentations and teach-ins
- Roadshow (one-on-ones and group events)
- Bookbuilding
- Pricing and allocation
- Closing

1. SEC Review can take longer. Varies significantly by industry, complexity, accounting issues, etc.
 2. IPO issuers can file confidentially and respond to SEC comments without making a public filing. Public filing is required at least 15 days before roadshow launch.

IPO Timing Risk Factors

- SEC accounting comments
- PCAOB uplift delays
- Market window volatility
- Financial statement staleness
- Exchange approval timing
- Concurrent M&A distraction (if dual track)

The Registration Process and Your Form Your Form S-1/F-1



Gearing Up for Due Diligence

- **What to Expect:** Underwriters and counsel drive a rigorous process to verify your S-1, protect against Section 11 liability, and ensure investor confidence.
- **Your Role:** Equip your finance and admin teams for:
 - Document production (contracts, IP, leases, insurance).
 - Interviews and follow-ups (management, key employees).
 - Evidence for claims: maintain support for market size, growth rates, TAM, clinical/technical claims, and competitive positioning; ensure third-party sources are credible, used with appropriate permissions/attribution, and disclosures are not misleading
- Redact sensitive terms in material contracts using redacted exhibit rules (Item 601(b)(10)(iv)); submit a confidential treatment request only when required or appropriate.
- **Action Plan:** Start early (12+ months pre-IPO). Organize a digital data room for efficiency. Prep for calls with customers, suppliers, and auditors.

WHY IT MATTERS: A smooth due diligence process builds trust, speeds SEC review, and sets the stage for a successful IPO. And Section 11 exposure extends to the issuer, directors, signing officers, underwriters and certain experts – diligence is a shared discipline.

Registration Statement: Typical Sections

PART I: PROSPECTUS (INVESTOR-FOCUSED DISCLOSURE)

- **Prospectus Summary:** High-level overview of the company, offering, and key risks/financials.
- **Risk Factors:** Detailed discussion of material risks to the business, operations, and investment.
- **Use of Proceeds:** How the IPO funds will be used (e.g., debt repayment, growth initiatives).
- **Dividend Policy:** Company's approach to dividends, if any.
- **Capitalization:** Snapshot of capital structure pre- and post-IPO.
- **Dilution:** Impact on existing shareholders from the offering.
- **Selected Financial Data:** Optional summary of key financial metrics to highlight trends (not a required Item 301 section)
- **Management's Discussion and Analysis (MD&A):** In-depth analysis of financial condition, results, and trends.
- **Business:** Description of operations, industry, products/services, strategy, and competitive landscape.
- **Management:** Bios of directors and officers, governance structure.
- **Executive Compensation:** Details on pay, incentives, and equity plans.
- **Certain Relationships and Related Transactions:** Disclosures of insider dealings.
- **Principal Stockholders:** Ownership breakdown pre- and post-IPO.
- **Description of Capital Stock:** Rights and preferences of shares.
- **Shares Eligible for Future Sale:** Lock-up agreements and resale restrictions.
- **Underwriting:** Terms of the offering and underwriter roles.
- **Legal Matters and Experts:** Opinions from counsel and auditors.
- **Index to Financial Statements:** Audited financials and notes.

Registration Statement: Typical Sections

PART II: INFORMATION NOT REQUIRED IN PROSPECTUS

- **Expenses of Issuance and Distribution:** Breakdown of offering costs.
- **Indemnification of Directors and Officers:** Liability protections.
- **Recent Sales of Unregistered Securities:** Past private placements.
- **Exhibits and Financial Statement Schedules:** Charter docs, material contracts, consents, and other docs.
- **Undertakings:** Commitments to future filings.

Confidential Submission: Strategic SEC Filing

- Many IPO issuers may submit a draft registration statement for nonpublic SEC review (EGCs under the JOBS Act and other issuers under SEC staff procedures), subject to required public filing timing.
- Defer filing fees until public submission.
- Address complex issues privately, maintaining discretion.
- Preserve flexibility for strategic alternatives, such as M&A or private placements.
- Publicly file the statement and all prior drafts at least 15 days before the roadshow.
- Draft should substantially mirror the public filing, typically omitting signatures and auditor consent until the public filing; include the required financial statements and audit report, with executed consents/signatures added for the public filing/effectiveness process.

The Roadshow: Launching Your IPO Story

Kick off marketing with a polished preliminary prospectus and roadshow presentation.

Executives and underwriters engage institutional investors in key cities or virtually.

Typical roadshow spans up to two weeks, building momentum.

Lead underwriter gathers indications of interest to form “the book.”

Orders remain non-binding, as shares cannot be sold at this stage.

Pricing and Closing: Sealing the Deal



- Post-roadshow, conduct a bring-down diligence call to confirm no material changes.
- Finalize offering terms with underwriters on a pricing call.
- Set public offering price and underwriters' spread.
- Execute Underwriting Agreement and deliver comfort letters.
- Finalize and print the Prospectus.
- File the final prospectus with the SEC within the required Rule 424(b) timeframe (commonly within two business days after pricing)
- Close the IPO one business day after pricing (T+1) (subject to limited exceptions and deal-specific mechanics)

Testing the Waters: Streamlined Path For Everyone

- Originally Available to EGCs.
- Rule 163B now available to all issuers regardless of size or reporting status.
- "Test the waters" by engaging QIBs and institutional accredited investors pre- or post-filing to gauge interest.
- Underwriters may join these discussions.
- Solicit non-binding indications of interest from investors.

Underwriters and the Underwriting Process

Overview of Underwriting Process

The Underwriting Process: Driving Your IPO Success



- **CORE ROLE:** Investment banks help structure and execute the offering, conduct diligence, advise on valuation/marketing, and—depending on deal structure—either purchase the shares for resale (firm commitment) or act as agent to place the shares (best efforts/other structures).
- **KEY STAGES**
 - Select experienced underwriter(s).
 - Conduct thorough due diligence.
 - Draft the prospectus.
 - Determine valuation and offering price.
 - Market the IPO to investors.
 - Finalize pricing and close the IPO.

Role of Underwriters in an IPO

Role of Underwriters: Guiding Your IPO Journey

UNDERWRITERS DRIVE EVERY PHASE OF THE IPO:

- Advise on structuring (primary/secondary offerings, stock splits).
- Provide market insights for registration statement.
- Lead rigorous due diligence process.
- Facilitate "Testing the Waters" with institutional investors.
- Support Management's Model/Analyst Day.
- Orchestrate roadshow, pricing, and closing.

Selecting Underwriters; Engagement Letters

Selecting Underwriters: Building Your IPO Team

Within the first month, choose underwriters, legal counsel, and an IPO-experienced auditor.

KEY FACTORS FOR SELECTING UNDERWRITERS:

- Strong reputation and high-quality research.
- Deep industry expertise.
- Proven track record via network connections.
- Cultural fit and compatibility.
- Capability to serve as lead or book-running manager.



Engagement Letters: Securing Underwriter Terms

- Engagement letters outline key provisions for IPO underwriters.

CRITICAL NEGOTIATED TERMS INCLUDE:

- **Reimbursement Clause:** Underwriters are typically reimbursed for reasonable out-of-pocket expenses (often subject to caps/approvals), including in some circumstances if the IPO is postponed or withdrawn.
- **Gross Spread/Underwriting Discount:** Sets the difference between the underwriter's purchase price and the public sale price.
- **Indemnification Provisions:** Defines obligations for losses or damages related to the IPO.

Underwriters' Due Diligence Process

Section 11 of the Securities Act: Ensuring Accuracy

LIABILITY SCOPE

- Section 11(a) holds parties accountable for material misstatements or omissions in the registration statement at effectiveness.

COVERED PARTIES

- Signatories of the registration statement.
- Board members.
- Experts (e.g., auditors) responsible for statement portions.
- Participating underwriters.

CLAIMS

- Section 11 claims are generally brought by purchasers of securities issued under the registration statement (including certain aftermarket purchasers, depending on tracing). Government enforcement typically proceeds under other federal securities law provisions.

Section 11 Liability: Defenses

ISSUER LIABILITY

- Issuers face strict liability under Section 11 for material misstatements or omissions (no due diligence defense).

DEFENSES FOR NON-ISSUERS

- **Due Diligence Defense:** Prove reasonable investigation and belief that statements were true, with no material omissions.
- **Reliance Defense:** For non-experts on expertized sections, show no reasonable grounds to suspect, nor belief in, material misstatements or omissions.

Due Diligence Process: Ensuring IPO Integrity

Underwriters conduct rigorous due diligence to mitigate liability and protect reputation.

Begins with a comprehensive management presentation (usually at the organizational meeting).

Continues through all drafting sessions until IPO closing.

Underwriters' counsel requests evidence to “back-up” registration statement claims.

Due Diligence Activities



- Comprehensive document request list.
- Management calls and key employee meetings.
- Calls with customers, suppliers, and auditors.
- Industry expert consultations (select sectors).
- Regulatory compliance review.
- Evidence requests to validate prospectus statements.

Due Diligence Examples

EXTENSIVE DOCUMENT REQUEST LIST

- All material customer and supplier contracts (including software/tech agreements).
- Schedule of all intellectual property (with agreements).
- Schedule of all real property owned or leased (with agreements).
- Schedule of all insurance policies (with policies).
- Schedule of all employees (with employment contracts).

SOURCE/EVIDENCE REQUESTS

(FOR STATEMENTS MADE IN PROSPECTUS)

- The Company's current facilities have the capacity to manufacture 2,500 widgets per day.
- In pre-clinical trials, our product candidate has been well-tolerated by patients and shown promising results in combatting malaria.
- The coffee segment worldwide is projected to grow by 4.47% (2023-2025) resulting in a market volume of over \$540 billion in 2025.

Underwriting Agreements

Underwriting Agreements



Underwriters, issuer, and selling stockholders sign an underwriting agreement for the IPO.

Defines terms for underwriters to purchase and distribute securities to the public.

Issuer and underwriters' counsel negotiate key provisions to ensure clarity and compliance.

Underwriting Agreement: Where to Begin?

- Investment banks and law firms use tailored “form” underwriting agreements for IPOs.
- Agreements are customized to match the IPO’s structure and terms.
- Underwriters’ counsel reviews recent, comparable IPO agreements.
- Underwriters’ counsel typically delivers the initial draft to issuer’s counsel.

Underwriting Agreements: Key Negotiated Terms

CRITICAL PROVISIONS HEAVILY NEGOTIATED IN UNDERWRITING AGREEMENTS:

- **Representations and Warranties:** Scope, including “materiality” and “knowledge” qualifiers.
- **Material Adverse Change/Effect:** Definition and triggers.
- **Underwriter Information Carve-out:** Allocates responsibility for disclosure provided by the underwriters (e.g., underwriting section), carving that information out of the issuer’s representations/indemnities.
- **Indemnification and Termination:** Obligations and exit clauses.
- **Lock-ups:** Restrictions on share sales post-IPO.
- **Offering Expenses:** Allocation of costs.
- **Deliverables:** Required documents and certifications.

Marketing the IPO

Testing the Waters: Gauging Investor Interest

Issuers may engage institutional investors to assess interest in a potential offering.

“Testing the Waters” (TTW) meetings may occur before and/or after the initial SEC submission/filing, subject to securities law communications rules and counsel-approved materials

SEC may request copies of TTW materials used in these discussions (generally no pre-use review or filing requirement).

TTW meetings are optional, used selectively based on deal strategy.



Road Show: Pitching Your IPO Story

- Takes place during the “waiting period” (post-SEC filing, pre-registration effectiveness; if confidential submission used, you must publicly file 15 days before roadshow).
- Prepare the road show presentation alongside the registration statement.
- Craft a compelling 30-minute pitch to distill the issuer’s story.
- Central to marketing, road show slides attract significant attention.
- Underwriters build an order book of investor indications of interest.

Road Show Process: Engaging Investors

- Involves extensive travel for the issuer’s management team.
- Begins with a “teach-in” to educate lead underwriters’ sales forces.
- Features group lunches with buy-side institutional investors and one-on-one meetings with major investors.
- Roadshows are often conducted in a mix of in-person and electronic formats. Materials are typically distributed and tracked electronically through approved platforms; any retail/electronic roadshow access is handled in coordination with counsel and the underwriters.

Pricing and Closing

Pricing the IPO: Setting the Stage

The day before the IPO, underwriters and the issuer's board finalize the offering price.

Price reflects analysis of institutional investor offers, market conditions, demand strength, and investor mix.

Ensures the issuer knows exact funds raised, unaffected by post-trading fluctuations.

Board, often with a pricing committee, approves the final price.

Launching the Shares

- Institutional investor bids typically exceed available IPO shares.
- Underwriters allocate shares around pricing, balancing based on expected shareholder behavior.
- Price discovery starts at market open, though trading begins later.
- Stock exchange records open market buy/sell offers for the issuer's shares.
- The exchange coordinates the opening process (e.g., NYSE DMM model; Nasdaq market maker framework). The underwriters and exchange work together to facilitate an orderly opening and initial trading.
- Major exchanges set an equilibrium opening price.

Trading Begins & Stabilization: Launching with Control

- Issuer's stock starts trading on the open market once the opening price is set.
- First-day trading can be highly volatile.
- Stabilization is commonly supported through the syndicate's over-allotment/short position, the over-allotment option (greenshoe), and syndicate covering transactions, consistent with securities law and exchange rules.
 - Underwriters may buy/sell up to 15% additional shares if demand exceeds supply.
 - If demand weakens and prices fall, underwriters can repurchase shares to support the stock price.

Closing the IPO: Finalizing the Transaction



Typically, T+1 (subject to deal-specific mechanics)

Underwriters transfer funds to Issuer,
net of commission.

Shares delivered to Investors

Financial Statements

IPO Financials: The Basics

NON-EGC REQUIREMENTS

- **Two years** audited balance sheets.
- **Three years** audited statements of income, cash flows, stockholders' equity (or issuer's life if shorter).
- Interim unaudited statements with prior-year comparisons if effective >134 days post-fiscal year-end.

EGC/SRC RELIEF

- **EGCs** (< \$1.235B revenue) and **SRCs** (< \$250M float or < \$100M revenue with < \$700M float) **need only two years** of audited statements.

STALENESS

- Financials must be current (≤ 134 days old at effectiveness for non-accelerated filers).

PREPARATION

- Comply with U.S. GAAP (or IFRS for foreign issuers).
- Audits must be conducted by a PCAOB-registered independent accounting firm in accordance with PCAOB standards.

Other Financial Statement Considerations

PRO FORM FINANCIAL STATEMENTS

- Required when a significant acquisition or disposition has occurred or is probable
- Governed by Regulation S-X Article 11
- Significance tests determine inclusion

CARVE-OUT FINANCIAL STATEMENTS

- Required when a business is carved out of a larger entity
- Must reflect stand-alone financial information
- Often complex and time-consuming

HEIGHTENED SEC SCRUTINY

- Segment reporting
- Revenue recognition
- Non-GAAP measures

Stock Exchanges: Listings, Governance and More

NYSE IPO Listing Criteria

The NYSE has quantitative initial listing standards under Section 102/103 of its Listed Company Manual. Companies must meet one of the following tests, demonstrated via audited financial statements. For EGCs providing only two years of statements, requirements adjust accordingly (e.g., two years for earnings/cash flow).

TEST	KEY FINANCIAL CRITERIA
Earnings	Adjusted pre-tax income: Aggregate \geq \$10 million over last 3 fiscal years; \geq \$2 million each of the 2 most recent years; $>$ \$0 in prior years.
Global Market Capitalization	Global market cap \geq \$200 million; Shareholders' equity \geq \$75 million (pro forma).
Valuation/Revenue with Cash Flow	Adjusted cash flows: Aggregate \geq \$100 million over last 3 fiscal years; \geq \$25 million each of the 2 most recent years. Global market cap \geq \$500 million; Revenue \geq \$100 million in most recent 12 months.
Pure Valuation/Revenue	Global market cap \geq \$750 million; Revenue \geq \$75 million in most recent fiscal year.
Affiliated Company	Global market cap \geq \$500 million; Parent/affiliate must be listed in good standing and retain control.

Nasdaq IPO Listing Criteria

NASDAQ has tiered markets with initial listing standards under Rules 5315/5405/5505. Companies must meet one standard per tier, demonstrated via financial statements (implying audits for multi-year data). Additional liquidity requirements apply (e.g., minimum shareholders, publicly held shares).

GLOBAL SELECT MARKET	
STANDARD	KEY FINANCIAL CRITERIA
Earnings	Pre-tax earnings: Aggregate > \$11 million over prior 3 fiscal years; > \$0 each year; > \$2.2 million each of 2 most recent years.
Capitalization with Cash Flow	Cash flows: Aggregate > \$27.5 million over prior 3 fiscal years; > \$0 each year. Average market cap > \$550 million over prior 12 months.
Capitalization with Revenue	Revenue > \$110 million in previous fiscal year; Average market cap > \$850 million over prior 12 months.
Assets with Equity	Total assets \geq \$80 million; Stockholders' equity \geq \$55 million.

Nasdaq (cont.)

GLOBAL MARKET	
STANDARD	KEY FINANCIAL CRITERIA
Income	Income from continuing operations \geq \$1 million in latest fiscal year or 2 of last 3 years; Stockholders' equity \geq \$15 million.
Equity	Stockholders' equity \geq \$30 million; 2 years operating history.
Market Value	Market value of listed securities \geq \$75 million.
Total Assets/Total Revenue	Total assets and revenue \geq \$75 million each in latest fiscal year or 2 of last 3 years.

CAPITAL MARKET	
STANDARD	KEY FINANCIAL CRITERIA
Income	Net income \geq \$750,000 in latest fiscal year or 2 of last 3 years; Stockholders' equity \geq \$4 million.
Equity	Stockholders' equity \geq \$5 million; Market value of publicly held shares \geq \$15 million; 2 years operating history.
Market Value of Listed Securities	Market value of listed securities \geq \$50 million; Stockholders' equity \geq \$4 million.
Market Value of Unrestricted Publicly Held Shares	Market value of unrestricted publicly held shares \geq \$20 million; Total assets and revenue \geq \$50 million each in latest fiscal year or 2 of last 3 years.

Nasdaq (Capital Market) small IPO liquidity changes: For certain initial listing standards, Nasdaq now requires the MVUPHS / public float requirement to be satisfied from IPO offering proceeds, which in practice can increase the minimum raise (often \$15M under some standards). Nasdaq has also adopted/SEC-approved additional updates to initial listing MVUPHS thresholds effective in 2026.

Continued Listing Standards

NYSE CONTINUED LISTING STANDARDS

NYSE continued listing standards (Manual Section 802.01) include distribution, price, and financial/market capitalization criteria. Specific triggers and cure periods vary depending on the deficiency category and, for certain financial tests, the company's original listing standard.

FINANCIAL STANDARDS (ONE MUST BE MET):

- **Global Market Capitalization:** Average global market cap \geq \$50 million over 30 trading days; Total stockholders' equity \geq \$50 million.
- **Distribution Standards:** \geq 400 total shareholders or \geq 2,200 total shareholders with average monthly trading volume \geq 100,000 shares (past 12 months); or \geq 500 total shareholders with average monthly trading volume \geq 1 million shares. Publicly held shares \geq 600,000.
- **Stock Price:** Average closing price \geq \$1.00 over 30 trading days.
- **Other Criteria:** Additional requirements for specific securities (e.g., preferred stock, bonds) or company types (e.g., REITs, closed-end funds).

Failure to meet standards triggers a compliance period which can vary by deficiency (often ~6 months for price; other categories vary) to regain compliance, or the NYSE may initiate delisting.

Continued Listing Standards

NASDAQ CONTINUED LISTING STANDARDS

NASDAQ's continued listing standards (Rules 5450/5550) apply to Global Select/Global Market and Capital Market tiers. Companies must meet all criteria for their tier, or face delisting. Key requirements:

GLOBAL SELECT/GLOBAL MARKET

- **Equity Standard:** Stockholders' equity \geq \$10 million; \geq 400 total shareholders; Publicly held shares \geq 750,000; Market value of publicly held shares \geq \$5 million.
- **Market Value Standard:** Market value of listed securities \geq \$50 million; or Total assets and revenue \geq \$50 million each (latest fiscal year or 2 of last 3 years).
- **Stock Price:** Bid price \geq \$1.00 over 30 trading days.
- **Other:** \geq 2 market makers; Compliance with governance rules (e.g., audit committee).

CAPITAL MARKET

- **Equity Standard:** Stockholders' equity \geq \$2.5 million; \geq 300 total shareholders; Publicly held shares \geq 500,000; Market value of publicly held shares \geq \$1 million.
- **Market Value Standard:** Market value of listed securities \geq \$35 million; or Net income \geq \$500,000 (latest fiscal year or 2 of last 3 years).
- **Stock Price:** Bid price \geq \$1.00 over 30 trading days.
- **Other:** \geq 2 market makers; Compliance with governance rules.

Non-compliance triggers a deficiency notice with a compliance period (e.g., 180 days for bid price). Companies may transfer to a lower tier or face delisting if unresolved. Note recent approvals affecting delisting mechanics for very low market value issuers.

Stock Exchange Governance

BOARD OF DIRECTORS REQUIREMENTS			
	NASDAQ	NYSE	OTHER
Independence	A majority of board members must be independent. Nasdaq defines independent directors in Rule 5605(a)(2) .	A majority of board members must be independent. The NYSE defines independent directors in Section 303A.02 .	The SEC requires each company to disclose: Names of directors the board considers independent, per exchange rules and company-specific standards; Any additional independence criteria followed; and Transactions, relationships, and factors the board assessed in determining independence.
Third-party Compensation of Directors	Nasdaq requires companies to disclose certain compensation and other payments made by third parties to their directors or director nominees.	The NYSE has no such requirement.	
Meetings of Independent Directors	Nasdaq mandates that independent directors hold at least two regularly scheduled "executive sessions" each year, where they meet without management or other board members present.	The NYSE requires companies to choose one of two governance practices: 1. non management directors must hold regularly scheduled executive sessions without management present, or 2. Only independent directors are required to hold regularly scheduled executive sessions. Additionally, companies must establish a method for interested parties to communicate directly with non-management or independent directors.	
Diversity	As of December 2024, Nasdaq's diversity rules for board composition and disclosure are no longer in effect. A decision by the U.S. Court of Appeals for the Fifth Circuit found that the SEC exceeded its authority in approving the rules. As a result, Nasdaq-listed companies are no longer required to meet diversity objectives or publicly disclose their board's diversity using a standardized matrix	NYSE does not have a diversity disclosure requirement, however it established the NYSE Board Services Program in 2019 to address the need for diverse, inclusive leadership on corporate boards.	
FPI Exceptions	Nasdaq permits FPIs to follow home country governance practices in lieu of many Nasdaq corporate governance requirements, subject to disclosure of material differences. (Nasdaq's former board diversity disclosure requirements are no longer in effect.)	The NYSE allows FPIs to follow their home country practice instead of requiring a majority of independent directors.	

Stock Exchange Governance

COMMITTEE REQUIREMENTS			
AUDIT COMMITTEE REQUIREMENTS			
	NASDAQ	NYSE	SEC
Committee Requirement	Yes, an audit committee is required.	Yes, an audit committee is required.	
Director Requirements	<p>Nasdaq requires at least three independent directors on the audit committee, each of whom:</p> <ul style="list-style-type: none"> • Meets the exchange's general independence requirements for all directors • Meets the SEC's enhanced independence standards for audit committee members pursuant to Rule 10A-3 under the Exchange Act • Can read and understand fundamental financial statements • Did not participate in preparing the company's financial statements at any time in the past three years. <p>At least one member of the audit committee must have prior experience that makes them financially sophisticated.</p>	<p>The NYSE requires at least three independent directors on the audit committee, each of whom:</p> <ul style="list-style-type: none"> • Meets the exchange's general independence requirements for all directors • Meets the SEC's enhanced independence standards for audit committee members pursuant to Rule 10A-3 under the Exchange Act • Is financially literate <p>At least one member of the audit committee must have accounting or related financial management expertise.</p>	<p>The SEC mandates that companies disclose in their Form 10-K or proxy statement whether they have at least one audit committee financial expert. If no such expert is present, the company must explain why.</p>
Exception to the Independent Director Requirement	<p>A Nasdaq-listed company may have one member on its audit committee who does not meet all of Nasdaq's independence requirements under exceptional circumstances if the following conditions are met:</p> <p>Temporary Appointment: The non-independent member can be appointed to the audit committee for a limited period, generally not exceeding two years, to address these exceptional circumstances.</p> <p>Public Disclosure: The company must publicly disclose in its next proxy statement (or Form 10-K if the company does not file a proxy statement) the nature of the relationship precluding independence and the reasons for the board's determination.</p> <p>Majority Independence: Despite the exception, the audit committee must still be comprised of a majority of independent directors.</p>	<p>The NYSE does not have an exception.</p>	

Stock Exchange Governance

COMMITTEE REQUIREMENTS			
AUDIT COMMITTEE REQUIREMENTS (CONT.)			
	NASDAQ	NYSE	SEC
Written Charter Requirements	<p>The audit committee must have a written charter outlining its purpose, duties, and responsibilities, which include:</p> <ul style="list-style-type: none"> Appointing, retaining, compensating, and overseeing the company's auditors. Reviewing the company's financial statements with management and auditors. Establishing procedures for handling complaints related to accounting or auditing, including confidential, anonymous submissions by employees. Setting policies for the pre approval of all audit and non-audit services by the auditors, with related policies disclosed in the proxy statement. Preparing the required audit committee report for the proxy statement. Having the authority and funding to hire independent counsel and outside advisors. 	<p>NYSE audit committee charter must address core responsibilities similar to Nasdaq/SEC expectations, including oversight of the independent auditor, review of financial reporting, authority/funding to retain advisors, and other charter elements required by NYSE rules and SEC requirements</p>	
Related Party Transactions	<p>Nasdaq mandates that the audit committee or another independent board committee regularly review transactions between the company and related parties (such as directors, executive officers, 5% stockholders, or their family members) to identify potential conflicts of interest. This review is required but does not need to include approval and can occur after the transaction has taken place.</p> <p>Nasdaq allows FPIs to follow home country practice instead of this requirement.</p>	<p>The NYSE requires the audit committee or another independent board committee to review, evaluate, and oversee related party transactions. The committee must conduct a reasonable prior review and block any transaction that is inconsistent with the company's and stockholders' interests. For ongoing related party transactions, the committee is expected to continuously evaluate and determine whether these transactions should continue.</p> <p>The NYSE does not provide an exemption for FPIs.</p>	

Stock Exchange Governance

COMMITTEE REQUIREMENTS			
AUDIT COMMITTEE REQUIREMENTS (CONT.)			
	NASDAQ	NYSE	SEC
FPI Exceptions	FPIs must comply with the SEC's Rule 10A-3 regarding audit committee oversight but can otherwise rely on their home country practices for audit committees, as long as certain core requirements of 10A-3 are met.	FPIs must have an audit committee that satisfies the SEC's Rule 10A-3 but otherwise can follow its home country practice instead of the exchange rules related to the audit committee.	
Other			<p>The SEC requires reporting companies to disclose information about the audit committee, including: The members of the committee.</p> <p>A description of the committee's charter. A report of the audit committee's oversight of financial reporting and the external auditor.</p> <p>Disclosure of the audit committee's approval of non-audit services provided by the auditor.</p> <p>Any relevant information about the audit committee's independence and whether there are any conflicts of interest, and how those are addressed.</p>

Stock Exchange Governance

COMMITTEE REQUIREMENTS			
COMPENSATION COMMITTEE			
	NASDAQ	NYSE	SEC
Committee Requirement	Yes, a compensation committee is required.	Yes, a compensation committee is required.	
Director Requirements	<p>Compensation committee must be comprised of at least two independent directors, each of whom:</p> <ul style="list-style-type: none"> Meets the exchange's general independence requirements for all directors. Is evaluated under an enhanced independence review for compensation members, including the sources of their compensation and any affiliations between the director and the company. 	<p>Compensation committee must be comprised of independent directors, each of whom:</p> <ul style="list-style-type: none"> Meets the exchanges general independence for all directors Is evaluated under and enhanced independence review for compensation committee members, including the sources of their compensation and any affiliations between the director and the company. 	
Charter Requirements	<p>The compensation committee's written charter must include the following responsibilities:</p> <ul style="list-style-type: none"> Determining (or recommending) CEO compensation. Reviewing and approving CEO compensation goals and evaluating performance. Ensuring the CEO is not present during deliberations or voting on their compensation. Retaining and overseeing compensation consultants, legal counsel, and advisors. Ensuring company funding for these consultants and advisors. Evaluating the independence of consultants, legal counsel (excluding in-house), and advisors. 	<p>The compensation committee's written charter must include the following responsibilities:</p> <ul style="list-style-type: none"> Determining (or recommending) CEO compensation. Reviewing and approving CEO compensation goals and evaluating performance. Determining or recommending compensation for other executives and board approved incentive/equity plans. Retaining and overseeing compensation consultants, legal counsel, and advisors. Ensuring company funding for these consultants and advisors. Evaluating the independence of compensation consultants, legal counsel (excluding in house), and advisors. 	

Stock Exchange Governance

COMMITTEE REQUIREMENTS			
COMPENSATION COMMITTEE (CONT.)			
	NASDAQ	NYSE	SEC
Exception to the Independent Director Requirement	Nasdaq allows one member to be non-independent under specific circumstances, with appropriate disclosure under Rule 5605(d)(2)(B).	NYSE does not have an exception.	
Other			<p>The SEC requires reporting companies to disclose information about the compensation committee, including:</p> <ul style="list-style-type: none"> The members of the committee. A description of the committee's charter. A description of the executive compensation process. A discussion of compensation policies and practices that may cause material risks to the company. Disclosure of fees paid to compensation consultants for services in addition to advice or recommendations on the amount or form of executive or director compensation under certain circumstances. Information about any conflicts of interest of compensation consultants, if applicable, including the nature of the conflict and how it is being addressed.
FPI Exceptions	Nasdaq allows FPIs to follow their home country practice instead of Nasdaq's exchange rules related to the compensation committee. If an FPI does not have an independent compensation committee, Nasdaq mandates that the company must provide an explanation in its annual SEC report for the absence of such a committee.	The NYSE allows FPIs to follow their home country practice instead of the NYSE's rules related to the compensation committee.	

Stock Exchange Governance

COMMITTEE REQUIREMENTS			
NOMINATING/CORPORATE GOVERNANCE COMMITTEE			
	NASDAQ	NYSE	SEC
Committee Requirement	A nominating/ corporate governance committee is not required. Either the company has a nominations committee or certain decisions regarding director candidates must be made by a group consisting of a majority of the independent directors on the board.	Yes, a nominating/ corporate governance committee is required.	
Director Requirements	<p>If the company has a nominating/ corporate governance committee, the committee must be composed entirely of independent directors, each of whom:</p> <ul style="list-style-type: none"> Meets the exchange's general independence requirements for all directors. <p>The nominating/ corporate governance committee may include one non-independent director only under exceptional and limited circumstances.</p>	Requires listed companies to have a nominating/corporate governance committee comprised entirely of independent directors that is responsible for director nominations as well as developing and overseeing the corporate governance policies of the company.	
Charter Requirements	Nasdaq mandates that companies must either adopt a written charter for an independent nominating committee or establish formal board resolutions if nominating decisions are made by a majority of independent directors. These documents should outline the company's nominating process.	<p>Requires the nominating/corporate governance committee to have a written charter that establishes the committee's purpose, duties and responsibilities, including:</p> <ul style="list-style-type: none"> Identification of people qualified to become company directors. Selection of director nominees. Development of the company's corporate governance guidelines. 	

Stock Exchange Governance

COMMITTEE REQUIREMENTS			
NOMINATING/CORPORATE GOVERNANCE COMMITTEE (CONT.)			
	NASDAQ	NYSE	SEC
Other			<p>The SEC requires a reporting company to disclose its process for nominating directors, including:</p> <p>Whether the company has a nominating committee, if not, why not, and whether the committee has a charter.</p> <p>The committee's process to identify and select director nominees and any minimum qualifications for directors.</p> <p>Whether the company will consider director candidates recommended by stockholders, and if so, how stockholders can recommend candidates.</p> <p>Whether and how the company considers diversity as a factor in identifying nominees for director.</p> <p>A description of the specific experience, qualifications and skills of each director and director nominee that caused the committee and/or the board to determine that each such person should be a director.</p>
FPI Exceptions	Nasdaq allows FPIs to follow their home country practice instead of Nasdaq's exchange rules related to the nominating and corporate governance committee.	The NYSE allows FPIs to follow their home country practice instead of the NYSE's rules related to the nominating and corporate governance committee.	

Stock Exchange Governance

FOREIGN PRIVATE ISSUERS		
DISCLOSURE REQUIREMENTS		
	NASDAQ	NYSE

**Public Disclosure
FPI Elects to
Follow Home
Country Practice**

Requires FPIs to disclose in their annual SEC reports any Nasdaq requirements it does not follow, along with a description of the home country practices it adheres to instead. If an FPI is not required to file an annual report on Form 20-F, this disclosure may be made solely on its website. Specifically, if an FPI opts for a home country practice over the requirement for an independent compensation committee, it must explain the absence of such a committee in its SEC annual report.

For FPIs making their initial public offering or first US listing on Nasdaq, they must disclose in their registration statement or on their website which Nasdaq requirements they do not follow and describe the alternative home country practices.

Requires FPIs listed on the exchange to disclose any significant differences between their corporate governance practices and those required for US companies under NYSE standards.

This disclosure should be a brief summary of the differences. If an FPI files an annual report on Form 20-F, it must include this information in that report. Alternatively, the disclosure can be made either in the annual SEC report or on the company's website. If the disclosure is made on the website, the company must mention this fact in its annual SEC report and provide the website address.

Stock Exchange Governance

ADDITIONAL REQUIREMENTS			
CODE OF CONDUCT/ BUSINESS CONDUCT AND ETHICS			
	NASDAQ	NYSE	OTHER
Disclosure Requirements	Nasdaq requires each listed company to adopt a code of conduct that applies to all of its directors, officers and employees. The code of conduct should provide a practical set of business, compliance and ethical standards for the participants.	NYSE requires each listed company to adopt a code of business conduct and ethics that applies to all of its directors, officers and employees. The code of conduct should provide a practical set of business, compliance and ethical standards for the participants.	Under Item 406 of Regulation S-K, the SEC mandates that companies disclose whether they have adopted a code of ethics for key executives, including the principal executive officer, principal financial officer, and principal accounting officer. If a company has not adopted such a code, it must publicly explain why. The code should outline written standards aimed at preventing misconduct.
Substance Requirements	Nasdaq requires that a code of conduct meet SEC standards and include a mechanism for enforcement.	<p>The NYSE code of business conduct and ethics should address the following:</p> <ul style="list-style-type: none"> • Conflicts of interest. • Corporate opportunities. • Confidentiality. • Fair dealing. • Proper use and protection of company assets. • Compliance with laws, rules and regulations, including insider trading laws. • Reporting of any illegal or unethical behavior, including any violations of the code. 	
Waiver of the Code	If the board of directors or a board committee approves a waiver of the code for a director or executive officer, the waiver and the reasons for the waiver must be disclosed within four business days by filing a Form 8-K (for foreign private issuers, a Form 6-K), in a press release or on the company's website (Rule 5610 and IM-5610).	If the board of directors or a board committee grants a waiver of the code for an executive officer or director, the waiver must be disclosed to stockholders within four business days in a press release, on the company's website or by filing a Form 8-K (Section 303A.10).	
FPI Exceptions	Nasdaq allows FPIs to follow their home country practice instead of the code of ethics or conduct requirement.	The NYSE allows FPIs to follow their home country practice instead of the code of ethics or conduct requirement.	If an FPI lacks a code of ethics for its principal executive officer, principal financial officer, principal accounting officer, controller, or individuals in similar roles, Form 20-F mandates an explanation for the absence of such a code.

Stock Exchange Governance

ADDITIONAL REQUIREMENTS		
OFFICER CERTIFICATIONS		
	NASDAQ	NYSE
Notification Requirements	Nasdaq only requires the CEO to promptly inform Nasdaq if any executive officer becomes aware of non compliance with its corporate governance standards.	The NYSE mandates that the CEO annually certify that they are not aware of any violations of the NYSE's corporate governance standards. Additionally, the CEO must promptly notify the NYSE in writing if any executive officer becomes aware of non-compliance with these standards.
FPI Exceptions		The NYSE allows FPIs to follow their home country practice instead of the CEO certification requirement. The NYSE also mandates that listed companies, including FPIs, submit a written affirmation of compliance with corporate governance rules annually and as required. While FPIs must also provide this affirmation, their affirmation form typically covers fewer items compared to the form used by other listed companies.

Communications Do's and Don'ts

Navigating the IPO Communications Rules

SECURITIES ACT OF 1933

- **Section 2(a)(3):** Defines “offer” broadly as any attempt to sell or solicit a security for value.
- **Section 5:** Before filing, offers are restricted (subject to limited exceptions). After filing, written offers generally must be made through a Securities Act-compliant prospectus (and certain other permitted written communications, such as FWPs, if conditions are satisfied). Sales cannot occur until the SEC declares the registration statement effective.
- **Waiting period:** After filing, oral offers are permitted, and written offers are limited to a compliant prospectus (and other permitted writings, as applicable).

GUN-JUMPING

- Unauthorized offers before permitted periods.
- Risks: Strict liability for unvetted statements, SEC-imposed cooling-off delays, and purchaser rescission rights.

TESTING-THE-WATERS

- Rule 163B permits communications with QIBs and IAs; EGCs also have TTW flexibility under Section 5(d).
- Supports cost-effective market evaluation and investor engagement.

IPO Communications – Phases and Publicity



IPO Communications: Phases and Publicity

PRE-FILING (QUIET PERIOD):

- Most restrictive. Sales are prohibited, and offers are heavily constrained, subject to limited safe harbors/permits (e.g., Rule 163A (30+ days pre-filing), Rule 169 (factual business information), Rule 163B (TTW), and Rule 241 (“generic” solicitation of interest)).
- “Offer”: Any attempt to sell or solicit a security, via any medium, that encourages IPO interest.
- Companies often treat the “quiet period” as beginning once IPO planning becomes active (often by or before underwriter engagement) because publicity can be viewed as conditioning the market. From that point on, “in registration”.

POST-FILING (WAITING PERIOD):

- Starts with public filing of the registration statement with the SEC.
- Oral offers permitted; written offers limited to a Securities Act-compliant prospectus.
- Ends when the SEC declares the registration statement effective.

POST-EFFECTIVENESS PERIOD:

- Begins once the SEC declares the registration statement effective.

IPO Communications: Do's and Don'ts

PERMITTED COMMUNICATIONS

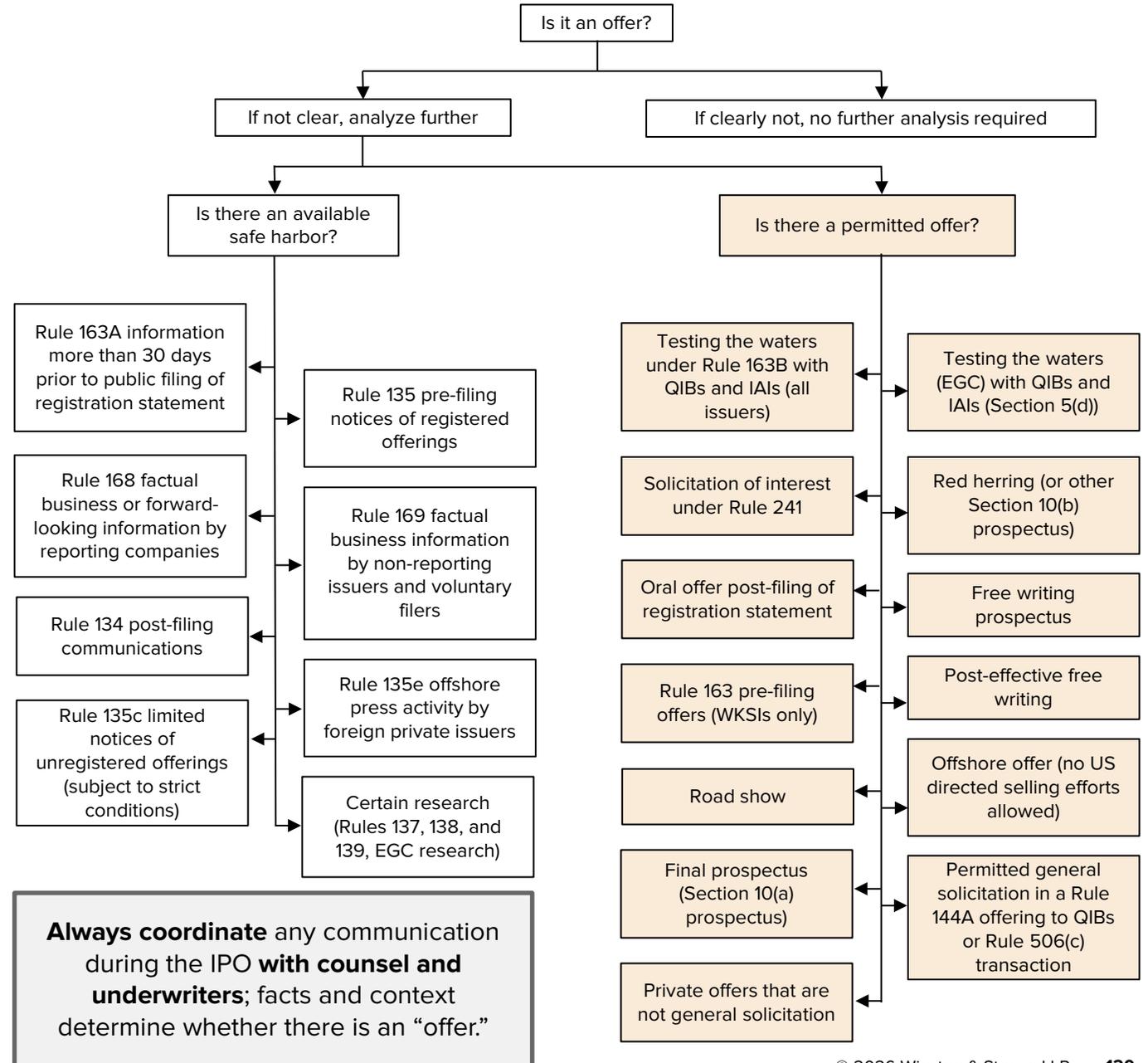
(if consistent with past practices)

- Product/service advertising.
- Factual business/financial updates unrelated to the IPO.
- Trade show and industry meeting participation.
- Trade press articles (but issuer-initiated or issuer-scripted publicity can create gun-jumping risk—coordinate with counsel).
- Responses to factual inquiries unrelated to the IPO.
- Media announcements on non-IPO business/financial developments.

PROHIBITED COMMUNICATIONS

- Actions conditioning the market (e.g., new/expanded corporate branding campaigns).
- Revenue, income, or growth forecasts for the company or industry.
- Media discussions or public announcements about the IPO, business strategy, or financial prospects.
- Discussions with securities analysts about the company/IPO (with exceptions).
- Investor/analyst conferences require careful planning; participation may be permissible if consistent with past practice and not conditioning the market, with counsel-approved messaging.
- Securities advertisements.

IPO Communications: Safe Harbors and Permitted Offers



Strong Communications: Setting the Foundation



- Establish strong communications protocols early in IPO preparation.
- Ensure all activities follow legal team guidance strictly.
- Align company, bankers, lawyers, investor relations, and communications teams on goals, objectives, metrics, and key messages.
- Develop an event calendar targeting priority audiences.
- Coordinate messaging across documents and filings (including investor decks, press releases) for consistency.
- Prioritize message uniformity amid volatile markets and heightened IPO scrutiny.

Communications for A Successful IPO and Beyond

- An IPO marks a pivotal milestone, demanding flawless execution on your terms.
- Position the company and leadership, setting foundations for public life.
- Drive valuation through **planned, counsel-vetted** investor and media engagement consistent with securities law communications rules.
- Build robust communications and IR functions, orchestrate listing events, and equip teams for quarterly reporting.
- Manage the public transition with precision and innovation to capitalize on opportunities.

Strategic Communication Imperatives

Focus messaging on management strengths, business strategy, growth prospects, and competitive edge.

Develop a robust plan to counter potential criticisms through targeted earned media in investor-focused outlets.

Ensure strong message alignment and media coverage to bolster stock price stability.

Post-listing, sustain investor awareness with growth communications and reputation management counsel.

IPO Communications: Plan Early for Impact

ADVANCED COMMUNICATIONS PLANNING IS ESSENTIAL

- Avoid the common pitfall: Delaying strategy until just before public filing, when quiet period restrictions limit outreach.
- Start shaping your narrative well before listing day to ensure accurate media coverage.
- Manage your IPO and growth story proactively and early to build awareness and correct misperceptions.
- Allocate ample time—ideally six months to a year—for initiatives like rebranding or strategic announcements to maximize effectiveness pre-quiet period (major branding campaigns right before filing can look like market conditioning).

Pre-IPO Communications Challenges: Overcoming Hurdles

- Common challenges for pre-IPO companies:
 - Limited media presence.
 - Sector media coverage, often overlooked or misread by financial press.
 - High-profile attention risking overhyping.
 - Weak connections with key journalists.
- Benefit from early, proactive message management of IPO and growth narrative.
- Seed key story elements with media and cultivate relationships with critical journalists well before IPO announcement.



Now That You Are Public

Boards and Committees

Board Independence Requirements: Building Compliance

CORE STANDARDS

- Majority of board must be independent
- Audit, compensation, and nominating/corporate governance committees must be fully independent.

IPO TRANSITION RULES

- Newly listed companies receive transition periods to meet board and committee independence requirements, but timing and triggers differ (especially for the audit committee under Rule 10A-3 and exchange rules). Plan early based on NYSE vs. Nasdaq and company facts.
- Generally, one independent director per committee at initial listing, majority independence for each committee within 90 days of listing, and full committee independence and board majority within one year of listing.

SPECIAL CONSIDERATIONS

- Private equity designees may qualify as independent, with specific audit committee rules applying.

Controlled Company Boards: Tailored Governance

DEFINITION

A “Controlled Company” exists when an individual, group, or entity (e.g., voting agreements designating directors or directing votes) holds >50% voting power for director elections.

EXEMPTIONS

- No majority independent board required.
- Independent compensation and nominating/governance committees not mandated.

REQUIREMENT

Must maintain an independent audit committee.

DISCLOSURE

Must report Controlled Company status and basis in the annual proxy statement and/or periodic reports.

Board Composition

SKILLS MATRIX

Evaluate specific experience, qualifications, and skills.

ALIGNMENT

Match attributes to the company's unique business context.

EMERGING FOCUS

Prioritize expertise in AI, technology, cybersecurity, digital assets, human capital, and climate, as appropriate. Certain industries will have specific expertise requirements (e.g., biotech).

BROADER PERSPECTIVE AND CAPACITY

Consider directors' service on other boards.

Committees

- **NYSE Requirement:** Mandatory audit, compensation, and nominating/corporate governance committees.
- **Nasdaq Requirement:** Audit committee plus independent executive compensation oversight.
- **Industry/Risk-Specific Committees:** Disclosure, executive, finance, compliance, risk, AI, technology, ESG (as needed).
- **Documentation:** Each committee must have a governing charter.



Committee Charters / Governance Policies

- Develop and adopt detailed charters for each Board committee
- Develop and adopt general corporate governance policies, such as:
 - Governance Guidelines
 - Code of Conduct
 - Financial Code of Ethics
 - Audit Committee Pre-Approval Policy
 - Whistleblower Policy
 - Related Persons Transactions Policy
 - Stock Ownership & Retention Guidelines
 - Insider Trading Policy
 - Short-Swing Trading and Reporting Policy
 - Regulation FD Policy
 - Document Retention Policy

Fiduciary Duties

Fiduciary Duties: Guiding Your Leadership

DUTY OF CARE

Act on an informed basis and with appropriate diligence.

DUTY OF LOYALTY

Act in the best interests of the corporation and stockholders; avoid conflicts.

DUTY OF GOOD FAITH

Violated by intentionally disregarding known risks or a knowing failure to apply minimum levels of diligence

DGCL 102(b)(7) exculpation: May limit monetary liability for certain care claims (subject to important exceptions; loyalty/bad faith not exculpable).

DUTY OF DISCLOSURE In the context of a public transaction, there is also a duty of disclosure

- Duty to disclose fully and fairly all material information within the board's control when it seeks shareholder approval
- The court may also apply a heightened standard of review due to conflicts of interest

Business Judgment Rule: Your Directors' Shield

EMPOWER INFORMED DECISIONS

- **Core Presumption:** Courts assume directors act on an informed basis, in good faith, and in the company's best interests.
- **Key Protections:** Shields from liability unless there's evidence of conflict, fraud, or gross negligence—no second-guessing by courts.
- **Tie to Fiduciary Duties:** Reinforces care, loyalty, and good faith; can reduced litigation risk (D&O coverage depends on policy terms and facts).

THE BUSINESS JUDGMENT RULE PROTECTS DIRECTORS & OFFICERS AGAINST HONEST ERRORS OF JUDGMENT

Periodic Reporting Requirements

Periodic Reporting Requirements

Public companies must file reports with the SEC under the Securities Exchange Act of 1934.

REQUIRED FILINGS

- Annual Reports on Form 10-K, including executive compensation and governance disclosures.
- Quarterly Reports on Form 10-Q.
- Current Reports on Form 8-K.

Form 10-K and Form 10-Q: Deadlines and Details

- Filing deadlines vary by filer status: non-accelerated, accelerated, or large accelerated.
- Newly public companies, typically non-accelerated filers, must file Form 10-K within 90 days and Form 10-Q within 45 days of the fiscal period end.
- EGCs and SRCs benefit from scaled disclosure requirements.

EGC Exemptions: Streamlining Compliance

EXEMPTIONS

- No stockholder advisory votes on executive compensation or golden parachutes (Section 14A(a) and (b)).
- No CEO pay ratio disclosure (Dodd-Frank Section 953(b)(1)).
- Reduced executive compensation disclosure (Item 402 of Regulation S-K), excluding CD&A.
- No auditor attestation of internal controls (Sarbanes-Oxley Section 404(b)); management still assesses effectiveness.

POST-EGC TRANSITION

- EGCs are exempt from say-on-pay / say-on-frequency / say-on-golden-parachute votes while they remain EGCs. After losing EGC status, the company must hold its first say-on-pay vote within one year.

SRCs: More Streamlining

- New issuers often qualify as SRCs with: (i) public float < \$250 million, or (ii) annual revenue < \$100 million and float < \$700 million.
- SRCs benefit from scaled disclosure, overlapping with EGC rules, but have some extra exemptions:
 - No pay ratio (Item 402(u))
 - No pay v. performance (Item 402(v))
 - No quantitative/qualitative market risk disclosures (Item 305)
 - Omit ratio of earnings to fixed charges exhibit (Item 601(b)(12))
- Many EGCs also classified as SRCs typically adopt EGC disclosure standards.

Form 8-K: Timely Event Reporting



REQUIRED SEC FILINGS FOR KEY EVENTS, INCLUDING:

- Change in accountants.
- Director/executive officer departures or elections.
- Material executive compensation plans or contracts.
- Stockholder vote submissions.
- Regulation FD disclosures.
- Cybersecurity Incident disclosures

MOST MUST BE FILED **WITHIN FOUR BUSINESS DAYS** OF THE EVENT – BUT TIMING MAY VARY AS SOME ITEMS HAVE SPECIFIC TRIGGERS/REQUIREMENTS.

Reporting Ownership: Section 16 and Schedules 13G/13D

Section 16: Insider Compliance Essentials

INSIDER OBLIGATIONS

(DIRECTORS, OFFICERS, 10% STOCKHOLDERS):

- Report equity ownership via Forms 3, 4, and 5 with the SEC.
- File Form 4 within two business days of any transaction (Form 3 filed at IPO; subsequent trades on Form 4).

COMPANY RESPONSIBILITIES

- Post Forms 3, 4, and 5 on website by end of business day after filing (or provide hyperlink to EDGAR).
- Maintain postings for 12 months, either directly or via hyperlink.

TRADING RULES

- Disgorge short-swing profits from share trades.
- Prohibit short sales of shares.

Beneficial Ownership

- SEC rules determine beneficial ownership, potentially exceeding record ownership for Section 16 insiders.
- Voting or investment power over securities is a primary factor in ownership assessment.
- Beneficial ownership, for reporting and short-swing profit liability, hinges on the insider's direct or indirect financial interest and ability to profit from trades.



Short Swing Profits

SECTION 16(B)

- Insiders must return short-swing profits from buying and selling (or selling and buying) company shares within six months.

LIABILITY

- Strict, requiring no proof of insider information use.

ENFORCEMENT

- Typically pursued by stockholders, though the company may act.

EXEMPTION

- Transactions under employee benefit plans are exempt if approved by the board or a committee.

Schedules 13G and 13D

SCHEDULE 13D (ACTIVIST)

- **Initial filing deadline** – within **5 business days** of acquiring beneficial ownership of > 5%
- **Amendment trigger** – a “material change”, including a 1% or greater change in holdings or a change in intent
- **Amendment deadline** – within **2 business days** after a material change

SCHEDULE 13G (PASSIVE/QII/EXEMPT)

- **Initial filing deadline**
 - **QII/Exempt:** within **45 days after the quarter-end** in which beneficial ownership > 5%
 - **Passive:** within **5 business days after the month end** in which beneficial ownership > 5%
- **Amendment trigger** - Any material change in information previously reported
- **Amendment deadline** - 45 days after the quarter-end; **accelerated deadlines** for > 10% ownership or 5% + change (accelerated amendment generally due within 2 business days after month-end)

General Disclosure Requirements

Materiality: Defining Investor Relevance

DEFINITION

(RULE 405, SECURITIES ACT)

Information a reasonable investor would likely deem significant when deciding to buy a registered security.

STANDARD

Requires a substantial likelihood of altering the “total mix” of available information (but does not require an investor making a change in investment or voting decisions).

GUIDANCE

Some disclosures include built-in materiality thresholds, but companies should avoid rigid, formulaic assessments.

No General Duty to Disclose

Public companies have no continuous, general duty to disclose material information beyond required filings (Forms 10-K, 10-Q, 8-K) absent insider trading or prior inaccuracies.

SPECIFIC OBLIGATIONS ARISE WHEN:

- Insiders selectively share material nonpublic information.
- The company trades its own stock.
- Previously disclosed information becomes inaccurate or outdated.

Duty to Correct: Ensuring Accuracy



- Companies must correct prior statements proven false or misleading when made.
- No duty applies if the original statement was vague, indefinite, or new information is unreliable.
- Courts rarely enforce correction for forward-looking statements unless based on inaccurate historical data.

Duty to Update: Dealing with Evolving Facts

- **Trigger:** Arises when a clear, factual, forward-looking statement with ongoing investor relevance becomes misleading due to subsequent events.
- **Key Factors:** Statement remains "alive" (relied upon by reasonable investors) and involves a fundamental issuer change.
- **Exceptions:** No duty for ordinary financial projections, vague statements/puffery, or historical facts.

EXAMPLE

SEC v. Walgreens (September 2018)

- Company and management learned that projections were 20% off, but CEO and CFO repeatedly re-affirmed guidance without disclosing heightened risks of achieving such results.
- SEC fined Walgreens \$34.5 million and CEO and CFO were fined \$160,000 each.

Risk Factors: Investor Caution

PURPOSE

Cautionary statements addressing risks that could materially impact business, financial condition, or operations, marking investments as speculative.

PRESENTATION

Featured under a distinct heading in periodic reports or prospectuses, reflecting management's view on potential effects.

IMPACT

Details how materialized risks may influence company performance and the value of investor-held securities.

Insider Trading

Insider Trading – Rule 10b-5

- **Prohibition:** Insiders cannot trade on company securities with material nonpublic information.
- **Liability Standard:** Rule 10b5-1 holds “possession,” not “use,” of such information as sufficient for liability.
- **Family/Associates:** Presumed to share insider knowledge; insiders should deter their trading during possession periods.
- **Tipping:** Unlawful for insiders to share material nonpublic information with outsiders for trading, or for outsiders to trade on it; avoid external discussions.
- **Misappropriation:** Unlawful for employees to trade another company’s securities using material nonpublic information obtained in breach of duty.

Rule 10b-5 Trading Plans: Safeguarding Insider Trades

- **Purpose:** Mitigates insider trading liability by allowing pre-planned trades during possession of material nonpublic information.
- **Format and Terms:**
 - Written plan established in good faith before possessing material nonpublic information.
 - Specifies timing, price, or volume of trades, executed by a broker or agent.
 - Limitations on multiple overlapping plans (for persons other than issuers).
 - Modifications only under specific conditions.
 - Effective for a set duration, cancellable only per plan terms.
- **Benefits:** Provides affirmative defense against Rule 10b-5 claims if followed strictly.

Rule 10b-5 Trading Plan Conditions: Recent Updates

- **Cooling-Off Period:** Trading may begin only after the later of 90 days after adoption/modification or two business days after disclosure of financial results for the relevant quarter, subject to a maximum of 120 days.
- **Certification:** Insiders must certify good faith and no material nonpublic information at plan inception.
- **Overlapping plans:** Generally restricted, subject to specific rule exceptions; single-trade plans are limited.



Disclosure Obligations: Insider Trading Oversight

QUARTERLY

Disclose directors'/officers' adoption, termination, or modification of Rule 10b5-1 plans, including material terms.

ANNUALLY

Report company insider trading policies and procedures in Form 10-K or proxy statements.

OPTION AWARDS

Disclose timing and awards near material nonpublic information releases.

SECTION 16 FILERS

Report 10b5-1 plan transactions and gift dispositions on Form 4 within two business days.

EXHIBIT REQUIREMENT

File insider trading policies as an exhibit under Item 601 of Regulation S-K.

Company Involvement in 10b5-1 Plans: Key Recommendations

- **Oversight:** Implement robust insider trading policies requiring preclearance and review by legal/compliance teams for good faith and compliance.
- **Plan Review:** Ensure plans adhere to SEC rules (e.g., cooling-off periods, no overlapping plans); verify written terms specify trade details without insider influence.
- **Broker Interaction:** Coordinate with brokers to confirm automated execution; provide clear instructions and monitor adherence.
- **Documentation & Monitoring:** Maintain records of plan adoption/modifications; conduct periodic reviews to prevent misuse.
- **Disclosure Alignment:** Align with quarterly/annual reporting obligations for transparency.

Insider Trading Policies: Essential Safeguards

BLACKOUT PERIODS

Restrict trading for designated personnel.

- **Earnings:** Often starts first business day of last full week before fiscal period end; often ends two trading days post-financial results release. Applies to directors, Section 16 officers, and CFO-designated individuals.
- **Event-Specific:** Imposed as needed (e.g., material transactions like business combinations).

COMPANY BENEFIT PLANS

- Outline permissible transactions.

RULE 10B5-1 PLANS

- Enable pre-planned trades.

PRE-CLEARANCE PROCEDURES

- Require approval for trades.

Regulation FD



Regulation FD: Ensuring Fair Disclosure

- **Purpose:** Prohibits selective disclosure of material nonpublic information by public companies before public release.
- **Background:** Addresses past favoritism toward analysts and select investors with early information.
- **Requirement:**
 - If CEO, CFO, IR, or spokespersons share material data with brokers, analysts, or shareholders, it must be publicly announced to ensure equity.
 - For unintentional selective disclosure, the issuer must make public disclosure promptly—as soon as reasonably practicable, but no later than 24 hours or the start of the next trading day, whichever is later.
- **Exception:** Disclosure permitted if recipients agree to confidentiality or owe a duty of trust (e.g., attorneys, bankers, auditors).

Material Nonpublic Information

DEFINITION

- Regulation FD lacks a specific “material” definition; deemed significant if a reasonable investor would find it important or it alters the information mix.

NONPUBLIC STATUS

- Applies if information is not broadly available to investors.

BEST PRACTICE

- Implement a robust Regulation FD Policy to guide conduct and ensure compliance.

Q&A



Attorney Bios



MIKE BLANKENSHIP

MANAGING PARTNER,
HOUSTON & CO-CHAIR,
CAPITAL MARKETS PRACTICE

Houston



ERIC JOHNSON

PARTNER, CAPITAL MARKETS
& CO-CHAIR, PUBLIC COMPANY
ADVISORY PRACTICE

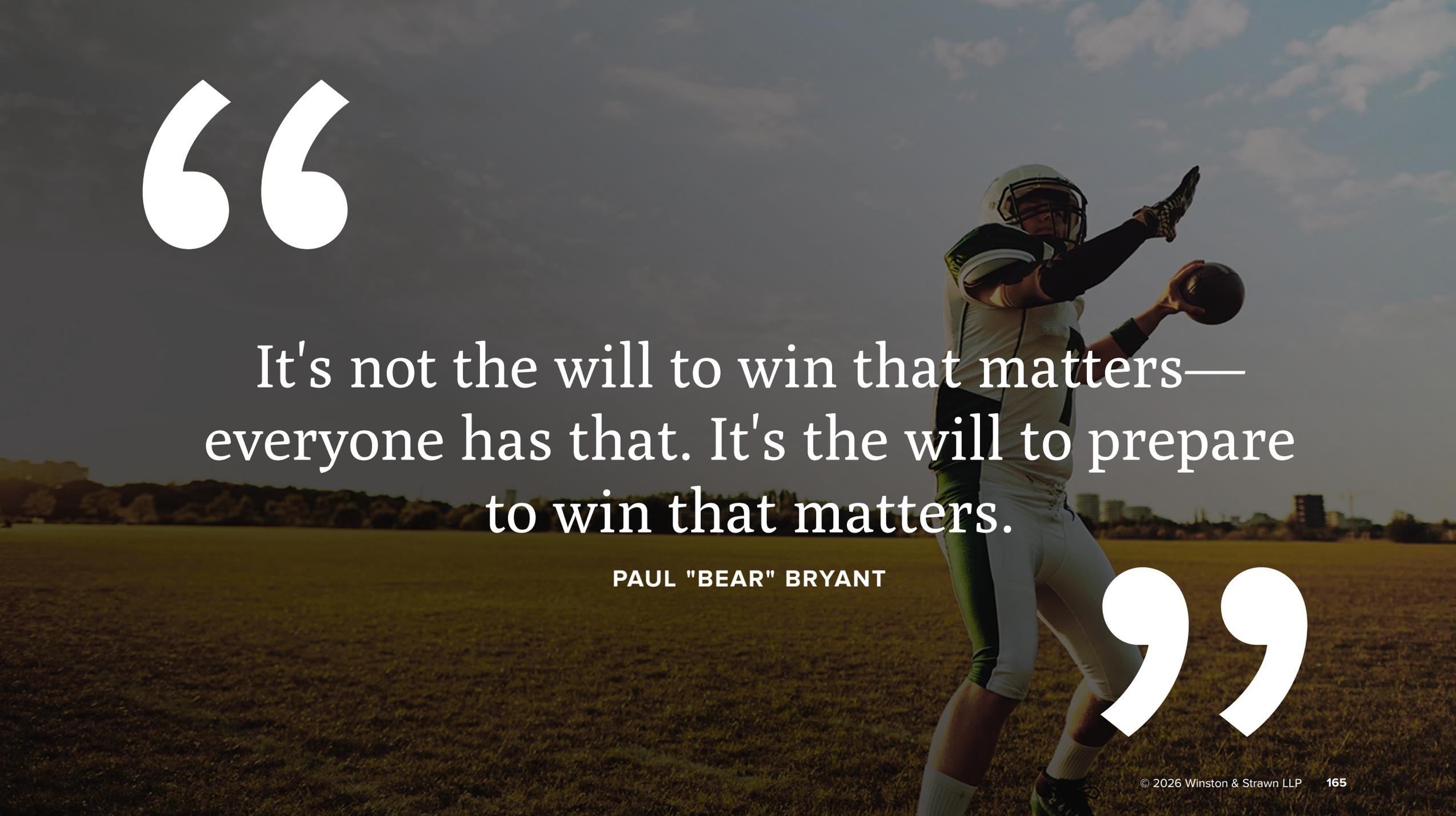
Houston



BEN SMOLIJ

PARTNER, CAPITAL MARKETS
PRACTICE

Houston

A football player in a white and green uniform is shown in the background, catching a football. The scene is set on a grassy field at dusk or dawn, with a cloudy sky and some buildings visible in the distance. The player is wearing a white helmet and is focused on the ball. The overall tone is inspirational and professional.

“

It's not the will to win that matters—
everyone has that. It's the will to prepare
to win that matters.

PAUL "BEAR" BRYANT

”

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The only place success comes
before work is in the dictionary.

VINCE LOMBARDI

”

WINSTON
& STRAWN
LLP