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## **IPOs for Private Equity-Sponsored Companies Post-JOBS Act: Overcoming the Legal Complexities**

Navigating Stockholder Arrangements, Financial Reporting  
and Disclosures, Corporate Governance, and More

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THURSDAY, MARCH 12, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Matthew E. Kaplan, Partner, **Debevoise & Plimpton**, New York

Steven J. Slutzky, Partner, **Debevoise & Plimpton**, New York

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# IPOs for Private Equity-Sponsored Companies Post-JOBS Act: Overcoming the Legal Complexities

Steven J. Slutzky  
Matthew E. Kaplan

March 12, 2015

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& Plimpton**

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Steven Slutzky is a corporate partner and Co-Head of the firm's Capital Markets Group and a member of the firm's Private Equity Group. His practice focuses on securities offerings and related transactions, and he regularly represents issuers and underwriters in securities transactions including initial public offerings, high-yield debt offerings, secondary equity offerings, debt offerings, tender offers and consent solicitations and private placements. Mr. Slutzky was named Dealmaker of the Year by *The American Lawyer* (2014) for his role in advising Verizon Communications Inc. on its \$49 billion bond offering, the largest-ever corporate bond issue. Mr. Slutzky is also ranked as a leading capital markets lawyer in the 2014 editions of *Chambers Global* and *Chambers USA* and in *IFLR1000* (2012). He is recognized in *The Legal 500 US* (2014) and one client praises him as one of the "best lawyers I have ever worked with" (2009). Mr. Slutzky has co-authored a number of articles, including "Tips For An Efficient Private Equity-Backed IPO," *Law360* (August, 2014) and "Advance Planning For Sponsor-Backed IPOs," *The Review Of Securities & Commodities Regulation* (May, 2014).

# Contacts



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Matthew Kaplan is a corporate partner, Co-Head of the firm's Capital Markets Group and a member of the firm's Banking and Private Equity Groups. Mr. Kaplan regularly represents issuers, private equity firms, and underwriters in public and private offerings of debt and equity securities, and he also counsels public and private companies on disclosure, corporate governance, finance and general corporate matters. Mr. Kaplan is ranked by *Chambers USA* as an Up and Comer – Nationwide Capital Markets Attorney (2014) where he is “lauded for being extremely responsive with an encyclopedic knowledge of the securities law” and is recognized by *The Legal 500 US* (2014), which notes that he is “a trusted adviser you can rely on.” Mr. Kaplan has also been ranked as a leading attorney in *IFLR1000* (2012) for his work on both debt and equity offerings. Mr. Kaplan has co-authored a number of articles discussing developments under the federal securities laws, including: “Dropped Herbalife Insider Case Leaves Questions Unanswered,” *Law360* (February, 2015), “Allergan Fuels Tension Over Schedule 13D Disclosure,” *Law360* (February, 2015) and “Second Circuit Speaks On Source Of Duty For Insider Trading And Scope Of Disgorgement Remedy,” *Financial Fraud Law Report* (January, 2015).

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# Agenda

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- Recent IPO trends for PE-sponsored portfolio companies
- JOBS Act requirements for pursuing an IPO
- Dual track IPO/auction process
- Stockholder arrangements
- SEC and SOX financial reporting and disclosures
- Corporate governance and control issues
- Management fee agreements
- Q & A

# Recent IPO trends for PE-sponsored portfolio companies

# Private Equity-Backed IPOs

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- Globally, there were over 1,200 offerings that raised over \$259 billion in 2014\*
  - Private equity-backed companies raised approximately \$110 billion through 211 offerings in 2014\*
  - IPOs for private equity-backed companies were up 88% in 2014 versus 2013\*
- In the United States, there were 71 private equity-backed IPOs that raised approximately \$25 billion in 2014\*
  - In 2014, the average private equity-backed IPO gained 13% with an average first day increase of 9%\*
- 28% of 727 follow-on offerings in 2014 were financial sponsor-backed\*
- Of the top 100 IPOs by deal size between September 2011 and October 2013, 54% were controlled companies\*

\* Sources of data: Ernst & Young LLP, *Private Equity, Public Exits Q4 2014* digital edition and Renaissance Capital *US IPO Market 2014 Annual Review*

# What the EGCs are Doing

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- Between April 2012 and June 2014, approximately 81% of all publicly filed IPO registration statements and approximately 84% of the IPOs that have gone effective were filed by EGCs\*
- Between April 2012 and June 2014, EGCs have used portions of the JOBS Act “on-ramp” to different degrees:
  - 85% of EGCs submitted registration statement confidentially \*
  - 94% of EGCs took advantage of reduced executive compensation disclosures\*
  - 53% of EGCs provided only two years of audited financial statements\*
    - » Of the EGCs that provided three years of audited financial statements, 65% provided fewer than five years of selected financial data\*
  - 18% of EGCs adopted new accounting standards using private company effective dates\*

\* Source of data: Ernst & Young LLP, *The JOBS Act: 2014 mid-year update* (August 2014)

# JOB S Act requirements for pursuing an IPO

# Impact of the JOBS Act – What is an EGC?

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- The JOBS Act creates a new category of issuer, called an Emerging Growth Company (EGC), that benefits from a transition period from private to public company. During this period – which can last for up to five years – EGCs are exempt from many costly requirements of being a public company
- The JOBS Act defines an EGC as a company with less than \$1 billion in annual gross revenues during its most recently completed fiscal year until the earliest of:
  - The last day of the fiscal year during which it had annual gross revenues of \$1 billion or more
  - The last day of the fiscal year following the fifth anniversary of its IPO
  - The date on which it has, during the previous three-year period, issued more than \$1 billion in non-convertible debt
  - The date on which it is deemed to be a “large accelerated filer” (i.e., a company with an unaffiliated float of at least \$700 million)

# Impact of the JOBS Act: What are the benefits of EGC status? (1 of 4)

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- EGCs may file S-1 on a confidential basis with SEC
  - Confidential submission(s), including exhibits, must be filed publicly within 21 days of road show
- EGC S-1 Reduced Disclosure:
  - Only two years of audited financial statements (instead of three)
  - Selected financial data only beginning with the earliest period presented in the S-1
  - Period-over-period MD&A discussion covering only the two-year audited fiscal periods (and any requisite interim periods)
  - Limited executive compensation disclosure, including the CD&A, that satisfies the requirements applicable to smaller reporting companies

# Impact of the JOBS Act: What are the benefits of EGC status? (2 of 4)

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- Testing-the-Water Communications:
  - EGCs and underwriters permitted to communicate orally and in writing with QIBs and IAIs during the pre-filing and post-filing periods “to determine whether such investors might have an interest in [the] contemplated securities offering”
- Investor Communication by Brokers and Dealers:
  - Permits brokers and dealers, including participating underwriters, to publish research reports about an EGC prior to, during and immediately following its IPO
  - Eliminates certain restrictions on communications between securities analysts and both potential investors and management of EGCs

# Impact of the JOBS Act: What are the benefits of EGC status? (3 of 4)

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- Post-IPO reduced disclosure so long as still an EGC:
  - Executive compensation disclosure, including the CD&A, that satisfies the requirements applicable to smaller reporting companies in post-IPO registration statements and reports filed with the SEC (e.g., the annual proxy)
  - Exempt from the auditor attestation requirements of Sarbanes-Oxley 404(b) regarding internal control over financial reporting
  - Permitted to present selected financial data in any post-IPO registration statement and reports filed with the SEC beginning with the earliest period presented in the S-1

# Impact of the JOBS Act: What are the benefits of EGC status? (4 of 4)

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- Post-IPO reduced disclosure so long as still an EGC (cont'd):
  - Exempt from new or revised financial accounting standards applicable only to public companies
  - Exempt from specific accounting and audit standards, including rules requiring mandatory audit firm rotation and any rule requiring the addition of an auditor discussion and analysis to the audit report
  - Exempt from the requirements relating to say-on-pay votes and say-on-golden-parachute votes and the disclosure of pay versus performance and the ratio of CEO-to-worker pay compensation

# Dual track IPO/auction process

# Key Players in Auction Process

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- Target Company
- Seller(s)
- Sell-Side Financial Advisor
- Seller's Counsel
- Potential Buyers
- Buyers' Counsel
- Financing Sources (for Financial Buyers)
- Financing Sources' Counsel

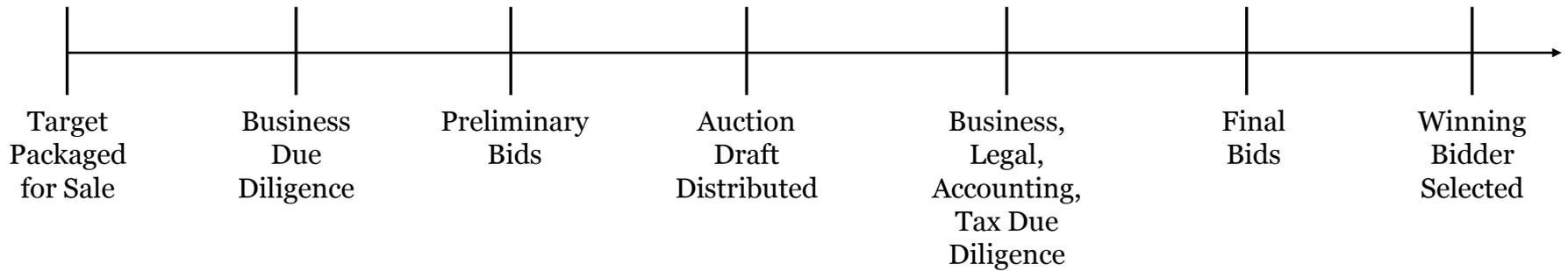
# Key Documents in Auction Process

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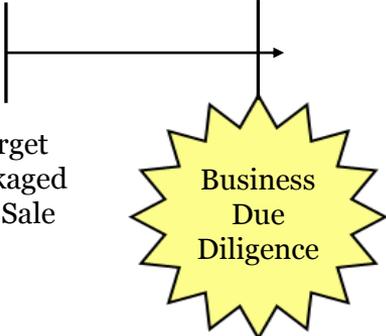
- Financial Advisor Engagement Letter
- Confidentiality Agreements with Bidders
- Confidential Information Memorandum
- Bid Process Letter
- Acquisition Agreement and related Disclosure Schedules
- Financing Related Documents (for Financial Buyers)
  - Debt Commitment Letter
  - Equity Commitment Letter
  - Limited Guarantee
- Other Transaction Agreements

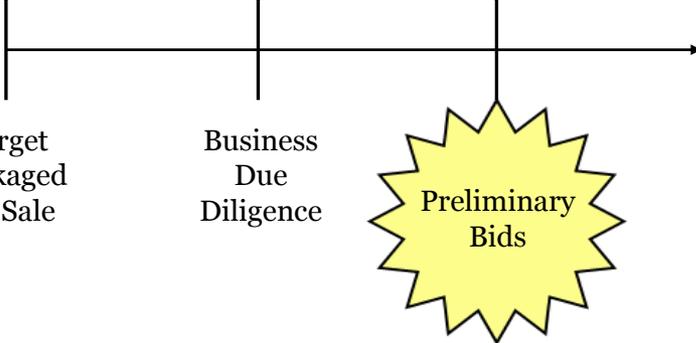
# Illustrative Auction Timeline

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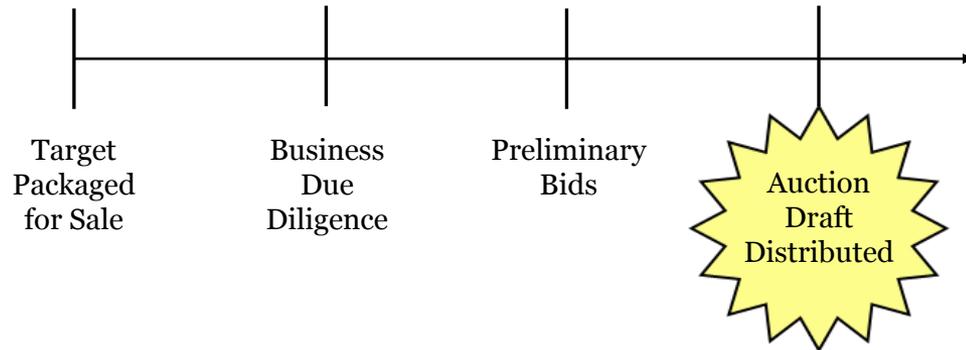


# Stages of an Auction (1 of 3)

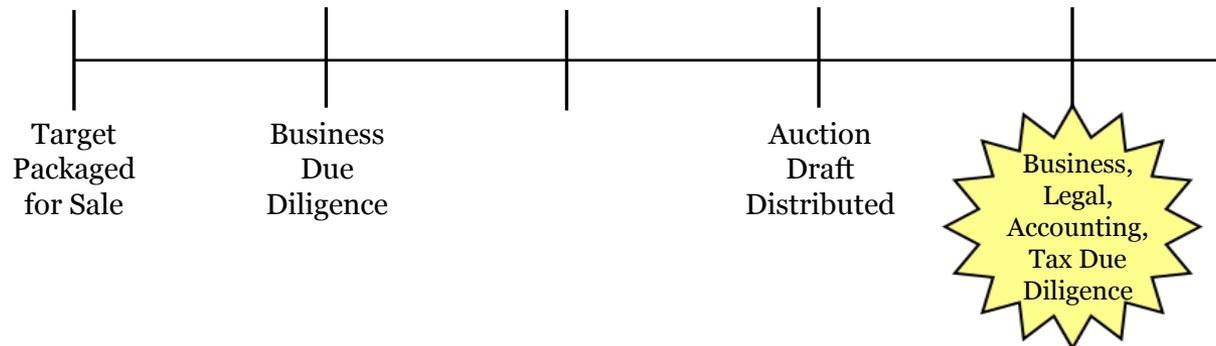
- A horizontal timeline arrow starts at a vertical tick mark labeled "Target Packaged for Sale". A second vertical tick mark is further to the right. A yellow starburst shape is positioned between these two tick marks, containing the text "Business Due Diligence".
  - Negotiate confidentiality agreements
  - Prepare information memo
  - Bidders engage in targeted review of diligence documents for “show-stoppers” and major value items

- A horizontal timeline arrow starts at a vertical tick mark labeled "Target Packaged for Sale". A second vertical tick mark is further to the right, labeled "Business Due Diligence". A third vertical tick mark is further to the right. A yellow starburst shape is positioned between the second and third tick marks, containing the text "Preliminary Bids".
  - Bidders submit bid letter/indication of interest
  - Formulate positions on key contract issues (e.g., indemnification, financing)

# Stages of an Auction (2 of 3)

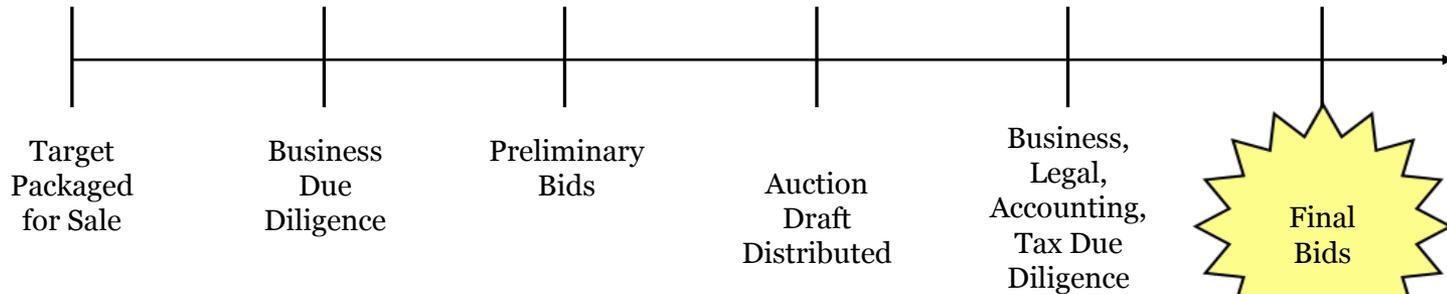


- Invite bidders to discuss issues raised by auction draft
- Bidders seek clues as to competitive dynamics

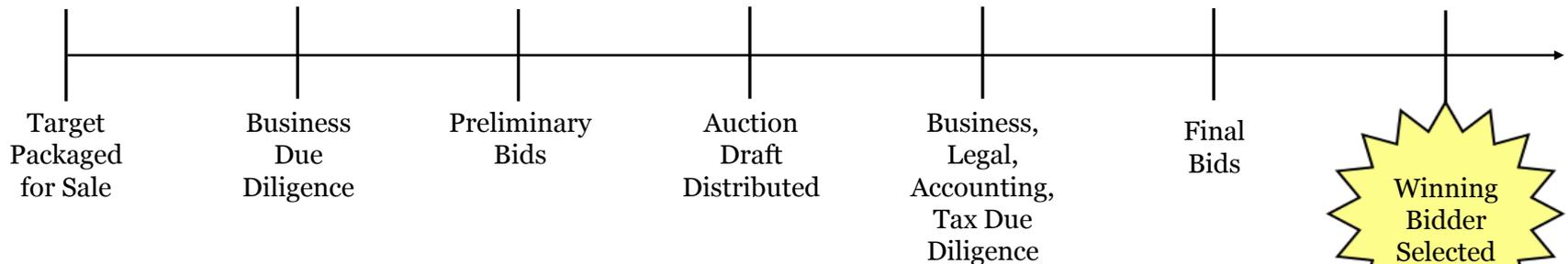


- Bidders engage in more thorough due diligence – seek to identify value items, key elements of legal diligence
- Bidders receive final due diligence reports

# Stages of an Auction (3 of 3)



- Final bid letters submitted
- Response to auction draft
- Additional legal documentation



- Execute acquisition agreement
- File HSR, obtain regulatory and third-party approvals, obtain financing

# Considerations: Advantages

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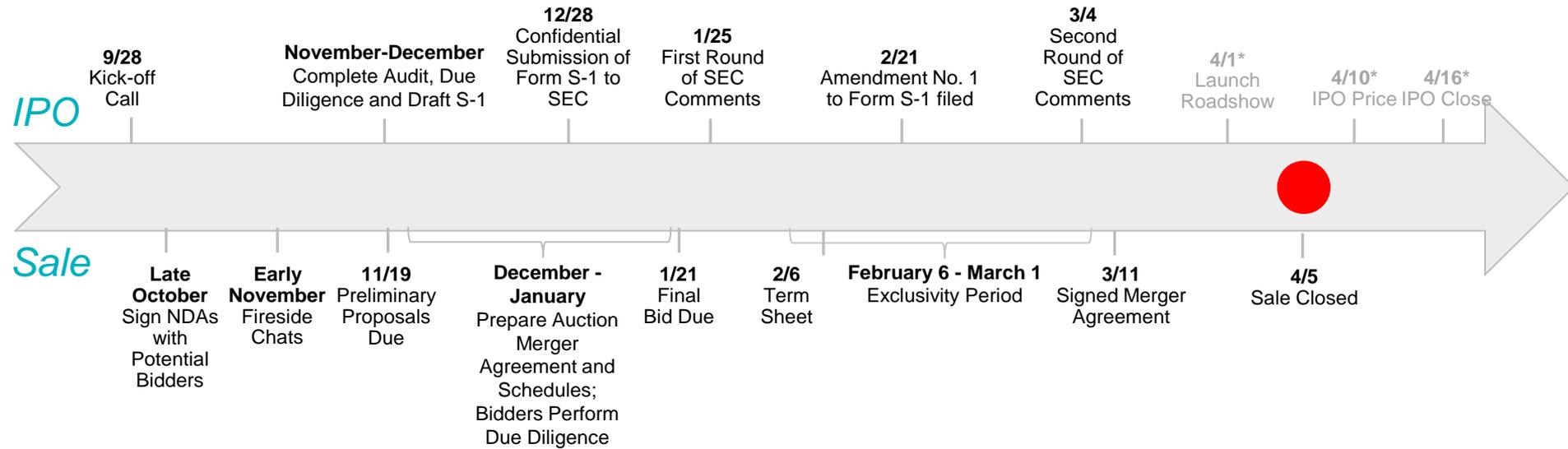
- Optionality - Maximizes optionality throughout the process enabling the seller to determine which exit transaction will yield the highest risk-adjusted return
  - Optionality can become useful if the capital markets become volatile when ready to launch the IPO
- Negotiation Leverage - IPO alternative can lead to better deal terms in sale process (the more credible the IPO alternative appears to a buyer, the greater the benefit it serves with respect to negotiations with the buyer)
  - Provides competitive pressure on a buyer in the absence of a hotly contested auction
  - Supports seller's position for a “public style” no recourse deal

# Considerations: Potential Disadvantages

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- Management Time and Attention - Each of the IPO and auction processes will require significant attention from key company personnel
- Cost - Significant additional cost in running a dual track process. However, certain efficiencies may be realized by running the two processes in parallel:
  - Shared diligence effort
  - Draft S-1 provides “road map” for sell-side marketing materials
  - SEC compliant financials needed for S-1 and most private equity financing plans
- Timing – Coordinating the timelines for the IPO and auction processes may lead to timing delays relative to a single track process
- Potential Conflicts
  - Management might receive materially different payouts in connection with an IPO v. a sale
  - A financial advisor involved in the auction and IPO processes is likely to receive different compensation depending on the form of exit

# Dual Track Timeline Case Study



# Stockholder arrangements

# Lock-ups

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- Lock-ups typically required from:
  - Directors
  - Officers
  - Existing shareholders
  - Optionholders
- Typical duration for IPO is 180 days

# Complying with Existing Registration Rights Agreements and Shareholder Agreements

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- Ensure compliance with:
  - Existing registration rights agreement or shareholder's agreement that provides for registration rights in connection with IPO
  - Existing shareholder's or other agreement that provide for pre-emptive or other existing security-holder rights.

# Amending Registration Rights Agreement and Shareholders Agreement

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Consider amendments to the existing registration rights agreement and shareholders agreement in connection with the IPO

- Registration rights agreements and shareholders agreements negotiated in a private company context are frequently not appropriate for a public company
- Registration rights agreement may need to be amended to ensure that its terms are consistent with the Sponsor's plan for exiting the investment
- Shareholders agreement may need to be amended to provide for phase-out of the Sponsor's corporate governance rights as the Sponsor exits the investment

# Shareholders Agreements

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- Director nomination/designation rights
  - Voting agreements between multiple shareholders
    - » **Group status for purposes of**
      - Securities laws
      - Controlled company rules
- Coordination committee to govern post-IPO liquidity events
- Board observer rights
- CEO or similar appointment rights

# SEC and SOX financial reporting and disclosures

# Post-IPO Periodic Reporting Requirements

	Form Type	Key Disclosures
Annual	10-K	<ul style="list-style-type: none"> <li>– Audited financials</li> <li>– MD&amp;A</li> <li>– Risk Factors</li> <li>– CD&amp;A (if not in proxy)</li> </ul>
Quarterly	10-Q	<ul style="list-style-type: none"> <li>– Quarterly financials</li> <li>– MD&amp;A</li> <li>– Risk Factor update</li> </ul>
Current	8-K	<ul style="list-style-type: none"> <li>– Required to be filed 4 business days after certain specified events</li> </ul>
Proxy Statement	DEF 14A	<ul style="list-style-type: none"> <li>– Proposals to be voted on by stockholders</li> <li>– Director elections</li> <li>– Director, officer &amp; corporate governance disclosure</li> <li>– CD&amp;A (if not in the 10-K)</li> <li>– Auditor approval</li> </ul>
Section 13	Schedules 13D and 13G	<ul style="list-style-type: none"> <li>– Filing required for 5% holders</li> </ul>
Section 16	Forms 3, 4 and 5	<ul style="list-style-type: none"> <li>– Filing required for: 10% holders, directors, and officers</li> </ul>

# Statutory Deadlines for Periodic Reporting

Form	Deadline	Change Post-IPO
10-K (Annual Report)	Within 90 days of the end of the fiscal year	Once an Accelerated Filer* 75 days (60 days if Large Accelerated Filer**)
10-Q (Quarterly Reports)	Within 45 days of quarter end	Once an Accelerated Filer* or Large Accelerated Filer** 40 days
8-K (Event Reports)	Required to be filed within 4 business days of the occurrence of specified events (or earlier if for Regulation FD purposes)	No change

\* Accelerated Filer: Defined as a company with \$75 million of worldwide market value of equity held by non-affiliates that has filed at least one annual report and has been subject to SEC reporting requirements for at least 12 months.

\*\* Large Accelerated Filer: An Accelerated Filer with worldwide public float in excess of \$700 million (also considered a WKSI).

# Sarbanes-Oxley and Other Requirements

Obligation/Rule	Post IPO
SOX Section 302 and 906 Certifications	✓
Regulation G—Reconciliation of Non-GAAP Financial Measures	✓
Off-Balance Sheet Transactions Disclosure	✓
Audit Committee Financial Expert	✓
Controls and Procedures	✓
Management Assessment of Internal Controls	✓ (subject to phase-in)
Sarbanes-Oxley Auditor Internal Control Audit	✓ (subject to phase-in)
Regulation FD	✓
Auditor Independence Rules	✓
Pre-Approval of Audit/Non-Audit Services	✓
Disclosure of Auditor Fees	✓
Independent Audit Committee	✓
Auditor's Report to the Audit Committee	✓

# Sarbanes-Oxley and Other Requirements

Obligation/Rule	Post IPO
Corporate Governance Guidelines	✓
Majority of Independent Directors	✓ (subject to phase-ins and controlled company exception)
Fully Independent Nominating Committee	✓ (subject to phase-ins and controlled company exception)
Fully Independent Compensation Committee	✓ (subject to phase-ins and controlled company exception and IRC 162(m)/Section 16 considerations)
Outside Directors Meet Regularly in Executive Session	✓
Code of Ethics	✓
Prohibition on Loans to D&O's	✓
Employee Benefit Plan Blackout Periods Apply to Directors and Officers	✓
Shareholders Vote on Equity Compensation Plans	✓
Reporting by Lawyers (Part 205)	✓

# Internal Control over Financial Reporting

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- Pursuant to Section 404 of the Sarbanes-Oxley Act as implemented by the SEC's Rules 13a-15 and 15d-15, management is required to perform an assessment of the Company's internal control over financial reporting, as of the end of its fiscal year
- Beginning with the second annual report, the Form 10-K will be required to include:
  - A report of management on the company's internal control over financial reporting; and
  - An attestation report on the company's internal control over financial reporting from the audit accounting firm that prepares the audit report
- The Form 10-K for the first annual report that is filed must state, unless the report is included:

“This annual report does not include a report of management's assessment regarding internal control over financial reporting or an attestation report of the company's registered public accounting firm due to a transition period established by rules of the Securities and Exchange Commission for newly public companies”

# Certification Requirements

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- Each quarterly report on Form 10-Q and annual report on Form 10-K requires the CEO and CFO to each certify to the following:
  - Section 302 Certification
    - » Accuracy of the report – no material misstatements or omissions
    - » Controls and procedures – the officer has:
      - designed the disclosure controls and procedures to ensure that all material information is made known to the officer and the internal control over financial reporting to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements in conformity with GAAP,
      - described the effectiveness of the disclosure controls and procedures based on such evaluation in the Form 10-Q or 10-K and whether there were any changes in the internal control over financial reporting during such period that have materially affected, or are reasonably likely to materially affect, the internal control over financial reporting, and
      - disclosed to the company’s auditors and Audit Committee any significant deficiencies or material weaknesses in the design or operation of internal control over financial reporting.
  - Section 906 Certification
    - » The report fully complies with the requirements of the Exchange Act
    - » Information contained in the report fairly presents, in all material respects, the company’s financial condition and results of operations

# Other Disclosure Requirements

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- Related Party Transactions
  - In annual reports, the company will be required to provide disclosures on any transactions with related parties in excess of \$120,000
  - Related parties include any directors, executive officers and 5% stockholders
- Conflict Minerals
  - The company will have to provide disclosures on conflict minerals that are necessary to the functionality or production of a product manufactured by the company
  - If the company uses conflict minerals in any product, there will be an extended diligence process, filing of disclosure on Form SD and possibly a conflict minerals report
- Iran Disclosures
  - The company will have to disclose certain activities in Iran, particularly investments or transactions related to the petroleum, petrochemical or marine transport sectors

# Cheap Stock

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- The SEC has challenged registrants who have issued stock, options or warrants to employees at a price significantly below the public offering price, shortly before going public, when compensation was not recorded on the basis of the public offering price
- The SEC may also request supporting data and documentation to support its determination of the fair market value for each award
  - Third party equity transactions for cash within a reasonable period of time of the grant to the employee
  - Appraisals by reputable valuation experts independent of the IPO that were prepared at or near the grant date
  - Changes in the company's business that would indicate there has been a change in the value of the business
  - The length of time between the grant to the employee(s) and the date of the IPO

# Pro Formas

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- Limited to most recent fiscal year and subsequent interim period
- Pro-forma income statement adjustments
  - Pro-forma income statement adjustments should include material charges, credits and related tax effects that are:
    - » Directly attributable to the transaction
    - » Factually supportable
    - » Expected to have a continuing impact
- Common adjustments include:
  - Impact of recent business acquisitions
  - New debt issuances and refinancings
  - Redeemable preferred stock or convertibles
  - Significant dividend payment to shareholders
- Disclose detailed notes describing pro-forma adjustments
- Not audited

# Financials of Acquired Companies

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- Based on the significance of an acquisition (or probable acquisition), a buyer may be required to file financial statements of the acquired business
- Significance based on the following tests:
  - Investment
  - Total assets
  - Pre-tax income from continuing operations
- The greatest of the three tests above determines the level of significance
  - If the business is significant at the 20%, 40%, or 50% level, then one, two, or three years of financial statements, respectively, are required. Interims are also required.
  - If the business is less than 20% significance in all three tests, financial statements are not required.

# Segment Analysis

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- Focuses on financial information that a public entity's decision makers use to make operating decisions and assessing performance
- Segment reporting has been a hot topic for the SEC in recent periods, with a specific focus on operating segment determination. Common SEC comments include:
  - General requests for more information about management's internal reporting structure
  - Request for a copy of the CODM package for SEC staff review
  - Supporting the measures used for segment profit/loss and assets, especially if the profit/loss measure is non-GAAP.
  - Comparing MD&A, press releases, and other public information to assess whether management's breakdown of the business is consistent with its segment reporting

# Predecessor/Successor Issues

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- Presentation of Predecessor and Successor periods is required when a transaction has occurred that would create a comparability issue between periods since those presented are under a different basis of accounting
- Required not only within the core financial statements but also in all required disclosures
- Need to consider impact in drafting the MD&A
  - Presentation of a non-GAAP combination of the predecessor and successor periods

# Auditor Independence

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- Financial statements filed with the SEC, including those in the registration statement, must be audited by an independent auditor
- To qualify as independent, the outside auditor may not provide certain non-audit services during the audit engagement period to the audit client, including: bookkeeping and services related to accounting records and financial statements, design and implementation of financial systems, appraisal or valuation services and fairness opinions, actuarial services, internal audit outsourcing services, and human resources, legal or expert services functions
- The assessment of independence is of services provided during the entire professional engagement period to an “audit client” which encompasses not only the entity where financial statements and information are being audited, but affiliates of that entity
- The Company’s auditors should confirm their independence analysis with respect to the Company at the earliest possible time to avoid delays in the registration process

# Corporate governance and control issues

# Independent Directors and Controlled Companies

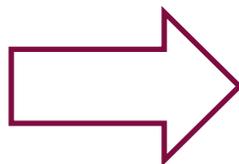
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- Subject to phase-in requirements, NYSE/NASDAQ listed companies generally must have:
  - A majority of independent directors
  - A fully independent:
    - » Audit committee
    - » Compensation committee
    - » Nomination/Corporate Governance committee
- “Controlled companies” (companies of which more than 50% of the voting power is held by an individual, a group or another company) are not required to comply with these independence requirements (other than the audit committee)
- Foreign Private Issuers or “FPIs” have substantially greater flexibility

# Board and Board Committee Composition (1 of 2)

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- Board and board committee composition requires advance planning
- Post-IPO board and committee members must be identified in prospectus
- Directors that are identified in prospectus as joining board at IPO or later have disclosure liability for IPO



Shareholders, management and directors should discuss these issues and begin director searches early in IPO process

# Board and Board Committee Composition (2 of 2)

IPO Phase-in	Board of Directors	Audit Committee	Nominating/Governance Committee (NYSE only) & Compensation Committee
<b>At IPO</b>	1 independent	1 independent (of, for NASDAQ only, at least 3); 1 “audit committee financial expert”	1 independent
<b>Within 90 days</b>	2 independents	>50% (of, for NYSE only, at least 2, and for NASDAQ only, at least 3) independent; 1 “audit committee financial expert”	>50% independent (of typically three)
<b>Within 1 year</b>	>50% independent	100% (of at least 3) independent; 1 “audit committee financial expert”	100% independent (of typically three)
<b>Controlled company exemption</b>	No majority independent board requirement	No exemption (subject to phase-in)	No independence requirements (but consider Section 16 and IRC 162 (m) benefits)

# Board and Board Committee Composition – Audit Committee

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- Required by SEC, NYSE and NASDAQ rules
  - No exemption from independence requirements for “controlled companies”
- Extensive responsibilities, including direct oversight of auditor
- At least three independent directors, subject to applicable phase-ins, that meet:
  - Exchange independence requirements
  - SEC’s enhanced independence requirements: no compensation other than as a director; no affiliated persons
- All members must be able to read financial statements
- One member must have prior financial management experience
- Disclose whether committee includes an “audit committee financial expert”

# Board and Board Committee Composition – Compensation Committee

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- Required by NYSE and NASDAQ rules
- Generally three independent directors
  - NYSE rules require all members to be independent; NASDAQ rules permit one non-independent director “under exceptional and limited circumstances”
  - Additional factors for determining independence of compensation committee members
- Key role in setting executive compensation
- “Controlled companies” excluded from independence requirements but need a committee of at least two that meets “outside director” and “non-employee director” standards in order to take advantage of Exchange Act Section 16 and IRC Section 162(m) benefits

# Board and Committee Composition – Nominating/Governance Committee

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- Required by NYSE rules; advisable for NASDAQ listed companies
  - If not established, SEC requires disclosure of reasons for not having a nominating committee
  - If not established, NASDAQ requires independent director oversight of nominations
- Generally three independent directors
- NASDAQ rules permit one non-independent director “under exceptional and limited circumstances”
- “Controlled companies” excluded from independence requirements
- Primary role is to recommend or approve directors and committee members
  - NYSE requires that the nominating committee also develop and recommend general corporate governance guidelines

# Defensive Profile

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Consider amendments to charter and bylaws to implement/address defensive measures

- Adequate reserve of unissued common stock
- Blank-check preferred stock
- Supermajority voting provisions
- Poison pill
- Opting out/not opting out of DGCL Section 203 or equivalent
- Choice of forum provisions
- High vote/low vote stock
- Staggered board
- Permitting only board to fill vacancies on the board
- Restricting shareholder ability to call special meetings
- Restricting shareholder action by written consent
- Advance notice bylaw provisions
- Fee shifting bylaw provisions

# Key Policies and Procedures

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- Disclosure controls and procedures
- Internal control over financial reporting
- Audit Committee Charter
- Compensation Committee Charter
- Corporate / Nominating Committee Charter
- Ethics Policy
- Insider Trading Policy
- Regulation FD Policy
- Corporate governance guidelines (NYSE)
- Disclosure committee
- Whistleblower policy
- Audit committee pre-approval policy
- Related party transactions
  - Policy
  - Disclosures
- Prohibition on loans to executive officers and directors

# Management fee agreements

# Sponsor Management/Consulting Agreements

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- Terminate or keep in place
  - Continuing fees may impair independence of Sponsor directors
  - How is termination fee calculated?
    - » Formula in agreement
    - » PV of remaining payments
    - » Other agreed formula
    - » Marketing considerations
    - » Disclosure considerations
  - Is there a deal fee?
    - » Potential regulatory implications for Sponsor
    - » Disclosure considerations
    - » Marketing considerations