

Later-stage companies need to be ready for many eventualities, including the possibility of an IPO or an M&A exit. The IPO process takes time and preparation. We have frequently seen management teams asked by their board of directors to prepare rapidly for an IPO with little advance warning, which can lead to unnecessary stress and strain on a company, and missteps in execution. Many of these planning steps are also appropriate for a later-stage private company, particularly one that may ultimately be acquired. It is our view that most of the following tips would be equally helpful to a fast-growing private company with \$50 million or more in revenue as to a company already planning for an IPO.

ADVISORS

Choose experienced advisors early, including attorneys and auditors. Significant experience in securities matters and public company financial reporting will be invaluable to company management, whether to support late-stage rounds with secondary liquidity to founders, or during the IPO process and afterward. On-the-job training for advisors is very costly—you need experienced advisors who have done it before.

INVESTMENT BANKERS

Identify and begin meeting investment bankers and analysts in your market space. Consider appropriate number and mix of managing underwriting firms, including lead book-runner and other book-runners, and clearly defining roles. Even if you're not planning to go public soon, cultivating relationships with top bankers early can be helpful – bankers are a great source of market intelligence, and can help you understand how your company would be perceived in the public markets or in identifying late stage investors or potential buyers.

BUILD OUT MANAGEMENT TEAM

Hire CFO, controller and financial team, if not already in place. It takes time for them to get up to speed, and they need to work with auditors to develop financial plan prior to beginning the IPO process. Not giving the finance team sufficient resources = delayed IPO or M&A exit.

AUDITED FINANCIAL STATEMENTS

Delays in audited financials are the biggest cause of preventable delay in the IPO process. Make sure your financial statements are close to being finalized before commencing the process, audited by a leading audit firm with significant public company experience. It always takes longer to generate public company

audited financials than people expect. You will only need two full years of audited financial statements in your SEC filings if you qualify as an “emerging growth company.” If you have switched auditors during that period, consult with both firms, as your current firm may need to re-audit prior years in order to be able to give the underwriters “comfort” on all numbers in the S-1 registration statement. If you have undertaken acquisitions or other significant transactions, understand what additional financial statements may be required in your filing, including pro forma financial statements and separate audited financial statements related to the acquired businesses.

INTERNAL FINANCIAL AND DISCLOSURE CONTROLS

Discuss with your advisors any “material weaknesses” or “significant deficiencies” in your internal financial controls and understand their impact on your SEC review. Many private companies end up with material weaknesses because of inadequate financial staff or insufficient accounting systems. Discuss up-front with underwriters and counsel during the process so that they have time to complete diligence. Be prepared to show your corrective actions. Also consider what key metrics (e.g. user numbers, non-GAAP measures, etc.) may be disclosed in the IPO registration statement and road show, and build internal controls to ensure the accuracy and consistency of these metrics over time.

QUARTERLY FINANCIAL STATEMENTS

Most private companies don't do a SAS 100 review of quarterly financials. Expect to include eight (or more) quarters of reviewed financials in your IPO prospectus if your company is generating revenue, and it is more efficient to do so during the audit. In addition, you'll need to prepare and present quarterly financials as the process moves forward.

ACCOUNTING ISSUES

Work with your audit team to identify any sensitive issues in your significant accounting policies, and consult with auditor's national office early and often. The SEC's hot button issues are constantly evolving, and resolving revenue accounting and other issues can be time-consuming and could disrupt or halt the IPO process.

AUDITOR INDEPENDENCE

Discuss with your auditors their independence under PCAOB and SEC rules. Understand what other relationships there may be between your auditors and your officers and directors. Be careful not to hire employees of your auditor until you understand the independence implications.

BOARD AND COMMITTEES

Understand the requirements for independent directors and the transition rules that will apply after your IPO. It takes time to identify and recruit new directors that will integrate well with your existing board and management, and finding individuals to serve as audit committee expert and/or as audit committee chair can be particularly challenging. Having at least one board member with significant public company audit committee experience in place prior to an IPO can be a helpful resource for a CFO during the IPO process.

CORPORATE GOVERNANCE

Begin to act like a public company. Focus on corporate governance appropriate for a public company and develop a culture of compliance. Work with counsel to adopt state-of-the-art corporate policies and codes of conduct.

SOX COMPLIANCE

Understand the transition period during which you will need to become compliant with the internal controls testing required by Section 404 of the Sarbanes-Oxley Act; if you qualify as an emerging growth company, you may have a few years before your auditors are required to formally test your internal controls under 404(b), but you will need adequate disclosures controls and procedures in place from the first days as a public company. Consider engaging an accounting consultancy firm (separate from your regular auditors) now to assist with compliance.

EXECUTIVE COMPENSATION

Consult with benefits counsel and compensation consultant to review compensation practices, including equity and non-equity incentives. Begin to discuss compensation structure appropriate for a public company with board. Education of board may be required about typical compensation structures.

OPTION GRANTS AND CHEAP STOCK

Start getting more frequent 409A valuations (quarterly or more often) as IPO approaches and work with auditors to ensure that valuations are acceptable for accounting purposes. This issue has become more critical as the IRS has announced it will be targeting companies with cheap stock charges disclosed in their SEC filings for potential Section 409A enforcement.

PUBLIC COMMUNICATIONS

As you get closer to an IPO, consult with counsel regarding public communications guidelines. Don't discuss the fact that you may seek to go public, but you may want to begin a more formal process of regular business and factual communications about your company's achievements which will enable you to continue to do so throughout the IPO process. Set up appropriate review processes for press releases and other communications in consultation with counsel.

CORPORATE WEBSITE

Review and update your website to avoid creating "gun jumping" and other issues and maintain consistency of content with draft registration statement as the process goes along.

STATE OF INCORPORATION

If you are not already a Delaware corporation, consider whether you should be, as the vast majority of public companies are domiciled in Delaware. Discuss with underwriters and counsel to understand impact on IPO marketing and stockholder rights post-IPO.

CORPORATE DOCUMENTS

Analyze charter and by-laws to make sure you are clear on who has approval rights. Review automatic conversion provisions in charter – would your IPO be a qualifying IPO that automatically converts preferred stock to common stock, or based on anticipated valuation range, could there be a need to negotiate with preferred? Who has registration rights? Do you have in place market "stand-off" agreements with all stockholders and optionholders agreeing to 180-day "lock up" in an IPO? Make sure that your capitalization records accurately reflect all stock, option and warrant issuances, transfers and cancellations. Outside counsel should conduct a full capitalization audit, and should analyze your historic option grants to ensure they have complied with Rule 701 of the Securities Act.

DUE DILIGENCE

Begin to assemble data room with all material agreements and corporate governance documents, and review minute books and material contracts, including any loan agreements and stockholders' rights agreement, for issues in the event of an IPO. Consider the need for an IP assessment. The underwriters and their counsel will conduct extensive due diligence on your company, including a thorough review of these documents and matters.

WHICH STOCK EXCHANGE

Understand the benefits of both the NYSE and Nasdaq stock exchanges. Analyze the listing standards of your preferred market to ensure you will qualify to list there. Prepare to negotiate – NYSE and Nasdaq both want new listings, and will negotiate on marketing and other perks. You can reserve a stock ticker symbol up to two years in advance of an IPO which can be used on either exchange.

LEGAL DISPUTES

Review pending legal disputes and assess whether any of these disputes could impact the IPO. Also consider the impact that filing for an IPO may have on your negotiating position in these disputes – it may be more efficient and cost-effective to settle prior to an IPO filing. If there are any parties that have threatened to sue, be prepared – many companies get sued promptly after filing to go public.

MATERIAL CONTRACTS AND CONFIDENTIAL TREATMENT

SEC rules will require you to publicly file material agreements. Discuss with counsel which agreements may be required to be filed and review these agreements for confidentiality provisions that may need to be waived by the other party. The SEC has a process allowing companies to redact portions of agreements that would be competitively harmful if disclosed.

DIRECTOR & OFFICER LIABILITY INSURANCE

The exposure to liability is significantly greater for directors and officers of public companies than it is for private companies. Choose an experienced D&O insurance broker and coordinate with the broker early in the process to ensure that your officers and directors are adequately protected. Consult with experienced insurance coverage counsel before signing up a new policy – there are many important revisions that can affect future coverage.

PERSONAL FINANCIAL PLANNING FOR EXECUTIVES

Senior management should consult with personal financial advisors regarding wealth maximization and tax minimization alternatives. Bear in mind that any loans from the company to executives or directors must be repaid before the company's first public filing with the SEC.

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