

COHEN & GRESSER

Public or Private?

A Guide for Growing Companies

Public & Private Markets

“Making IPOs great again” is a stated goal of Paul S. Atkins, U.S. Securities and Exchange Commission (SEC) Chairman. To redress a decline in the number of companies listed on the U.S. exchanges over the past three decades, Chairman Atkins wants to streamline SEC reporting requirements and, to the extent feasible, “de-politicize” public shareholder meetings and reduce the threat of shareholder litigation. By reducing the burdens placed on public companies, Chairman Atkins and many others hope that more private companies will be motivated to raise money in public markets.

The truth is that it is much easier to raise capital in private markets than it is to go public, and it is relatively easy to stay private through many rounds of financing. As a result, private markets increasingly dwarf public markets and provide the overwhelming amount of capital markets investment. There are nonetheless many advantages to going public through a traditional IPO or through a business combination with a special purpose acquisition company (SPAC) in a so-called “de-SPAC” transaction. Public markets carry prestige, and (all other things being equal) securities are more valuable when they are liquid.

Choosing the right approach to public or private markets is critical, involving a host of general and company-specific legal issues, as well as questions about valuation and market timing – topics we address in this and subsequent articles.





Choosing the Right Approach

Traditional IPOs

The pathway to an initial public offering is long and requires significant preparation. Many companies find it useful to spend a full year getting ready for an IPO preparing the required financial statements; implementing more regular governance practices; and developing key relationships with the attorneys, auditors, investment bankers, independent directors and others that they will need to go public. Some companies have a leg up in this process as a result of measures taken in connection with private funding rounds. But all companies will benefit from engaging with their attorneys to help get them ready to go public.

Once the company has selected an underwriter, it can expect at least a couple of months of intense activity, accompanied by some uncertainty, preparing a registration statement and listing application and engaging in related due diligence activities. Once the company clears SEC comments, the registration statement can go effective and the offering can be priced.

The stock of a successful public company becomes a valuable currency that can be used in acquisitions and in executive compensation. Follow-on rounds of equity offerings can provide financing on attractive terms. Existing investors can achieve liquidity for their stock, either through a secondary registration or individual sales pursuant to Rule 144 under the Securities Act of 1933.

In general, companies must reach some level of maturity in order to be able to access public markets successfully, although in some industries, such as biotech, companies can enter public markets quite early. Also as a general rule, smaller companies have more difficulty attracting attention in public markets and trading in their stock is often less liquid. Although there are some accommodations in

reporting requirements for smaller companies, they still are subject to significant SEC regulatory burdens.

De-SPAC Transactions

A de-SPAC transaction is another way for a company to go public. From the target's perspective, it may seem easier than a traditional IPO, because the SPAC has done some of the work of going public. The timeline for the company may be shorter for a de-SPAC transaction than an IPO, and the transaction may be less costly for the company. The business combination agreement sets many of the terms of the transaction and provides some level of certainty that is absent in an IPO.

The principal drawback for a de-SPAC transaction is that the SPAC's investors generally have the right to redeem their shares in connection with the transaction, so that neither the target nor the SPAC can be sure of the amount of cash that will remain in the SPAC's escrow account after SPAC investors have exercised their redemption rights. The de-SPAC transaction is typically financed by additional private equity investment immediately prior to the closing of the transaction, with the additional investors having the right to sell their shares pursuant to a secondary registration statement following the closing of the de-SPAC transaction. The target usually assists the SPAC in presentations to the SPAC's shareholders and potential investors in the de-SPAC transaction.

Given the large number of SPACs that went public in 2025 and early 2026, a large number of de-SPAC transactions can be expected over the next two years.

Private Placements

Private equity and venture capital transactions are both generally structured as private placements under Rule 506(b) or (c) under the Securities Act of 1933. The principal issues faced by the company in these transactions do not flow from the regulatory requirements, but from the negotiation of investor rights under contracts with the lead investors. These negotiations can be critical to ensuring that founders can continue to hold a significant equity position in the company but that the company also has sufficient funds to grow the business. Investors, for their part, want assurance that, within a timeframe of perhaps seven years, they will have some chance at liquidity, through an IPO or sale of the business, although the largest private companies do not appear to be constrained by such issues. Smaller investors and employees holding stock may achieve liquidity by making private sales to larger investors or occasionally through a tender offer conducted by the company.

The time between the term sheet and the closing can be quite short. Companies should not, however, rush to a term sheet, as these can vary in ways that affect the company and impact the rights of founders and existing investors.



Conclusion

Going public remains a safer bet for mature companies that can afford the additional costs of public reporting and withstand the impact of public scrutiny. For these companies, the liquidity and financing opportunities traditionally associated with public company status will outweigh many disadvantages. By contrast, the stresses put on early-stage companies by public reporting obligations and securities exchange listing requirements can be major hurdles and sometimes counterproductive to executing the company's business plan. Being delisted from a national securities exchange can be a difficult event for any company to come back from, and failing in SEC reporting obligations and having to report those events can be crushing.

As a result, the decision to go public should not be undertaken lightly. Choosing the private option now does not preclude a subsequent public offering. Sometimes companies need to pay attention to public markets and jump in when there is an attractive opportunity. But at other times it may be beneficial to consolidate growth while taking in private investment as needed.

Even if the regulatory environment for public companies becomes more hospitable, many companies will remain private as long as private markets provide funding. Similarly, regardless of the regulatory environment, some companies will opt for the gold standard of the traditional IPO.



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Bonnie leads the corporate securities practice at Cohen & Gresser and has over 30 years of experience as a corporate lawyer advising publicly and privately held companies and funds. Her practice focuses on securities law, capital markets, mergers and acquisitions, and executive compensation. Bonnie represents U.S. and internationally based companies, financial intermediaries, and investors in public and private offerings, including cross-border offerings and SPACs. She also regularly advises public companies and their boards of directors on public disclosure, SEC compliance matters, and corporate governance. She serves as counsel to companies and investment funds in early and later stage venture capital financing transactions and has significant experience in fund formation and investment. She regularly advises companies and executives on equity compensation issues.



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Owen is a partner in Cohen & Gresser's New York office. He advises companies, investors, and financial institutions on corporate, commercial, and regulatory matters across a range of technology-driven and highly regulated industries. His practice encompasses representation of both emerging and established businesses in the biotechnology and life sciences; communications and media; information technology, blockchain and digital assets; satellites and space; and venture capital and private equity sectors. Owen has extensive experience guiding clients through complex domestic and cross-border transactions, including mergers and acquisitions, private equity and venture capital investments, debt offerings of securitized bonds and debentures, including offerings qualified under the Trust Indenture Act, buyouts, divestitures, spin-offs, roll-ups, project and structured finance, joint ventures, and strategic collaborations. He also regularly advises on securities offerings, including private placements and SPAC transactions, as well as financial and strategic investments.

