

PUBLIC OR PRIVATE: WHEN SHOULD A COMPANY GO PUBLIC AND WHEN STAY PRIVATE?

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I. Executive Summary

According to Bloomberg, in 2000, during the “dot-com” bubble, the average time between a company’s formation and going public in an Initial Public Offering (“IPO”) was three years. Now, the average time is nine years. Public reporting company status is traditionally prestigious, increases access to capital, improves liquidity and enables more favorable financing terms and opportunities. Yet public reporting company status exposes companies to the glare of public scrutiny and burdensome compliance obligations, often before they are ready to shoulder those responsibilities and sometimes without raising much capital or increasing liquidity and financing opportunities appreciably. In the meantime, the private equity markets increasingly dwarf the public markets and provide the overwhelming amount of capital markets investment. When should companies go public, and when should they stay private?

II. Public vs. Private: The Stats

The SEC has compiled valuable statistics on registered and exempt-from-registration securities offerings for FY 2024, ending June 30, 2024, as reported in the FY 2024 Annual Report of the SEC Office of the Advocate for Small Business Capital Formation. According to the Annual Report (available at <https://www.sec.gov/files/2024-oasb-annual-report.pdf>), highlights include:

SEC Exempt-from-Registration and Registered Offerings Utilization Data Metric Highlights

Exempt from Registration Private Placements and Securities Offerings

- **Regulation D, Rule 506(b) (called “Private Placements” in the Report’s nomenclature)** was used to raise \$1.87 trillion, including \$1.7 trillion by pooled investment funds and another \$170 billion by non-fund businesses (this is the first time that the Small Business Capital Formation report has separately broken out capital raised by pooled investment funds and other types of business; see our "Forming Exempt Private Investment Funds" client advisory available [Here](#)). This was a huge drop from FY 2023’s \$2.7 trillion, which had been up from \$2.3 trillion in FY 2022. Use of Rule 506(b) was led by the pooled investment funds sector, followed by the tech, real estate and healthcare sectors. New pooled investment fund formation of all kinds (venture

capital, private equity, hedge, etc.) was increasingly dominated by family offices and high net worth individuals.

- **Regulation D, Rule 506(c) (General Solicitation Offerings)** was used to raise \$125 billion in capital by funds and \$12 billion by other types of businesses, a total of \$147 billion, a significant drop from FY 2023's \$169 billion, which had been up from \$148 billion in FY 2022, with a median offering amount of \$750,000.
- **Regulation A/A+ (mini-IPOs)**, a quasi-public offering not requiring Securities Act section 5 registration, was used to raise \$1.2 billion by non-fund businesses and essentially not used by funds, down from \$1.5 billion in FY 2023 and \$1.8 billion in FY 2022's \$1.8 billion. Use of Reg. A was led by the real estate sector, followed by the financial services/Fintech, manufacturing and tech sectors.
- **Regulation D, Rule 504** was used to raise \$246 million by non-fund businesses and essentially not used by funds, a moderate decline from FY 2003's \$258 million, which was a marked and significant decline from FY 2022's \$624 million (however, in FY 2021 \$313 million was raised, meaning that 2022 saw a 2x increase from 2021, which then decreased in 2023 by over 2x, raising the question of whether emergence from the Covid 19 pandemic contributed to the 2022 surge in Rule 504 usage).
- **Regulation CF (Crowdfunding)** was used to raise \$249 million by non-fund businesses and essentially not used by funds, down from FY 2023's \$352 million, little changed from FY 2022's \$368 million, with a median offering amount of \$106,000.
- **Other Exempt Offering Methods (Regulation S and Rule 144A)** were used to raise \$949 billion by non-fund businesses and \$99 billion by funds, a total of over \$1.0 trillion, down from FY 2023's \$1.3 trillion and sharply down from FY 2022's 2.0 trillion (but FY 2021 had been \$1.3 trillion, another indication that 2022 may have been a pandemic emergence-influenced surge).

Registered Securities Offerings

- **IPOs, including SPACs**, were used by non-fund businesses to raise \$28 billion and by funds to raise \$4 billion, a total of \$32 billion, up from FY 2023's \$17 billion, which had crashed from FY 2022's \$126 billion, which itself was less than half of FY 2021's \$317 billion, with a median offering amount of \$17 million.

- **Other Registered Offerings (Secondary and Debt Offerings)** were used to raise \$1.2 trillion by non-fund businesses and \$4 billion by funds.

Takeaways

First, exempt, non-registered placements and offerings continue to dominate the U.S. capital markets. Reg. D, Rule 506(b) alone was used to raise over 50 times the amount raised in IPOs, and the total of \$3.2 trillion raised in exempt offerings was over 250 times the amount raised in IPOs, including SPACs, as well as being the equivalent of nearly 10% of U.S. GDP. Put another way, IPOs, including SPACs, accounted for less than 1% of new capital formation, while exempt offerings accounted for over 99%. IPOs and SPACs get a lot of press, but the level of IPO/SPAC capital formation is dwarfed by that of Rule 506(b) and the exempt-from-registration capital markets generally. The U.S. IPO market, now a fraction of the size of the private capital markets in both deal volume and size, has become almost exclusively the territory of large, mature companies, which account for over two-thirds of the approximately 4,500 public listed company registrants.

Second, is the continued dominance of Reg. D, Rule 506(b) among exemptions. As discussed, the SEC has worked hard to amend other exemptions to make them more useful, available and less complicated and expensive. Reg. D, Rule 504, for example, which had an aggregate offering limit of \$1 million only a few years ago, was increased first to \$5 million and then to \$10 million. Crowdfunding has gone from \$1 million to \$5 million. Reg. A+ has been increased to a \$75 million aggregate offering limit and offers freely resalable shares. Nevertheless, Rule 506(b), which offers an unlimited aggregate offering limit, continues to dominate. The unlimited aggregate offering amount of Rule 506(b), easing of financial information required by Rule 502 to harmonize with that required by Reg. A, lower transaction costs compared to Reg. A, availability to both U.S. and foreign Issuers, limited general solicitation permitted by Rule 148 and increasing liberalization of resale availability for Reg. D securities can be assumed to be responsible for Rule 506(b)'s continuing and even increasing popularity, while several other exemptions, such as Reg. A and Rule 504 have languished and even declined.

III. Public or Private: Discussion

There are two main ways by which a private company goes “public”: first, in a public offering of a newly-issued specified number of a class of securities (debt or equity) pursuant to section 5 of the Securities Act of 1933 (the “Securities Act”) and SEC Reg. C, usually on an SEC Form S-1 registration

statement, including a prospectus with highly detailed and exacting financial and non-financial requirements; or second, by registering an entire class of securities (as opposed to a specified number of a class) pursuant to section 12(b) or 12(g) of the Securities Exchange Act of 1934 (the “Exchange Act”) on SEC Form 10. Companies can also go public through other means, such as spin-offs; reverse mergers, including the “business combination” phase of a SPAC; or through a “Form 10 IPO,” which combines a Reg. D private placement to raise capital, a Form 10 registration statement to register the class of shares sold in the private placement and a Form S-1 registration of the private placement shares for resale (it sounds cumbersome, and it is, but it allows capital to be raised before incurring most of the IPO’s costs). Through any of these methods, a company becomes a public reporting company, meaning it must file annual, quarterly and other reports pursuant to Exchange Act sections 12, 13 and 15(d).

But when and why *should* a company go public, and when and why should it remain private? First of all, under some circumstances, a company *has* to register as a public reporting company, whether it wants to or not. A company must register as a reporting company pursuant to Exchange Act section 12(g) if it crosses the thresholds of (i) more than \$10 million in total assets and (ii) a class of equity securities that is held of record by either 2,000 or more persons or 500 or more persons who are not Accredited Investors (for an explanation of Accredited Investor status, see our “Raising Capital” Section I). A company must also register pursuant to Exchange Act section 12(b) to list the securities on a U.S. national securities exchange such as NASDAQ. Let’s consider some of the public vs. private factors:

1. Costs and Timing of Going Public vs. Staying Private.

Securities Act IPO. A Form S-1 Registration Statement, usually used for an IPO or SPAC IPO, is an extremely detailed document that includes as its major component a prospectus referring back to SEC Reg. S-K for required qualitative information, such as Risk Factors, Use of Proceeds, Management Discussion & Analysis (“MD&A”) and Dilution; and Reg. S-X for required financial statement information. Many of the Form S-1 elements would be familiar to companies that have conducted private placements pursuant to Reg. D or Reg. A as scaled-up, more detailed and rigorous versions of the information to be furnished on SEC Form 1-A (Form 1-A, technically a Reg. A form, is now used for both Reg. A and Reg. D pursuant to SEC harmonization efforts over the last few years; see also “Raising Capital,” Sections I and III).

A traditional (i.e., non-SPAC) IPO typically costs approximately \$1 million in legal fees, approximately \$500,000 in accounting fees and approximately \$500,000+ in other fees, including securities exchange listing fees, transfer agent fees, FINRA (Financial Industry Regulatory Authority) fees and others, for a

total of between \$2 million and \$3 million in costs. In addition, underwriter fees by an investment bank average 7% of the offering amount raised, for a total of all costs of approximately \$10 million, or 10%, of the raise in a \$100 million IPO, slightly amortized in larger IPOs. A SPAC IPO typically costs one quarter to one third of those legal and accounting fee amounts, in large measure because a SPAC, as a newly-formed “blank check” company, has no financial or operating history to disclose in its registration statement (see “SPACs are Back: An IPO and Private Equity Alternative” (March 2025) in [Kurtin PLLC Raising Capital](#)).

The traditional IPO process typically takes at least 4 - 6 months, with wide variations for responding to SEC comments and amending the registration statement in response to those comments, the length of the roadshow to promote the IPO and other factors. A SPAC IPO might take two 2 – 3 months. Also, a traditional IPO is a company life-consuming event; while an IPO is proceeding, from kick-off to filing to the road show to going effective, it should be assumed that it will dominate the time of the CEO, CFO, General Counsel and many other company players, to say nothing of outside counsel, accountants and investment bankers. Other milestones in the company business plan will inevitably be deferred, and some business opportunities may be lost.

Exchange Act Registration. Registration pursuant to Exchange Act section 12(b) or (g) on Form 10 is considerably less onerous than Form S-1, but nevertheless requires disclosure of substantial qualitative and financial information required by Reg. S-K and Reg. S-X. Costs might run to over \$100,000, depending on the complexity of the financial and other information being adapted for the registration statement. Once registered, a company will then usually list its securities on an exchange like NASDAQ or NYSE, which have their own listing requirements. The process might take 3 - 4 months.

Raising Capital in the Private Markets. By contrast, a private placement under Reg. D, Rule 506 in the \$25 million - \$100 million range typically costs between \$50,000 - 75,000 in legal fees, with accounting and filing fees adding perhaps another \$30,000 - 50,000, for a total of approximately \$80,000 - \$100,000. All costs are reduced if the private placement is made only to Accredited Investors (see “Raising Capital,” Section I). An offering pursuant to Reg. A is typically somewhat more expensive because of more stringent requirements, perhaps \$75,000 - \$100,000 in legal fees, and \$50,000 in other expenses.

2. The Prestige Factor and Liquidity/Access to Capital.

This factor may have been a more significant driver of the decision to go public in the past than now. The fact that public reporting company status traditionally leads to greater prestige, liquidity and access to capital doesn't mean either that it will for a given company or that those benefits can't be obtained in the private markets. There are plenty of large, prestigious, well-capitalized private companies and funds with excellent access to any needed capital that have never gone public: Bloomberg, SpaceX, Fidelity Investments, Bechtel, Koch Industries, Bain & Co., Platinum Equity, Cargill and others.

3. The Market Maker Factor.

One of the reasons reverse mergers fell out of favor and gave way to SPACs (a reverse merger following an IPO and using the IPO proceeds for the acquisition) is that a reverse merger, in and of itself, does not raise money for the newly public company, meaning no broker-dealers are making a market for it and no analysts follow it, leading to a phenomenon sometimes called "being lost on the NASDAQ," in which the company's public float has little trading volume, no real opportunity for stock appreciation and there is little of the hoped-for liquidity. A successful SPAC IPO raises capital, intended to be used for the second-stage reverse merger or "business combination," sometimes called "De-SPACing." Moreover, SPACs often also conduct a simultaneous PIPE ("Private Investment in Public Equity") transaction, a private placement under Regulation D, Rule 506, which raises additional capital. In any event, after their 2020 – 2021 boom, the SPAC market has diminished to a fraction of its former self.

4. The Public Scrutiny Factor.

This is one of the most difficult parts of public reporting company life, especially for companies that are not mature and still developing their business plan, relatively thinly capitalized, and relatively thinly staffed. When a public reporting company issues required annual, quarterly and current reports on SEC Forms 10-K, 10-Q and 8-K, everything significant that it does or that happens to it is immediately disclosed to the public; that is the literal price of access to the public capital markets. Litigation, loss of a material contract, key employee departures, volatility in the listed stock price itself are all under the microscope every day. Moreover, stakeholders may actually put pressure on company board and officers to maximize short-term, usually quarterly returns, often at the expense of long-term strategy. The fact of the matter is that not all companies are ready to handle and manage that scrutiny, and many that manage it do so at detrimental cost of executive attention to executing the company business plan and the best long-term interests of the company and its shareholders, rather than ensuring that no news causes a stock price drop.

IV. Summary

A summary of the yield from the foregoing for comparative public reporting company vs. private company advantages and disadvantages suggests that public reporting company status remains, as it has traditionally been, a safer bet for mature, proven companies with large shareholder floats that can assume that the liquidity and financing opportunities traditionally associated with public company status will actually materialize. The prestige factor traditionally associated with public company status may be attenuated and may always have been exaggerated, especially since the private equity markets developed; many large, successful and prestigious companies that are “household names” in their sectors are and have always been private companies. The stresses put on early-stage companies by public reporting obligations can be major hurdles and sometimes counterproductive to executing the company business plan. The responsibilities and tasks of a public company CEO and CFO are markedly different from those in a private company, and require more salesmanship and stewardship of shareholders, especially institutional shareholders, their advisors and market intermediaries like analysts and bankers than expertise in executing the company business plan. Being de-listed from a national exchange such as NASDAQ is a difficult event for any company to come back from, and starting to fail in SEC reporting obligations and having to report those events can be crushing.

Bottom line: with so much capital available in the private markets through exempt-from-registration financing methods, an early-stage company should need a real reason to go public. For larger, more mature companies that believe that the public markets offer greater access to capital and greater liquidity than the private markets can provide, or which have exhausted their opportunities in the private markets, and which can handle the greater transaction costs – especially in the context of a larger capital raise - and public scrutiny, an IPO may make more sense.

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