

Planning for Liquidity

Sales and IPOs of Businesses Located Outside the U.S.

Preparing for All Transactions (IPO or Sale)

1. Valuation and Alignment of Stakeholders

- What are the legal needs of stakeholders?
 - Qualified IPO trigger
 - Preference stack effects
 - Drag-along/consent hurdles
 - Debt/SAFE repayment or conversion events or requirements
- What do your stakeholders want?
 - Cash for immediate liquidity and certain return?
 - Opportunity for longer play and more potential return by accepting equity instead?
 - Is the consideration sufficiently liquid if not cash?

2. Financial Statements

- Are they reliable and audited by a reputable firm?
- Will a buyer need them? If so, how soon?
- Can you meet public company reporting and forecasting expectations?
- Are your internal controls ready?

3. Material Contracts and/or Key IP

- Any trigger on an IPO or change of control (e.g., payment rights)?
- Any issue with disclosing them to another party/the public?
- Will any go away with a sale or IPO (e.g., termination provisions)?

4. Regulatory

- Antitrust
- National security
- Other industry regulators (e.g., FCA, SEC, FINRA, PCI, HIPAA)

5. Board Dynamics

- Is the board ready?
- Have you considered conflicts?

6. Corporate Structure

- Jurisdiction of incorporation issues
 - Familiar to public investors or strategic buyers?
 - Is the law sufficiently flexible and reliable?
- Consider tax implications
- Consider stamp duty requirements

7. Common Diligence Skeletons in the Closet

- Are prior equity and option awards properly issued and documented?
- Did you comply with Rule 701/past securities laws on issuances?
 - Basic limits of greater than \$1 million annually
 - Disclosure provided for more than \$10 million annually
 - Alternate exemptions and effects on Exchange Act 12(g)
 - Did you comply with HMRC/IRC 409A on past options?- Proper valuation processes used
- Have you prepared for data privacy and consumer protection laws?
- Have you taken steps to properly protect assets, particularly IP?
 - Have all necessary parties signed invention assignments?
- Status of material litigation or regulatory concerns?

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Additional Considerations for IPO Candidates

1. What Does It Take to Go Public in the U.S.?

- Listing standards - NYSE/NASDAQ
- Market expectations

2. Can You Qualify as a Foreign Private Issuer?

- Organized outside the U.S.?
- Are fewer than 50 percent of outstanding voting securities held "of record" by U.S. residents?
- If not, can you meet the business test (fails if *any* of these are not met)?
 - the majority of your executive officers are U.S. citizens or residents;
 - the majority of your directors are U.S. citizens or residents;
 - more than 50 percent of the company's assets are located in the U.S.; and
 - the company's business is administered principally in the U.S.
- Home country rules challenges - local accounts, required disclosures, etc.

3. Accounting and Finance

- Do you have U.S. GAAP or IFRS financial statements?
- Do you need audited financial statements and pro formas for a recent acquisition or disposition?
- Are your auditors independent under U.S. rules?
- Have you discussed PCAOB uplift procedures?
- How many periods of financials can you produce in audited form?
- Can your auditors produce a clean comfort letter?
- Internal controls: Have you started auditing?
- Can you report timely under SEC rules and Street expectations?
- Can you make accurate projections and give guidance?
- Is the IR function ready? What is the messaging to the Street?

4. Governance and Board

- Do you meet the independence requirements?
- Have you considered the working relationship and experience of the board?
- Do you meet the committee composition requirements?
 - Do you have an Audit Committee Financial Expert?
- Operational needs: Do you have the team to drive the business?
- Experience: Does any of your C-suite have public company experience?
- Diversity: Have you considered the composition of the Board and management?

5. Disclosure

- Have you considered the disclosure needed?
- Do you need to seek confidential treatment on any material contracts?
- Have you considered compensation expectations prompted by disclosure?

6. Mechanics/Housekeeping

- Do you have proper lock-up language in your articles or shareholders agreement?
- What consents are needed?

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