

Understanding and Planning an Initial Public Offering (IPO)

Understanding the IPO Process

An initial public offering (IPO) is the process achieved when a private company registers its shares of common stock with the SEC and sells them to public investors in an underwritten offering. The shares subsequently trade on a stock exchange, such as the NYSE or Nasdaq, and the company becomes subject to the public reporting requirements of the federal securities laws.

The process is often challenging – it is a time-consuming distraction for management, it often involves significant transaction costs and, with a narrow “market window,” there is no guarantee the IPO will generate the level of hoped-for proceeds, or be completed at all. Understanding the IPO process and managing it effectively can help avoid these risks.

Early preparation and an experienced team of underwriters, lawyers and accountants are key to a smoothly run IPO process. Below is an outline of the basic steps that will occur over the 3 to 5 month period:

Phase One: Pre-Offering Planning

- Begin preparation of audited historical financial statements.
- Recruit (as needed) qualified, “credentialed” management and Board members, including independent directors.
- Update organizational and capital structure to be acceptable for a public company.

Phase Two: Due Diligence and Filings

- Create electronic data room with complete legal, financial and technical due diligence documents and information for working group.
- Draft the IPO prospectus, describing the company’s products/services, business strategy, marketing and sales; its industry and target market; the management team’s experience and directors’ backgrounds; the risks regarding the company and an investment in the shares; the use of offering proceeds; the compensation paid to management and the Board; and the ownership of the company by management and other existing large shareholders.
- File the registration statement with the SEC (and consider initial confidential submission, if applicable).
- Submit listing application with stock exchange for trading following the IPO.

Phase Three: Market and Close the Offering

- Through selling efforts such as a road show, the company and underwriters promote the offering to potential investors following the preparation of the “red herring” prospectus.
- Before the IPO process is complete, implement all necessary controls and procedures, organize Board committees, secure appropriate level of D&O insurance and adopt employee equity incentive award plan.
- When demand for the offering solidifies, management and underwriters price the shares to the public and sign the underwriting agreement. The stock begins trading the day after pricing, and the company receives the offering net proceeds three business days thereafter.

The entire IPO process is much more involved than many people realize – advance planning with the right team of advisors increases the chances of successfully completing your IPO.

How Olshan Can Help

Olshan can provide assistance during each phase of the IPO process.

The IPO Planning Phase – The pre-IPO preparation phase sets the groundwork for a successful IPO. Olshan will:

- Identify gating issues upfront and recommend changes to enhance corporate governance and transparency as a public company.
- Develop a high-level timeline clearly identifying responsibilities.
- Help assemble the right IPO team – underwriters, accountants and even CFOs.
- Provide support for dual-track strategies such as private equity and other M&A transactions.

The IPO Preparation and Filing Phase – This phase involves a substantial amount of detailed legal documentation. Deep experience with the Securities Act of 1933 and Regulation S-X is imperative during this phase as mistakes can cause serious and costly delays. Olshan will:

- Provide due diligence support for document requests from underwriters and counsel.
- Prepare registration statement on Form S-1, including business disclosures, offering terms and management bios.
- Review SOX corporate governance requirements with management.

The Post-IPO Phase – the post-IPO phase requires attentive ongoing SEC reporting and disclosure. Olshan will help with the following ongoing requirements:

- Preparation of annual, quarterly and current SEC reports, and proxy statements.
- Review director and officer beneficial ownership filings.
- Development of insider trading and Regulation FD policies and codes of ethics.

2021 IPO Market Setting Record-Breaking Pace

Through the third quarter of 2021, 313 IPOs have raised \$107.5 billion, marking 2021 already as one of the most active years since the dot.com era. While technology and healthcare companies have accounted for most of the traditional IPO activity, the year has been accented by IPOs for trading app Robinhood Markets, electric vehicle maker startup Rivian Automotive, Covid-19 pandemic-influenced consumer brands, crypto asset mining companies and trading platforms, vertically-integrated cannabis companies and small-cap biotech, as well as big name direct listings and endless blank-check SPAC offerings and mergers. Strong stock market trading in 2021 has supported a robust IPO market for new issuers in multiple industry sectors.

Are You Prepared to Go Public?

If your company is considering whether to go public, some self-analysis is necessary to determine if your company has all the components for success. Because timing is everything during the IPO process and you may only have one chance, you should be able to effectively answer the following questions to be ready.

1. **Do you have a clear business strategy for your company today and for future growth?**
When you go public, you are selling your company and, most particularly for emerging companies, its vision of what it can be. A company needs to present to potential investors a thoughtful and compelling “story” of this vision and how, when and why it can be achieved.
2. **Do you have the right management team in place?**
Investors look closely at top management and their industry experience and track record at prior companies to see if they are capable of executing the company’s vision.
3. **Do you have trusted Board members overseeing the company?**
Your Board of Directors should understand your business and be able to bring ideas, as well as contacts, to the company. They should have a diverse and balanced background with expertise from operations and finance to technology and regulatory matters, to help guide the company through the early years as a public company.
4. **Do you have a history of profitable operations?**
Your financial results should reflect strong sales, reasonable levels of costs and momentum towards greater earnings. Your accountants may need to restate earnings from previous years if, as a private company, earnings were minimal for tax purposes.
5. **Have you selected the best underwriter for your IPO?**
This is perhaps the most important decision management will make. Through contacts of advisors and outside investors, companies typically seek the “biggest name” – the strongest and most reputable in successfully completed IPO transactions in your industry. But, analyst coverage, level of interest in your company, track record with other IPOs and aftermarket support are also important factors. Interview several lead underwriter candidates as part of the process.
6. **Are you prepared to take on the initial and ongoing costs in being a public company?**
Along with the IPO’s transactional fees and costs for underwriters, SEC registration, FINRA filing, legal counsel and accountants, there are also stock exchange listing and transfer agent fees. After the IPO, there are ongoing public reporting costs and associated professional fees, in addition to internal accounting staff and more sophisticated SOX-compliant accounting and information systems.
7. **Do you know the SEC’s “hot buttons” to avoid unnecessary delays in the process?**
Experienced counsel and auditors can be instrumental in this, identifying legal issues such as “gun jumping” and “integration” of prior offerings, and accounting issues such as revenue recognition that could require a restatement or significant adjustment of your financial statements.

The IPO process offers more than new growth capital, it enhances access to capital markets in the future, facilitates employee compensation, acts as “acquisition currency,” permits owners and investors to gain liquidity and improves the stature and perceived stability of your company. If you would like to discuss this possibility, Olshan can assist you in determining whether this is the right time for you. If prepared, Olshan can guide your company through every step in the process.

Recent Olshan Public Offerings

Representing:

- P10, Inc. (NYSE: PX) in Morgan Stanley-led Class A common stock initial public offering
- Alzamend Neuro, Inc. (Nasdaq: ALZN) in Spartan Capital common stock initial public offering
- Anebulo Pharmaceuticals, Inc. (Nasdaq: ANEB) in Benchmark Company common stock initial public offering
- Alleghany Corp. (NYSE: Y) in public offering of senior notes via BMO Capital Markets and Goldman Sachs
- Blink Charging Co. (Nasdaq: BLNK) in public offering of common stock via Barclays
- A.G.P. in InspireMD, Inc. (NYSE Amex: NSPR) common stock and warrant offering
- Legacy Housing Corp. (Nasdaq: LEGH) in B. Riley FBR led initial public offering of common stock
- IMAC Holdings (Nasdaq: IMAC) in Dawson James common stock and warrant initial public offering
- Source Capital in Overstock.com (Nasdaq: OSTK) blockchain voting series A preferred stock offering (first public offering of digital securities)
- Nathan’s Famous (Nasdaq: NATH) in Jefferies senior note offering
- Maxim Group in Quest Resource Holding (Nasdaq: QRHC) common stock and warrant offering
- IZEA (Nasdaq: IZEA) in initial common stock offering via Aegis Capital
- Roth Capital in Pioneer Power Solutions (Nasdaq: PPSI) common stock offering
- Aerojet Rocketdyne Holdings f/k/a GenCorp (NYSE: AJRD) in Morgan Stanley, Citigroup debt offering

Growing Pipeline Setting the Stage for a Booming 2022

All signs point to a booming IPO market in 2022. With record stock market index levels coupled with a large and growing pipeline of IPO companies positioned to thrive in a post-Covid economy, many investment banks and institutional investors expect an increase in both IPO deal count and total offering proceeds next year. As of November 11, 2021, there were 56 active IPOs in the pipeline, composed of a diverse group of companies representing the healthcare, tech and consumer segments, increasingly with ESG goals and meme stock potential. Several Olshan clients are in among those looking to test the market, as the IPO window appears to be open for new deals well into 2022.

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