Securities Lawyer 101

Going Public Q & A

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Going Public Q & A

Going public is a big step for any company. While going public offers many benefits it also comes with risks and mounds of regulations. Going public is a complicated & intricate procedure, and it is important to have an experienced securities attorney to help your company navigate through the process and deal with the Securities & Exchange Commission ("SEC"), Financial Regulatory Authority ("FINRA") & Depository Trust Company ("DTC"). Upon completion of a going public transaction, most companies are subject to the regulations that apply to public companies, including those of the Securities Act of 1933, as amended (the "Securities Act") and Securities Exchange Act of 1934, as amended (the "Exchange Act").

This Securities Lawyer 101 Q &A discusses the most common questions we receive from our clients about going public transactions.

Q. What does it mean for a company to Go Public?

A. Going public often refers to the process of a company filing a registration statement with the SEC to register its securities and become an SEC reporting company. Other times going public may mean the filing a Form 211 with FINRA to obtain a ticker symbol for quotation on the OTC Markets Pink Sheets without filing a registration statement with the SEC.

Q. Why do most companies Go Public?

A. Most companies go public to raise money. It is much easier for a public company to locate capital than it is for a private company. Funds raised in going public transactions can be used for working capital, research and development, retiring existing indebtedness, acquiring other companies or businesses or paying suppliers.

Q. What are other advantages of Going Public?

A. Numerous additional benefits come with public company status. Among them are:

- Once a going public transaction is complete, the company will be able to use its common stock as a form of currency and as collateral for loans.
- Going public creates value for an issuer's securities. Going public also creates liquidity for existing and future investors and provides an exit strategy for shareholders and/or investors.
- Additionally, public company stockholders may be able to sell their shares or use them as collateral.
- Public companies have greater visibility than private companies. It is easier to build recognition of a public company than a private one. Publicly traded companies are often promoted and gain publicity from their status as a public company. Further, the media has greater economic incentive to provide coverage of matters concerning public companies than private companies because of the number of shareholders and investors seeking information about the company.
- Going public may allow a private company to attract more qualified employees and key personnel, such as officers and directors because it allows the company's management and employees to share in its growth and success through stock options and other equity-based compensation.
- There is a certain amount of prestige associated with public company status or service to a public company.

Q. What are the disadvantages of Going Public?

A. The disadvantages to going public include:

- Going public requires management to answer to shareholders and give up a certain amount of their control over company matters.
- Going public is expensive and staying public is expensive. Legal, accounting and compliance costs are significant and these costs will have to be paid regardless of whether a company raises capital.
- After a going public transaction, a newly public company will incur higher costs as a public company, including auditing and legal expenses and costs of compliance with the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").
- Public companies are subject to more scrutiny than private companies. Once a company becomes public, certain information must be disclosed to the public, such as executive compensation, financial information, previous violations of the securities and other laws and material agreements must be disclosed. Public companies operate under close scrutiny as well as oversight.
- SEC reporting companies must comply with reporting requirements under the Exchange Act as soon as their going public transaction is complete. Complying with these reporting requirements is costly and time consuming for management.
- Going public also exposes the company and its management to liability for false or misleading statements in filings and reports filed with the SEC.

Q. What is the difference between filing a registration statement under the Securities Act and filing a registration statement under the Exchange Act in a Going Public transaction?

A. Filing a registration statement under the Securities Act registers an offering of securities. Shares registered by the issuer or on behalf of its selling shareholders who are not affiliates of the issuer generally are unrestricted securities. Filing a registration statement under the Exchange Act registers a class of securities such as common stock. Registration under the Exchange Act does not register a securities offering and does not create unrestricted securities.

Q. What is a Direct Public Offering?

A. A direct public offering is an offering conducted by a company on its own behalf without an underwriter.

Q. Can a Direct Public Offering be used in a Going Public transaction?

A. Yes, direct public offerings are often used in conjunction with going public transactions.

Q. Do I have to file a registration statement with the SEC if I conduct a Direct Public Offering?

A. Not necessarily. A direct public offering can be structured for a listing on the OTC Markets Pink Sheets and it can involve a private offering rather than an offering subject to an SEC registration statement.

Q. What is DTC eligibility & why does my company need to be DTC Eligible?

A. The DTC serves as the only custodian of securities for its participants, which include broker-dealers. DTC is also the only securities settlement provider in the U.S. If an issuer's stock is DTC eligible, DTC will hold an inventory of free-trading street name shares on deposit. These free-trading shares are also known as the "public float". Without DTC eligibility, shares can only be publicly traded if there is physical delivery of a stock certificate and payment between a buyer and a seller. Without DTC eligibility, it is almost impossible for a public company to establish an active trading market in its securities.

Q. What is a Reverse Merger?

A. A reverse merger is a transaction in which a private company merges into or is acquired by an existing public company.

Q. Should I use a Reverse Merger in my Going Public Transaction?

A. Probably not. Reverse mergers are often vehicles for fraud and new rules impact reverse merger transactions. Most often if done properly, reverse mergers cost more and take longer than filing a registration statement with the SEC in a going public transaction.

Q. Why do some securities attorneys say I should use a Reverse Merger in my Going Public Transaction?

A. Often securities lawyers who suggest reverse merger transactions manufacture shells. They make a substantial amount of money selling their own public shells.

For further information about this securities law Q & A, please contact Brenda Hamilton, Securities Attorney at 101 Plaza Real South, Suite 202 North, Boca Raton Florida, (561) 416-8956, by email at info@securitieslawyer101.com or visit www.securitieslawyer101.com. This securities law blog post is provided as a general informational service to clients and friends of Hamilton & Associates Law Group and should not be construed as, and does not constitute legal advice on any specific matter, nor does this message create an attorney-client relationship. Please note that the prior results discussed herein do not guarantee similar outcomes.
