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**Securities Industry  
Experts Clarify the Realities  
of Taking a Private  
Company Public**

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## Securities Industry Experts Clarify the Realities of Taking a Private Company Public

Pubco CEO, officers and directors fall into two camps: “Going public was the best decision we ever made,” and “If we knew then what we knew now, we would have stayed private.”

There is a very simple reason that going public transactions like IPO’s and [reverse mergers](#) go bad. The control persons who decided to access the public markets were most likely authorities and experts in their respective fields – biotechnology, communications, transportation and entertainment. However, they lacked a fundamental understanding of what is involved in [going public](#), and successfully staying public.

Taking a private company public is nothing short of creating a new company on top of an existing company. The private company was built with careful planning, persistence, and the ability to adapt. The formation of the public version of the subject company requires just as much meticulous effort.

### Considerations Prior to Going Public

Prior to even making the final decision to go public, the control persons of the private entity should carefully conduct a SWOT analysis by assessing their strengths, weaknesses, opportunities and threats. More importantly, they need to clearly identify and understand why they want to go public in the first place.

Jason Paltrowitz is the Executive Vice President of Corporate Services at OTC Markets Group Inc. OTC Markets Group’s financial markets, including the [OTCQX](#) and [OTCQB](#), provide investors with the information necessary to intelligently analyze, value and trade 10,000 U.S. and global securities.

“Having a publicly traded stock can provide enormous advantages to companies that are ready – from the ability to raise capital from the public markets and a public market valuation to increased visibility with customers, partners and investors and the ability to attract and incentivize top-notch talent,” Paltrowitz said. “My advice to private companies that are considering going public – whether via the new SEC [Regulation A+](#), a Slow PO or other method – is to have in place a strong management team and team of advisors (legal, accounting and potentially an IR firm), have your financial statements in order and select the public market that is the right fit for your business.”

Generally speaking, CEO’s and directors of private companies believe that going public means the end of their capitalization concerns. The urban legend surrounding going public is that money simply falls from the sky. The money may indeed fall, but at first it’s going to fall out of the company’s coffers.

Business plans, PCAOB audits, legal fees, and manpower all cost money. If existing officers are reassigned to prepare the company to go public, the quality of their previous duties may become compromised. If new executives are hired to groom the private company to become public, payroll expenses will increase. Either way, the subject company’s bottom line will be impacted.

The old adage of having to spend money to make money directly applies when taking a private company public.

### Raising Capital

[Initial public offerings](#) for small and emerging companies tend to be small; many are self-underwritten, and the capital raised is not enough to support needed growth. If the private company becomes a publicly traded entity through a



[reverse merger](#), the element of the capital raise is still a completely separate endeavor. Small companies that go public do not automatically have access to investment capital. Subsequent, well-planned capital raises such as PIPE's and follow-on [registered offerings](#) must be initiated.

Mr. Leonard J. Sokolow is the President and CEO of Newbridge Financial Inc. and Chairman of Newbridge Securities Corporation. He possesses more than two decades of investment banking experience and is one of the most respected authorities in the public markets. Mr. Sokolow served as CEO of Union Atlantic LC, co-founded vFinance, Inc., served as President and CEO of Genesis Partners, Inc., and also served as the President of National Holdings Corporation.

“Those who would be deemed controls persons, especially officers and directors, of a public company should understand that a liquidity event for their share ownership should not be the primary driver of their decision to go public,” said Mr. Sokolow. “More likely than not, a liquidity event would be the result of value created, often ultimately realized in the form of a sale to or merger with a strategic company, for all of the stakeholders because of the compelling opportunities being public could provide. These include greater access to capital markets, financial and corporate governance transparency, and the associated business discipline as well as the ability to attract employee talent and effectuate mergers and acquisitions of complementary businesses, products or sales channels,” Sokolow continued.

## Preparation of Audited Financial Statements

Every private company, regardless of its product or service, generally possesses financial statements. However, GAAP compliant financial statements audited by a PCAOB auditor are a completely different animal.

The [PCAOB \(Public Company Accounting Oversight Board\)](#) was established as a result of the creation of the Sarbanes-Oxley Act of 2002. The board's aim is to protect investors and other stakeholders of public companies by ensuring that the auditor of a company's financial statements has followed a set of strict guidelines.

Pubco audited financials are primarily based on the subject company's existing financials, so if the existing “private variety” financials are in disarray, the creation of audited financial statements becomes even more vexing.

While a private company can successfully operate for years without financials that are current, procedurally correct and generally organized, a public company cannot. Additionally, PCAOB financials are subject to ongoing regulatory compliance and the scrutiny of shareholders. If they're off by an amount that was considered de minimus when the company was private, they will not fulfill the reporting obligations of the new and improved public company. PCAOB financials are not graded A, B, C, D; they are graded as “pass or fail.”

Marcum LLP is one of the largest independent public accounting and advisory services firms in the United States. Marcum offers traditional accounting, assurance and tax, including domestic and international tax planning and preparation; the firm's professional services include mergers and acquisition planning, family office services, forensic accounting, business valuation and litigation support.

Kim Lamplough is a Partner in Marcum's Assurance Division. She has more than 30 years of experience providing audit and financial reporting services to both domestic and international companies in the public and private sectors, including commercial, SEC, and not-for-profit clients.

“Going and being public, including the road show involved in attracting and securing investors, puts tremendous demands on top management, including the CFO,” Ms. Lamplough said. “Management should be sure that they already have appropriate skills and experience on their team, make strategic changes, or seek support from external consultants prior to beginning the process. Having a finance and accounting team that understands the requirements and challenges of going public will save time and money, both during the initial registration and on an ongoing basis thereafter. Whether





in an [IPO](#) registration or a reverse merger with an existing shell, any company considering a going-public transaction should honestly assess the skills, experience and bandwidth of their finance and accounting team. This assessment should include identifying audit committee candidates. The more like an experienced public company the entity looks at registration, the better the response of investors will be. In short, the demands on a public company's finance and accounting team are very different from those of a private company. Any company looking to be public should address these differences as early in the process as possible.”

## Assembling the Pubco Team

Although some aspects of the going public process can be handled internally, the most important ones require the skill and expertise of a variety of specialists.

The selection of a PCAOB Auditor is a very important one, but the quarterback in the going public transaction is most often the [securities attorney](#) and/or a corporate and [securities law firm](#). In some cases an investment banker or underwriter may serve as the “point man”, but the majority of IPO's and going public scenarios for smaller companies are directed by corporate counsel.

The securities attorney spearheading the going public transaction should possess at least ten years of experience in this particular field and be current and active in the pubco space; the operative term being “current.”

In the short span of two or three years, applicable securities laws and industry standards can change dramatically; the going public strategies that worked in 2006 may not work at all today. In addition to current legal expertise in taking private companies public, the securities attorney selected to steer the ship should also possess numerous long-standing working relationships with various corporate service providers and other key persons. Transfer agents, EDGAR filers, investment banks, and contacts within the SEC, FINRA, [DTC](#) and various exchanges are pivotal to the going public process. It is essential that cornerstone connections already exist between the securities attorney and the aforementioned entities in order for the going public transaction to run smoothly.

Another crucial component of the pubco team is the investment banker. Although it is difficult for small companies to attract the attention and services of an established investment banking firm, it is indeed possible. Recently, more speculative, forward-thinking investment banking firms with long-term perspectives are making greater efforts to reach out and establish relationships with small companies that, after being carefully evaluated, are deemed to possess promising upside potential.

## Transfer Agents

Choosing the right transfer agent is also an important consideration. A pubco should be sure to select a transfer agent that is registered with the SEC and has a wide range of experience with growth companies. A transfer agent is often the interface with pubco shareholders so it is imperative that they are responsive, professional and knowledgeable.

Computershare was founded in 1978 in the suburbs of Melbourne, Australia. At the time it was little more than a start-up technology company designed to offer computer services to businesses that needed to automate processes. Computershare is now one of the world's foremost transfer agents and investor services providers. Due to the fact that Computershare grew from such humble beginnings into a multi-billion-dollar international juggernaut that spans 20 countries, has 16,000 employees and services more than 125,000 shareholders, their management team and account executives genuinely understand that even the smallest public companies can eventually dominate their respective industry.



“If you are considering taking your company public, I recommend taking a holistic view of your company’s potential life cycle,” stated Jay McHale, President of U.S. Equity Services at Computershare. “Working with a transfer agent that provides a comprehensive suite of services can provide guidance on how they will support your company as it continues to evolve. We offer management of pre-IPO stock certificates, a dedicated team to support a company going public, support for your executives and directors as well as provide exceptional service to your shareholders. As the company grows, we can also provide support for corporate activities including mergers and acquisitions, rights offerings and tender offers as well as employee equity plans and efficient communications programs.”

## Financial Stability of Officers and Directors

The going public process is meticulous, time-consuming and requires absolute focus from the subject company’s officers and directors. Since they are concentrating the majority of their time and effort on making the company’s public debut a success, it is commonplace for officers, directors and other key persons to overlook their own financial stability. Fortunately, the possibility of losing a key person in the middle of an IPO or a reverse merger because their personal finances have fallen into disarray is a problem that can be avoided.

Chris Johnson is the Managing Director and Head of Wealth Advisory for Stifel Financial. Stifel has extensive financial advisory and capital-raising experience, having completed over 3,100 public offerings, 900 merger and acquisition transactions and 400 private placements since 2000. The company’s investment banking practice focuses on the middle market. Stifel manages public offerings of equity and debt securities, raises debt and equity in the private markets, and initiates, structures, and negotiates mergers, acquisitions, and divestitures.

“Private company executives who are thinking about going public should also consider undertaking personal wealth planning 12-18 months prior to the proposed transaction,” stated Mr. Johnson. “Unfortunately, executives are often (and rightfully) are so focused on corporate-level strategies that they relegate their personal planning to the back burner. Indeed, holistic planning commenced well in advance of a transaction can serve to mitigate income and gift/estate tax burdens while also permitting an executive to focus on pressing, corporate-level issues during the final stages of the IPO.”

## Assessing the Marketplace

Anticipating the marketplace is a lot like picking a winning horse at the race track; plenty of people do it even though most of them get it wrong.

Ironically, this is the one aspect of going public where the CEO and control persons of the private entity have a distinct advantage over the going public specialists. As stated, those working with the private company know their sector. They see firsthand if demand for their product or service is increasing or decreasing.

Hypothetically, the founders and operators of a retail website that sells cybersecurity software know whether or not their products are becoming more widely used by an expanding demographic. They will also know who their competitors are, the strength of their R&D team, what potential pitfalls exist, and many other factors that can be collated to create a relatively accurate market forecast.

This is the step in the going public process when effective communication is most important. In the same respect that these software engineers will have some initial difficulty understanding the dynamics of running a publicly traded company, the going public team will most likely have some trouble understanding how cybersecurity software works, or is even used, by the consumer.



Each party must be able to convey their technical knowledge to their counterpart in an understandable manner. [Going public specialists](#) such as securities attorneys and PCAOB auditors are accustomed to explaining how the going public process works when speaking to clients who have no frame of reference regarding taking a private company public.

Inversely, the software engineers generally speak to other software professionals so they may not be as adept at explaining their product and its importance in layman's terms. So as to avoid a misunderstanding or outright communication breakdown, the specialists who operate the private company should prepare language that can be easily understood by those outside of their technical arena. By doing so, control persons of the private company are able to effectively communicate with corporate counsel and also provide key language that will be needed by securities counsel when drafting the company's SEC filings. These SEC filings must comply with federal securities laws, one of which is the "plain English" requirement that requires the subject company's goods and services be described in a manner that can be clearly understood by the general public.

Once the communication bridge has been crossed, the two parties can then make a calculated projection as to whether prospective shareholders will receive the subject company with open arms or raised eyebrows.

## Building Investor Awareness

In the times before crowded restaurants were silent because all patrons were staring into their mobile devices, building investor awareness was relatively simple. These days the control persons of a publicly traded company must create and operate a rather sophisticated image broadcasting team. If not, the company's history of success, upside potential, or even its very existence will be the stock market's best kept secrets.

Ralph Waldo Emerson once said, "If a man has good corn or wood, or boards, or pigs, to sell, or can make better chairs or knives, crucibles or church organs, than anybody else, you will find a broad hard-beaten road to his house, though it be in the woods."

While this wisdom may be relevant to the success or failure of a private company, it does not even remotely apply to publicly traded companies. Investors will not undertake independent investigative research to discern if the subject company is truly the best in its sector. If key information about the private company going public is not readily available, it will not be known.

Shareholders have become increasingly sophisticated since the advent of the Internet. The dawn of the information age has not only provided shareholders and prospective shareholders with access to more information faster, but has also instilled in them certain expectations regarding how seriously companies maintain their Internet presence.

If the subject company and its corresponding product or service cannot be found on multiple online platforms with a simple Google search, shareholders will perceive that if they cannot locate this information, potential shareholders will also not be able to do so as well.

The public company must maintain a consistent presence on [Facebook](#), [Twitter](#), [LinkedIn](#) and all other relevant online platforms so as to ensure investor awareness and investor confidence. Once again, this responsibility falls under the category of media relations and shareholder relations, so it is generally more effectively handled in-house.

## Management Team Media

Successful private companies with a history of increased earnings are the best possible candidates for going public. In most cases they already possess strong branding and core language that describes their product or service. However,



these same companies generally lack language that accurately describes the experience, abilities and sophistication of their management team.

To be successful, private companies need only convey the superiority of their product or service. Public companies must also be able to convey the intelligence and acumen of the people who made the product or service a success.

One of the key elements that contribute to the success of a publicly traded company is the strength of their management team. Prospective investors need to know that there are some very accomplished professionals dedicating their collective efforts to ensure the subject company's success. Shareholders must clearly understand that these individuals are capable of maximizing the company's potential so as to facilitate long-term growth and sustained profitability.

In terms of media, key persons of the public company must be able to demonstrate their understanding of what it takes to run a publicly traded entity. They need to express that their two primary concerns are the success of the company and the satisfaction of its shareholders.

A well-planned and precisely executed media effort is of the utmost importance. The company should be able to disseminate news whenever newsworthy events occur. When doing so it is better to include quotes from various members of the management team as opposed to just quoting the company's CEO.

The news that the public company disseminates to the media and subsequently the investment community must be completely accurate. Redundant safeguards must be put into place to ensure that company spokespersons never make a statement that clearly violates regulatory compliance requirements. In addition to traditional fact-checking it is imperative that all communications intended for public distribution are reviewed by corporate and securities legal counsel to ensure absolute compliance.

The distribution of news by the subject company will generate inquiries from shareholders and potential investors. The company must be prepared to answer any and all shareholder inquiries in a consistent, systematic and timely manner. Once again, all corporate communications must be compliant with regulatory requirements and should be reviewed by corporate counsel.

Media relations and shareholder communications can be outsourced. However, public companies that take the time and effort to create their own media and shareholder relations departments can more effectively monitor the content and compliance of the information being disseminated.

## Monitoring for Misinformation

In business, the only thing more important than information is the source from which it emanates. The public company must have people in place who perpetually seek out news and information that pertains to the company. Particularly, these "media police" should be on the lookout for unauthorized news that was not reviewed, approved and distributed by the company or its media relations firm.

Shareholders who accumulate larger-than-average quantities of the company's shares are incentivized by financial gain. Whether they are "long" and want to see the share price improve, or "short" and want to see the share price decline, some individuals and groups will initiate their own media campaign in order to influence share price.

Upon discovering any such unauthorized and/or seemingly manipulative news stories pertaining to the subject company, control persons must take immediate action to identify the source of the information and memorialize the fact that this news was written and disseminated without the company's knowledge or authorization.





The FINRA Office of Fraud Detection and Market Intelligence perpetually and effectively locates public company news and promotional materials that appear aggressive, misleading or deceptive. The public company must be able to do the same in order to respond to any FINRA inquiries pertaining to the dissemination of unauthorized information.

## Planning to Overcome the Wild Card

“Expect the unexpected,” is one of the best pieces of advice ever given. Publicly traded companies are basically celebrities; their every action is scrutinized, their appearance is praised or criticized, and thousands of people (hopefully) will develop an ongoing interest in every last aspect of their structure and operations.

This newfound fame means that any type of unforeseen circumstance can present itself at any given time. So as to avoid going into “crisis mode,” the public company must have people and action plans in place that can deal with any eventuality in an effective and professional manner.

Panic breeds fear, and fear breeds panic. If the public company's response team is not prepared to address problematic occurrences of an unforeseeable nature, the subject company runs the risk of shareholders engaging in panic selling and/or initiating shareholder lawsuits.

However, in the same fashion that members of first responder teams are selected, the public company's response team should be comprised of professionals with an even temperament and an abundance of experience in dealing with and neutralizing any and all wild-card scenarios.

## SEC Reporting Requirements, Corporate Governance and Internal Controls

The [OTCQX](#) tier of OTC Markets and all national exchanges such as the [NYSE MKT](#) and [NASDAQ](#) have corporate governance requirements for listed companies, including requirements related to having a majority of independent directors, having an audit, compensation and nomination committee, having an annual shareholders meeting and distributing annual reports with audited financial statements to the shareholders. National Exchange requirements are more stringent than the OTCQX and will include required code of conduct, conflict of interest rules, shareholder approval rights that go beyond state law provisions and more.

The [Sarbanes-Oxley Act of 2002](#) (“SOX”) implemented a requirement that the company's principal executive officer or officers and principal financial officer or officers execute certain personal certifications included with each Form 10-Q and 10-K. Under the CEO/CFO certification requirement, the CEO and CFO must personally certify the accuracy of the information contained in reports filed with the SEC and the procedures established by the company to report disclosures and prepare financial statements. In order to ensure the adequacy and accuracy of such reports and support the CEO/CFO certifications, a company must maintain adequate disclosure controls and procedures.

The SEC defines “disclosure controls and procedures” as “controls and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports filed or submitted by it under the Exchange Act is recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms. Disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an issuer in its Exchange Act reports is accumulated and communicated to the issuer's management, including its principal executive and financial officers, as appropriate to allow timely decisions regarding required disclosure.”





The aforementioned [SEC reporting requirements](#), internal controls and corporate governance standards are indeed complex. In reality, corporate and [securities attorneys](#) are the few specialists qualified to correctly interpret, apply and administer these regulations and requirements on behalf of publicly traded companies.

As established, the control persons of private and publicly traded companies, while experts in their respective fields, cannot be expected to possess a comprehensive knowledge of pubco operations. CEO's, officers and directors of publicly traded companies must have absolute confidence in the team of pubco experts they assemble.

### **The Author**

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[Securities attorney](#) Laura Anthony and her experienced legal team provides ongoing corporate counsel to small and midsize private companies, OTC and exchange traded issuers as well as private companies going public on the NASDAQ, NYSE MKT or over-the-counter market, such as the OTCQB and OTCQX. For nearly two decades [Legal & Compliance, LLC](#) has served clients providing fast, personalized, cutting-edge legal service. The firm's reputation and relationships provide invaluable resources to clients including introductions to investment bankers, broker-dealers, institutional investors and other strategic alliances.

The firm's focus includes, but is not limited to, compliance with the Securities Act of 1933 offer sale and registration requirements, including private placement transactions under Regulation D and Regulation S and PIPE Transactions as well as registration statements on Forms S-1, S-8 and S-4; compliance with the reporting requirements of the Securities Exchange Act of 1934, including registration on Form 10, reporting on Forms 10-Q, 10-K and 8-K, and 14C Information and 14A Proxy Statements; Regulation A/A+ offerings; all forms of going public transactions; mergers and acquisitions including both reverse mergers and forward mergers; applications to and compliance with the corporate governance requirements of securities exchanges including NASDAQ and NYSE MKT; crowdfunding; corporate; and general contract and business transactions.

Attorney Laura Anthony and her firm represents both target and acquiring companies in reverse mergers and forward mergers, including the preparation of transaction documents such as merger agreements, share exchange agreements, stock purchase agreements, asset purchase agreements and reorganization agreements. Ms. Anthony's legal team prepares the necessary documentation and assists in completing the requirements of federal and state securities laws and SROs such as FINRA and DTC for 15c2-11 applications, corporate name changes, reverse and forward splits and changes of domicile.

Securities attorney Laura Anthony is an approved PAL Advisor with OTC Markets Group, the creator and author of [SecuritiesLawBlog.com](#), the OTC Market's top source for industry news, and the producer and host of [LawCast.com](#), The Securities Law Network, and a contributing blogger for [The Huffington Post](#).

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