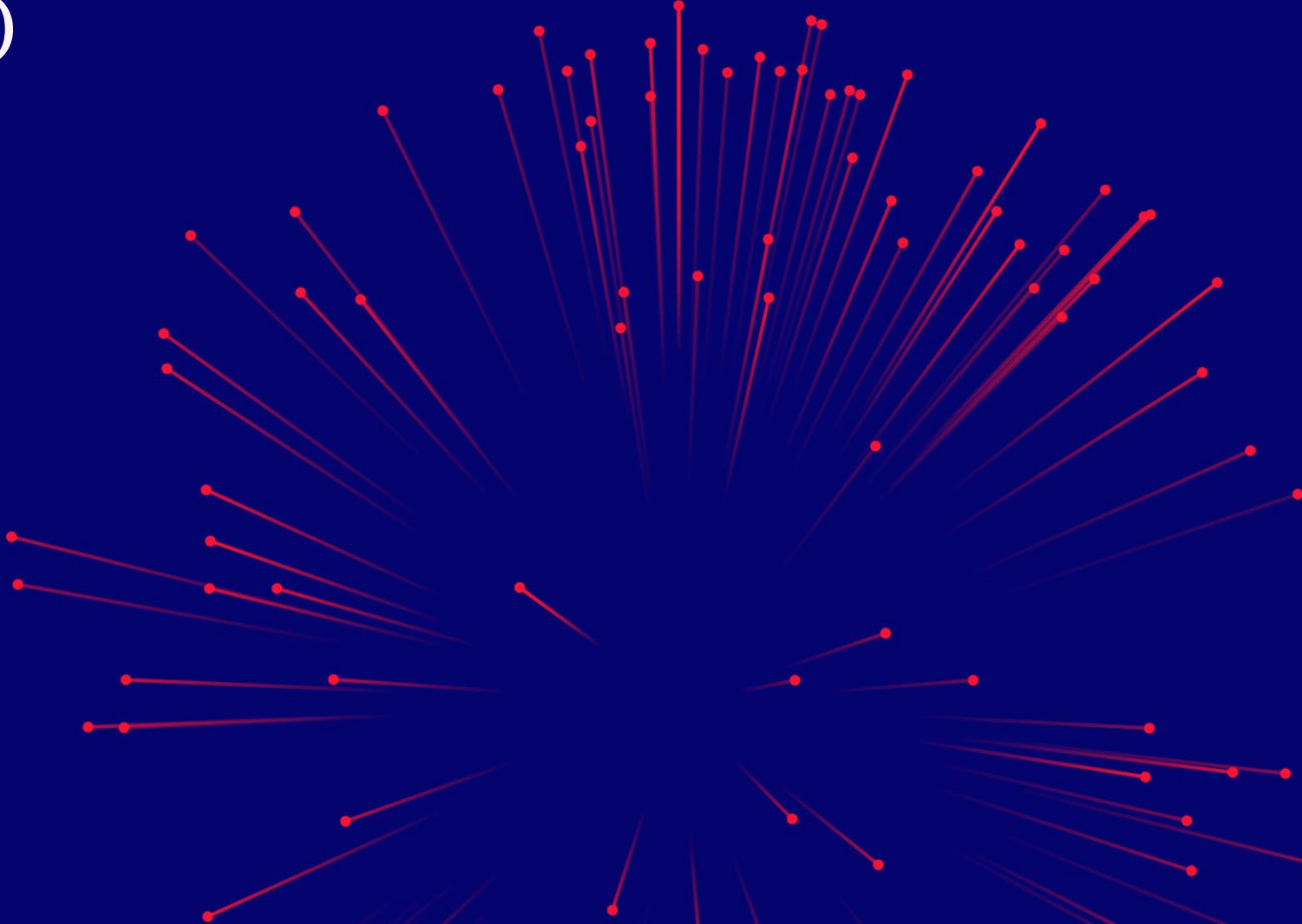


Before the Bell: Legal Perspectives on IPO Preparation

2026 Legal Insights: A CLE Webinar Series

March 18, 2026

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Agenda

- Our goal today is to prepare you for your role in an IPO
- As GCs and CFOs, you will quarterback the IPO process
- We will discuss an introduction to the IPO process and your role
- Four key areas to consider in advance of an IPO, with short-fuse and longer-term action items

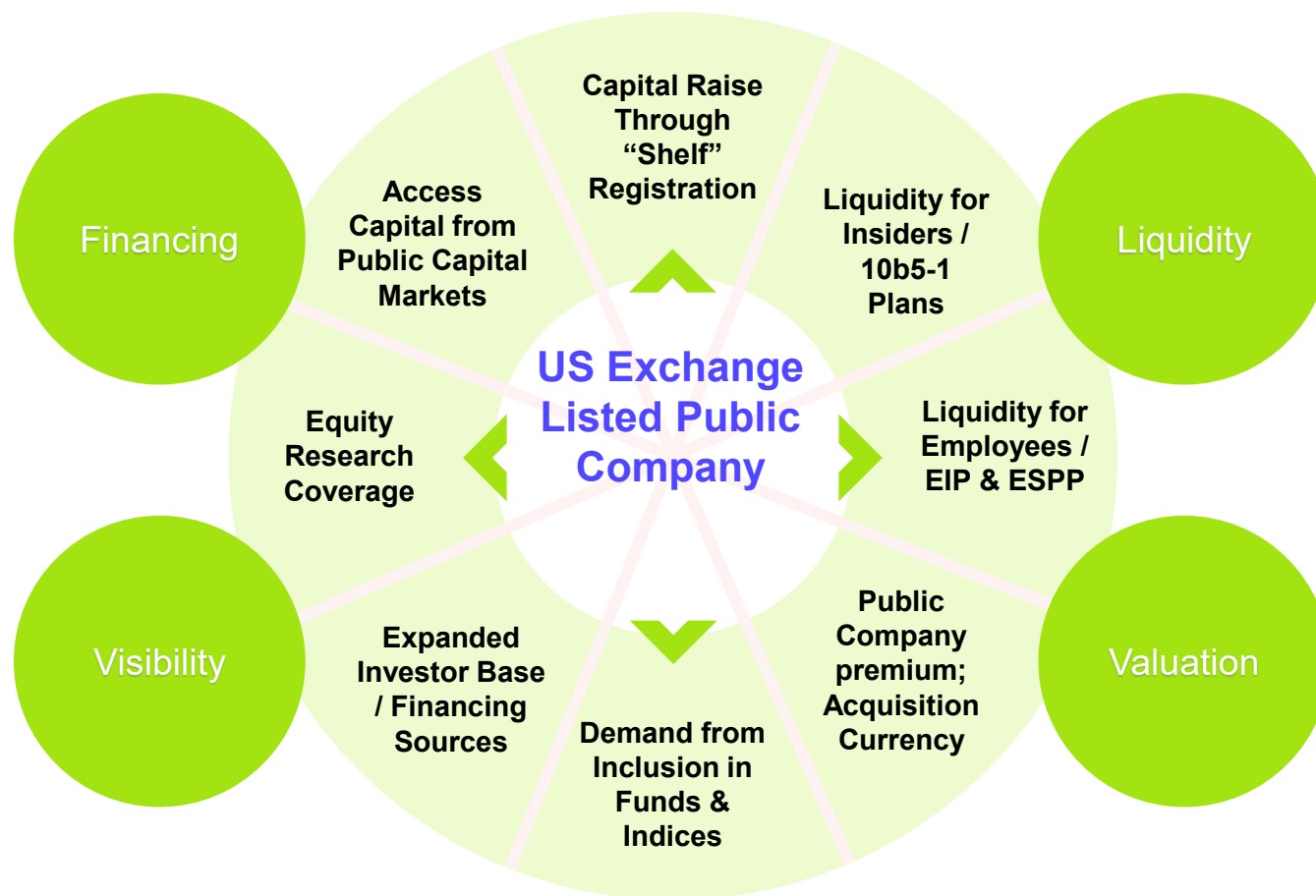
Introduction to the IPO Process



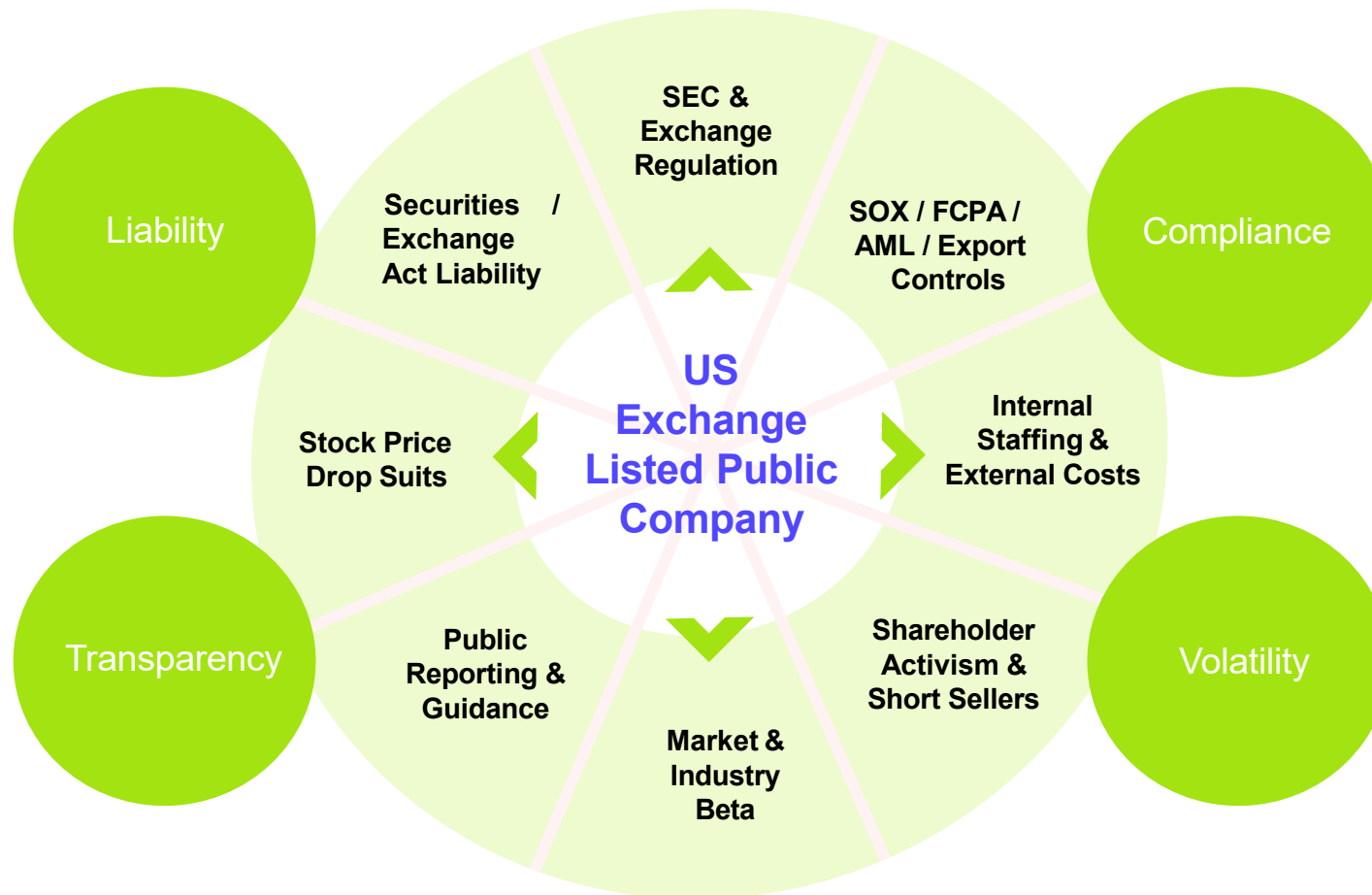
Why Go Public?



There are Significant Benefits to Going Public



... But There Are Also Important Considerations



Telling Your Story



The Story Matters as Much as the Numbers

- Your IPO is a critical opportunity to define how investors and the market think about your company
- Getting your story right is a legal priority
 - Setting the framework for analysts and investors
 - Inconsistencies create legal exposure
 - Poorly constructed narratives invite SEC comments
 - The IPO story is the baseline for all future filings, earnings calls and communications

Components of Your Story

- What do you do?
- What is your market opportunity?
- Who is your competition?
- What are your strengths?
- What is your strategy?
- Who is your management?
- What is your financial story?

Storytelling: Action Items

What to think about now:

- How do you want to tell your story? Does it align with your historical business operations and the financials you will present?
- Market sizing: what do you want to say and do you have sufficient backup and consent?
- Milestones and timelines
- Regulatory considerations
 - SEC comments
 - Highly regulated industries

If you have time:

- Customer case studies (if applicable) – need consent and takes time to align on messaging
- Graphics and cover art
- Letter from CEO
- Highly produced roadshow video

IPO Timelines and Your Role

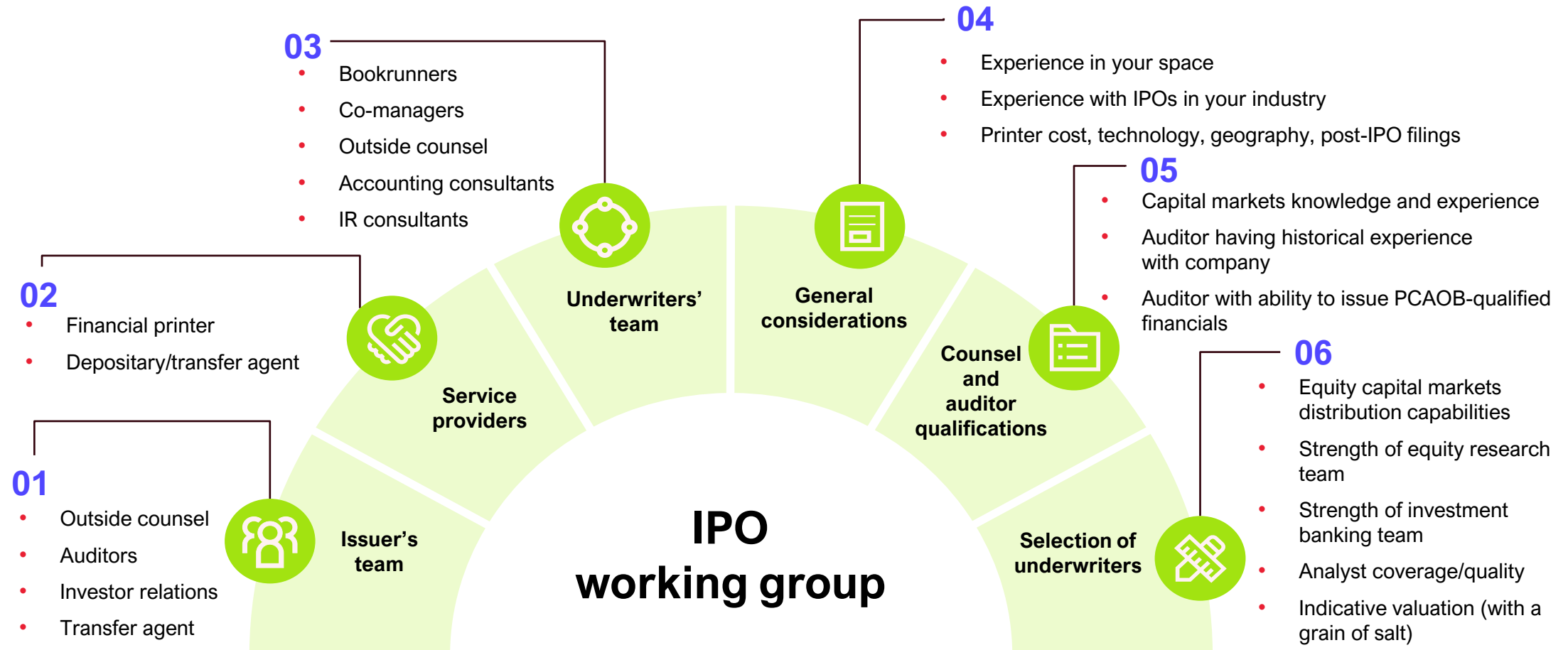


Overview of IPO Process



- **Realistic timeframe:**
 - ~ 6 months from org meeting
- **Risks to timing:**
 - Audit
 - Market, economic, political conditions
 - Aging financials (availability of quarterly results)
 - SEC review (generally accounting)
 - Business challenges

IPO Participants



Role of general counsel in an IPO process

- Review and address key legal areas
 - Determine if there are any issues under key areas of focus such as data privacy, GDPR, FCPA and sanctions compliance, pending litigation or privacy and security risks
 - Structure, disclosure and timing considerations relating to pre-IPO mezzanine rounds, intercompany agreements, executive/director loans, related party transactions, among others
- Prepare data room
- Prepare for underwriter due diligence calls
- Coordinate with the IR team on IPO-related communications, educate company and drive cultural change surrounding approach to communications
- Drive IPO process
 - Manage counsels and other outside service providers and advisors
 - Establish corporate governance framework
- Work with the board and as a liaison between external advisors and board members
- Work with CFO to assess whether you need to engage external consultants or make key hires in legal, finance or IR for the IPO process or to be a public company

Role of CFO in an IPO process

- Oversee PCAOB audit readiness, coordinate with the auditor on financial statement periods required, and resolve any open accounting policy questions (e.g.: revenue recognition, stock-based compensation, segment reporting, lease accounting)
- Develop and communicate a compelling growth story that will attract institutional investors
- Develop financial model and spend time meeting with sell-side analysts and potential investors to educate them on the company and gather feedback
- Consider the company's narrative on market positioning and whether its estimated TAM is well-supported. Some companies may need to commission industry studies for this purpose.
- Work with underwriters on identifying and refining key financial and operational metrics
- Work with the CEO and Board to determine whether and how the company will provide financial guidance to the market post-IPO; build out the FP&A function to support quarterly public reporting cadence
- Optimize the balance sheet for the IPO; understand lock-up obligations, use of proceeds, and how to communicate them
- Begin gap assessment of internal controls over financial reporting; understand the SOX 404(a) and 404(b) timelines
- Own the financial diligence process, the MD&A, the staleness-date calendar, and the quarterly reporting obligations relative to the IPO window

The IPO Prospectus



The Prospectus

1. Prospectus Cover
2. Cover Art
3. Prospectus Summary (the “Box”)
4. Risk Factors
5. Use of Proceeds, Capitalization, Dilution
6. Management’s Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”)
7. Business
8. “Back-Half”
 - Management
 - Market, Industry and Other Data
 - Executive Compensation
 - Related Party Transactions
 - Principal [and Selling] Stockholders (“BOT”)
 - Description of Capital Stock
 - Shares Eligible for Future Sale
 - Tax Disclosures
 - Underwriting
 - Legal Matters
 - Experts
 - Where You Can Find Additional Information
 - Exhibits
9. Financial Statements

Publicity and Communications



Publicity During an IPO

An Overview of "Gun Jumping"

Legal framework:

- It is illegal to make oral or written "offers" for your company's IPO securities before a registration statement is filed with the SEC
- After a registration statement is filed, oral offers can be made but all written offers must be in the form of an SEC-filed prospectus
- The concept of an "offer" for securities is broadly defined:
 - Includes any communication that may have the effect of creating interest in purchasing the IPO securities
 - Any publicity may be viewed as "conditioning the market"
 - Does not need to refer to an IPO to be an illegal offer

Practical implications:

- Communications made during the IPO process run the risk of being deemed an illegal offer
- You will be limited in your ability to communicate with outsiders or the media
- Gun jumping can have negative consequences

Risks & Penalties of Gun-Jumping

- Difficult to predict the practical consequences. Examples include:
 - "Cooling-off period" (i.e., a delay in the IPO) of up to six months
 - Investor lawsuits
 - Repurchase of shares sold in the IPO at the IPO price
 - Disclosure of communication in registration statement and disclosure re: violation of law
 - Exclusion of particular underwriters
 - Sanctions or fines for violating the Securities Act
- Even if the SEC did not institute sanctions or fines, it will be important for the company to establish a good working relationship with the SEC examiners who will review the S-1
- Public embarrassment
- Since market conditions are subject to volatility, any delay or penalty could impair the IPO

Publicity and Communications: Action Items

What to think about now:

- Build a robust internal publicity process now that creates internal controls around communications:
 - Establish a publicity plan and designate company spokespeople
 - Solidify internal and external IR/PR teams
 - Create and execute on a publicity strategy, including an approval process
- Conduct internal trainings to avoid gun jumping and educate management and employees on risks
- Create internal IPO communications plan for employees

If you have time:

- Conduct an audit of past publicity to understand any statements made regarding IPO plans or prospects
- Build a “past pattern or practice” of pre-IPO, ordinary course publicity
- Scrub website to identify forward-looking statements and projections

Due Diligence



Due Diligence

- You should expect a comprehensive diligence process that touches on virtually every aspect of the company
- Company has strict liability for material misstatements or omissions in the registration statement
 - Underwriters and the company's board of directors have a due diligence defense
- Three components:
 - Documentary due diligence (data room)
 - Diligence calls (company, auditors, customers, partners)
 - Factual backup
- Ongoing throughout the IPO process

Due Diligence: Action Items

What to think about now:

- Organize responsive materials into a data room
- Identify document gaps
- Identify key material agreements
- Review cap table
- Confirm that you have appropriate policies and procedures in place (cybersecurity, international compliance, data privacy)

If you have time:

- Proactive legal audit of any litigation, IP or regulatory risks
- Gather factual backup materials
- Identify and help prepare various individuals who will need to participate in diligence calls

Board Composition and Compliance



Director Independence Requirements

- Both Nasdaq and NYSE require that a majority of the directors on the board be independent directors.
- The Nasdaq and NYSE definitions of “***Independence***” and “***Independent***” contain both subjective and bright-line tests.
- Under both Nasdaq and NYSE rules, the board has an affirmative duty to determine that the requisite directors are independent.
- Ownership of shares (even a significant amount) does not by itself preclude a finding of independence.

Board & Committee Composition Requirements

Governance Requirement	Nasdaq vs. NYSE	Implementation Deadline	Controlled Companies
Majority of Board Members are Independent	Each require majority of board members to be independent	Majority of members independent: Within 1 year of listing	Not applicable, but still required to hold executive sessions.
Compensation Committee	<p>Nasdaq: Independent committee required with a 2 member minimum.</p> <p>NYSE: Independent committee required with a 1 member minimum.</p>	<ul style="list-style-type: none"> • Time of Listing: 1 Independent Member • Majority of Members: Within 90 days of listing • All Members Independent: Within 1 year of listing 	Not required to comply with independence requirements for this committee.
Nominating & Corporate Governance Committee	<p>Nasdaq: No committee required, but board nominees must be approved by group consisting of a majority of the independent directors of the board. If a nominating committee exists, must be entirely independent.</p> <p>NYSE: Independent committee required with a 1 member minimum.</p>	Same as Compensation Committee	Same as Compensation Committee.
Audit Committee	<p>3 member minimum.</p> <p>The exchanges' audit committee standards are substantially the same, except that Nasdaq rules preclude from membership any person who has participated in the preparation of the financial statements of the company or any of its subsidiaries within the past 3 years.</p>	Same as Compensation Committee	Same requirements as for non-controlled companies.

Board Composition and Compliance: Action Items

What to think about now:

- Discuss ideal post-IPO board composition
- Consider independence, board structure and committee composition
- Identify any gaps (board chair, audit chair)
- Begin director search

If you have time:

- Plan gradual, graceful board transitions
- Establish a regular cadence of board meetings
- Start preparing and distributing board materials early

Audit and Financial Statement Readiness



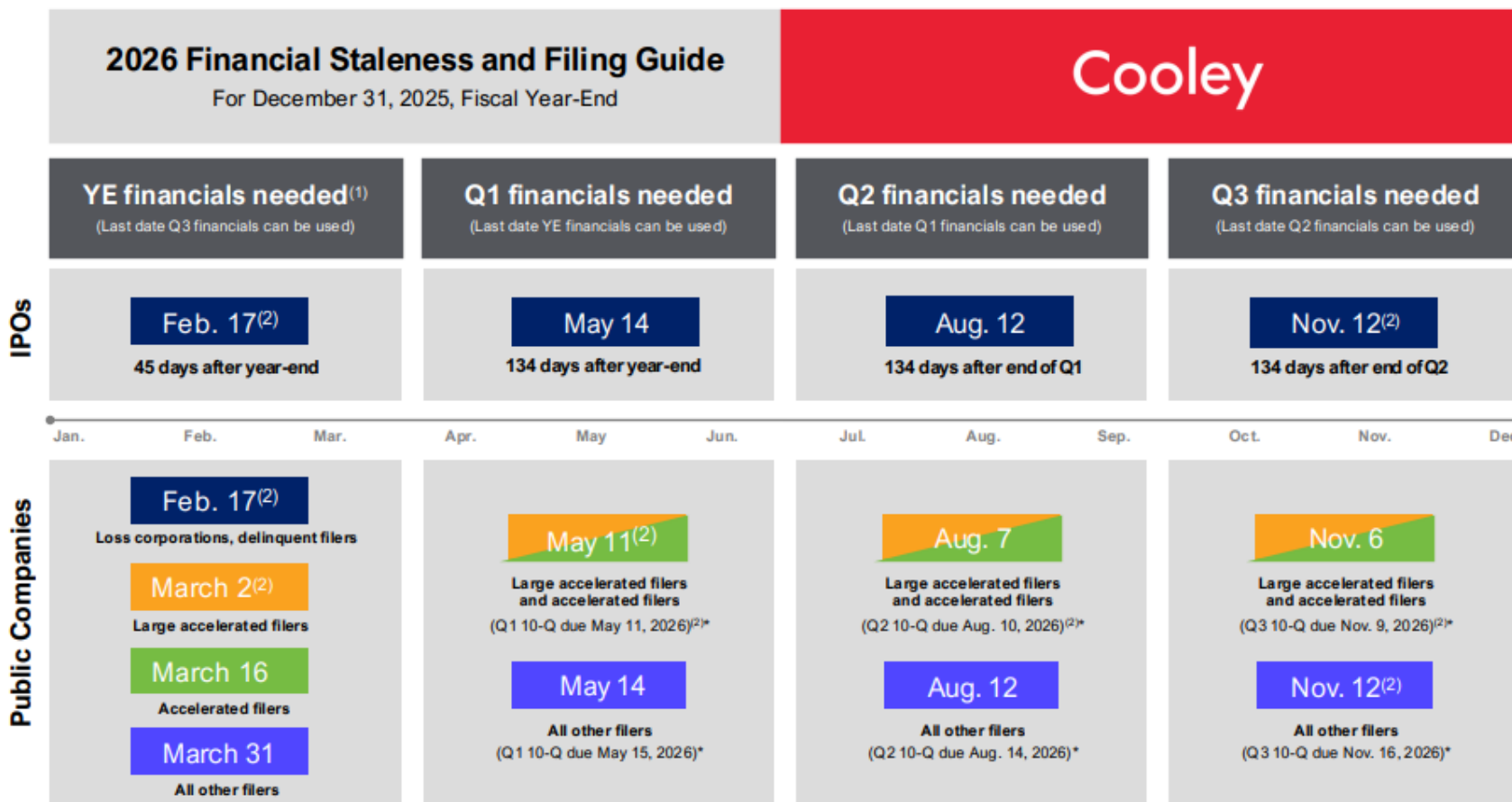
Setting the Stage: What is Required?

- Threshold questions:
 - **Are you an emerging growth company (EGC)?**
 - EGC status determines how many years of financial statements you are required to present.
 - A company qualifies as an EGC if it had less than \$1.235 billion in annual revenue in its most recently completed fiscal year. It will continue to be an EGC for 5 years after IPO, unless one of the following occurs:
 - The last day of the issuer's fiscal year during which its gross revenues equal or exceed \$1.235 billion
 - The date on which the issuer has, during the previous 3-year period, issued more than \$1 billion in non-convertible debt
 - The date on which the issuer has a public float (measured as of the end of its most recently completed second fiscal quarter) of \$700 million or more
 - **Have you completed (or do you plan to undertake) any material M&A that could require target company or proforma financial statements and impact your ability to meet your timing goals?**
 - Any financials required for target companies must be identified as early as possible to confirm the availability of such financials and to allow for preparation of any required pro forma financials.

Filing Requirements

	Non-EGC requirements	EGC requirements
Annual audited financial statements in an effective IPO filing	Balance sheet – 2 years	Balance sheet – 2 years
	Statements of operations, cash flows and shareholders' equity – 3 years	Statements of operations, cash flows and shareholders' equity – 2 years
Audited financial statements of an acquired business in an effective IPO filing	20% significance – 1 year	20% significance – 1 year
	40% significance – 2 years	40% significance – 2 years
	50% significance – 2 years	50% significance – 2 years
Auditor attestation on internal control – SOX 404(b)	Auditor's attestation on internal controls over financial reporting in second Form 10-K filing (applicable for accelerated and large accelerated filers)	Deferred for as long as the company is an EGC , i.e., deferred for up to 5 years
Executive compensation disclosures	Shareholders' voting on "say on pay" and "golden parachute" compensation disclosures are required	EGCs are exempt from shareholders' voting on "say on pay" and "golden parachute" compensation disclosures
	Provide full compensation disclosures (e.g., compensation tables for top 5 executives for 1 year)	EGCs are allowed to follow reporting obligations of smaller reporting company (SRC) (e.g., compensation tables for top 3 executives for 1 year within the Form S-1)
"Testing the waters"	During a securities offering, both EGCs and non-EGCs are allowed to engage in oral or written communications with potential investors that are QIBs or accredited investors	

Know Your Financial Staleness Calendar



(1) Close coordination with the auditors and underwriters regarding timing may be required to ensure that negative assurances can be received from the auditors, which is limited to 134 days (Feb. 11) without any holiday extension.
 (2) Reflects a permitted extension to the next business day, as the date would have otherwise fallen on a weekend or holiday. See [Securities Act Rule 417](#) and [Exchange Act Rule 0-3\(a\)](#).

* For domestic issuers only -- foreign private issuers have a different staleness calendar and only require full year and half year financials

Audit and Financial Readiness: Action Items

What to think about now:

- Identify and engage key third parties: your independent auditor, consultants and tax advisors
- Determine your EGC status and financial statement requirements (including M&A that could require target or pro forma financials)
- Complete necessary audits and SAS 100 quarterly reviews
- Manage staleness dates
- Determine key financial and operational metrics
- Determine guidance strategy
- Identify and resolve key accounting and tax issues
- Identify and effect changes needed to report as a public company, including hiring of any finance staff

If you have time:

- Begin a SOX readiness assessment
- Build out the FP&A function to support a quarterly earnings cadence
- Evaluate whether your current ERP and reporting systems can support public company disclosure requirements

Cooley

Thank You

