

A CORPORATE & SECURITIES ATTORNEY’S COMPARISON OF PUBLIC VS. PRIVATE COMPANIES

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The tabular comments below are meant to be read in connection with the notes that follow.

<u>Topic</u>	<u>IPO/Public company</u>	<u>Private-held company¹</u>
Initial capitalization	Rarely available through IPOs. Minimum size req'd.	Standard source of capital for start-ups
Growth capital	Once minimum size is attained, IPOs can provide growth capital. Follow-on offerings can be done with decreased complexity as company size increases. Also, public companies can quickly raise capital by private placements followed by registration of resales or exchange for subsequently publicly registered securities with identical terms.	Private sources of capital available to fund growth. Sources of capital include friends & family, angels, venture capital, private equity, & industry sources.
Availability of capital to worthy companies	High	High
Transaction time to close & costs ²	Costs vary, but expensive for small companies. IPO lead time is the greatest. Must have 2 yrs. audited financials to file with SEC for IPO, then several months to complete the registration process. Transaction costs include CPAs, securities counsel, blue sky fees & legal costs, & underwriter’s discount plus fees of underwriter’s counsel. O&G companies will have to have reserve reports from independent engineers. Estimated time is 6-9 months from audit start to close offering.	Significantly lower costs than IPO. In all but the smallest deals, audited financials will be required, plus legal fees, & possible appraisal or engineering costs. Issuer usually must pay legal fees of investors. Estimated time from audit start to closing is 3-6 months.

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State securities laws	Unless the company will be registered on an exchange or another exemption is available, these laws apply, & registration is required.	In many cases, registration requirements of state securities laws are preempted save for fraud provisions.
Quality of disclosure to investors as part of the offering	Very good, even better as the company grows & seasons.	Former SEC Chair Mary Jo White expressed concern that disclosures in private placements are inferior to public offerings. ³ In general, I concur except where investors control the information they receive pre-investment.
Exposure of ownership & management to risks of lawsuits	High, particularly if stock price falls post-IPO. Promoters of publicly companies that do not fare well are subject to scapegoating by plaintiff investors.	Low if investors believe all material fact were disclosed. Absent fraud, sophisticated investors are less likely to become plaintiffs. Unsophisticated friends & family investors may not appreciate investment risks & are more likely to sue for bad investment.
Board membership	Founders, major investor representatives, plus independent directors.	Founders & representatives of major investors.
Corporate structure	Corporations, with the Del. Gen. Corporation Law being the preferred state law for incorporation.	Venture capital & private equity funds generally prefer corporations where the entity is likely to be sold. In instances where asset sales are likely, entities taxed as partnerships are often used to avoid double taxation.
Corporate governance	Extensive statutory & case law requirements apply, particularly under Delaware law. In addition, SEC & exchanges require disclosures regarding other corporate governance matters. Further social pressures may urge other requirements.	Corporate or other entity governance is based on statutory & case law requirements, but certain entities, LPs & LLCs, permit significant, contractually-agreed variances to meet the desires of owners.
Annual compliance costs	High, with annual audits, quarterly, annual, & interim reports, plus proxy costs. Could be >\$2.0 MM	Lower, with annual audits, plus information as required by investors.

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<p>Aggravating factors (which also increase compliance costs & distract management from running business)</p>	<p>High. Examples include:</p> <ul style="list-style-type: none"> • Quarterly & interim reports on Forms 10-Q & 8-K. • Annual report on Form 10-K. • Annual proxy statement & stockholder meeting, often with the requirement for inclusion of stockholder proposals. • Disclosure & defense of mgmt. & bd. compensation in excruciating detail. • Corporate governance requirements & disclosure • Code of ethics disclosure. • Conflict mineral disclosure. • Disclosure of SEC & Cong. concerns <i>de jour</i>: e.g., cybersecurity, compensation. Remember Y2K? • Reg FD complicates disclosure of non-GAAP accounting measures often requested (req'd) by analysts. • Required public disclosures may betray trade secrets or information that the company may wish to keep private, such as the loss of key customers or problems with important technology. • Threat of stockholder activists. • Exchange requirements. • Pressure to hit quarterly earnings targets. • Disclosure of insiders' compliance with Sec. 16(a) of the '34 Act. • Review of the foregoing by SEC or exchange staffers in most instances with ltd. or no private sector mgmt. or investment experience. • Director compensation • Higher D&O liab. ins. premium. 	<p>Low</p> <p>In general, none of the matters shown to the left, unless negotiated with investors.</p>

<u>Topic</u>	<u>IPO/Public company</u>	<u>Private-held company¹</u>
Equity-based compensation for management	Restricted stock grants, incentive stock options, non-qualified stock options, phantom stock grants.	<p>For private corporations, the choices are essentially the same as for public companies, however, private company status & contractual arrangements may delay cashing out of these rights.</p> <p>For private companies taxed as corporations, carried interests may be used along with phantom rights & other contractual bonus rights.</p>
Founders' liquidity	Founders can sell in market as affiliates under Rule 144 or registration rights have been provided, unless "lockups" are negotiated. Post-IPO market liquidity may limit ability of stockholders to sell into the public market.	Except in unusual circumstances, founders can sell no sooner than the investors' exit strategy.
Acquisition of the company	Acquisitions of public companies, including going private transactions, are complicated involving SEC-approved disclosures, sometimes two-step transactions, fairness opinions, "go-shop" periods, dissenters' rights, & almost always stockholder litigation. ⁴ The costs are exorbitant.	Acquisitions are now the primary exit strategy for private companies. Transactions are largely negotiated in advance with all parties including investors in the target agreeing to the terms. Acquisitions by public companies can avoid pre-closing SEC filings (e.g., '33 Act registration on Form S-4) by all-cash deals. Also, acquisitions by public companies in consideration of the acquirer's stock or other securities can delay SEC filings by private placement of securities with public registration of the resale of the consideration securities to be done post-closing. ⁵

Important Notes:

I am a member of the Securities and Exchange Commission's Advisory Committee on Small and Emerging Companies. The opinions and analysis expressed here however are mine alone, & they do not reflect the opinions of the SEC, its commissioners or staff, the Advisory Committee or its members.

This is not a scientific analysis, but is my subjective commentary based on 39 years of practicing transactional securities law in the Dallas-Fort Worth area. Also, my comments above are generalizations, and exceptions likely exist for all comments. I have tried to be neutral in my analysis, preferring neither public nor private companies. In drafting, legalese is eschewed in favor of general terms.

This comparison does not address the differences in valuations of public and private companies. Those comparisons are available from other sources.

Nothing in this document is intended to constitute legal advice. Persons desiring legal advice should engage counsel with expertise in these areas.

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¹ This column only discusses growth oriented private companies & ignores the majority of private companies that exist to operate the business & to provide regular income to the owners without expectation of significant growth beyond that financed by retained earnings & bank debt.

² Transaction time and costs can grow rapidly if the company has contingent liabilities or other problems investors call "hair".

³ "Keynote Address at the SEC-Rock Center on Corporate Governance Silicon Valley Initiative," Chair Mary Jo White, March 31, 2016, <https://www.sec.gov/news/speech/chair-white-silicon-valley-initiative-3-31-16.html>.

⁴ E.g., see *In Re: Appraisal of Dell Inc.*, ___ A.3d ___ (Del. Ct. of Chan. 2016).

⁵ See, Exxon Mobil Corporation (XOM) announced purchase & sale agreement for acquisition of private O&G companies owned by certain members of the Bass family of Fort Worth, TX for \$5.6 billion of XOM common stock to be privately placed, plus contingent cash payments. XOM Form 8-K filed Jan. 17, 2017.