

2018 IFA

LEGAL SYMPOSIUM

• May 6-8 | Washington, DC

Corporate Counsel Session I

- **Part I: Marketing Issues**, Carol Anne Been, Dentons
- **Part II: Getting Your House in Order**, Keith Townsend, King & Spalding
- **Part III: Implementing Brand Repositioning**, Sarah Powell, Focus Brands

Part I

**Marketing Issues:
Contests, Sweepstakes and
Sponsorship/Naming Rights**

Marketing Issues: Promotional Contests and Sweepstakes

- United States
- Canada
- Mexico
- United Arab Emirates
- India
- China

United States Promotion Law

- Sweepstakes*
- Contests*
- Raffles
- Lotteries
- Gambling
- Mostly governed by state law

The Big Three

- If all 3 elements occur together, it's *illegal*
 - Prize
 - Chance
 - Consideration

Prize Element

- The point of the promotion: The Prize
 - Everyone wants to win
 - Prize can generate interest
 - Prize can be Sponsor's product/service/activity
 - Hard to value prizes: "ARV"
 - Risky prizes

Chance Element

- How are winners selected?
 - Random drawing, random number generator
 - Exercise of talent, skill
 - Educated guess - sports, weather, beans in jar
 - First to respond, first 10 in line
 - Public voting

Consideration Element

- No Purchase Necessary
- Payment for event, text message
- Non-monetary consideration
 - Visit location
 - Play game, share contacts; like, follow or tweet
 - Take a photo, make a video
- Alternate Method of Entry

Sweepstakes vs. Contest

- Both have **Prize** Element
- How are winners selected?
- Sweepstakes use **Chance** Element
 - So must eliminate **Consideration** Element
- Contest uses Skill
 - Eliminates **Chance** so is **Consideration** OK? (some states)

Who May Enter

- Legal Residents of United States 18 or older?
 - Carve out certain states
- Not employees or their family members
- Children under 13, between 13-17 years old
- Purchasers of Sponsor's product/service?

How to Enter

- Mail, email, website, dedicated microsite
- Text message
- Social media posts (check platform terms of use)
- User generated content
- What to submit: Contest Judging Criteria

Official Rules

- Sponsor's contract with entrants
- Describe details of entry, winner selection, prizes
- Limit Sponsor's liability
- Legal compliance
- Links to Rules, short form Rules

Registration and Bonding

- If total retail value of all prizes exceeds \$5,000:
 - New York
 - Florida
- If total retail value of all prizes exceeds \$500 and “retail establishment”:
 - Rhode Island (registration only)

Privacy

- Tell entrants what personally identifiable information (PII) Sponsor will collect
- Tell entrants how Sponsor will use their PII
 - For winners' list
 - For marketing to them, by whom?
- Does Sponsor's privacy policy apply?

Advertising and Compliance

- Full Rules, short Rules
- No unfair or deceptive advertising
- Special requirements for use of US Mail
- Endorsements and testimonials
- Award all prizes

Canada Promotion Law

- Sweepstakes must have no-purchase entry option
- Sweepstakes must include skill question
 - Time limited, four-step math question
- Quebec also requires French language, registration and fees
 - Often Quebec is excluded

Mexico Promotion Law

- Ministry of Interior permit required for sweepstakes
 - Articles of Incorporation, Taxpayer ID, Bond
 - Full Rules in Spanish
- Ministry must be present at drawing in Mexico
- Post-drawing reporting is required

United Arab Emirates Promotion Law

- 7 emirates and 45 free zones regulate separately
- Permit and fee required in Dubai and Abu Dhabi
- Generally no purchase to enter
- Official must be present at drawing
- Retail promotions during 2 “sale seasons”

India Promotion Law

- Prize competitions governed by states
 - Some states bar sweepstakes as gambling
- Puzzle competitions governed by national Prize Competition Act
 - But subject to state approval

China Promotion Law

- Prize promotions of two types
 - With gift offers - no prize cap
 - With lucky draws - prize may not exceed \$8,000
- Live Q&A challenges (similar to HQ) are popular
 - Prize shared among winners
- Retail store promotions must be registered

Part II

**Getting Your House in
Order: Preparing for IPO
or Sale to Private Equity**

Initial Public Offerings

Execution Overview and Considerations



Keith M. Townsend

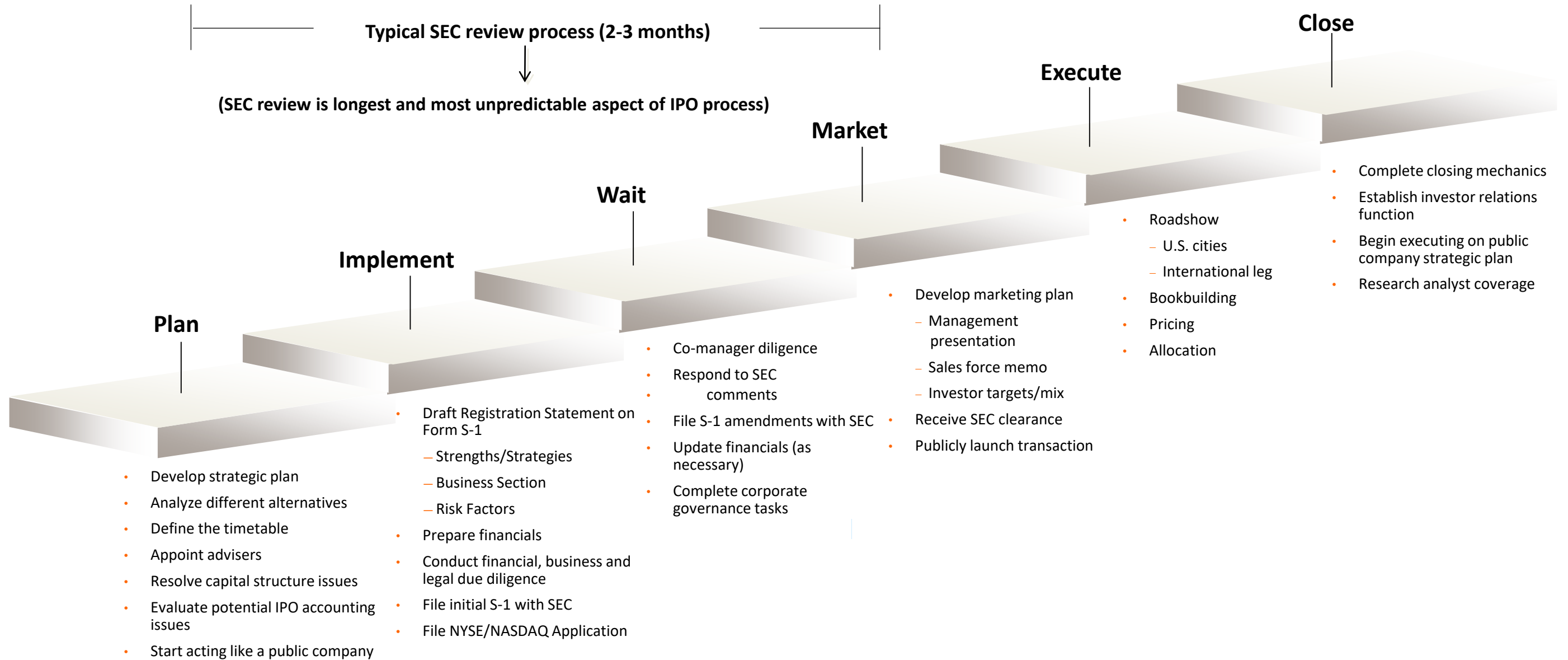
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TYPICAL IPO EXECUTION OVERVIEW

THE IPO PROCESS TYPICALLY TAKES 4 - 6 MONTHS FROM START TO FINISH



IPO PROCESS INITIAL STEPS

TWO – THREE MONTHS

PRELIMINARY PREPARATIONS

- Meetings with lawyers and ECM advisor to discuss detailed timeline, gun jumping considerations, key execution items and deliverables
- Assess board members and determine committee chairs / develop pay plan for outside directors / independence analysis
- Update historic financials for public company information / footnotes
- Finalize public company readiness assessment
- Prepare initial corporate governance proposal for review
- Evaluate structure; engage accounting advisors to assist, as needed
- Review any pre-IPO re-organization needs and assess impact under material agreements
- Invite banks to participate in bake-off / circulate NDAs / develop bake-off materials / evaluate ECM advisor / evaluate IR firm engagement
- Begin preparation of org meeting deck
- Analyze related party transactions
- Material contract analysis / assess exhibit filing requirements

TWO MONTHS

PRE-ORGANIZATIONAL MEETING

- Any additional bake-off meetings / banker selection
- Review / summarize shareholder agreements, management agreements and other equityholder agreements (COC / IPO implications)
- Select dataroom provider and prepare dataroom
- Deliver final corporate governance proposal
- Distribute precedent books to working group
- Begin preparations of shell, risk factors, MD&A and “back half” of S-1
- Evaluate board make-up and independence / consider additional candidates
- Begin preparing corporate governance documentation and update / implement registration rights agreement
- Begin preparing / refining analyst model
- Finalize audit work

IPO PROCESS OVERVIEW (CONT'D)

TWO MONTHS

PRE-FILING

- Organizational meeting
- Draft “box” disclosure / finalize draft S-1 w/ full working group
- Legal and business due diligence
- Prepare draft analyst presentation
- Reserve ticker symbol / evaluate Nasdaq vs. NYSE
- Distribute D&O questionnaires
- Negotiate underwriting documentation and comfort letter
- Board approvals / board education / constitute audit committee
- Evaluate IPO equity grants and/or bonuses, as appropriate
- Engage D&O insurance broker / seek proposals for D&O tower
- Prepare artwork for initial submission
- Active banks to clear committees
- Evaluate directed share program
- Initial filing / confidential submission of S-1

ONE – TWO MONTHS

PRE-FIRST AMENDMENT

- Analyst day
- Prepare roadshow presentation
- Respond to SEC comments
- Finalize corporate governance documentation / file all key exhibits
- Finalize new equity compensation plan
- Select transfer agent / equity plan administrator and begin transition
- Obtain EDGAR codes for D&Os
- Update for audit / additional quarters (earlier if needed)
- Select exchange / begin clearance process
- Additional board education
- Prepare employee communications

TWO WEEKS

MARKETING / ROADSHOW

- Work with analysts / finalize model / review models
- Submit stock based comp letter to the SEC
- Clear final SEC comments
- Finalize roadshow presentation
- Update audit
- Launch roadshow
- Prepare and file Section 16 filings / 8-A / Closing documentation / 462(b) filing, as needed
- Prepare IR website to go live post-IPO
- Invites / planning for bell ringing
- FINRA / Exchange and SEC clearance
- Pricing / file final prospectus
- Closing

Financial Statements and Accounting Standards

- Meeting the accounting standards demanded by the market
- Providing comparable metrics to peers on key performance indicators
- Presenting financial results
- Correct historical data and appropriate standards
- Internal controls over financial reporting and disclosure controls and procedures
- Evaluate business combination financial statement requirements

Corporate Governance Considerations

- Having the right Board and executive team
- Determining whether to utilize “controlled company” exemption
- Assessing need for post-IPO shareholders agreement

Other Considerations

- Corporate structure – any pre-IPO reorganization transactions
- Evaluate SEC pre-clearance issues
- Confirm auditor independence under Public Company Accounting Oversight Board standards and standing of current audit firm
- Building public company infrastructure, as needed
- Prepare background materials for bake-off, including views on forward projections
- Evaluate use of “testing-the-waters” communications with qualified institutional buyers and other institutional, accredited investors to gauge interest in the potential offering

“IPO Readiness involves the acceptance and implementation of change – not just by executive management, but throughout every aspect of your business, organization and corporate culture.”

- EY’s guide to going public, 2013

“GUN-JUMPING” CONSIDERATIONS

Overview

- Communications outside of your IPO prospectus can have the effect of conditioning the public mind or arousing public interest in your offering, subject to important safe harbors
- SEC rules place restrictions on communications that could stimulate investor interest prior to them having an opportunity to see the legal selling document (*i.e.*, the prospectus)
- Directors, officers and employees should not communicate with media or analysts without first obtaining pre-approval from senior leadership

Potential Consequences to Violations

- Delay of the IPO—6 months
- Inclusion of unwanted emails, press releases or other communications in the body of the prospectus
- Potential rescission rights for IPO investors
- Civil and/or criminal sanctions

Practical Tips

- No discussion of the IPO with anyone not directly involved in the process
- Do not affirm rumors regarding the IPO
- Use caution in discussions with research analysts
- Counsel should review the company’s website for “offers”; the SEC views website and information accessed by hyperlinks as written statements by the company
- Plan for post-filing communications with employees and suppliers



“GUN-JUMPING” CONSIDERATIONS (CONT'D)

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By Chelsea Naso

Law360, New York (October 22, 2014, 4:22 PM EDT) -- Private equity-backed chicken wing chain **Wingstop Restaurants Inc.** is the latest restaurant group cooking up initial public offering plans. Dallas-based Wingstop has recently met with underwriting banks to discuss a potential offering that could raise about \$100 million and value the company at about \$500 million, The Wall Street Journal reported, citing people familiar with the potential deal. The chicken wing chain, acquired by **Roark Capital Group** in 2010, has more than 660 restaurants in the U.S., Mexico, Russia, Singapore and other countries and recently announced plans to open 50 locations in the Philippines and 100 in Indonesia.

Sandwich Chain Jimmy John's Plans October IPO

The deal will value the company around \$2 billion, people who have seen the deal documents say.

By Ben Walsh, Dave Jamieson



GILBERT CARRASQUILLO/GETTY IMAGES
Jimmy John's is planning an initial public offering.

Sandwich chain Jimmy John's is planning to announce an initial public offering as early as next week, a source told The Huffington Post.













The deal will value the company around \$2 billion, people who have seen the deal documents say. Morgan Stanley, Piper Jaffray and Jefferies are listed as underwriters on the transaction. Morgan Stanley is the most senior, or "lead-left," bookrunner.

IPO VALUATION METRICS — ARE WE READY?



	Wing-Stop	Bojangles	The Habit	
Profile	Units	726	635	99
	Number of States	31	10	4
	Total Revenue	70	430	162
	EBITDA	24	67	20
	% Margin	34%	16%	12%
Unit Economics	% Franchised	98%	59%	<i>Pending at IPO</i>
	AUV	1,070	1,800	1,700
	Cash-on-Cash Return	52%	129%	30%
Historical Growth	SSS:			
	LFY @ IPO	13%	5%	4%
	FY -1	10%	3%	4%
	FY -2	14%	7%	9%
	2-year CAGR:			
	Units	14%	8%	36%
	SSS (2-year stacked)	22%	7%	4%
	Sales	14%	11%	43%
EBITDA	25%	12%	49%	

IPO VALUATION METRICS — ARE WE READY?

IPO Date	Market Performance		Deal Statistics		Scale		LTM Growth			LTM Debt	Forward Valuation @ IPO		
	1-Day	30-Day	Base Deal	% of Mkt. Cap.	Revenue	EBITDA	Sales	EBITDA	EPS	/ EBITDA	P/E/G	P/E	EBITDA
 6/11/2015	61%	73%	\$110	20%	\$70	\$24	14%	14%	19%	4.2x	2.3x	43.2x	23.9x
 5/7/2015	25%	31%	147	22%	430	67	10%	10-12%	15%	3.7x	1.7x	25.0x	12.9x
 1/29/2015	119%	117%	105	14%	107	17	NA	NA	NA	0.0x	NM	NM	37.3x
 11/19/2014	120%	95%	90	20%	162	20	29%	25%	26%	0.1x	NM	NM	17.1x
 7/24/2014	60%	115%	107	20%	319	57	6%	20%	NA	3.3x	1.3x	23.4x	11.8x
 5/1/2014	0%	(7%)	64	34%	80	26	9-10%	10%+	15%	4.5x	1.6x	24.6x	11.4x
 4/10/2014	65%	73%	88	32%	26	11	20-25%	20%	25%	5.7x	NM	NM	16.4x
 10/3/2013	120%	97%	105	29%	290	33	14%	20%	24%	0.0x	1.5x	35.6x	9.5x
 6/27/2013	104%	139%	111	20%	312	37	16%	20%	25%	0.4x	1.4x	34.0x	14.3x
 7/23/2012	16%	33%	87	42%	139	34	20%	22%	25%	0.4x	0.8x	20.3x	10.7x
 7/26/2011	47%	38%	486	21%	589	287	6-8%	10-12%	15%	5.2x	1.1x	16.0x	11.8x
 1/25/2006	100%	112%	199	28%	582	46	21%	28%	30%	0.1x	1.1x	32.1x	6.7x
Median	63%	84%	\$106	22%	\$226	\$34	15%	20%	25%	1.9x	1.4x	25.0x	12.4x
Average	70%	76%	\$142	25%	\$259	\$55	16%	21%	22%	2.3x	1.4x	28.2x	15.3x

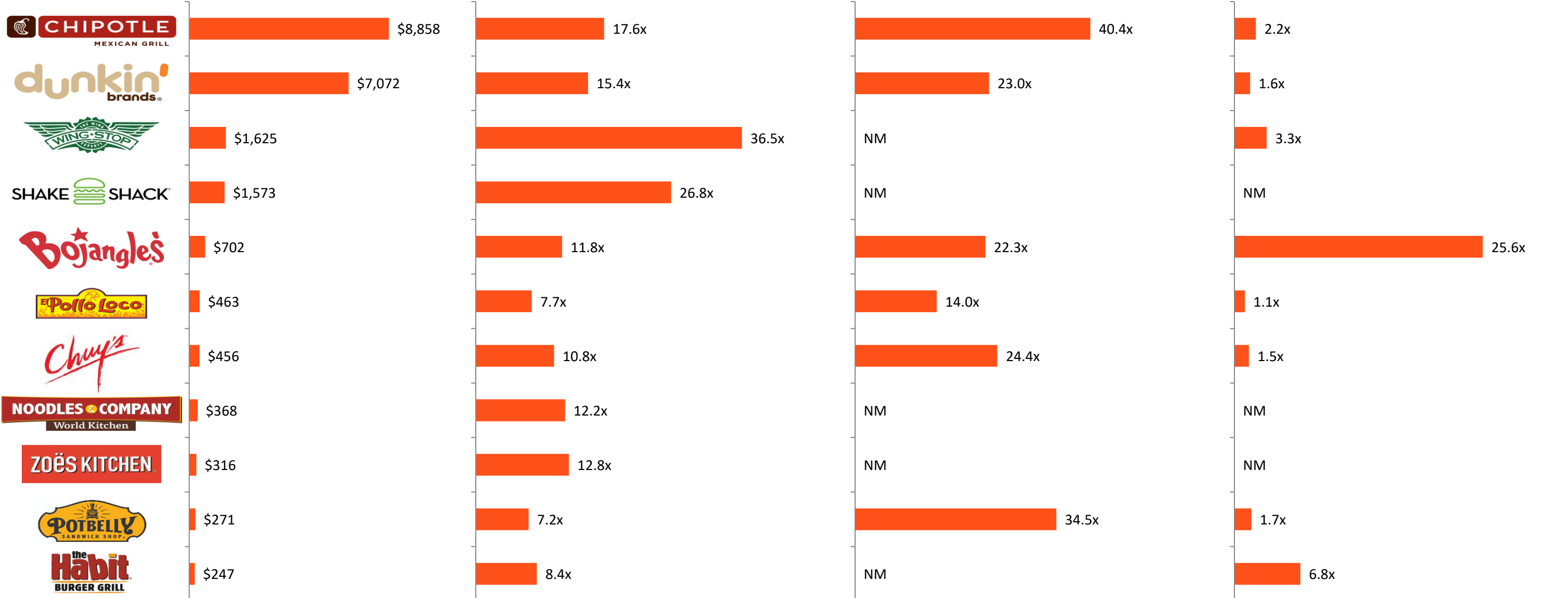
IPO VALUATION METRICS — ARE WE READY?

ENTERPRISE VALUE (MM)

EV / 2018E EBITDA

2018E P/E⁽¹⁾

2018E P/E⁽¹⁾



MEDIAN:

12.2x

23.7x

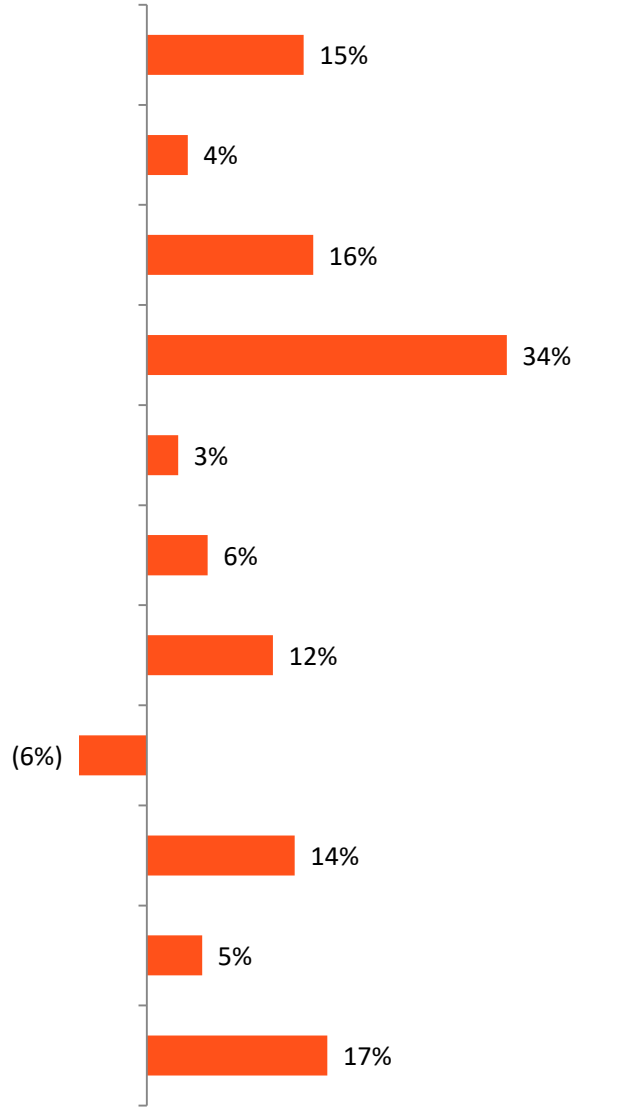
2.0x

IPO VALUATION METRICS — ARE WE READY?

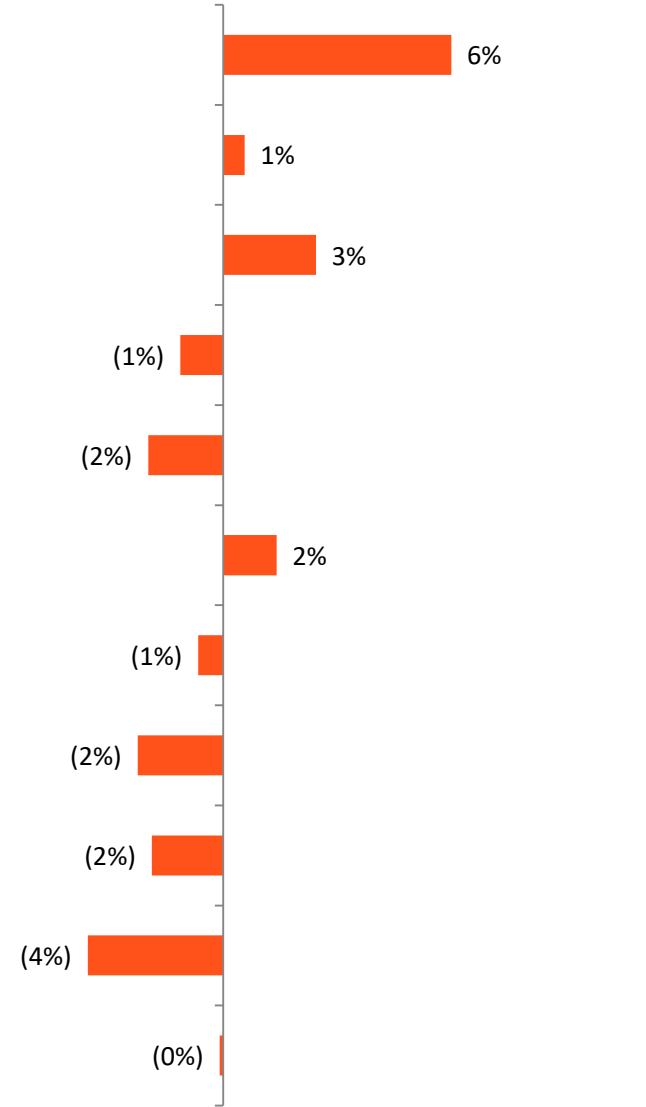
AVERAGE UNIT VOLUME



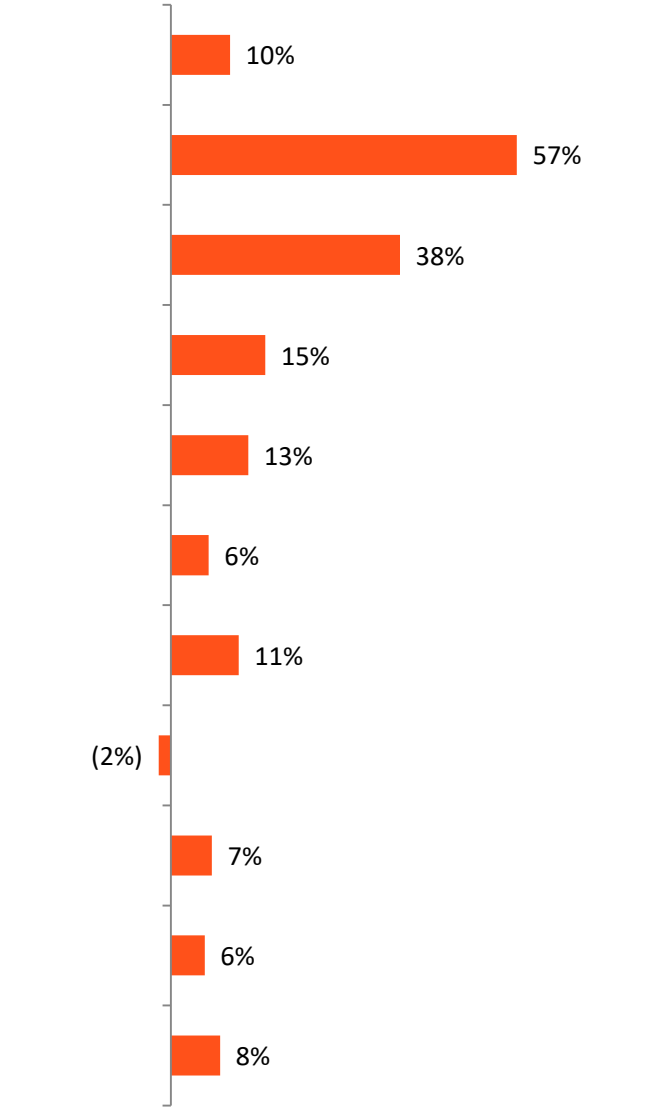
LTM TOTAL SALES GROWTH



LTM SSS GROWTH



LTM EBITDA MARGIN



MEDIAN:

11.8%

(0.7%)

9.7%

IPO LOCK-UPS, DIRECTED SHARE PROGRAMS (DSP) AND POST-IPO PERFORMANCE

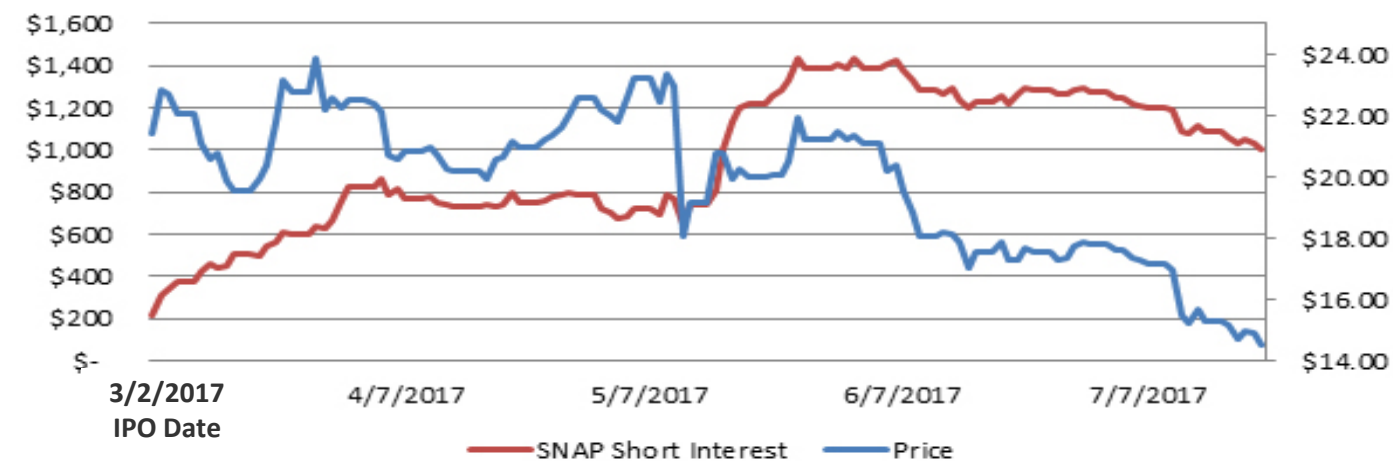
Overview of an IPO Lock-up

- Purpose of lock-up is to keep share price volatility resulting from new investor liquidity down as the IPO shares trade into a natural volume
 - Upon lock-up release typical for increased share price volatility for a short time
- Standard lock-up of 180 days for pre-IPO shareholders including management and board

DSP Overview

- Gives invited individuals an opportunity to purchase stock at the public offer price
- Size: DSPs typically represent up to ~5% of a base offering
- Participants: can include employees, franchisees, other affiliates and even family / friends
 - More narrowly defining the invite list will help minimize the burden on management, who will receive many in-bound requests from people looking to participate

SNAP Short Interest vs. Price Data by S3 Partners



Post-IPO Performance

- Business performance / execution since IPO
 - Important to properly manage expectations and communication to the Street
 - Under promise and over deliver
- Price appreciation: Important signal to price a secondary offering above the IPO price

"It is imperative that correct expectations are set during the IPO and that the company can meet or, preferably, slightly exceed them with its first set of results and beyond."

- PWC, Guide to Executing a successful IPO, 2018

Financial Statement Discussion Topics

Financial Statements to be Included

- Three years for non-EGCs / two years for EGCs
- Any acquisition financials required; complete 3-05 and SAB 80 analysis
 - Audited financials and unaudited stub period
 - Pro formas
- Public company additions to existing footnote disclosure
- Selected financial data presentation
 - Discuss use of blackline accounting
 - Discuss other metrics and non-GAAP measures to include in S-1

Quarterly Reviews by Auditors

- Comparable period information for prior year (e.g., 2018 information for 2019 IPO)
- 8 quarter financial table for inclusion in S-1
- Build timeline to allow for one to two “dry runs” with a < 40-45 day quarterly close + SAS 100 review before launch of roadshow
- Confirm no requirement by auditors for audits of stub periods

Other Considerations

- MD&A
 - Evaluate / discuss segment reporting
 - Consider any operational / reporting line / information packages to CODMs changes
 - Discuss preparation of MD&A template
- Forecasting / model for research analysts
- SOX readiness / internal control documentation / internal audit
- Information / accounting systems
- Consulting help / additional personnel needs, if any
- Audit Committee membership / documentation
- Comfort letter process
- Any accounting issues to preview with the SEC
- Other IPO-specific accounting issues (e.g., cheap stock)

***“The preparation of SEC-compliant financials and the development of the capability to produce these in a timely way going forward is almost without exception always the ‘longest pole’ in the IPO timeline and the area most demanding of the up-front investment of resources.*”**

- Initial Public Offerings: Considerations for Business Owners and Executives Taking Their Company Public

Key Point: IPO Staleness Considerations

- *Understanding timing requirements for providing financials is critical to avoid “staleness” issues*

DUAL TRACK IPOs

Determining Whether to Primarily Pursue an IPO, Exclusive Sale Process, or Dual Track Process will Hinge Upon Stakeholder Considerations Relating to Broader Strategic Objectives, Ownership Structure and Timing Considerations

		INITIAL PUBLIC OFFERING	COMPANY SALE
Timing / Process	▶	<ul style="list-style-type: none"> 4 – 6 months assuming no material legal, governance or accounting issues 	<ul style="list-style-type: none"> 4 – 6 months
Scope of Process	▶	<ul style="list-style-type: none"> Due Diligence SEC Filings / Documentation Marketing / Road Show Pricing / Distribution 	<ul style="list-style-type: none"> Preparation of Confidential Memorandum Marketing / Screening Due Diligence / Management Presentations Negotiate Definitive Agreement(s) / Closing
Investor Base	▶	<ul style="list-style-type: none"> Wide range of investors including asset managers, hedge funds and retail investors 	<ul style="list-style-type: none"> Strategic Purchasers Private Equity Firms
Post Investment Results	▶	<ul style="list-style-type: none"> Greater disclosure / publicity to capital markets Retained upside in growth prospects 	<ul style="list-style-type: none"> Disclosure of confidential information may be transferred to competition Full exit / Immediate liquidity

IPO PROCESS: PROSPECTUS ARTWORK



Analyst Communications During the Bake-Off Process

- FINRA has rules regarding communications that analysts can engage in once a company makes it known that the company intends to proceed with an IPO – referred to as the IPO “solicitation period”
 - During the solicitation period, the research analyst will be restricted from any communications beyond bona fide vetting and due diligence, which materially restricts the typical dialogue between analysts and the C-suite
- In contrast, during the pre-IPO period, an analyst can speak more freely and provide feedback on comparables and valuation as long as it is clear that the discussions are not part of the solicitation process
 - The same is true after underwriters have been selected; at that point, analysts can communicate more freely with the executive team

Timing of Pre-IPO Option Grants / Other Equity Awards

- The SEC generally focuses on grants made during the 12 month period leading up to an IPO as part of the IPO comment letter process
- In order to be in the best position to avoid a “cheap stock” comment and/or charge, work with management on the timing, amount and appropriate strike prices for any new pre-IPO equity awards
- During the comment process, carefully consider timing of preliminary range and/or separate cheap stock letter to the SEC; the comment cannot be closed until a preliminary range is available (which should pre-date filing an S-1 amendment reflecting a price range)

OTHER SELECTED IPO ISSUES & CONSIDERATIONS (CONT'D)

Executive Compensation and IPO Bonuses

- It is fairly typical to re-evaluate compensation structure and levels for the senior leadership team in connection with an IPO
- Companies will likely need to put a new public company equity incentive plan in place in preparation for an IPO
- IPO bonuses and/or IPO grants occur in some transactions

Registration Rights Agreements

- All parties should evaluate what, if any, registration rights exist with respect to the IPO
- Most registration rights do not kick in until 180 days post-IPO, but if pre-IPO rights exist, companies should ensure that the appropriate notices or waivers are in-hand at the appropriate time

Director Compensation

- Director compensation usually changes in connection with an IPO
- Sponsor affiliated directors typically do not receive board fees

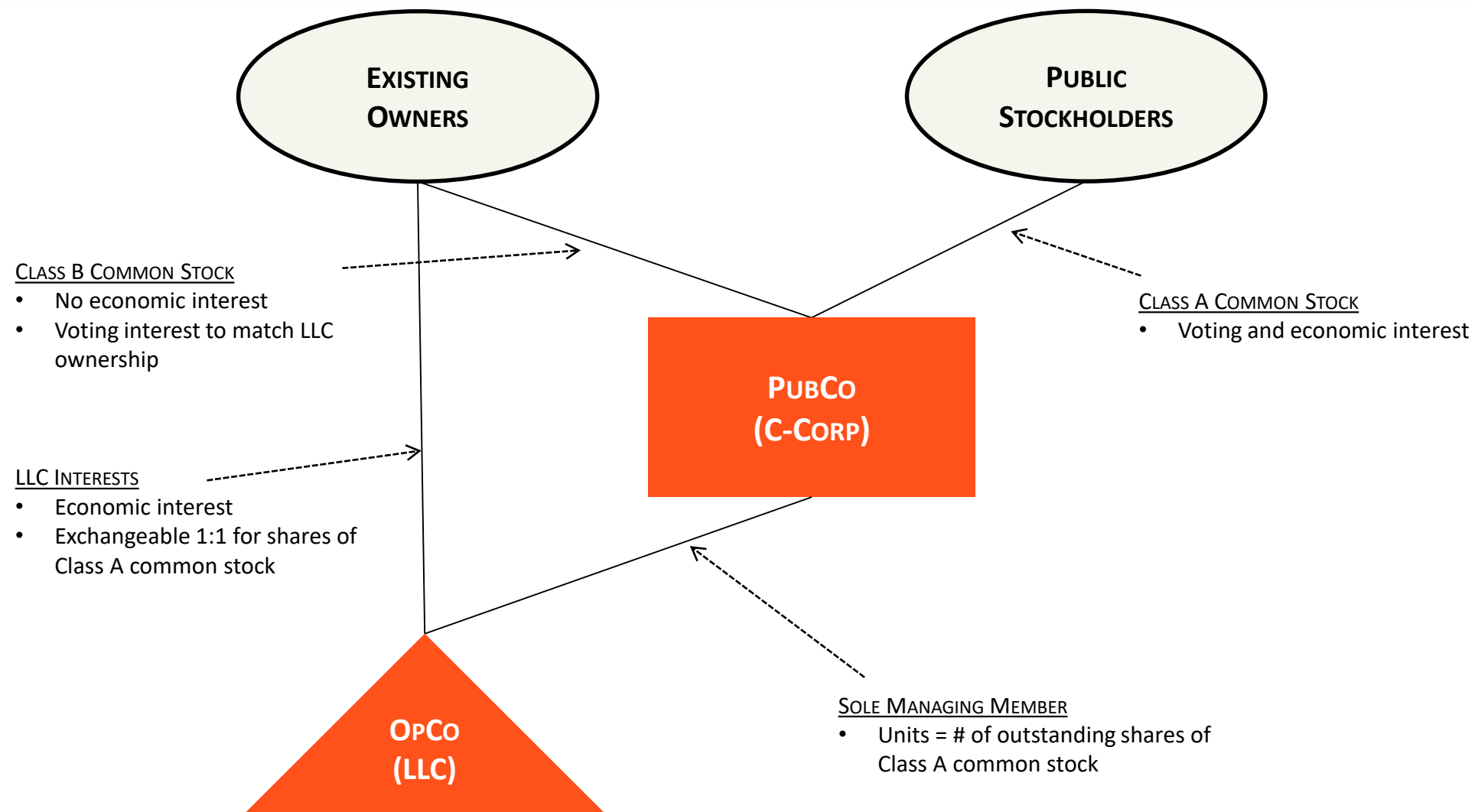
ECM Advisors

- Consider engaging independent equity capital markets advisors to assist in providing an “unbiased” capital markets perspective, assist with the bake off process and to provide insights from recent deals
- Evaluate whether an independent ECM advisor would be a value add to the process; consider seeking input from key investment banking relationships

OTHER SELECTED IPO ISSUES & CONSIDERATIONS (CONT'D)

Up-C IPO Structure Overview

- Class A common stock has one vote per share and holds all economic interests in PubCo
- Class B common stock has no economic interest in PubCo, but has a number of votes equal to the holder's economic interest in OpCo
- Existing owners (pre-IPO holders) continue to hold economic interest directly in OpCo unless and until exchanged
- PubCo is the sole managing member of OpCo



Up-C Structure Takeaway

- Designed to allow companies to preserve “pass through” status and for legacy owners along with an agreement to be paid 85% of cash tax benefits recognized by PubCo in the future

BOARD AND COMMITTEE INDEPENDENCE

	AT LISTING / CLOSING	Within 90 Days	Within One Year
Majority Independent Board	None	None	Majority Independent
Independent Audit Committee	At least one independent member at listing (3 members)	Majority of independent members	Fully independent
Audit Committee Financial Expertise	All members must be financially literate and one member must be financial expert	Same	Same
Independent Compensation Committee	At least two independent members needed to form a subcommittee for Section 16 purposes (3 total members)	Majority of independent members	Majority of independent members
Independent Nominating / Governance Committee	None (3 total members)	Majority of independent members	Fully independent

Part III

Implementing Brand Repositioning

Repositioning vs. Rebranding

- Rebranding is a change in a brand's identity, including name, logo and tagline.
- Brand Repositioning focuses on changing what customers associate with the brand and may include a change in the brand promise or personality.

When is it time for a change?

- Response to brand declining in core markets or entry of new competitors
- Research indicates brand is no longer relevant to target consumers
- Disruption in industry and brand (e.g. technology)

Phase I: Focus Groups

- Consumer opinion about the brand relative to competitors
- Consumer opinion of the brand's products
- Franchisee feedback regarding on-the-ground consumer brand perception and engagement

Phase I: Data Analytics

- Has target consumer changed?
- Is brand strategy still relevant?
- Are shifts in consumer preference and engagement system-wide or regionally/category-focused?

Phase II: Repositioning Strategy

- Identify repositioning strategy
- Evaluate strategy in test markets
- Ongoing data analytics and use of focus groups

Phase III: Franchisee Buy-In

- Demonstrated proof of concept
- Advisory Council
- Surveys

Legal Considerations in Implementing Brand Repositioning

- Restrictions under franchise agreements
- Franchisor/franchisee relationship management

Phase IV: Implementation

- Identify early adopters
- Establish consistent communication regarding brand repositioning strategy among franchise development and communications personnel
- Establish timeline for roll-out

Considerations for Execution

- Exit strategy for franchisees that want to leave the system
- FDD Considerations (e.g. Item 7; Item 19)
- Trademark Updates (where repositioning includes rebranding)

Considerations for Execution (cont'd)

- Update franchise agreements and related documents
- Wind down of original brand-related collateral and programs