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Nasdaq Private Market

# Market Updates on Late Stage Private Placements

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# Agenda

- Market developments affecting the private markets and late stage private placements
- Unicorn investors and the emergence of new market actors
- Issuer and third-party tender offers; liquidity programs
- Principal concerns for crossover funds participating in these rounds
- Investments by corporate venture capital investors (“CVC”) and strategics
- Other regulatory developments



# Market Developments Affecting Private Markets and Late Stage Private Placements

# Market Overview

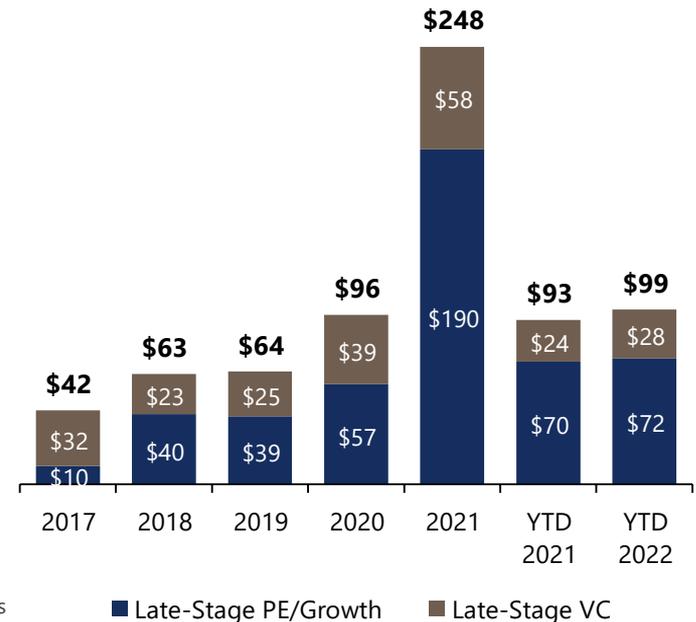
- Equity markets entered bear market territory this week following Friday's US CPI report, fueled by concern around Fed tightening and softening economic growth
- Debt and equity markets continue to remain volatile
- Many companies unable to raise public capital continue to source financing through the private markets
  - ~\$99bn<sup>1</sup> YTD VC/PE/growth rounds
  - ~\$6bn<sup>2</sup> YTD IPO volume

Source: PitchBook, Dealogic as of 6/15/2022

1. Includes completed, US Headquartered, late-stage VC/PE/Growth deals with at least \$50mm in proceeds

2. Includes completed, US listed, non-SPAC IPOs

## US LATE-STAGE VC AND PE DEAL ACTIVITY<sup>1</sup>

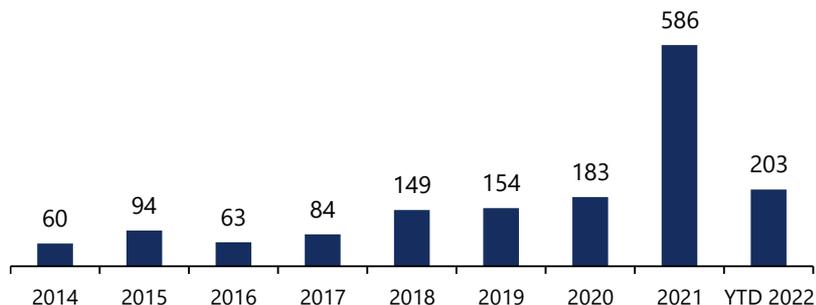


# Late Stage Private Placement Activity

- Public equity market volatility is starting to influence private market valuations
- Late stage private rounds as an alternative to SPAC mergers and traditional IPOs has become topical
- Increased structure and downside protection in minority transactions
- Insider rounds without valuation strikes
- Defensive capital vs. offensive capital needs
- Significant dry powder in the private equity community will continue to support deal activity

# Unicorn Market, Down-Rounds and Growth of Non-Traditional Investor Universe

## GLOBAL NUMBER OF NEW UNICORNS



## UP, FLAT, AND DOWN ROUNDS



## ILLUSTRATIVE LATE STAGE PRIVATE PLACEMENT INVESTORS

TRADITIONAL				NON-TRADITIONAL							
LARGE VENTURE CAPITAL				SWF/PENSION/INSURANCE				CORPORATE VC'S		FAMILY OFFICES	
andressen HOROWITZ	Accel	A TIME THER	RAILIE GIFFORD	AIG	AIMCo	BARINGS	OPPI Investments	G/	Intel Capital	COHEN PRIVATE VENTURES	ICONIQ
Bessemer Ventures Partners	DI CAPITAL PARTNERS	DRAGONEER	GENERAL ATLANTIC	FRANKLIN TEMPLETON INVESTMENTS	GIC	MetLife	MUBADALA	Nike	Qualcomm ventures	KOCH	MSB
GENERAL CATALYST	INSIGHT PARTNERS	Lightspeed	SEQUOIA	OMERS	TEMASEK	Prudential	QIA	salesforce ventures	Tencent 腾讯	SOROS Soros Fund Management	W
	SoftBank	TIGERGLOBAL									

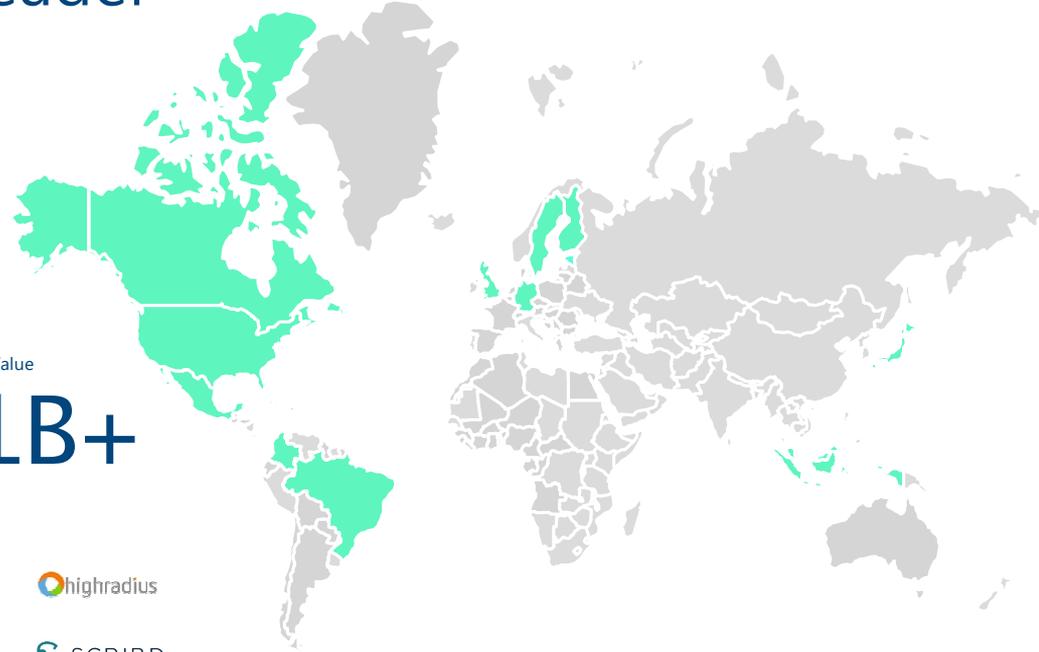
Source: PitchBook as of 6/15/2022



# Secondary Market Transactions and Liquidity Programs

# A Global Private Market Leader

Nasdaq Private Market (NPM) is a technology platform and marketplace that enables control, access, connectivity and execution services across the entire ecosystem of private companies.



Total Number of Participants

150k+

Total Company Programs

575+

Total Transaction Value

\$41B+



# 2021 Detailed Stats

NPM partners with private companies of all stages, engaging in a consultative approach, providing them our knowledge and education. We align our solutions with each individual company goals and objectives.

Total Transaction Value

**\$13B+**

Total Number of Participants

**39k+**

Total Number of Programs

**146**

## Company Profiles

### Valuations:

- Median: \$1B
- Maximum: \$100B

### Most Recent Financing Stage:

- Series C: 18%
- Series D: 16%
- Series E: 18%

### HQ Locations:

- California: 44%
- New York: 16%
- International: 14%

## Program Terms

### Eligibility Across Programs:

- Employees: 88%
- Ex-Employees: 47%
- Founders: 40%
- Investors: 51%

### Most Common Restrictions:

- Employees: 20%
- Ex-Employees: 100%
- Founders: 0%
- Investors: 100%

### Securities Eligible Across Programs:

- Preferred: 46%
- Common: 83%
- Options: 75%
- RSUs: 2%
- Warrants: 10%

## Transaction Data

### Valuation Discount to Preferred:

- Median: 0.0%
- Largest Premium: 72%
- Largest Discount: 43%

### Median Participation Rates:

- Employees: 48%
- Ex-Employees: 37%
- Founders: 100%
- Investors: 38%

### Transaction Structures:

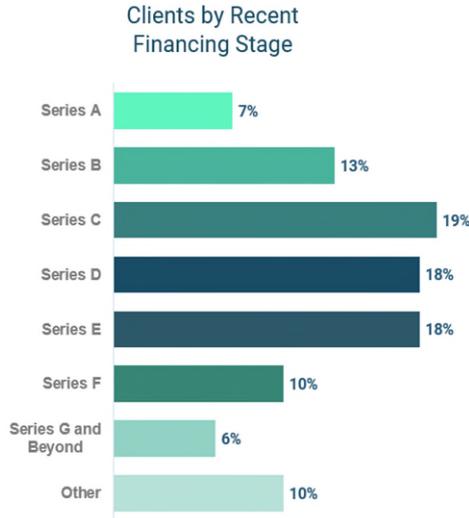
- Third Party Offerings: 70%
- Company Repurchases/Other: 30%

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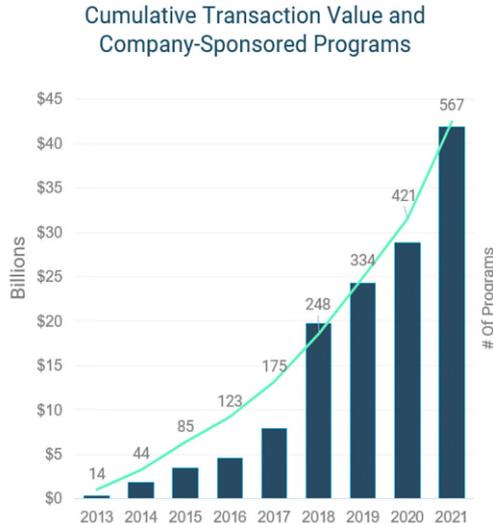
Total Transaction Value

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Total Number of Participants

**39k+**



Total Number of Programs

**146**



# Why Companies Partner with NPM

Our longstanding background in operating markets allows us to deploy evolving solutions that service the **full company liquidity lifecycle** through **one marketplace** and **technology platform**.



## Company-Tailored Solutions

*Liquidity offerings customized to meet the needs of companies and their shareholders*



## Industry-Leading Experience & Trusted Brand

*NPM provides one centralized platform & marketplace to address the entire liquidity lifecycle of a private company*



## Global Distribution Network

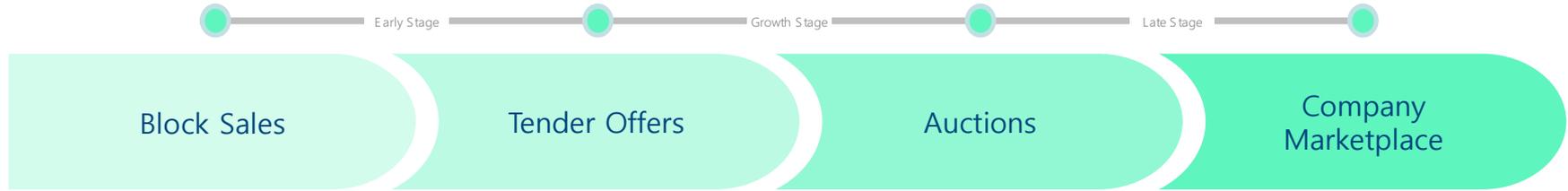
*NPM simplifies and connects companies to investors in this growing global marketplace*

## Multiple Opportunities. One Platform.



# Products and Services Overview

NPM provides a customizable liquidity platform that aligns with the company's goals and allows the company to build its own liquidity solution and marketplace.



**Individual sale** of a block of shares for executives, employees, or investors.

- One-to-one privately negotiated
- Maximize price with competitive bidding based on seller expectations and timeline
- Confidential data room for selected investors, pre-approved by company

**Broad liquidity** event for existing shareholders with a single-priced offering.

- Privately negotiated by company
- For companies new to broad liquidity
- For institutional buyers seeking larger investments
- Simple for employees and operationally efficient

Competitive **market-driven auction** by selected buyers controlled by the company.

- Buy side process to drive price for company
- For companies evolving towards a market-driven process to set price through network of demand
- Set price for Tender offer or execute through Modified Auction

A **centralized, order book** enabled marketplace during windows of liquidity.

- Market-driven process across all participants
- For companies that have outgrown tender offers and have active secondaries they want centralized into uniform experience
- Arm's length with preferred buyer control through simple one-time setup, operated during defined windows

# Example Timeline for Tender Offer

The timeline is customizable based on discovery calls with Company, and NPM requires all items to be considered final at least 2 business days prior to launch.

## Platform Setup

5-10 days\*

- Configure platform to Company's parameters
- Upload Company-approved disclosure materials to data- room
- Map offering materials and holdings to the seller workflow
- Support for in-person town halls or webinars with shareholders to educate and review process

## Tender Offer

20 days (min.)

- Activation emails are sent to eligible participants for accessing platform and offering
- Host informational session and platform demo
- Provide real-time monitoring and activity reports for Company and ongoing shareholder support
- Collect sell interest and required e-signature legal documents and agreements

## Payment and Settlement

6-8 days\*

- Deliver a holding-level report of all securities offered in the program for the company to review and approve
- Wire funding from Purchaser to NPM
- Wire from NPM to settlement payments including exercise costs, withholdings, and net proceeds to Company and sellers
- Deliver final documents to the Company and participating sellers

### Companies Have the Opportunity to Finalize a Program Efficiently

Month 1				
Monday	Tuesday	Wednesday	Thursday	Friday
	1	2	3	4
7	8	9	10	11
14	15	16	17	18
21	22	23	24	25
28	29	30	31	

Month 2				
Monday	Tuesday	Wednesday	Thursday	Friday
				1
4	5	6	7	8
11	12	13	14	15
18	19	20	21	22
25	26	28	29	30

# Our Engagement Process with Companies



## Define and Setup Parameters

- Company executives engage with NPM to run a liquidity program
- Company is seeking a program structure that aligns with goals and objectives
- NPM and Company define upfront structure, timeline and transaction rules that will be communicated via NPM Platform

## Investor Targeting & Location

- Company and NPM create defined eligible Buyer List that align with Company long-term institutional shareholder objectives
- Institutions pre-approved by and onboarded to NPM
- NPM sets up platform with Company disclosures and governing transaction rules

## Liquidity Program through NPM

- Defined process allows for company selected investors to engage through one organized program structure
- Company has full transparency to real-time book from investor bids and selling shareholders
- Clearing price determined by Company rules and offering structure

## Processing on NPM

- Investors allocated based on defined rules of the offering
- NPM Platform centralizes and manages the entire transaction process and settlement, including all agreements, transfers and net proceeds to all participants



# Areas of Focus for Crossover Funds Participating in These Rounds

# Considerations for Crossover Funds

- Deal structure and terms can be highly variable
  - Common stock, preferred stock, convertible preferred, though convertible preferred stock is the most common
  - Affirmative and negative covenants
    - Generally, investors will insist upon a separate series vote on a number of matters, which may include: waiver of treatment of change of control transactions as deemed liquidation events and waiver of anti-dilution protection; an automatic conversion in the event of an IPO that is not a Qualified IPO; a deemed liquidation event where the minimum return is not achieved; and the occurrence of adverse changes or changes that are disproportionately adverse when considered versus other series
  - Information rights
  - Financial statement requirements
  - IPO/Qualified IPO provisions
  - M&A and IPO ratchet provisions designed to ensure some minimum investment return

# Considerations for Crossover Funds *(cont'd)*

- Lock up provisions
  - Cross-over investors prefer to negotiate the lock-up provisions at the time of their investment, and to limit the lock up to 180 days in respect of shares acquired prior to the IPO (not in the IPO or in the open market), provided that the issuer's directors, officers, and 1% stockholders are subject to the same or similar restrictions, and that to the extent others receive better terms (an MFN) those terms will be extended to the crossovers. So, any lock up release would be extended to the crossovers to the same extent and in the same percentage or on the same pro rata basis
- Board observer rights
  - Cross over investors will not want to be "affiliates" and be impaired from selling or have an active role in governance
- Preemptive Rights
- Drag-Along provisions
  - A class vote if the minimum return is not achieved or if proceeds will not follow liquidation waterfall

# Secondary Purchases

- Secondary purchases — often combine investment directly in issuer with purchase in secondary directly from existing stockholders
  - “Cross-purchase” structure
  - Less cash from investment available for company
  - Typically purchase of common stock from management and employees to provide liquidity
  - Can also purchase preferred from previous investors particularly those that need exit given LP demands
    - Note issues particularly with liquidation preferences and other terms not desirable to late stage investor
    - Cannot change charter rights of class, but can change contractual rights
    - In contract rights, particularly important to ensure that you can bundle secondary shares with primary securities for co-sale, tag, and registration rights

# CVC Market Participation

# CVCs Often Invest in Early-Stage Companies

- CVCs usually focus on early-stage companies, where their non-financial contribution is of greater value. Studies of CVC investment over the last five years show a consistent breakdown by stage:
  - 60% to 70% of CVC investments are made in Series A or Series B rounds or earlier
  - 10% to 15% of CVC investments are in late-stage investments
  - This distribution is even more front-loaded taking into account follow-on investments
- Most CVCs invest in their own or related industries, where specific knowledge and support may provide additional value to the portfolio company and gives the CVC an information advantage in choosing investments
- Portfolio companies often receive CVC investment and simultaneously establishes a strategic relationship, such as a joint development arrangement or cross-license, with the CVC's corporate parent

# Conflicts Between Financial Investors and CVCs

- The terms and conditions of an investment by CVCs or financial investors (or both) are classic venture capital convertible preferred stock issued in series. Conflicts between CVCs and financial investors tend to relate to a strategic relationship between the portfolio company and the CVC's corporate parent.
- Areas of conflict may include:
  - Governance: A CVC may want involvement in governance (e.g., a board seat) with a hope of providing greatest strategic benefits to the CVC's corporate parent, if only with respect to timing of sale or other corporate events; the financial investor sees that as value-limiting.
  - Joint Development Agreements and Cross-Licenses: If the CVC brings know-how or related support to the portfolio company, its corporate parent may seek a cross-license or other mechanism for the corporate parent to have access to the portfolio company's technology. If this arrangement is too restrictive or on too favorable terms to the parent, the value of the portfolio company may be diminished.

# CVCs in Late Stage Financings—Strategic Investors

- A CVC's participation in a late-stage financing is often accompanied by a strategic relationship established with the CVC's corporate parent or the hope of such a relationship.
- As the portfolio company is well-established by this time, the strategic relationship and related financing are together seen as a third-party validation of the portfolio company's technology or business model. However, the portfolio company can insist on market terms for the strategic relationship.
- CVCs rarely take the sole lead in a venture financing, but may jointly lead a financing round with one or more financial investors.

# Strategic Investors – Transfer and Investment Restrictions

- Transfer to “competitors”
  - More heavily negotiated definition of competitors to whom investor may not transfer— current and future competitors
  - Negotiated “update” rights to list of competitors
- Negotiation of the right for strategic investor to make investment in competitors of company
  - Particularly important to issuer if investment is coupled with a strategic partnership or commercial arrangement
  - Key is definition of competitor — by type of product and/or by name — and update rights over time
  - Also negotiation regarding steps to be taken if investor buys into a competitor either directly or indirectly

# Strategic Investors – Standstill Provisions

- Stand-still provisions are more common in M&A transactions
- Sometimes asked of investors in late stage deals, particularly of strategics
  - Investor is obligated to refrain from actions that relate to acquisition of control of the issuer including making proposals to acquire the issuer, buying shares, or launching a proxy contest
  - Exceptions:
    - Negotiated sale
    - Agreed-to-limits

# Strategic Investors – Right of First Look for M&A

- Right of first offer
  - Notice period
  - Negotiation period
  - Other potential rights
- Right of first refusal
  - Investor friendly
  - Chilling effect on competitive M&A
  - Terms of transaction

# Regulatory Developments

# Guiding Principles for Integration Analysis

- Rule 152(a) sets out the general principle, which provides that for all offerings not covered by one of the safe harbors contained in Rule 152(b), offers and sales will not be integrated if, based on the particular facts and circumstances, the issuer can establish that each offering either complies with the registration requirements of the Securities Act, or an exemption from registration that is available for the particular offering.
- Rule 152(a)(1) codifies the SEC guidance from 2007 and the Staff interpretations and relates to exempt offerings as to which general solicitation is not permitted. In this case, the issuer must have a reasonable belief, based on the facts and circumstances, with respect to each purchaser in the exempt offering prohibiting general solicitation, that the issuer (or any person acting on the issuer's behalf) **either (1)** did not solicit such purchaser through the use of general solicitation; **or (2)** established a substantive relationship with such purchaser prior to the commencement of the exempt offering prohibiting general solicitation.

# Guiding Principles for Integration Analysis *(cont'd)*

- Rule 152(a)(2), addresses two or more concurrent exempt offerings permitting general solicitation. In this case, the issuer's general solicitation offering materials for one offering that includes information about the material terms of a concurrent offering under another exemption may constitute an "offer" of the securities in such other offering.
- In addition to satisfying the conditions of the particular exemption, the offer must comply with all the requirements for, and restrictions on, offers under the exemption being relied on for such other offering, including any necessary legends or communications restrictions.

# Non-exclusive Integration Safe Harbors

- New Rule 152(b) provides the four non-exclusive integration safe harbors shown below:

<b>Safe Harbor 1, Rule 152(b)(1)</b>	Any offering made more than 30 calendar days before the commencement of any other offering, or more than 30 calendar days after the termination or completion of any other offering, would not be integrated with such other offering; provided, that, for an exempt offering for which general solicitation is not permitted that follows by 30 calendar days or more an offering that allows general solicitation, the provisions of Rule 152(a)(1) apply ( <i>i.e.</i> , the purchasers either were not solicited through the use of general solicitation or established a substantive relationship with the issuer prior to the commencement of the offering for which general solicitation is not permitted).
<b>Safe Harbor 2, Rule 152(b)(2)</b>	Offers and sales made in compliance with Rule 701, pursuant to an employee benefits plan, or in compliance with Regulation S would not be integrated with other offerings.
<b>Safe Harbor 3, Rule 152(b)(3)</b>	An offering for which a Securities Act registration statement has been filed would not be integrated if made subsequent to: <b>(1)</b> a terminated or completed offering for which general solicitation is not permitted; <b>(2)</b> a terminated or completed offering for which general solicitation is permitted and made only to qualified institutional buyers (QIBs) and institutional accredited investors (IAIs), <b>or (3)</b> an offering for which general solicitation is permitted that terminated or completed more than 30 calendar days prior to the commencement of the registered offering.
<b>Safe Harbor 4, Rule 152(b)(4)</b>	Offers and sales made in reliance on an exemption for which general solicitation is permitted would not be integrated if made subsequent to any terminated or completed offering.

# Staff Guidance on Forwards on Stock of Pre-IPO Issuers

- June 9, 2022: Staff issued a C&DI providing guidance that a forward contract would not be considered to be intended to be physically settled (and entitled to the exclusions from the swap definitions and related requirements) if it relates to private securities that cannot be transferred under the securities laws or are subject to contractual transfer restrictions
- As a result the only way for holders of private company stock to monetize using a forward would be with the company's participation, as the alternative would require compliance with Title VII rules

# Staff C&DI

- **Question 101.01 Question: Would the Staff of the Division of Corporation Finance or the Division of Trading and Markets consider a future or forward contract that permits cash or physical settlement to be “intended to be physically settled” and therefore excluded from the definitions of “swap” and “security-based swap” if, at the time the parties enter into the contract, the underlying securities cannot be legally transferred, or the transfer of the underlying securities is restricted by contract?**
- **Answer:** No. In Release 33-9338, the Commission stated that the analysis as to whether sales of securities for deferred shipment or delivery are intended to be physically settled is a facts and circumstances determination. However, the Commission also stated in Release 33-9338 that the purchase and sale of the underlying securities occurs at the time when the parties enter into the contract, and that the determination of whether an instrument is a swap or security-based swap should be made prior to execution, but no later than when the parties offer to enter into the instrument. To the extent that at the time of sale the securities underlying a future or forward contract could not be legally transferred, or the transfer of the underlying securities would be restricted by contract, the staff of the Division of Corporation Finance and the Division of Trading and Markets would not consider the contract to be “intended to be physically settled” for purposes of the definitions of “swap” and “security-based swap.” Accordingly, for the Staff to conclude that a sale of securities for deferred shipment or delivery is intended to be physically settled, it is a necessary prerequisite that at the time the parties enter into the contract (i) the offer and sale of the underlying securities must be registered in compliance with Section 5 of the Securities Act or an exemption from registration must be available with respect to the underlying securities, and (ii) any applicable contractual provisions restricting the transfer of the underlying securities must be satisfied or otherwise waived. [June 9, 2022]

# Rollback of progress for private placements and more regulation for private companies?

- **The Exchange Act Section 12(g) Threshold**. SEC Commissioner Lee: “Investors and the public are increasingly left in the dark when it comes to ever-expanding segments of the economy. This has implications for the future vitality of the private markets (which depend in many ways on the transparency and discipline of public markets) and it has implications for optimizing capital allocation across both markets.... Accordingly, we should consider whether to recalibrate the way issuers must count shareholders of record under Section 12(g) (and Rule 12g5-1) in order to hew more closely to the intent of Congress and the Commission in requiring issuers to count shareholders to begin with. In other words, it’s time for us to reassess what it means to be a holder of record under Section 12(g).”
- **Proposed Amendments to Regulation D**. Commissioner Crenshaw: “In 2013, the SEC proposed to amend Regulation D to strengthen the filing and disclosure requirements. I believe it should be a priority to finalize those proposed changes, as well as to consider what other information we need.”
- **Revisiting the Accredited Investor Definition, Again!**

# Additional Resources

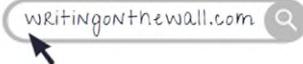


In the *International Financial Law Review's* publication, "[A Deep Dive into Capital Raising Alternatives](#)," Mayer Brown provides context on the changes in market structure and market dynamics that led to the enactment of the JOBS Act.

Specifically, the trend for many private companies to remain private longer, defer or dispense with traditional IPOs in the US, and rely on private capital to fund their growth. We discuss reliance on the JOBS Act to undertake an IPO, including the IPO process and practices adopted by emerging growth companies.



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The blog provides up-to-the-minute information regarding securities law developments and commentary on developments relating to private placements, IPOs, and other securities topics.



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