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Pre-IPO Liquidity for Late Stage Start-Ups

A Lexis Practice Advisor® Practice Note by Dawn Belt, Fenwick & West LLP

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Introduction

This practice note discusses techniques private companies may use to provide liquidity to their founders, executives, employees, and investors. These techniques enable shareholders to receive a return on their investment prior to the company's initial public offering (IPO) or acquisition. Start-ups typically use these techniques in the later stages of their development.

This practice note reviews:

- The background for late stage start-up liquidity programs
- Liquidity techniques that have emerged in the last decade, including:
  - Orderly negotiated secondary sales
  - Structured liquidity programs, such as private tender offers of capital stock
  - Loans, derivatives, synthetics, and other alternatives to secondary sales
- Considerations and recommendations that you should be aware of in dealing with these liquidity methods
- Issues that arise (particularly from the issuer's point of view) in analyzing, structuring, and documenting transactions providing liquidity to private company shareholders

Background to Late Stage Start-Up Liquidity

Historically, there were very few, if any, options for large numbers of private company stockholders to get pre-exit liquidity for private company shares. Stockholders and employees traditionally expected to wait until the company was acquired or became a public company in order to receive a return on their investment. Starting in the early 2000s, many companies have decided to stay private longer. A number of developments have fueled this preference to stay private, including volatile public markets in which debuting companies might face valuations at or below their last round of private company financing and increasingly burdensome new regulatory and compliance obligations, particularly with the passage of the Sarbanes-Oxley Act of 2002 and the regulations promulgated thereunder.

At the same time, because companies were staying private longer, investors have been seeking opportunities to buy shares in private companies prior to the traditional liquidity events, in the hopes of generating large returns on a relatively short horizon. These investors include large institutional investors who might normally invest in an IPO, but might not be able to get their preferred allocation of shares. In addition to established institutional investors, other investors who would normally not have access to any share allocations in IPOs have formed funds specifically to buy private company shares. Many individual investors have also sought to invest in private companies, particularly those with household names prior to their IPO (e.g., Facebook, Zynga, Twitter). Platforms like SecondMarket and SharesPost helped to connect sellers and buyers, aggregated self-collected company information

(generally without company verification), and facilitated a large number of transactions between about 2006 and 2013 (known as the secondary boom). Though there is no compiled and verified data on the full scope of these transactions, it is believed that hundreds of millions of dollars of transactions were completed in this period.

Secondary market activity continues through this day, but not on the scale seen during the secondary boom. With the implementation of more stringent transfer restrictions and the use of larger and more structured secondary transactions, companies have been able to limit unrestrained trading and design pre-IPO liquidity programs to better incentivize employees and longer-term shareholders. For additional information on secondary market activity, see Secondary Market Trading of Private Company Shares.

Secondary Sales

The most basic avenue for private company stock liquidity is a secondary sale. In a basic secondary sale, an existing stockholder finds a buyer for the company shares, negotiates a price and terms, and then sells the shares to the buyer. These simple transactions can be an effective way for stockholders to sell shares in individual transactions and achieve some liquidity goals. Issuers may be fine with a small number of these transactions, on an occasional basis, particularly when there are selling stockholders who may have limited connection with the company or who may face extenuating circumstances (such as health issues) in which immediate liquidity is necessary. Issuers also may prefer purchases by existing stockholders who are friendly to the company. However, rampant secondary market activity can:

- Become a major distraction to a company
- Result in unfair economic results if only certain stockholders are able to find buyers and sell shares
- Lead to the company needing to deal with new stockholders with whom the company had no previous direct relationship

If you find your company is facing more secondary transactions than is desirable, you might consider implementing additional transfer restrictions, as described in the section below entitled "Transfer Restrictions."

Right of First Refusal

One of the first items to consider in evaluating a secondary sale is an existing right of first refusal. Most private companies have a right of first refusal over their shares in the agreement between the company and the stockholder that governs the original issuance of the shares (the stock issuance agreement). A right of first refusal requires stockholders to offer their shares to the company to purchase before they can sell those shares to a third party. As a result, once a stockholder has negotiated a deal with a prospective buyer, the stockholder must deliver a notice to the company regarding the proposed sale. The parameters of the notice and related procedural requirements are set forth in the stock issuance agreement and usually require that the notice include the number of shares, price per share, identity of the buyer, and other material terms. Upon receipt of the notice, the company generally will have a period of time (often 30 days) to decide whether to exercise its right of first refusal, or assign its right of first refusal to another party to purchase the shares. If the company does not exercise or assign its right of first refusal, the seller may proceed with selling the shares to the proposed buyer on the terms set forth in the notice. Typically, if the proposed sale is not completed within a specified period of time (often 30 days from the company's declining to exercise the right or 60 days from the company's receipt of the original notice), then the right of first refusal is once again revived and the stockholder would have to deliver a new notice to proceed with the same or different stock sale. In some situations, another investor in the company may also have a right of first refusal over all or certain shares. You should check stockholder and investor agreements to confirm whether this is the case, and follow the procedures set forth in those agreements accordingly. For an example of a right of first refusal in the context of an equity plan for a private company, see Section 10.7 of Equity Incentive Plan (Private Company).

Company Repurchase and Information Asymmetry Considerations

If the company exercises its right of first refusal, it will pay the price set forth in the notice and repurchase the shares, using a stock transfer agreement that contains the mechanics of the repurchase. The stock transfer agreement will also include basic representations and warranties from the seller regarding title, due authorization, enforceability, non-contravention, securities law compliance, and other matters. The company generally will not deliver any representations to the seller, but should consider whether any material information asymmetries exist that could create potential liability for the company (e.g., if the company knew that a sale of the company at a price higher than the repurchase price was imminent). At a minimum, best practices suggest that a company provide disclosures similar to those required under Rule 701(e) (17 C.F.R. § 230.701) for employees and contractors who receive company securities as part of a written compensation plan pursuant

to Rule 701 (701-type disclosure). That would include audited financial statements (income statement, balance sheet, and statement of cash flows) for the last two fiscal years, as well as any stub period needed to bring such financial statements within 180 days of the date of delivery. For further information on Rule 701, see Start-Up Equity Offerings to Employees: Securities Law Issues — Rule 701. In addition, if the company knows that the shares are more valuable than the purchase price at the time of transaction due to, for example, an in-process sale of the company at a higher price, there is risk the company may be liable under Rule 10b-5 (17 C.F.R. § 240.10b-5) for trading based on material nonpublic information that is not shared with the stockholder counterparty. In such a situation, a company should not purchase the shares, or should disclose the material information to the seller (generally pursuant to a non-disclosure agreement) before completing the sale. For additional information on Rule 10b-5, see Liability under the Federal Securities Laws for Securities Offerings — Section 10(b) of the Exchange Act and Rule 10b-5.

In addition to the representations and warranties discussed above, a repurchase agreement should also include the seller's express acknowledgement that the value of the shares may increase in the future and that the seller will not have an opportunity to participate in such future gains if it completes the contemplated sale. If you are counsel for the company, you should also consider whether or not to ask for a release of claims in connection with the transaction, either limited to the sale or broad-based. Most companies will also require a covenant to keep the transaction confidential. If the repurchased shares are originally issued out of an equity incentive plan pool, you should check the plan to see if the shares return to the pool for re-issuance.

Third-Party Purchaser and Securities Law Compliance

If the company does not exercise its right of first refusal to repurchase the shares itself, then the sale may occur either to an assignee of the company or to the original proposed purchaser. Though the company is not a party to the transaction in that case, and the primary responsibility for securities law compliance sits with the seller, the company still has an interest in minimizing legal compliance and other risks surrounding the transaction. Therefore, companies often require that sellers and buyers use the company's standard form of transfer agreement.

Secondary sales typically rely on the so-called Section 4(a)(1 ½) private resale exemption from registration under the Securities Act of 1933, as amended. See Domestic Resales of Unregistered Securities: Rule 144, Section 4(a)(1½), and Section 4(a)(7) — Resales Using Section 4(a)(1½). So, a best practices form of transfer agreement between a seller and a third-party purchaser would include a fulsome set of representations from both parties designed to fit within the parameters of this exemption, including:

- That the purchaser is purchasing for its own account and not with an intent to distribute
- That such party has had access to information it reasonably considers important in making the decision to sell and/or buy the shares
- That such party is an accredited investor (ideally and if applicable), or at a minimum that such party is a sophisticated person familiar with these types of transactions
- That seller did not engage in, nor did buyer receive, a general solicitation to participate in the transaction
- That the purchaser acknowledges that the shares remain restricted after the completion of the transfer (and will be legended as such) and that there is no current market for the shares

The Section 4(a)(7) non-exclusive safe harbor for private resales requires that the securities being sold have been outstanding for at least 90 days, and that certain disclosures will have been delivered to prospective purchasers, including the issuer's most recent balance sheet and income statement for the preceding two years. Because it is more difficult to meet these additional requirements, we see fewer sellers relying on this exemption.

If you are representing the company, you might also request that the seller retain counsel to deliver a legal opinion stating that the transfer is in compliance with securities laws. For a form of legal opinion that may be used, see Selling Stockholder Legal Opinion (Secondary Offering). In March 2016, the Securities and Exchange Commission (SEC) stated that it would be focused on compliance issues surrounding secondary market activity, thereby making it all the more important that companies exercise reasonable diligence in managing the secondary market activity in their shares.

Where the Purchaser Is an Affiliate of the Company

If the purchaser of the shares is an affiliate of the company, whether because it is the company's assignee of the right of first refusal or the original prospective purchaser identified by the stockholder, many of the same considerations outlined above regarding information asymmetry concerns may apply. Depending on the degree

of control and information access that such an affiliate may have, the company may be treated as an imputed buyer for certain purposes and therefore carry more risk of liability in such transactions. As a result, you should consider providing the 701-type disclosure to both the seller and buyer, notwithstanding that the company is not a party to the transaction. The stock transfer agreement documenting the transaction would typically contain representations and warranties by the seller regarding title, and by both the seller and the buyer regarding due authorization, enforceability, non-contravention, securities law compliance, and, in the event either of the parties is located in a foreign jurisdiction, compliance with applicable foreign laws. Note also that if an existing larger stockholder is acquiring more shares, such a purchaser should also analyze whether any filings under the Hart-Scott-Rodino Act will be required.

Where the Purchaser Is a Non-affiliate

The mechanics of a stock sale to a non-affiliate are the same as those outlined above, but it will be less likely that information asymmetry exists, and lower risk that any premium paid over the fair market value be treated as compensatory payments as further discussed below. See "Characterization of Gains." However, from the company's perspective, if the non-affiliate is not a current stockholder or otherwise known to the company, sales to non-affiliates may be viewed less favorably because they introduce new stockholders whose interests might not be aligned with existing stockholders but will have basic stockholder rights after the completion of the transfer. The issues regarding unknown persons joining the company's shareholder base may be compounded if there is a large amount of trading in the company's securities. There have been some instances of questionable, or even fraudulent, actions associated with secondary market activity around high-profile companies as the lure of financial gains in short-term trading of the stock of household names increased participation by speculators and less sophisticated investors. Though the companies whose stock was traded in these types of questionable transfers might not have had a role in the transactions beyond recording the completion of a transfer conducted in accordance with the procedures outlined in the original stock issuance agreement, if later claims or investigations arise with respect to questionable transfers, company personnel and resources might still be required to deal with these post-transaction issues.

Purchased Shares

Whether or not the purchaser is an affiliate, because the shares are not being repurchased by the company itself, you must also assess:

- What types of restrictions and obligations apply to the shares in the hands of the seller
- Which of those restrictions and obligations the purchaser must agree to as a condition to the transfer
- Whether in the case of a purchaser who is an existing shareholder, you might instead require the purchaser to apply its existing agreements with the company to these new shares

For example, in a transaction where the seller is an ex-employee who is not party to a voting agreement, but the purchaser is an existing investor who is party to such an agreement, the investor would normally be required to vote the newly purchased shares in accordance with the voting agreement to which the investor is already subject. On the other hand, if the seller has certain registration rights with respect to its shares, but is transferring only a small number of shares to a prospective buyer whose holdings will be minimal and therefore does not generally need or benefit from comprehensive registration rights, the company might request that the buyer waive the registration rights originally attached to the shares. For an example of an agreement to which an investor in a private company may be subject, see Investor Rights Agreement.

Transfer Restrictions

As a reaction to some of the widespread trading in public company securities that occurred starting around 2006, many companies began adopting more comprehensive transfer restrictions that went beyond the standard right of first refusal. These restrictions prohibit any transfer without the company's consent and are often placed directly in the company's certificate of incorporation, bylaws, and/or equity incentive plan agreements. A typical formulation of these blanket restrictions would:

- Prohibit the sale, disposition, pledge, encumbrance, or other transfer of any shares of the company's capital stock (or only common stock)
- Apply to the transfer of beneficial ownership, voting rights, or economic benefits, as well
- Usually prohibit the use of derivative or synthetic transactions such as those described below
- Be subject to an enumerated set of exceptions that may include a transfer approved by the company and estate planning and affiliate transfers not for consideration.

Blanket restrictions are controversial. Some believe such restrictions are anathema to fundamental principles regarding property rights. Others, however, view these restrictions as necessary to control the number and composition of stockholders who may request access to

confidential company information and to tamp down the distraction and expense of dealing with widespread trading. Some private companies also implement insider trading policies similar to those adopted by public companies. However, with no regular releases of material information, private companies usually have very limited (if any) windows for trading. If you decide to adopt an insider trading policy for your private company, you should thoughtfully consider which modifications would be appropriate in the private company context.

Tax Treatment and Valuation Effects

There are significant tax and accounting issues that accompany secondary sales, and it is imperative that all involved parties understand the tax and accounting effects that may result. Before embarking on any secondary market transaction, the seller and buyer should have a detailed discussion with their tax advisors and accountants regarding their particular situations, and the company should conduct its own analysis to determine if it has any tax reporting or withholding obligations.

Characterization of Gains

The key tax question is how a seller should treat the gains from a secondary sale of shares. The spread between the original purchase price paid by the seller and the fair market value of the shares at the time of sale is almost certain to be treated as either short-term or long-term capital gain, depending on how long the seller has held the shares. However, in many instances, the purchase price paid by the buyer in the transaction is higher than the then-current fair market value (FMV) as determined by the company's board of directors for Section 409A purposes (i.e., the minimum price used as the exercise price for contemporaneous stock option grants). If such a spread exists, the seller and the company must determine the character of this spread (either capital gain or ordinary income) in order to apply the appropriate tax treatment. If the spread is ordinary income, the seller will be subject to a higher tax rate and employment-related taxes, and the company will be subject to withholding obligations and employer contributions.

If repurchased by the company at a value higher than the FMV, the spread between the FMV and the purchase price is almost certainly going to be characterized as compensation if the seller is an employee and the company is the purchaser. As a result, seller will have to pay taxes on the spread at the ordinary income rate, as well as applicable employment taxes. The company must withhold at the minimum withholding rate and pay the employer-side taxes as well.

We have seen that in certain instances, auditors may also require that the spread between FMV and purchase price be treated as compensation if the purchaser is an affiliate of the company. Because of uncertainty involving the tax treatment in this situation, you should conduct a detailed analysis of each transaction.

Effect on Valuations

As part of its regular process of generating Section 409A valuation reports, your company's appraiser will ask for details regarding secondary sales, and factor those into its overall analysis of your company's FMV. Generally, a small number of sales involving a small percentage of the company's outstanding securities are unlikely to have a significant impact on the FMV, particularly if the sales are to unaffiliated purchasers. Conversely, a steady flow of sales with significant deal volume may indicate there is a free-flowing market for shares that more strongly influences FMV. Also, if the company (or potentially an affiliate of the company) purchases shares from employees and takes the position that any premium paid to the Section 409A price is not compensatory, then an appraiser is likely to weight the purchase price more heavily in its analysis regarding the company's FMV. As we see companies pursue direct listings as an alternative to the traditional underwritten IPO, we may also see the trading prices in private transactions have added weight on the direct listing price discovery process.

Alternatives to Secondary Sales of Shares – Loans, Derivatives, Synthetics

In addition to direct transactions in company stock, sellers, investors, and other market participants also use loans, derivatives, and other synthetic purchases with respect to private company securities. The most basic form of these indirect avenues of pre-IPO liquidity is a secured or collateralized loan. However, most banks will not accept private company securities as collateral for secured loans. One reason for this is that the value of the private company securities is hard to ascertain and is speculative in nature. Another is that banks are aware of transfer restrictions that often extend to pledges. Finally, even if no blanket restriction applies, the existence of a right of first refusal may impede the bank's ability to foreclose on the shares in the event of a default on the loan. Nonetheless, there are nontraditional lenders who may be willing to extend loans secured by private company shares.

A structured derivative collateralized by shares is more complex than a simple collateralized loan, and most individual stockholders would not have had access to these types of derivatives. However, in the last few years, platforms such as EquityZen have formed to connect stockholders looking for partial immediate liquidity to investors who wish to purchase a right to share in proceeds of private company securities if and when the company eventually has a successful exit.

Another structure, which has been around for some time but is not often used due to the difficulty in finding willing investors and the high costs of implementation, is the Waverly loan. In this structure, an investor loans the stockholder cash up front, with shares as collateral, and also receives a call right to buy the collateralized shares for some nominal amount during a specified term.

Though there is no comprehensive data on the use of these types of loans, derivatives, and synthetics, their historical and current use appears to be small. Moreover, comprehensive blanket transfer restrictions generally prohibit these categories of activity.

Structured Liquidity Programs

As an alternative to a series of individual secondary sales or loans, derivatives, or synthetics, a company might facilitate a more structured transaction to allow for liquidity to a larger group of stockholders. Though a structured transaction may involve significant work by the company, the work is consolidated into one project and the company may have more control over the sellers and buyers. This addresses some of the distraction, fairness, and relationship concerns raised by unrestrained secondary market activity. Generally, only more mature private companies with very strong investor interest and support, and a base of employees and stockholders that have been holding company stock for many years, pursue these programs. When they do, the programs generally take the form of tender offers made by the company or one or more third parties.

Who Is the Offeror?

Many tender offers are conducted in connection with a financing, where a new investor buys both new preferred stock issued by the company as well as outstanding common stock and/or preferred stock from existing stockholders and option holders who exercise options in order to participate in the transaction. The new investor may pay the same purchase price for both the primary and secondary shares, or may pay a reduced price for common stock and junior preferred stock that has fewer rights or lower preferences than the new preferred stock issued in the contemporaneous financing. Where the price paid for the common stock is higher than the then-applicable 409A value, you must analyze the tax treatment of the spread and the effect on the company's go-forward 409A value in designing and implementing the transaction. See "Tax Treatment and Valuation Effects."

Another way tender offers can be conducted in connection with a financing is for the investor(s) to invest entirely in new preferred stock issued by the company, but specify that a percentage of the new investment dollars may be used to repurchase shares from existing stockholders. Companies and current stockholders find this type of self-tender in connection with a financing less preferable because the company takes on additional liquidation preference, often senior to all other stockholders, in order to grant liquidity to some (but not necessarily all) junior stockholders, and the repurchase price may be at a value that is less than the new liquidation preference per share. Moreover, as discussed above, the implications on the tax treatment of the spread between the purchase price and FMV as compensation and the effect on the 409A value are also less favorable when the purchaser is the company.

Applicable Tender Offer Rules

Tender offers are regulated through Sections 14(d) and 14(e) (15 U.S.C. § 78n) and Section 13(e) (15 U.S.C. § 78m) of the Securities Exchange Act of 1934, as amended (the Exchange Act) and related regulations implemented by the SEC. However, the statute and regulations do not define exactly what is a "tender offer." The term generally means a widespread offer to purchase a significant amount of a company's securities over a relatively short time period. Potential purchasers analyze the question of whether an offer to purchase constitutes a tender offer using the eight-factor test set forth in Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979).

If the party offering to purchase shares determines that the transaction is a tender offer, then the anti-fraud provisions of Section 14(e) of the Exchange Act and the procedural requirements of Regulation 14E (17 C.F.R. § 240.14e-1–.14f-1) promulgated thereunder must be met, notwithstanding that the offer is for private company securities. These requirements include:

- Holding the offer open for at least 20 business days
- Not increasing or decreasing the percentage of the class of securities being sought or the consideration being offered unless the tender offer remains open for at least 10 business days from the date that the notice of such increase or decrease is first published or sent or given to security holders, subject to certain exceptions

- Prompt payment of the consideration, or return of the tendered securities, upon termination or withdrawal of the tender offer
- Public notice of the extension of a tender offer, which must include disclosure of the amount of securities already tendered
- Disclosure of the issuer's position with respect to the offeror's tender offer for the issuer's securities
- Avoidance of certain trading when a person is in possession of material nonpublic information relating to the tender offer
- Maintaining a net long position in the tendered security by the tendering persons
- No direct or indirect purchase by a covered person (including an arrangement to purchase) of any subject securities or any related securities except as part of the tender offer, from the time of public announcement of the tender offer until the tender offer expires

However, the additional tender offer-related provisions of Section 14(d), Regulation 14D (17 C.F.R. § 240.14d-1–.14f-1) and Rule 13e-4 (17 C.F.R. § 240.13e-4) do not apply to tender offers for private company stock. Most notably, private company tender offers are not required to comply with the proration, best price, and all holders' rules that apply to offers to purchase public company securities. Under these rules, the tender offer must be open to all holders of the class of securities, pay the same price per share to all holders, and prorate shares if the offer is oversubscribed. Without application of these rules to private company tender offers, offerors (and companies that may waive transfer restrictions or otherwise facilitate a tender offer by a third party) have significant flexibility in setting the parameters of a tender offer, including who can participate and the allocation of participation.

Information

In connection with a tender offer, an offeror should provide basic disclosure documents related to the company and its securities. A typical set of disclosures would include the company's current certificate of incorporation and bylaws, the 701-type disclosure, and a summary of the business (perhaps in the form of an investor presentation). The information asymmetry concerns discussed above with respect to secondary sales also apply in the tender offer context, so it is important to provide sellers with sufficient information to allow them to make an informed decision as to whether they should tender their shares.

Documentation

The definitive documentation for the tender offer generally consists of:

- An offer to purchase, which contains the details of the offer including the total size, offered price, who is eligible for the offer, the allocation methodology, timing and deadlines, and instructions on how to participate
- A letter of transmittal that the tendering stockholders must complete in order to sell shares in the transaction
- Instructions on how to complete the contingent exercise and the option exercise agreement (if current option holders are allowed to participate through a contingent option exercise in connection with their sale of shares in the offer)

Where the offeror is a third party, the company might also enter into a side agreement in which the company and purchaser may make certain representations, warranties, and covenants to each other. These would typically include company representations—covering basic matters such as capitalization, non-contravention, the waiver of rights of first refusal, and any other transfer restrictions in favor of the company that would otherwise prohibit the completion of the tender offer—and purchaser representations regarding securities law compliance.

Certain potential sellers might be subject to additional agreements with the company and/or other stockholders, such as a voting agreement or a right of first refusal and co-sale agreement. In such cases, you should identify and obtain any required consents, waivers, and/or other documents. An offeror may condition the launch of the offer on satisfying these requirements, and may ask that the company make a representation accordingly. In addition, the company and purchaser may agree to a certain set of rights, restrictions, and obligations pertaining to the shares following the completion of the transaction, all of which would be documented in this side agreement.

Logistics

Though an offeror may run the logistics of a tender offer by itself, many companies and third-party buyers engage a third-party provider such as NASDAQ Private Market, which offers an online platform that can distribute and collect the offering materials and tendering documentation, as well as host a data room for the disclosure materials. Note that the issuer must manage its cap table on the Carta platform in order to use Carta to facilitate a tender offer.

Tax Treatment

The same considerations discussed above as to how to treat the spread between FMV and price paid in a secondary sale also apply to a tender offer. However, because of the larger dollar amounts and number of participants in a tender offer, you will want to complete a more detailed analysis and have a clear view of the tax treatment of the transaction that will be applicable to employees and other stockholders before the launch of the offer. In fact, the offer to purchase will generally contain a detailed frequently asked questions (FAQ) or similar summary that outlines the general tax treatment for the transaction, including the treatment for option holders who are exercising options in connection with the sale. Because many of the participants in a tender offer will likely be current employees, the company will likely have a stronger interest in ensuring that the offering documentation is helpful and easy to understand for the participants, even if the company is not the purchaser.

Allocation Design

In tender offers for private company stock, the company as offeror (or a third-party offeror whose ability to successfully complete the tender offer depends on the company's cooperation) must determine the allocation structure that will control who can sell in the offer (e.g., current employees, employees with a certain tenure, or holders of certain classes or series of stock), how much they can sell (e.g., maximum dollar value, a percentage of vested shares, or a combination of both), and the priorities that will apply to the allocation in the event of an oversubscription to the offer. Because the additional tender offer-related provisions of Section 14(d), Regulation 14D, and Rule 13e-4 do not apply to tender offers for private company stock, there is a great deal of flexibility in choosing these design elements. Some common goals used by offerors in designing these allocation structures are to:

- Reward long-term stockholders
- Give employees a way to diversify some of their wealth
- Limit how much liquidity any particular stockholder can get from the transaction
- Remove certain smaller holders from the shareholder base

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Recognized among top women leaders in technology law, Dawn shepherds emerging and high-growth companies through key moments in their lifecycle. She assists clients with startup formation, venture financings and evaluating exit opportunities and provides guidance on mergers and acquisitions, public offerings, SEC compliance and corporate governance.

Over the last decade, Dawn has worked on a wide range of tech transactions. These include Bill.com's $216 million IPO, Facebook's $16 billion IPO (the largest tech IPO in history at the time), GoPro's $490 million IPO, ServiceNow's $241 million IPO, Nimble Storage's $1.2 billion acquisition by HPE and significant venture financings for consumer and enterprise-facing technology companies such as Brandless, Dropbox, Minerva Project, Optimizely, Silver Peak Systems and Proterra.

Dawn advises company executives and boards of directors on financial reporting and disclosure issues, securities offerings and corporate governance matters. She is co-author of the firm's Gender Diversity Survey, a benchmark report on women's participation at the most senior levels of public technology and life sciences companies in the Silicon Valley 150 Index and the Standard & Poor's 100 Index.