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Navigating a Successful Private Secondary Offering Through Murky Waters

Corporate, Securities, and Governance


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- ***Ease the pressure.*** Aside from the apparent benefits of private secondary offerings, such as the boost to employee morale or a heightened sense of credibility, they also reduce the internal pressure to go public.
- ***Share the load.*** Take advantage of any of the dedicated facilitators and brokers that have sprung up to cater to the booming secondary offerings market.
- ***Advise participating employees.*** Private shares are tightly regulated by the SEC — be careful not to run afoul of securities laws.
- ***Beware hostile investors.*** Unsupervised secondary private offerings can attract undesirable participants, such as activist investors, direct competitors or investors planning a hostile takeover.

A well-crafted, company-facilitated secondary offering of private company shares (a private secondary offering) enables pre-IPO companies to satisfy the liquidity needs of early investors and employees without becoming exposed to the burdens and risks associated with going public. While investors and employees have historically sought to cash out their holdings following an IPO, this traditional liquidity event exposes companies to new risks like the volatility of quarter-driven public stock markets, compliance costs, and requirements to publicly disclose financial and other material information.

There are numerous sobering tales of a public company's stock price getting hammered due to one mediocre fiscal quarter, but the costs and burdens associated with both an IPO and remaining a public company are equally frightening to a private company executive. In 2011, the IPO task force estimated that the average cost to go public was $2.5 million and the annual cost of staying public was another $1.5 million. Moreover, public company disclosure requirements can cause severe heartburn for the private company executive. Even minimal disclosure can create a competitive disadvantage, which is perhaps why roughly 76 percent of CFOs at US-based private companies do not share regular financial updates with their employees. In light of the costs of going and staying public, companies have sought to stay private longer. Today, the average age of a company at IPO is 11 years, versus five years at the peak of the dot-com bubble in 1999–2000, and the median time to IPO exit for venture-backed companies was 7.4 years in 2013 versus just 3.1 years in 2000.

With the IPO market languishing, the secondary offering market for shareholders of private companies has started to boom. According to industry estimates, the private secondary offering market was somewhere between $10 and $30 billion last year. The CEO of SecondMarket, which enjoyed a 400 percent increase in facilitated secondary transactions from 2013 to 2014, estimates that the number of large company-organized sales of early investors and employee stock will double in 2015, up to 30 to 40 offerings. This boom has drawn in established trading platforms, like NASDAQ, and other prominent entities to join the ranks of broker-dealers and "bulletin board" type services that exclusively previously facilitating these deals, like SecondMarket, AngelList, EquityZen, MicroVentures, the PORTAL Alliance and Crowdfunder.

The growth of the private secondary offering market has been a result of both supply side and demand side drivers.

On the supply side, as private companies have delayed their liquidity event, both employees and investors have looked to the private secondary market to "cash-out." Employees at start-ups, in particular, have often sacrificed the higher salary, job stability and full benefits associated with mature companies, in exchange for the hope of enjoying significant equity returns. As companies have opted to stay private longer, channels for these employees and early investors to obtain liquidity have inevitably emerged. Without such channels, employees holding onto illiquid options may not be in a position to wait 10 years before enjoying any of the benefits of their increased paper wealth, especially with the rising costs of school tuition and home ownership.

For investors, most venture capital funds are structured to require a liquidity event within 10 years or less, and early stage investors may be eager to reinvest some or all of their capital in new earlier-stage companies that promise bigger gains. Current market conditions have also made cashing-out more appealing now rather than later. Today, there are at least 73 private companies valued at $1 billion or more, compared to just 13 in 2012 and 35 at the height of the dot-com bubble in 2000. The number of companies valued at $10 billion or more has also doubled in the past year, up to eight companies, and at the upper end of the valuation range private companies like smartphone maker Xiaomi Corp. ($46 billion) and car-hailing app Uber Technologies Inc. ($41.2 billion) are valued more in the private market than comparable public companies like Sony Corp. and Hertz Global Holdings Inc.

Many of the demand side drivers for robust private secondary offering markets are intertwined with supply side drivers, with the largest driver being the potential return on investment. Globally, bond yields are low with nearly $4 trillion worth of government bonds trading in the middle of the first quarter with negative yields. Investors seeking strong returns have turned to riskier investments in equity, but have been unable to rely upon IPOs which have become fewer and far between. As private companies have used the availability of late-stage capital to delay their IPOs and mature away from the public's eye, investors have found that it is often too late to capture a significant return if they wait for companies to go public before acquiring a stake.

As investors look for greater returns, venture capital is at its highest level since 2001, and US venture firms raised $33 billion in capital last year, up 62 percent from a year earlier. Faced with this competition, larger mutual funds have begun to steer away from the familiar investments in mature public companies, and come to make earlier-stage investments with hopes of large financial gains in the next headline IPO. For example, three of the biggest mutual fund managers, BlackRock, Fidelity Investments and T. Rowe Price, have invested in 19 of the private companies now valued at a billion dollars or more, with $425 million of the $1.2 billion raised in Uber's most recent fundraising round coming from Fidelity Investments.

Even though they facilitate their long voyages as private companies, flourishing private secondary offerings are not always an unmitigated good for pre-IPO companies. In particular, without careful management at the company level, employee trading of private company shares can have a disastrous impact on issues like preserving confidential information or valuing options, and can be a distraction within the organization. Moreover, since private shares are unregistered, their trading is highly regulated by the SEC, which means that their sales by employees or early investors may run afoul of federal securities laws, if such sales are not carefully arranged to fit within an available exemption. The rest of this article will detail the benefits, drawbacks and techniques for mitigating risk and achieving positive outcomes at the company level arising from the secondary market trading of private company shares.

Pros and cons of private secondary offerings

In-house counsel at today's high-growth private companies not only handle a wide range of complex legal issues but also serve as trusted advisors to the executive team. As part of this advisory role, in-house counsel at venture-backed companies should have some familiarity with private secondary offerings because they can have such a substantial effect on the company and its employees.

Accordingly, it is important to understand the numerous benefits and potential risks associated with a secondary offering when both structuring the offering and formulating legal advice regarding the offering for the executive team.

Private secondary offerings provide both direct and indirect benefits. As described above, the most cited direct benefit is the ability to reward early investors and retain employees by providing partial liquidity well before the IPO. The popular web-based gaming company, Kabam, conducted two secondary offerings within a 16-month period, "to reward the employees who have worked so hard for the company's growth and the investors who have believed in Kabam from the beginning."

Another direct benefit of private secondary offerings is an almost immediate boost to employee morale. The vast majority of employees will view a secondary offering as a positive development that will provide them with immediate cash. The increased employee morale often leads to a spike in the company's reputation and goodwill, for respecting, fairly compensating and acknowledging it's employees.

Private secondary offerings also often instill a heightened sense of credibility and confidence in employees, investors and the general public with respect to the company's business model. When accredited investors purchase private shares on the secondary market, it is often a testament to the company's leadership and long-term viability. Although largely dependent upon the amount of liquidity generated, this increase in confidence is a welcomed benefit to the executive team of a successful secondary offering. All of these benefits can help the company attract and retain top talent and desirable investors.

The most notable indirect benefit of private secondary offerings is the reduced internal pressure to go public. By delaying the IPO, a company can retain control and privacy over its affairs and continue to grow its business away from the scrutiny of analysts, competitors and even potential plaintiffs. For example, studies have shown that companies that have recently filed for an IPO are particularly likely to be sued for patent infringement by a non-practicing entity that will try to take advantage of the company at a critical time.

Although a company's capital position and number of shareholders will certainly place limits on how long a company can remain private, controlling the timing of the eventual IPO is a strategic option enabled by the private secondary offering. In addition, a private secondary offering in many ways can serve as a "dry run" of the IPO by ensuring that a private company has all the necessary financial controls in place for the IPO. In essence, the private secondary offering acts as a mini-IPO with the added benefit of switching out early-stage investors with mutual funds and other large institutional investors, who are more likely to hold their shares following an IPO and corresponding lock-up period.

Five techniques in-house counsel can use to protect their company from harmful secondary sales

1. Right of first refusal. A right of first refusal can help the company in controlling its stockholder

base, by allowing the company to intervene if a shareholder attempts to sell to an undesirable stockholder.
2. Transfer restrictions. Transfer restrictions also help the company keep control over the size, incentives and composition of its stockholder base, while still maintaining the flexibility to provide as-needed liquidity.
3. Restricted stock units. Restricted stock units may stop unauthorized trading, since they cannot be transferred, however, they should be used selectively since they are not tied to the increasing value of the company and thus may not properly align incentives.
4. Insider trading policies. Insider trading policies help minimize the risk of Rule 10b-5 violations by selling stockholders who possess material nonpublic information.
5. Confidentiality Agreements. Confidentiality agreements prevent selling stockholders from providing confidential information to potential buyers, including competitors or other parties who are more likely to widely disseminate sensitive company information.

Even though a private secondary offering offers a wide range of advantages, the potential risks of the offering should be carefully considered. A secondary offering can, and most likely will, be a major distraction to all levels of the organization. For example, recently hired employees may wonder why they are not eligible to participate in the offering with their unvested shares and executive officers may have detailed questions about the tax consequences of participating in the offering. Even the most carefully considered offering is likely to leave some employees frustrated due to the various legal and technical issues that are likely to arise before, during and after the offering.

In addition to the distraction, which may have a temporary but tangible impact on employee productivity, other drawbacks include the danger of increasing your shareholder base and inadvertently triggering the registration requirement of Section 12 of the Exchange Act. If a company has total assets of more than $10 million and its stock is held by either 2,000 persons or 500 persons who are not accredited investors, the company becomes an SEC reporting company, subject to the same annual, quarterly and current reporting obligations of public companies.

A private secondary offering, especially if it is conducted without company oversight, also has the potential to attract undesirable investors into the company's shareholder base. New investors who purchase private shares from existing shareholders may not always have the company's best interests in mind and may even, in some instances, be direct competitors. Like all shareholders, these new investors will typically have the right to inspect a corporation's books and records, thereby gaining access to potentially sensitive financial information. Although most states permit inspection only for "proper" purposes, shareholders in Delaware do have intrinsic rights to information that would be damaging if it were in the wrong hands.

See, e.g., Delaware Code § 220 ("Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from … [t]he corporation's stock ledger, a list of its stockholders, and its other books and records.").

Another possible detriment to private secondary offerings is the effect they may have on the fair market value of the company. Under Section 409A of the Internal Revenue Code, stock options with an exercise price that is less than the fair market value of the underlying stock could result in significant adverse tax consequences to the option holder. If a private secondary offering is conducted shortly after the issuance of stock options and the per share price obtained through the offering is substantially higher than the strike price of the options, the IRS may be inclined to use the private secondary offering as evidence of the fair market value of the stock as of the grant date. The single share price in the private secondary offering may also be used to set a practical base valuation for the company at the subsequent IPO. Since it tends to be based on less fulsome disclosures, the price and derived valuation of a company based on the price obtained from a private secondary offering is somewhat speculative and may not adequately represent the true value of a company. If the implied company valuation during the private secondary offering is too high, it may be difficult to set a similar or higher price for the IPO.

Many of the drawbacks of private secondary offerings discussed in this article can be alleviated by the company carefully structuring the terms and conditions of the offering, and not allowing employees to go out and find their own buyers. As will be discussed later in this article, channels like SecondMarket and NASDAQ Private Market provide a private company with the tools to tailor and control the amount of liquidity received by its shareholders, including the ability to limit who is allowed to purchase shares. When evaluating whether a secondary offering makes sense for a particular company, it is important to balance the anticipated benefits with the adverse consequences of the offering.

Regulation

Under US securities law, every offer and sale or resale of a security must either be registered with the SEC or exempt from the registration requirements of the Securities Act of 1933 (the Securities Act). Private secondary offering participants may sell their unregistered securities pursuant to (1) statutory exemptions (especially Rule 144 and Rule 144A under the Securities Act), (2) uncodified, common law exemptions like Section 4(a)(1½) and (3) in certain sales to non-US persons, exemptions under Regulation S.

Rule 144 and 144A both provide non-exclusive safe harbors from the SEC's registration requirements. Rule 144 is mainly a viable option for non-affiliates of an issuer — that is, shareholders who are not an executive officer, a director or a large shareholder in a relationship of control with the issuer. The only requirement for sellers who are not affiliates at the time of, and for the three months preceding, the Rule 144 sale is that they have held the securities for at least one year. This one-year holding period may cause problems for many employee non-affiliates because of the tax implications and exercise price payment associated with exercising their options.

For affiliates of an issuer Rule 144 requires certain current information about the issuer be made public. While not as stringent as reporting requirements for public companies, private companies whose affiliates rely upon Rule 144 must still provide the general public with material information regarding the issuer's business, products, services offered and facilities, as well as balance sheet, profit and loss and retained earnings statements (current and for the preceding two fiscal years). Many private companies do not wish to provide this level of public disclosure, making the Rule 144 safe harbor inapplicable for executive officers, directors and large early investors.

Rule 144A is limited to sales (by affiliates and non-affiliates alike) to qualified institutional buyers (QIBs). QIBs are generally financial institutions that own or invest, on a discretionary basis, at least $100 million in securities of non-affiliated issuers. Individuals are ineligible for QIB status. Both buyers and sellers of Rule 144A securities also have the right to obtain "reasonably current" information about the issuer, similar to the information required for a Rule 144 sale above.

Perhaps because Rule 144 and Rule 144A both provide fairly limited exemptions, and both require specific disclosure requirements, the most common exemption used by secondary market sellers is, instead, the so-called Section “4(a)(1½)” exemption.

The Section 4(a)(1½) exemption is so named because it combines the analyses for the exemptions provided in Sections 4(a)(1) and 4(a)(2). Without getting too technical, Section 4(a)(1) exempts transactions by “any person other than an issuer, underwriter, or dealer” from the registration requirements of the Securities Act. While it is fairly easy to spot an issuer or a dealer, the definition of an underwriter is sufficiently broad to prevent most affiliates of an issuer from relying upon this exemption.

Section 2(a)(11) defines the term “underwriter” as any person who:
• buys from an issuer, or its affiliates, with a view to distribution;
• offers or sells for an issuer, or its affiliates, in connection with the distribution of a security;
• participates, or has a direct or indirect participation, in such distribution; or participates or has a participation in the direct or indirect underwriting of such distribution.

Section 4(a)(2) of the Securities Act exempts from registration offers and sales by the issuer that do not involve a public offering or distribution. SEC rulings and case law have set out Section 4(a)(2) sales by an issuer do not involve a public offering or distribution when the offers are only made to “sophisticated investors.” While this term is not defined by Section 4(a)(2), it generally is understood to include both QIBs and the much larger pool of “accredited investors,” which includes individuals who have an income that exceeds $200,000 (or $300,000 together with a spouse) in each of the prior two years, and reasonably expects the same for the current year, or who have a net worth over $1 million, either alone or together with a spouse (excluding the value of their primary residence).

The principle behind the 4(a)(1½) exemption provides that transactions that would be exempt under Section 4(a)(2) if taken by the issuer probably do not involve a “distribution” if undertaken by a non-issuer. Hence, a selling shareholder may rely on the exemption provided by Section 4(a)(1) if the original sales by the issuer, together with all subsequent resales of securities acquired in that offering, generally reflect the principles applicable to issuer offerings under Section 4(a)(2), primarily that the offerings may only be made to “sophisticated investors.”

Many commentators recommend that sellers planning to rely on the 4(a) (1½) exemption take the following steps to avoid the private transactions being transformed to a distribution:

- Arrange for the issuer to have a Rule 144(a)(3) legend placed on the securities;
- Arrange to have the issuer issue a “stop transfer order” to the transfer agent for securities to prevent the buyer from reselling the securities purchased in the Section 4(a)(1½) transaction without obtaining an opinion of counsel; and
- Secure a written representation by the buyer that clearly indicates the buyer’s awareness of the restrictive character of the securities, the need for the buyer to hold them for investment and buyer’s financial sophistication and wherewithal to hold the securities as an investment.

While an issuer, whether reporting or non-reporting, is not required to furnish any particular information to purchasers who are accredited investors in connection with an offering under Regulation D, the SEC has never addressed whether an accredited investor purchasing in a private resale under Section 4(a)(1½), particularly in the case of a purchase of securities of a non-reporting issuer, must be furnished or given access to issuer information.

See J. William Hicks, Exempted Transactions Under the Securities Act of 1933 § 6.12 (2009). See also, SEC v. Cavanagh, at 371-72, where the court endorsed the use of similar provisions in connection with an exemption under Section 4(1½). These provisions appear to have their bases in the previous Securities Act Rule 146 (a predecessor to Regulation D), where an issuer was required to exercise reasonable care to ensure that purchasers of the subject securities were not statutory underwriters. See Rule 502(d); Use of Legends and Stop-Transfer Instructions as Evidence of Non-Public Offering, Release No. 33-5121 (Dec. 30, 1970).

Participants may also include a concurrent offering of securities to "non-US persons" (which category excludes foreigners living in the United States) under Regulation S. Such offerings must be (1) offshore, (2) not directed in or into the United States, and (3) may need to comply with additional enumerated restrictions depending upon the identity and characteristics of both the issuer and the selling participant.

In addition to federal securities laws, Rule 144A offerings and Section 4(a) (1½) offerings for issuers that are not reporting companies must also comply with state securities laws (so-called blue sky laws). While a comprehensive discussion of blue sky laws is beyond the scope of this article, generally there are four resale exemptions that may be applicable to private secondary offerings: (1) isolated non-issuer transactions (provided for by all states, except New York), (2) institutional investors exemption (provided for by all states, except New York), (3) manual exemption and (4) unsolicited broker dealer.

Private secondary offerings are also impacted by SEC, Financial Industry Regulatory Authority (FINRA), Securities Investor Protection Corporation and local state regulations for broker-dealers. For example, in March 2012 the SEC charged the transaction facilitator SharesPost with engaging in securities transactions without registering as a broker-dealer. As a result of these charges, SharesPost and its CEO consented to an SEC order finding that SharesPost committed and the CEO caused a violation of Section 15(a) of the Exchange Act, and agreed to pay penalties of $80,000 and $20,000 respectively. SharesPost subsequently acquired a broker-dealer and its membership agreement was approved by FINRA.

Channels

Private secondary offerings can be structured as either buybacks (in which the issuer is the buyer, which provides for more control over price and other conditions) or sales to third parties (which has the advantage of not using any of the issuer's cash, but requires a greater degree of diligence). While there are myriad avenues for conducting offerings, including both more passive but risky options like bulletin boards or dark pool operators and the more active approach of working directly with institutional investors, the two most prominent registered broker-dealer platforms for private secondary offerings are SecondMarket and NASDAQ Private Market.

SecondMarket has evolved since its inception in 2004, investing millions into its online platform to provide a central market, improved user experience and streamlined sales process for transactions. SecondMarket's original strategy was to simply match buyers and sellers of private company stock in privately negotiated block trades or through a competitive Dutch auction format, completing these types of trades for stocks of over 60 companies including Facebook and Twitter. In 2011, SecondMarket pivoted its private company secondary business to provide shareholder liquidity solely in the context of company-sponsored or supported liquidity programs, working closely with private companies to facilitate orderly sales of stock by their existing shareholders. SecondMarket has reaped rewards from this pivot, growing from around $30 million in transactions in 2008, to $1.4

billion in 2014. The mix of buyers using SecondMarket has evolved as well, with hedge funds buying accounting for 47.9 percent of sales as of mid-2012, but mutual funds accounting for 75 percent of third-party buyers in mid-2014. SecondMarket facilitates both small and larger transactions, with a median offering size of $18 million and a smallest deal of only $2 million in 2014.

Companies who use SecondMarket are given control over how and when liquidity is provided to its shareholders, including identifying and approving potential buyers, establishing the number of shares eligible to be sold, and setting the frequency of transactions. In these transactions, SecondMarket acts as depositary, paying and information agent, and handles all of the administrative aspects of the transactions, from capitalization table management, to online access to the transaction data room, to electronic execution of deal documents and fund flows.

San Francisco-based NASDAQ Private Market was announced on March 6, 2013 as a partnership between SharesPost and NASDAQ OMX Group. More than 100 private companies already use NASDAQ Private Market's online platform to conduct company controlled secondary transactions and structured liquidity programs, manage capitalization tables and stock plans, and provide current and potential investors with efficient access to company disclosures and communications in a secure environment. Like SecondMarket, NASDAQ Private Market provides companies with complete control over which investors are able to participate in their liquidity program and can also set limits for participating selling security holders. In particular, a member company can control who can access its private company portal to view company information, who can buy or sell company shares, how many shares can be offered, and when market participants can transact.

Five key takeaways

1. A well-structured secondary offering generates controlled liquidity for shareholders, which boosts moral and helps with attracting and retaining talent, while also optimizing the shareholder base and maintaining a reasonable implied valuation for the company.
2. A secondary offering can be a major distraction to a company and its employees and must be closely managed to minimize productivity loss.
3. A successful secondary offering allows a private company to defer going public until it strategically makes most sense, if ever.
4. Private secondary offerings are a global phenomenon serving the needs of private companies, their employees and early-stage investors.
5. A private secondary offering should function much like a mini-IPO, providing useful insight into the systems, processes, and personnel needed for an eventual IPO.

Both SecondMarket and NASDAQ Private Market impose some disclosure requirements for issuers and minimum qualification requirements for buyers, and claim to vet all issuers before allowing them to sign up. SecondMarket requires companies to provide robust disclosures to eligible buyers and sellers, which generally include audited financial statements and company risk factors. NASDAQ Private Market member companies are also required to provide a minimum set of financial and informational disclosures to investors considering a possible purchase in company securities. Depending on the circumstances, these may include audited annual and unaudited quarterly financial statements, summary capitalization information, significant business developments, and risk factors. Information provided through both SecondMarket and NASDAQ Private Market is stored in online data rooms. Buyers on SecondMarket must be accredited investors or QIBs that provide certifications regarding their status, and all participants must undergo a background check similar to that undertaken in connection with opening a new brokerage account. Buyers on NASDAQ Private Market must also be accredited investors.

The fees charged by these services vary. For SecondMarket, while participation is free, transaction fees depend on the nature and complexity of the transaction. The price for companies to use NASDAQ Private Market is also customized based on client requirements based upon factors like whether the company is seeking to connect with NASDAQ's broker-dealer network, the complexity of the company's equity program, and the level of service the company is seeking. Brokers must also share a portion of their total commission with NASDAQ Private Market.

Further Reading

Practical Law, Secondary Market Trading of Private Company Shares, p. 11.

Practical Law, Resales Under Rule 144(A) and Section 4(1½).

Practical Law, Secondary Market Trading of Private Company Shares, p. 10.

SecondMarket, Q3 2011 Private Company Report (Oct. 6, 2011).

Practicing Law Institute, Staying Private, §13:6.2.

Practicing Law Institute, Staying Private, §13:6.2, citing SecondMarket, Member Services Page.

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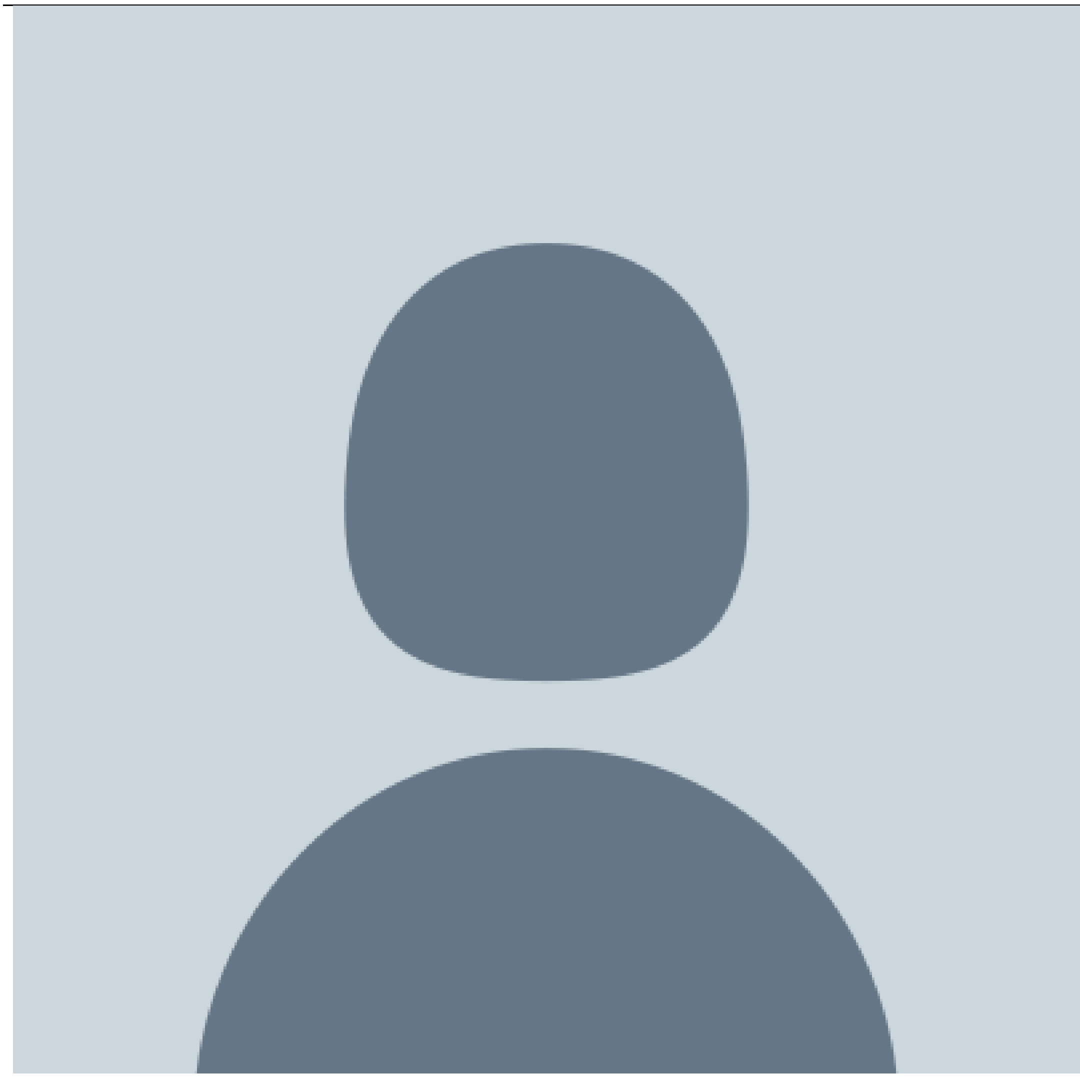

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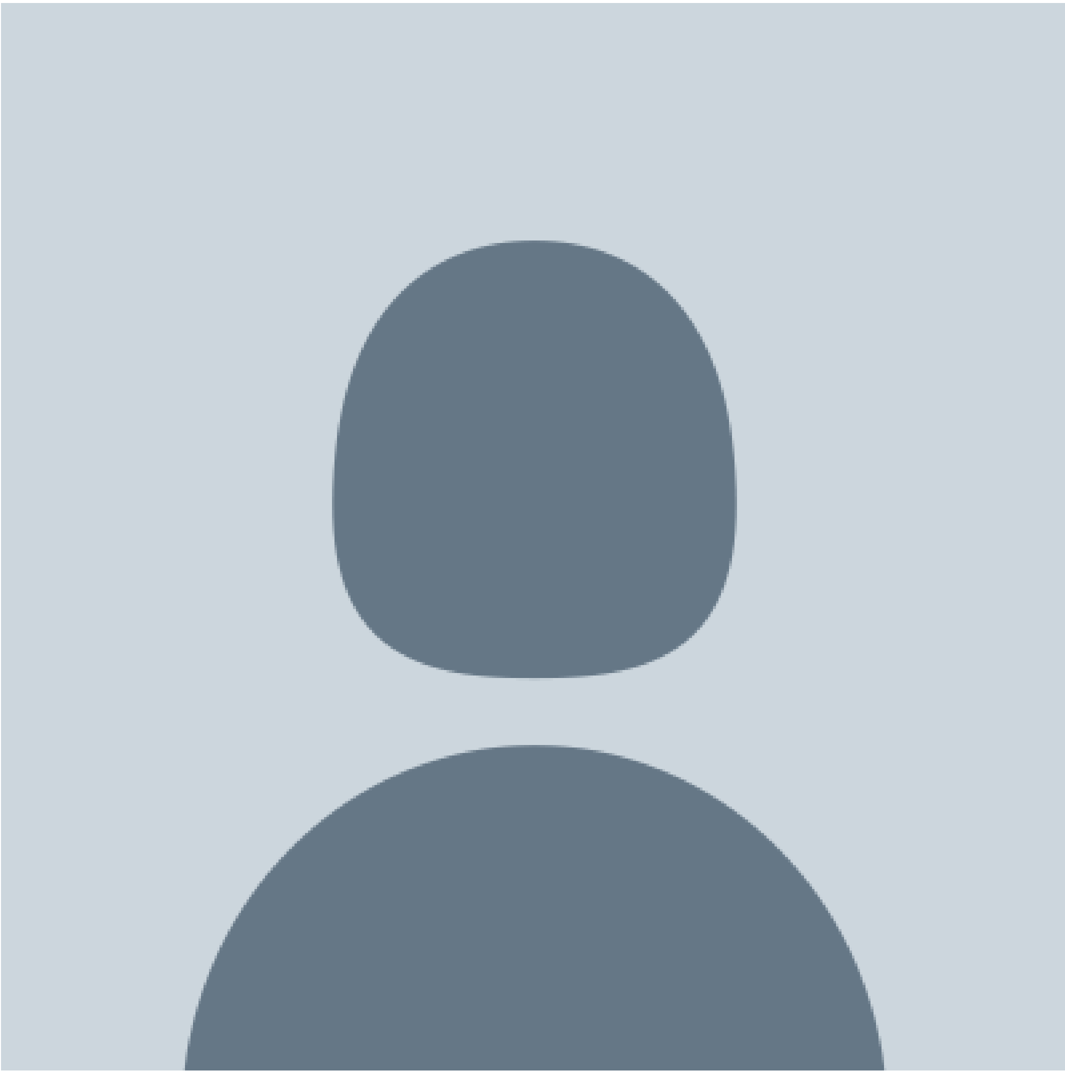

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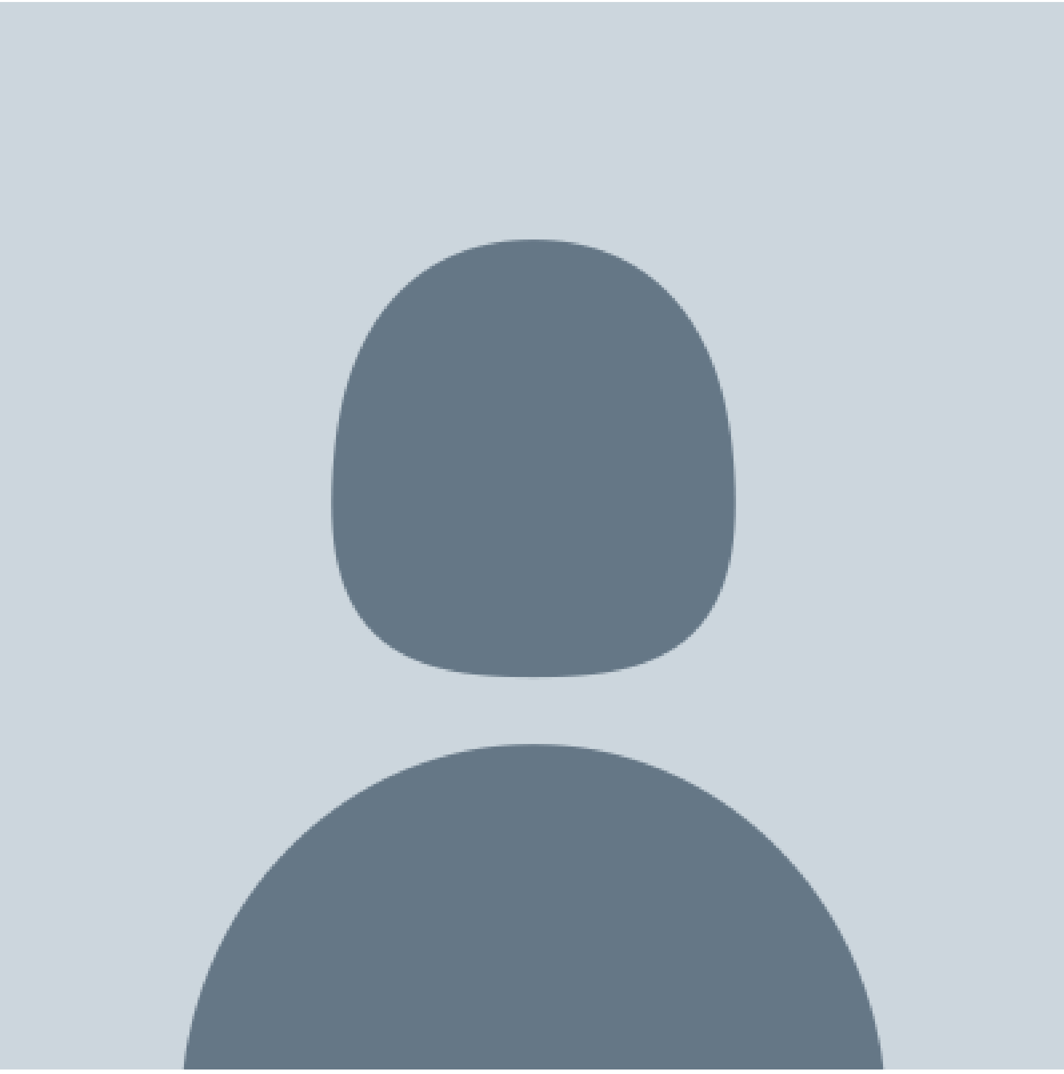

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