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5 Ways To Perfect Your IPO Prospectus Before You Even Begin

By **Karlee Weinmann**

Law360, New York (October 22, 2014, 1:31 PM ET) -- Plans for an initial public offering kick into overdrive after a company files its prospectus, a move that signals the home stretch of a go-public process and the end of preparations that last months — or even years — in the lead-up to the filing.

Between assembling its advisers and doing its research about the marketplace, a company needs to start thinking early about how exactly it wants to breeze onto the public markets. The prospectus is a central piece of the strategy, spelling out a company's objectives and promises to, in theory, entice potential investors.

When done right, the document should be the culmination of a wide-reaching effort to gather and refine information that relates to a company's history and its plans.

“A company needs to start planning far enough in advance of their targeted IPO date, because there is a lot of information required to be in a prospectus,” said Jen Carlson, a corporate and securities partner at Mayer Brown LLP.

A proactive approach gets a company ready to strike into the public markets with minimal holdups, anchored by a filing that gives its top brass plenty to work with in road show pitches. It can be a slog, but there's a method to the madness that can deliver a substantial payoff — and it all starts before putting pen to paper.

Here, Law360 runs down five must-do's to keep in mind before drafting the prospectus.

Adopt an Open Kimono Policy

A range of advisers, including legal counsel and underwriters, form the foundation of the team that drives a company to its listing. Most companies headed for an IPO haven't dabbled in the public markets before, spotlighting the advisers' dual role as gatekeepers and architects to get deals done.

To work most effectively, advisers need full access to a company's books, its vision and any other inside information. Through the due diligence process, they peg a company's valuation and marketing strategy to begin carving out its near- and long-term paths.

“From the earliest point in time, you want to have an open kimono policy in terms of due diligence efforts and make sure [underwriters] have access to everything they need from a diligence perspective,” said David Lynn, co-chair of the corporate finance group at Morrison & Foerster LLP and former chief counsel of the Division of Corporation Finance at the U.S. Securities and Exchange Commission.

It's important to have conversations, especially with bankers, about how to best market a deal based on that information. What the facts and figures tell underwriters could deviate from how a company sees itself — but could also lead to higher valuations, based on different disclosures and data in the prospectus.

Roping in auditors at an early stage can help streamline the process, especially if a company hasn't retained a firm for quarterly or annual reviews, Carlson said. In any case, the auditors will be heavily involved in drafting the registration statement and prospectus — and they have plenty of ground to cover in their reviews.

Think Like a Public Company

The decision to stage an IPO sends immediate shockwaves through a company, then reverberates for its entire future. To best position itself, a company needs to switch up its approach as soon as it can after it decides to pursue an IPO, attorneys said.

“A year or more in advance, they need to start thinking and operating like a public company,” Carlson said. “That includes involving internal and external counsel in things like corporate governance, capital structure, executive compensation and anti-takeover defenses.”

For advisers, that means clueing a company in on the kinds of obstacles they could see post-debut tied to exchange requirements, including for board leadership and independence, and disclosure rules from the SEC — especially the onslaught that comes in the first year after the IPO.

Without that heads up, companies could struggle to prove their prowess in the public marketplace, and stumbles can prove especially costly when investors and the media are watching.

“It's easy for companies to be entirely focused on what [they] need to do now, and that's obviously the primary focus,” said Tony Jeffries, a partner at Wilson Sonsini Goodrich & Rosati. “But think about what it means for years to come and make it all sync together.”

Remember High School English

Applying the same strategies that teach high schoolers how to craft a persuasive essay can provide a helpful framework for putting together a prospectus — a document designed to convince investors to bet on a given company.

A small group of higher-ups at the company and a few bankers should each brainstorm what they'd like to emphasize about the business and what's most important for investors to understand. From there, Jeffries said, they should gather to share those free-form ideas and draw up an outline for how to showcase the company's best face in the prospectus.

Following a less-organized framework for drafting a business summary could deliver sloppy, incoherent results. While a more deliberate approach might seem painstaking, attorneys said it acts as an insurance policy against extra work down the line.

“Rewriting something not well thought out in the first place is so much harder than building infrastructure and scaffolding and the building from the ground up,” Jeffries said. “There's ample opportunity for everything to be scrubbed and verified and rewritten.”

Critically Consider Capabilities

Prospective investors will want to see bright growth prospects for the company based on a rosy outlook for its life as a public outfit. But there's an art to squaring a sunny forecast with the realities a company will confront after its debut.

“It's easy when you're dealing with companies that are excited about the process to think on a grand scale,” Carlson said. “It's great to have lofty goals and dreams, but you need to remember that your investors will remember those promises and will want to know if those goals have been accomplished.”

Advisers should harken back to a solid diligence process to make sure facts can support any statements made in the prospectus. There's another layer to that process for companies, especially in the tech space, that rely on nontraditional metrics — subscriber numbers or markets reached, for example.

“It's important to think about those [metrics], to interface with your bankers because, if done right, they can provide really great additional information about your business to help investors understand it,” Jeffries said. “The CFO and bankers and analysts need to think hard about how to position things so that there's not disappointment later.”

Read SEC Comments

Regulators routinely issue questions and comments on IPO filings, meant to shore up the documents and make sure companies meet requirements for going public. The SEC makes its feedback available, and it can be a valuable resource to help avoid holdups and learn from other companies' mistakes.

“One thing that is really useful is to look at SEC comment letters that have been issued for companies in your industry that have recently gone public,” Carlson said. “The letters include information on what the SEC looks for in disclosure and potential hot-button issues for the SEC.”

The published comments should provide more than a general lay of the land, however.

“The SEC from time to time has run into a problem where people are just anticipating all the comments and not thinking about whether the comments apply to their particular company,” Lynn said. “It's about trying to understand every question that the SEC would potentially ask.”

--Editing by Philip Shea.
