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Initial Public Offerings

An Issuer's Guide (US Edition)

Contents

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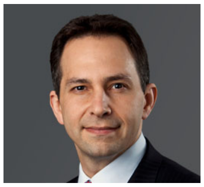

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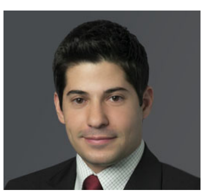

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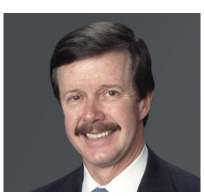

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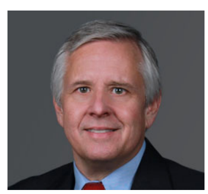

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Introduction

For most companies and their owners, an initial public offering (IPO) is a "once-in-in-a-lifetime" event that represents the culmination of many years of hard work and personal investment. The IPO provides stockholders and management of the company with a significant sense of accomplishment and represents one of the most important milestones in the corporate evolution of a company.

An IPO, however, frequently also brings with it a sense of upheaval as significant changes are often required to be made to the way a company operates and conducts itself – membership in the new "public" world brings with it legal and compliance obligations and challenges.

This guide provides an overview of some of the key issues with which we believe all directors, members of senior management, general counsels and other key decision makers involved with a potential US domestic IPO candidate should be familiar and focuses on the public offering process in the United States and listing on the New York Stock Exchange (NYSE) or the Nasdaq Stock Market (Nasdaq) and life as a public company. However, it is not intended as a comprehensive treatment of the subject matters covered by this guide or of all matters relevant to an IPO. This guide is also not intended as a substitute for legal advice, and we encourage our readers to reach out to the authors of this guide or any of the other key members of our US Capital Markets Practice before taking any action.

European issuers should consult our guide Initial Public Offerings—an Issuer's Guide (European Edition) and Asian issuers should consult our guide Initial Public Offerings—an Issuer's Guide (Asia Edition) for additional information that foreign private issuers organized under the laws of those jurisdictions should consider when contemplating an initial public offering in the United States.

What Are the Potential Benefits of Conducting an IPO?

There are a number of different reasons why a company may consider an IPO, including:

- The need to raise additional capital to fund growth, either organically or through acquisitions.
- The need to provide existing stockholders with a "liquidity event" and an option to "exit" all or part of their investment.
- The need to facilitate the transition from an "owner-managed" company to a more widely-held company with a professional (non-owner) management team, frequently in connection with succession planning in family-owned or otherwise closely-held companies.
- The desire to provide value to stockholders through a spin-off or carve-out of a particular division or line of business.
- The desire to enhance the profile and standing of the company with customers, suppliers, lenders and other investors, and as an attractive employer.

Being a public company can have significant benefits, including:

- Access to a much broader investor base, consisting of both institutional and retail investors.
- Access to the public capital markets as an additional source of capital, through both subsequent equity offerings and potential debt offerings, possibly on more favorable terms than those available in the private equity, debt or loan markets.
- Increased liquidity for existing stockholders, including employees of the company who may have acquired shares as part of their compensation arrangements.
- The ability to use the listed shares of the company as all or part of the consideration for an acquisition.
- An enhanced ability to attract and retain key talent for the company through equity incentive arrangements for executives and other employees, including restricted shares, stock options or similar arrangements.
- A generally enhanced company profile and increased confidence in the company by investors, creditors, customers, suppliers and other stakeholders in the company, deriving from public company status and the resulting enhanced transparency and disclosure.

What Are the Potential Costs and Other Potential Downsides of Conducting an IPO?

While being a public company can offer many advantages, the owners of a private company should not make the decision to conduct an IPO lightly and will need to carefully consider the various costs and other potential downsides that can come with being a public company, including:

- The costs resulting from an IPO: conducting the IPO itself as well as the ongoing costs of being a public company. These include costs of maintaining a public company board and management team, costs of ongoing reporting obligations, listing fees, costs of the company's auditors, costs of legal advisers and other general compliance costs.
- The loss of control by the existing owners: accommodating the potentially divergent interests of other stockholders, adhering to a new set of rules and regulations, meeting requirements for increased transparency, including disclosure of beneficial ownership of stockholders, management compensation and related party transactions, and the potential for a hostile takeover of the company.
- Exposure to potential liability under the US securities laws in connection with the IPO and ongoing SEC reporting requirements.
- Exposure to potential scrutiny and activism by public stockholders and other interested parties.

Is Your Company Ready for an IPO?

Once the owners of a private company have determined that the benefits of "going public" outweigh the downsides, the company and its stockholders, together with their respective financial, accounting and legal advisers, need to consider whether the company is ready for an IPO or whether the company would benefit from remaining a private company for the time being.

The ideal IPO candidate tends to exhibit some or all of the following characteristics:

- A clearly defined strategy.
- A track record of sound financial performance and a solid balance sheet.
- Market leading positions, favorable industry trends and growth prospects.
- A large potential customer base and products or services that are attractive and accepted by the market.
- An experienced management team with a proven track record.

The company's "equity story" needs to be considered—investors must be provided with facts, figures and details as to why they should consider purchasing shares in the company. The financial advisers, together with the company and its owners, will need to develop the equity story by focusing on the position of the company as a growth or income play, its position within its market and sector and its strengths, strategy, track record and business plan, together with macro data. All of this must be clearly and convincingly outlined in a management presentation or other document at the outset of the process for the benefit of the financial and legal advisers involved in the proposed IPO. Management will need to ensure that any key assumptions and projections are supported with independent information (to the extent possible) in order to allow the company's underwriters and other financial advisers to assess the feasibility of an IPO.

Getting Ready

Prior to "going public", the owners and management of a potential IPO candidate, in consultation with their advisers, must implement a corporate governance structure and other internal procedures and guidelines that are suitable for its life as a public company. In addition, the period leading up to the IPO is also an opportune time to consider what, if any, changes the owners and management of a potential IPO candidate should make to the company in the near to long-term future.

In considering any necessary or desirable changes, it is important to bear in mind that many changes—those that require stockholder consent under applicable corporate law or under the listing rules of the exchange on which the shares of the company will be listed—may be much easier and less costly and time-consuming to implement prior to the IPO when the company may still be more closely held and not yet subject to the relevant proxy disclosure rules. In practice, certain changes may be very difficult to implement after the IPO, once the company has a potentially large percentage of public stockholders with possibly divergent agendas and incentives.

Key steps in getting ready for an IPO may include, for example:

- Simplifying the company's capital structure.
- Moving assets out of or into the entity that will be listed or its subsidiaries.
- Intra-group restructuring to make the company operate in a more tax efficient manner.
- Formalizing and properly documenting any existing relationships and commercial dealings between the company and its pre-IPO owners.
- Addressing internal "housekeeping" matters, such as reviewing and amending the company's charter and bylaws, committee charters or other organizational documents.
- Putting in place a corporate governance structure suitable for a public company, including a board of directors with independent members and various committees.
- Reviewing and organizing the company's financial and corporate records.
- Creating financial statements that comply with US generally accepted accounting principles (**GAAP**) and with the rules of the US Securities and Exchange Commission (**SEC**).
- Establishing or reviewing, together with its auditors, the company's internal controls and creating procedures to support the on-going public reporting of the company post-IPO.
- Reviewing and amending and implementing appropriate compensation and incentive and pension arrangements.
- Reviewing the company's policies for corporate communications and establishing a formal investor relations program.
- Creating, reviewing and updating a website suitable for a public company.

To avoid unnecessary costs and delays, these issues should be considered sufficiently in advance of the formal IPO "kick-off" meeting, and we encourage companies to start discussions with legal advisors to plan for changes prior to commencing a formal IPO process.

Are Changes Needed in the Company's Capital Structure or Relationships with Its Key Stockholders or Other Related Parties?

The listing requirements of the applicable securities exchange, coupled with investors' expectations about acceptable arrangements, may require significant changes to be made to a company's capital structure and to its relationship with its existing stockholders. The company and its owners, with support from their financial and legal advisers, should scrutinize their respective positions and various relationships in the initial IPO stages and then determine the nature of any changes that may be required, how to make any necessary changes and what arrangements will or should continue after the IPO. Most, if not all, issues can typically be addressed and there are few true "deal killers." However, the time it takes to agree upon and implement certain changes should not be underestimated, and this process should start in earnest as soon as a decision has been made to proceed with the IPO.

ANALYZING AND SIMPLIFYING THE EXISTING CAPITAL STRUCTURE

Many potential IPO candidates will have raised capital in the past from investors in private offerings. Where companies have been funded by venture capital, there may have been multiple funding rounds. As a result, it is not uncommon to find IPO candidates with highly complex capital structures that may be comprised of multiple classes of common and preferred stock. While in a pre-IPO world the existence of many different share classes may be acceptable, the circumstances for a listed company are very different. It may therefore be necessary to significantly simplify the share capital structure of the IPO candidate and, ideally, convert or collapse the different classes of shares into a single class of common stock on or before the IPO date. Venture capital documents will typically provide for the conversion of multiple classes or series of common and preferred stock into a single class of common stock upon the completion of a "qualifying" IPO. It is important to understand the parameters of a "qualifying" IPO to ensure that the contemplated IPO will meet these parameters.

The rights of the holders of the different share classes and the interaction of those rights across the different classes can be highly complex. If these are not structured and documented properly at the time of each funding round, certain classes of stock or even individual stockholders may effectively be able to block necessary or desirable changes to the company's capital structure, creating potentially significant holdout value for the relevant investors even when the relevant early round investors may otherwise have been significantly diluted as a result of subsequent funding rounds and only hold a small economic stake in the company. Matters can be further complicated by the existence of options, warrants or convertible bonds.

A stock split or reverse stock split may be necessary to achieve a target price per share in the IPO or a threshold number of shares available for trading post-IPO. Care should be taken to ensure that the company has an authorized capitalization large enough to support conversion of senior securities, future financings and acquisitions and compensation under employee equity plans. Changes in capital structure may create complicated accounting, tax or securities law issues that require many months of preparation. In addition, structural changes must be adequately explained to potential investors and may impact the presentation of financial statements.

REVISITING RELATIONSHIPS WITH KEY STOCKHOLDERS AND OTHER RELATED PARTIES

The company and its key stockholders are often parties to a stockholders' agreement that governs their relationship. Stockholders' agreements usually include provisions that:

- Place restrictions on actions of the stockholders and the company.
- Define how company decisions are made.
- Determine who gets to nominate or appoint directors.
- Define the circumstances in which stockholders can sell shares in the company or under which the company can issue new shares.

Again, while certain types of stockholders' agreements and arrangements may be typical and workable for a private company, it may be necessary to terminate or substantially revise them on or prior to the IPO date. On the other hand, if there will continue to be a "controlling stockholder" after the IPO, market expectations may require that this relationship be formalized and appropriate protections for non-controlling/minority stockholders be put in place.

Key stockholders of an IPO candidate and their affiliates may also be significant customers or suppliers of the company or may have other significant relationships with the company. For example, the founder or controlling stockholder of the IPO candidate, rather than the company itself, may be the legal owner of key operating assets or intellectual property rights that the company relies on to operate its business. Formalizing and properly documenting these "related party transactions" and commercial arrangements among the company and its pre-IPO owners on "arm's-length" terms and properly describing them in the IPO prospectus can be crucial for the success of the IPO. This may involve entering into formal, long-term, purchase, supply or licensing agreements or transferring key assets to the company.

The Sarbanes-Oxley Act of 2002 (**Sarbanes-Oxley Act**) prohibits a company from extending or maintaining credit, or arranging for the extension of credit, in the form of a personal loan to any of its executive officers, with limited exceptions. It may not be obvious whether an extension of credit by a company to an executive officer is a personal loan, rather than a short-term loan related to a business purpose, such as a cash advance for business-related travel to pay anticipated expenses. Any personal loans to executive officers will have to be repaid prior to the filing of a registration statement with the SEC. As a result, any loans should be reviewed sufficiently far in advance of the filing of the registration statement to permit the executive officer to obtain a loan from another source, if necessary.

What Is the Right Corporate Governance Structure for the Company Post-IPO?

Corporate governance structures that may be appropriate, and may even have proven to be highly effective for a particular private company, may be unsuitable for a company once its shares are publicly listed. The company and its owners, with support from their financial and legal advisers, will therefore need to carefully review and, in all likelihood, supplement or possibly even completely replace, existing corporate governance structures in preparation for a proposed IPO. Factors that may influence the post-IPO corporate governance structure include:

- Requirements under federal securities laws.
- The rules of the stock exchange(s) on which the company's shares will be listed, including corporate governance requirements.
- The expectations of investors and the investment guidelines of key institutional investors.
- Market practice for similar listed companies.
- The requirements of the underwriters for the IPO.
- The type of board, both in terms of size and composition, the company needs to be successful as a public company.

In practice this means, at the very least, a company proposing to list its shares on a stock exchange should have an appropriate mix of executive and non-executive directors on its board. These directors must have the right skills, as well as suitable personal and professional backgrounds to run a public company. In addition to having board members with relevant industry and geographic expertise, the company and its owners are likely to want to appoint a minimum number of directors who have served on the boards of other public companies, are financially literate, and have experience with public company reporting. Other considerations such as the racial, gender and age diversity of the board may also be factors in determining the perfect balance for a particular company.

Subject to limited exceptions, the boards of directors of public companies are required, under applicable listing rules to be comprised of at least a majority of "independent" directors. These rules have been enacted to avoid potential conflicts of interest and to ensure that the board can properly exercise its supervisory role. "Independence" in this context means that the relevant director must not have any material relationship with the company or its management, other than his or her role as a director. Only non-executive directors can therefore be independent, but other relationships with the company or company management may also negate independence, including:

- Other employment or consulting relationships with the company.
- Ownership of or an executive role at a (significant) customer or supplier of the company.
- Family relationships with senior members of company management.

US stock exchange listing rules set out a non-exhaustive list of criteria to determine whether a director is not "independent." Companies sometimes supplement those lists with additional criteria set forth in governance guidelines or other policies.

Significant share ownership or the fact that a particular director may have been appointed by a particular stockholder may not necessarily be problematic. However, where there will continue to be one or more dominant or controlling stockholders in a company post-IPO, it may also be necessary to ensure a minimum number of directors remain independent from controlling stockholder(s) to protect the interests of the public minority stockholders and make sure that no individual or small group of individuals dominate the board's decision making. This is particularly important where a significant stockholder or its affiliates are also significant customers or suppliers of the company and where independent directors will have to confirm the "arm's length" nature of any future transactions with the stockholder or its affiliates.

The precise number of independent directors to be appointed depends on the synthesis of factors such as the size of the company, the exchange on which the shares will be listed and market practice. In any case, the process of identifying and recruiting the right director candidates can take considerable time and effort and should be started as soon as a decision to conduct an IPO has been made. In addition to specialist search companies, the underwriters for the IPO are often able to assist with introducing possible candidates to the company.

Other corporate governance questions that frequently arise in connection with an IPO include:

- Whether the roles of chairman of the board and chief executive officer should be performed by a single individual or split between two individuals.
- Whether the chief financial officer should be a director.
- Whether the company should adopt any anti-takeover defenses such as advance notice bylaws, supermajority voting requirements or blank check preferred stock.

The applicable corporate governance regime may also require that various board committees be established prior to the IPO, if they are not already in existence. These typically include compensation, nominating/corporate governance and audit committees. Depending on the industry in which the company operates, additional committees may be appropriate, including risk, investment, environmental or technology/R&D committees. The charters and composition of these committees should be considered, and the company's legal advisers should work with the company and its other advisers to agree on their scope and content.

The non-quantitative listing requirements for NYSE and Nasdaq-listed companies are contained in Appendix 1 to this guide.

Are the Company's Existing Financial Statements Suitable?

Financial statements for private issuers are not necessarily prepared to meet GAAP's stringent requirements or the requirements of the SEC. Preparing financial statements meeting those requirements can take considerable time and effort.

Public company financial statements must be audited by an independent auditor registered with the US Public Company Accounting Oversight Board (**PCAOB**), a nonprofit corporation supervised by the SEC, and the auditor must meet the SEC's strict independence requirements. If the company's current accounting firm does not meet these requirements, the company will need to retain a different accounting firm. The underwriters may also suggest that a company retain a new accounting firm if the company's current auditor is not nationally recognized. The search for a different accounting firm, if needed, should begin early in the IPO planning process as the need to re-audit the company's financial statements could cause delays.

The SEC will review an IPO company's financial statements to ensure compliance with its requirements. One of the areas that receives a great deal of scrutiny is the company's revenue recognition practices. The SEC will often raise questions to ensure that the company is not recognizing revenues until all of the applicable GAAP revenue recognition criteria have been satisfied. Some SEC questions can be avoided by benchmarking the IPO company's accounting policies and disclosures against those of other companies in the same industry as the IPO company.

Are the Company's Pre-IPO Equity Awards Problematic?

Another area that receives a great deal of SEC scrutiny is the granting of equity-based awards, such as stock options or restricted stock, to employees prior to the IPO, particularly in the 12 to 18 months before the date the registration statement is filed with the SEC. If the option strike price or the price at which the equity is sold to the employee is less than the fair market price (presumed to be the mid-point of the anticipated offering range disclosed in the registration statement), the SEC will require the company to recognize the difference as compensation expense that will be amortized over a period of time, which can result in an embarrassing restatement of financial statements, be a drag on future earnings and adversely affect the timing of the IPO. If a company is anticipating making significant equity awards pre-IPO, contemporaneous independent appraisals or concurrent third-party investments can be used to support the fair market price in responding to SEC comments.

The company should analyze prior equity grants for securities law compliance, as all offers of securities must either be registered under the Securities Act of 1933 (**Securities Act**) or qualify for an exemption from registration. Most equity grants by private companies qualify for an exemption from registration under Rule 701 under the Securities Act, but the company's legal advisors should confirm that the exemption has been satisfied and remediate any missing documentation or approvals.

How Can the Company's Employees Benefit from and Participate in the IPO?

One of the many advantages of an IPO is that it enables direct employee participation in the financial performance of the company. Most IPO candidates will therefore establish, effective as of the IPO date, long-term equity-based incentive plans for employees. If properly structured, these plans align the interests of the company and its employees and serve as an important tool to recruit and retain top talent. Of course, these plans need to be structured to comply with applicable local laws in those jurisdictions where particular participating employees reside.

Companies will sometimes set aside a portion of the IPO shares to be offered on a priority basis in a "directed share" program or offering to employees, customers, suppliers and other friends of the company. Issuers often see these programs as a way to reward employees and business partners for their loyalty and to keep their interests aligned with the company going forward. Determining the persons to whom the directed share program will be offered is a balancing act. Directed share programs are typically small, comprising no more than five to ten percent of the shares offered in the IPO. If the group of offerees is too large, the plan may become unwieldy and offerees may be disappointed because they are unable to purchase the number of shares that they desire. On the other hand, the existence of the directed share program will be disclosed in the company's prospectus, so employees and suppliers that were not included in the group of offerees may be upset that they were excluded.

There are strict rules regarding the use of written communications, including emails, in offering shares, including through a directed share program. The SEC will often ask to see any such communications to ensure compliance with the offering restrictions. It is important, therefore, to have legal counsel review any of these types of communications prior to their use.

How Should Investor Relations Be Handled?

Among the benefits of being a private company is that there is rarely any need to regularly engage with public investors, analysts or the media, and there are no public reporting obligations. Private companies, even those of significant size, typically do not have full-time personnel dedicated to interacting with public investors, securities analysts or the media. To the extent financial information is shared with third parties at all, it is generally limited to the company's finance/accounting department providing limited financial information to lenders under existing credit facilities on a confidential basis. To the extent there are any regular or formal dealings with the media, these typically support the company's sales and marketing efforts.

The approach to investor relations will change once the company has formally announced its intention to go public and certainly once the company's shares are listed and publicly traded on a stock exchange. In particular, the company becomes subject to ongoing reporting obligations requiring it to publish formal annual and quarterly reports and to publicly announce material developments that may affect the price of the company's shares on a real-time basis. Any material misstatements or omissions in these reports or announcements, delays in publishing any required reports or delays in making required announcements, or inaccurate, unapproved or selective disclosure of material, non-public information either orally or in writing (e.g., disclosure of information by unauthorized employees or even ad hoc statements by senior management in response to questions with investors, analysts or journalists – possibly even in a social context) can have a significant impact on the company's share price. These disclosures can also damage a company's reputation and expose both it and the individuals involved to potential civil and criminal liability for securities fraud, market manipulation, insider trading or other offenses.

The IPO candidate must begin to review the company's policies for corporate communications in the initial stages of the IPO process, establishing a formal investor relations program and creating or updating a website suitable for a public company. Many companies find it helpful to engage the services of a specialist investor relations firm during and after the IPO process to assist the company with the various press releases, presentations, question-and-answer briefings, the creation of a dedicated investor relations website and arranging press interviews and coverage.

The need for effective communication with the company's investors and other stakeholders does not end on the date of the IPO, and many would argue it only begins. The company will need to continue to work effectively with its investors in order to fully realize many of the benefits of being a public company. Strong communications can engage investors and keep them updated about the company's strategy and progress in executing its plans, as well as ensuring that they are not surprised by any unexpected developments. It will also accrue to the benefit of management and the board in the event an activist investor agitates for a change in the company's strategy.

It's important that, post-IPO, the company maintains an effective investor relations program. This involves:

- Implementing best practices regarding disclosure polices and procedures.
- Establishing and maintaining close relationships with investors and the media.
- Regularly bringing senior management to meet with investors.
- Developing processes for earnings and key announcements and reports.

In the early days after its IPO, a company is likely to consult more frequently with its legal advisers to determine what announcements are required, when they should be made and what they should contain. A post-IPO company is also likely to require enhanced assistance from its legal advisers and investor relations consultants in the preparation of its initial regulatory filings, such as annual and quarterly reports.

Which Securities Exchange to List On?

There are more than 20 national securities exchanges in the United States. Some specialize in certain types of securities or the securities of certain types of issuers. The trading volume is small on several of these exchanges. For most IPO issuers, the choice comes down to either the NYSE or Nasdaq, which has three markets tiers: (i) Nasdaq Global Select Market (large cap), (ii) Nasdaq Global Market (mid cap) and (iii) Nasdaq Capital Market (small cap).

The NYSE and Nasdaq both have initial quantitative listing standards that an issuer must satisfy at the time of listing and continued quantitative listing standards that apply after the initial listing. Appendix 2 to this guide sets forth the initial and continued quantitative listing requirements for the NYSE and for Nasdaq's three market tiers. The NYSE and Nasdaq also impose substantive corporate governance requirements on listed companies. There are exceptions and phase-ins for some of these corporate governance requirements for IPOs and controlled companies (i.e., companies for which 50 percent or more of the voting power to elect directors is held by an individual, a group or another company). The non-quantitative and quantitative listing requirements for NYSE and Nasdaq listed companies are contained in Appendix 1 and Appendix 2 to this guide.

The underwriters will assist the IPO candidate in selecting a securities exchange upon which to list the company's shares. Among the factors considered will be the markets on which other companies in the IPO candidate's industry are listed, the exchange's listing requirements and the initial and ongoing fees charged by the exchange.

The IPO candidate will typically select a market before the registration statement is filed with the SEC, as the listing application is generally submitted to the selected exchange at the same time that the registration statement is filed with the SEC. As soon as the market is selected, the company should select a trading symbol and reserve it with the chosen exchange to ensure that the symbol is available when trading begins several months later.

Offer Structure

In advising companies and their owners in connection with capital markets transactions, we are frequently asked for our views on the matters described below. We have therefore attempted to address these matters based on the personal experiences of the authors of this guide. As these matters are primarily of a non-legal nature, we recommend that potential IPO candidates and their owners also solicit input from the underwriters and other financial advisers retained in connection with any proposed IPO.

Offer Size

Determining the appropriate total offer size for an IPO will require the careful consideration of a number of factors, including:

- The current and anticipated future funding needs of the company and plans to issue additional shares, including in connection with employee incentive plans or as potential acquisition currency for future M&A transactions.
- The target proceeds from the IPO for any selling stockholders.
- Any minimum offering size, market capitalization and "free float" requirements imposed by potential investors or applicable stock exchange listing rules or the company's charter or existing stockholder agreements for the IPO to qualify as a "qualifying IPO."
- Any voting thresholds for key corporate decisions imposed by applicable corporate law.
- The short- and mid-term target/minimum ownership percentage of the selling stockholders/current owners of the company following the IPO.

Primary vs. Secondary Shares

Determining the appropriate split between primary and secondary shares involves similar considerations as those involved in determining the total offer size. The decision also depends on the "equity story" described in the prospectus. "Primary offering" or "primary shares" refers to the portion of an offering comprising newly issued shares by the company, whereas "secondary offering" or "secondary shares" refers to the portion of the offering comprising shares being sold by existing stockholders. The term "secondary offering" can also refer to a follow-on offering of shares after the IPO.

As a general rule, investors like "growth stories" that involve the injection of at least some "new money" into the company to support concrete and plausible plans for expansion through organic growth or acquisitions. However, an IPO candidate should not include primary shares or raise additional capital in an IPO just for the sake of perception as the additional shares will dilute future earnings per share if the proceeds are not profitability reinvested. In particular, primary shares may be less important as a selling point in connection with a private equity exit, as it may be easier to explain the rationale for the current private equity stockholder exiting. If a company determines that it is necessary to raise additional equity capital in the future, it may do so in one or more follow-on equity offerings after the IPO when it actually needs the additional capital.

Allocation—Institutional vs. Retail

The allocation of shares to investors in an IPO depends on the specific distribution objectives of the company and the quality of interested investors. In some cases, emotional factors may also play a role. For example, strong name or brand recognition of the company and its products or services may translate into high demand, and presumably better pricing, for the company's shares.

The final allocation, including the split between the institutional and retail tranches, is ultimately agreed between the company and the bookrunner(s) for the IPO immediately prior to pricing (i.e., after completion of the roadshow). It is important that the company considers relevant investor selection criteria in the initial stages of the process with input from various stakeholders, including the proposed underwriters. The company should also consider sharing information with the bookrunner(s) about potential investors it might already know and would like to invite to participate in the IPO.

Investor quality is influenced by a number of factors and depends on many non-legal considerations, including:

- The importance of a particular investor as a valuation leader—rather than as a valuation follower.
- The investor's ownership levels in the particular industry sector—is the investor a natural holder rather than a likely seller?

- The investor's investment philosophy— is the investor a long-term holder or a short-term trader?
- Participation of the investor in the roadshow.
- Transparency of the investor's purchase intentions.
- Potential deal feedback and price indications from the investor.

Distribution objectives may include:

- Limited flipping—stable "buy-to-hold" investor base.
- Absence of hedge funds.
- An appropriate mix of institutional and retail stockholders.
- Breadth of ownership across target institutions.
- Desire for after-market trading of the shares to commence at a premium to the IPO price.

It is usually fruitless to try to pre-determine the ultimate split between the institutional and retail tranches at the outset of a transaction, as the actual split depends on many non-legal considerations, as well as prevailing market conditions at the time of the launch of the IPO.

For legal and logistical reasons, IPOs are typically structured to permit a retail offering only in either a single jurisdiction (the company's "home jurisdiction," which is typically also the jurisdiction in which the company's shares will be listed) or, at most, one or two additional jurisdictions.

Key Documents

An IPO typically requires the preparation of the following key documents:

- Form S-1 Registration Statement (registering the offer and sale of securities).
- Form 8-A Registration Statement (registering the class of securities for ongoing reporting requirements).
- Underwriting agreement.
- Lock-up agreements.
- Legal opinions and negative assurance letters.
- Comfort letters.
- Engagement Letter.

Each of these documents is described in more detail below.

Registration Statement

Offerings of securities to the public in the United States must be registered with the SEC under the Securities Act. The document filed with the SEC in connection with an IPO is a registration statement on Form S-1. The Form S-1 cross-references to SEC Regulation S-K, which contains the substantive disclosure requirements for non-financial portions of the registration statement and to SEC Regulation S-X for financial statement requirements. Regulation S-K and Regulation S-X provide scaled disclosure for smaller reporting companies. A smaller reporting company is a company with a public float of less than $75 million or no public float and revenues of less than $50 million in the preceding fiscal year.[1] The Jumpstart our Business Startup Act (**JOBS ACT**) created a new category of companies called emerging growth companies (**EGCs**). EGCs also are eligible for a variety of disclosure accommodations, including certain of the scaled accommodations available to smaller reporting companies and additional exemptions from other disclosure requirements. The publicity restrictions for EGCs are also not as onerous as they are for non-EGCs, as discussed below under "The IPO Process—Publicity Considerations." An EGC is a company with total annual gross revenues of less than $1.07 billion. The SEC is required to adjust the EGC revenue threshold every five years to reflect inflation, with the next adjustment scheduled to occur in 2022. An issuer remains an EGC until the earliest of: (A) the last day of the fiscal year during which it had total annual gross revenues of $1.07 billion or more; (B) the last day of the fiscal year following the fifth anniversary of its initial public offering date; (C) the date on which it has, during the previous three-year period, issued more than $1 billion in non-convertible debt; or (D) the date on which it is deemed to be a "large accelerated filer" (i.e., the common equity held by non-affiliates has a market value of more than $700 million).

1 The SEC has proposed amending the definition of smaller reporting company so that a company with a public float of less than $250 million or a company with no public float and less than $100 million in revenues in the prior fiscal year would qualify.

The rules of the securities exchange on which the company's securities will be listed also require that certain information be disclosed in the registration statement.

In addition to the specific requirements of Form S-1 and of the applicable securities exchange, the disclosure must satisfy the standards under the general anti-fraud provisions of US law. The company, its directors and officers, the underwriters, and other parties involved in an offering must always ensure that the offering document:

- Does not contain a misstatement of a material fact.
- Does not omit to state a material fact necessary in order to make the statements made not misleading.

Material misstatements or omissions in the offering documents expose the company, its officers, directors and auditors, the underwriters and any other offering participants to potential liability under applicable anti-fraud laws, which are discussed below under "The IPO Process—Liability." Reviewing the prospectus carefully is the primary responsibility of the company's management team.

The Form S-1 consists of two parts: the prospectus (the disclosure document provided to potential investors) and information not required in a prospectus (which is not required to be delivered to potential investors but is available on the SEC's website).

PART I—INFORMATION REQUIRED IN A PROSPECTUS

The prospectus is a disclosure document intended to provide potential investors with material information necessary to make an informed decision whether to invest in the shares of the company.

In addition to providing potential investors with information about the proposed offering, the prospectus can also protect the company, its officers, directors and auditors, the underwriters and any other offering participants from liability under federal securities laws for alleged material misstatements or omissions in connection with the offer and sale of the shares.

SEC rules require that information contained in a prospectus be presented in a clear, concise, understandable manner. The SEC requires the use of plain English principles in the organization, language and design of the front and back cover pages, the summary and the risk factors section of a prospectus. Nevertheless, it is common to use plain English principles throughout the prospectus. The SEC has published *A Plain English Handbook: How to create clear SEC disclosure documents* to assist companies in creating documents using plain English principles.[2]

The prospectus contains, among other sections:

- A summary of the company and its results of operations, its financial condition and the offering.
- A description of the risks associated with an investment in the shares.
- A discussion of the use of proceeds from the offering.
- A capitalization table.
- Dilution.
- Selected financial information.
- "Management's Discussion and Analysis of Financial Condition and Results of Operations" (**MD&A**), which provides management's analysis of current trends and recent financial performance of the company.
- A description of the company's business, including strengths and strategies of the company, and of the industry and markets in which the company operates.
- Biographies of executive officers and directors.
- Information about compensation of executive officers and directors.
- A description of any related party transactions.
- Information about principal and any selling stockholders.
- A description of the company's capital stock.
- A discussion of shares eligible for future sale.
- A description of the underwriting arrangements.
- Historical financial statements.

2 The handbook is located at the SEC's website at https://www.sec.gov/pdf/handbook.pdf.

Each of these sections and related disclosure requirements is described briefly below. The disclosure requirements are subject to a number of important exceptions and qualifications, all of which are not discussed below. As noted above, Regulations S-K and S-X contain scaled disclosure for smaller reporting companies and EGCs. The discussion below generally describes the requirements for issuers that do not fall into either of those categories. A summary of the accommodations for EGCs and smaller reporting companies is contained in Appendix 3 to this guide.

Summary. (S-K Item 503) The summary has a marketing focus and provides (i) a brief description of the company's business and strategy and key investment highlights, (ii) a risk factor summary, (iii) an offering summary and (iv) summary financial data. The company and underwriters spend considerable time on the summary section since it is the first section that investors will read in determining whether to purchase shares in the IPO.

Risk Factors. (S-K Item 503) The risk factors section of the prospectus includes a discussion of the factors making an investment in the IPO speculative or risky. The discussion must be concise and organized logically. The risk factors should be described in order of importance, and the section is often divided into subsections, such as:

- Risks related to the business of the issuer.
- Risks related to the industry in which the issuer operates.
- Risks related to an investment in the common stock of the issuer.

Specific risk factors may include:

- The issuer's lack of an extensive operating history.
- Any lack of profitable operations in recent periods.
- The company's current or anticipated financial position.
- Prospects for success of the company's proposed business or new business lines.
- The company's ability to successfully implement the strategy described elsewhere in the prospectus.

Issuers should review the types of risks that public companies in the issuer's industry include in their filings. SEC comment letters can also be a valuable resource in determining the SEC's views on risk factors appropriate to companies in particular industries or situations.

The risk factors section has a dual purpose:

- To inform investors of any material risks related to an investment in the IPO.
- To insulate the company, its directors, officers and auditors, the underwriters and any other offering participants from potential civil and criminal liability in the event of a decline in the price of the shares post-IPO due, directly or indirectly, to the occurrence of one or more of the risks disclosed.

If allegations of inadequate disclosure in the prospectus or allegations of securities fraud are made, the ability to point to a specific risk factor in the prospectus highlighting the possibility that the relevant adverse event or development might occur is a significant advantage.

Companies should not simply present generic risks that could apply to any company or any offering but need to explain how each particular risk affects the particular company or offering. Risk factors should also avoid including "mitigating" language (i.e., language that "waters down" the risk or serves to minimize its impact or likelihood). In other words, qualifying language or explanations indicating that investors should not be overly concerned about a particular risk because it is already being somehow addressed or mitigated by the issuer, or because the likelihood of its actual occurrence is low, should be avoided.

The risk factors section of the prospectus frequently receives a high level of attention by the issuer, the underwriters, their advisers and the SEC, for different reasons. The uninitiated owners and management of an IPO candidate, in particular, may initially be alarmed by the number of risk factors and the one-sided and unbalanced nature of the risk factors section and may be concerned that the negative overall tone of the section may convey an unfair and overly negative image of the company and its prospects, which could distract from the positive marketing message of the IPO. However, institutional and experienced retail investors are accustomed to lengthy risk factors and are not typically deterred by descriptions of ordinary risks. There are other sections of the prospectus that are better suited to convey the potential benefits and prospects of the company and an investment in the IPO, such as the business section, which typically includes a separate "strengths and strategy" subsection, and the financial Information or MD&A section, which will include a subsection that describes any known trends and the key factors affecting the company's results, both good and bad. In addition, the company and its management will have plenty of opportunities to "sell" the IPO to securities analysts and key investors in person during analyst sessions and the investors roadshow that will be organized by the underwriters for the IPO.

Use of Proceeds. (S-K Item 504) The use of proceeds section describes the intended use of the net proceeds from the offering. If any material part of the proceeds is to be used to discharge indebtedness, the terms of the debt need to be described in this section.

Capitalization. The capitalization table shows the long-term debt and equity of the company on an actual basis and as adjusted to show the effects of the offering and the use of proceeds. The capitalization table is not required by SEC rules, but it is useful for marketing purposes to provide a snapshot of the company's financial position, both before and after the IPO.

Dilution. (S-K Item 506) When there is a substantial disparity between the public offering price in the IPO and the effective cash cost to officers, directors, promoters and affiliated persons of common equity acquired by them during the past five years, the company is required to include a comparison of those amounts and the net tangible book value per share both before and after the IPO, and the amount of the increase in net tangible book value attributable to, and the amount of the dilution being absorbed by, purchasers in the IPO.

Selected Financial Information. (S-K Item 301) The selected financial table shows the amounts for various line items in the income statement and balance sheet of the issuer for the last five fiscal years (or such shorter period of time that the issuer has been in existence) and for any interim periods (three-, six- or nine-month periods) since the end of the last fiscal year and the corresponding period in the prior year. Only a small number of line items from the income statement and balance sheet is required, but it is more common to include most of the line items from the income statement in the selected financial table.

EGCs are not required to present selected financial data for any period prior to the earliest audited financial statement period included in the registration statement. Smaller reporting companies are not required to include selected financial information in a registration statement. See Appendix 3.

MD&A. (S-K Items 303 and 305) The MD&A (Management's Discussion and Analysis of Financial Condition and Results of Operations) is a key part of all prospectuses. Because of its importance, the SEC has, over the years, issued extensive rules, as well as detailed interpretive guidance regarding the content, format and purpose of the MD&A.

In SEC Release No. 33-8350, the SEC states that purpose of the MD&A section is to provide readers information necessary to gain an understanding of a company's financial condition, changes in financial condition and results of operations. The MD&A requirements are intended to satisfy three principal objectives:

- To provide a narrative explanation of a company's financial statements that enables investors to see the company through the eyes of management.
- To enhance the overall financial disclosure and provide the context within which financial information should be analyzed.
- To provide information about the quality of and potential variability of a company's earnings and cash flow so that investors can ascertain the likelihood that past performance is indicative of future performance.

The MD&A should not be a recitation of financial statements in narrative form or an otherwise-uninformative series of technical responses to the MD&A requirements, neither of which provides this important management perspective.

The SEC expressly encourages early top-level involvement by a company's management in identifying the key disclosure themes and items that should be included.

With regard to overall presentation of the MD&A, the SEC emphasizes the following points:

- Within the universe of material information, companies should present their disclosure so that the most important information is most prominent.
- Companies should avoid unnecessary duplicative disclosure that can tend to overwhelm readers and act as an obstacle to identifying and understanding material matters.
- Many companies would benefit from starting their MD&A with a section that provides an executive-level overview that provides context for the remainder of the discussion.

With regard to focus and content of the MD&A, the SEC emphasizes that:

- In deciding on the content of the MD&A, companies should focus on material information and eliminate immaterial information that does not promote understanding of companies' financial condition, liquidity, and capital resources, changes in financial condition and results of operations—both in the context of profit and loss and cash flows.
- Companies should identify and discuss key performance indicators, including non-financial performance indicators, that their management uses to manage the business and that would be material to investors.
- Companies must identify and disclose known trends, events, demands, commitments and uncertainties that are reasonably likely to have a material effect on financial condition or operating performance.
- Companies should provide not only disclosure of information responsive to the technical requirements for an MD&A under the relevant SEC rules, but also an analysis that explains management's view of the implications and significance of that information and that satisfies the objectives of the MD&A.

Potential investors should be able to read and understand the MD&A on a standalone basis, so the MD&A often starts with an "Overview" that briefly outlines the company and its business.

This discussion is typically followed by "Key Drivers/Factors" that have affected the company's past performance and that management expects to affect the company's results of operations going forward. These key drivers may relate to the economy as a whole, the industry in which the issuer operates or factors unique to the specific issuer. They may include:

- Revenue drivers (such as cyclicality or seasonality of demand, competitive developments, loss of patent protection or introductions of new products or services).
- Cost drivers (such as fluctuations in raw material prices or changes in labor costs).
- The impact of strategic initiatives (such as acquisitions, divestitures or restructurings).
- External factors (such as exchange rate fluctuations).

The "key drivers/factors" described in the MD&A must be consistent with related discussions elsewhere in the offering document, in particular the risk factors section and the "strengths and strategies" described in the business section.

This is then typically followed by one of the most prominent (and often very time-consuming to produce) portions of the MD&A—a narrative, line-by-line comparison and discussion of the issuer's "Results of Operations" for the three most recently completed financial years plus any interim periods. If the "Key Drivers/Factors" subsection is well drafted, the explanations provided in this subsection as to the reasons for any significant changes in individual line items over the periods under review should match the key factors and not come as a surprise to the reader. The discussion must focus on the company's consolidated results of operations, as well as the results of operations for each reportable business segment.

EGCs and smaller reporting companies may limit this discussion to those years for which audited financial statements are included, plus any interim periods included in the registration statement. See Appendix 3.

The issuer must also provide information about its "Liquidity and Capital Resources." To the extent material, this information should include:

- Historical information regarding sources and uses of cash, focusing on each of the major sections of the company's statement of cash flows.
- An evaluation of the amounts and certainty of cash flows.
- The existence and timing of commitments for capital expenditures and other known and reasonably likely cash requirements.
- A discussion and analysis of known trends and uncertainties.
- A description of expected changes in the mix and relative cost of capital resources.
- Indications of which balance sheet or income statement or cash flow items should be considered in assessing liquidity.
- A discussion of prospective information regarding the company's sources of and needs for capital, except where otherwise clear from the discussion.

A discussion and analysis of material covenants related to the issuer's outstanding debt (or covenants applicable to the companies or third parties in respect of guarantees or other contingent obligations) may be required. There are at least two scenarios where this information should be included:

- Companies that are, or are reasonably likely to be, in breach of these covenants must disclose material information about that breach and analyze the impact on the company if material.
- Companies with debt covenants that limit, or are reasonably likely to limit, their ability to undertake financing to a material extent must discuss the covenants in question and the consequences of the limitation to the company's financial condition and operating performance.

The issuer then discusses off-balance sheet arrangements under a separate subheading, and in tabular form under another subheading, information about the maturity profile of the company's contractual obligations. The "Contractual Obligations" subsection should cover long-term debt obligations, lease obligations and purchase obligations. Smaller reporting companies are not required to include the contractual obligations table. See Appendix 3.

The company must also discuss quantitative and qualitative disclosures about market risk. The company should categorize market risk-sensitive instruments into those entered into for trading purposes and those entered into for purposes other than trading purposes and provide separate quantitative information, to the extent material, with respect to interest rate risk, foreign currency exchange rate risk, commodity price risk and other relevant market risks, such as equity price risk. A smaller reporting company is not required to include this discussion in its registration statement. See Appendix 3.

The company may need to include a discussion of its "Significant Accounting Policies/Critical Accounting Estimates." Many estimates and assumptions involved in the application of GAAP have a material impact on reported financial condition and operating performance and on the comparability of that information over different reporting periods. This subsection should address any material implications of uncertainties associated with the methods, assumptions and estimates underlying the company's critical accounting measurements. This disclosure should supplement, not simply duplicate, the description of accounting policies that are already disclosed in the notes to the financial statements. The disclosure should provide greater insight into the quality and variability of information regarding the company's financial condition and operating performance. While accounting policy notes in the financial statements generally describe the method used to apply an accounting principle, the discussion in the MD&A should present a company's analysis of the uncertainties involved in applying a principle at a given time or the variability that is reasonably likely to result from its application over time. It should address specifically why its accounting estimates or assumptions bear the risk of change (for example, because there is an uncertainty attached to the estimate or assumption or that it just may be difficult to measure or value).

Equally important, companies should address the questions that arise once the critical accounting estimate or assumption has been identified by analyzing to the extent material, such factors as:

- How the company arrived at the estimate.
- How accurate the estimate/assumption has been in the past.
- How much the estimate/assumption has changed in the past.
- Whether the estimate/assumption is reasonably likely to change in the future.

Since critical accounting estimates and assumptions are based on matters that are highly uncertain, this section should cover their specific sensitivity to change based on other outcomes that are reasonably likely to occur and would have a material effect.

Business. (S-K Items 101, 102 and 103) The business section of the prospectus provides information about the company's business operations, the products it makes or the services it provides, as well as factors that affect its business. It also provides information regarding the adequacy and suitability of the company's properties and any plans for future changes. Drafting the business section requires significant factual input from the issuer, including senior management, and can be time-consuming.

Among other things, the business section contains:

- Technical details about the company, including the date of formation, legal form and a discussion of its history and development over the past five years.
- If the company has not received revenue from operations during each of the three years preceding the date of filing of the registration statement, the company must discuss its plan of operations, including how long the cash from the offering will be sufficient for the company's needs and whether it will be necessary to raise additional capital in the next six months.
- Financial information about geographic and reporting segments.
- A narrative description of the company's business for each reportable segment, focusing on:
  - » The principal products produced and services rendered, the principal markets for, and the methods of distribution of, the products and services.
  - » A description of the status of a product or segment and if there has been a public announcement of a new product or segment that would require an investment of a material amount of assets or that is otherwise material.
  - » The sources and availability of raw materials.
  - » The importance and duration and effect of all patents, trademarks, licenses, franchises and concessions held.
  - » Seasonality.
  - » Practices of the company and the industry relating to working capital items.
  - » Dependence of the segment upon a single customer, or a few customers, naming any customer that accounts for 10 percent or more of the company's consolidated revenues.
  - » The dollar amount of firm backlog orders.
  - » A description of any material portion of the business that may be subject to renegotiation of profits or the termination of contracts at the election of the government.
  - » The principal markets in which the company competes, the company's main competitors in those markets, the basis of competition and the company's competitive position.
- The amount spent during each of the last three fiscal years on research and development activities.
- The material effects that compliance with environmental laws may have upon the capital expenditures, earnings and competitive position of the company.
- The number of company employees.
- A discussion of material contracts.
- Information relating to materially important properties owned or leased by the company.

- A description of any pending material legal proceedings.
- A description of the regulatory environment in which the company operates.

The disclosure requirements for smaller reporting companies are less onerous that described above. See Appendix 3.

The business section is a key opportunity for the issuer to present its "equity story" and explain its operations and business prospects to potential investors. The section generally includes a separate subsection towards the beginning describing the company's strengths and competitive advantages as well as management's strategy for capitalizing on those strengths in pursuing future growth of the business. This "strengths and strategy" subsection frequently receives a very high level of attention and scrutiny by all offering participants, as it impacts the core marketing message for the IPO. For this reason, the lead underwriter for the IPO, with input from the company's management as well as the relevant industry coverage team, may prepare the initial draft of the "strengths and strategy" subsection for review and comment by the company and its counsel.

Management. (S-K Item 401) This section provides biographical information for each of the company's directors and executive officers for at least the last five years, including in the case of directors, any specific experience, qualification, attributes or skills that lead to the conclusion that such person should serve as a director of the company. The disclosure must identify which of the directors are independent and also on which of the audit, compensation and nominating committees of the board of directors each director serves.

The SEC defines an executive officer of a company as its president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the company. In some cases, executive officers of subsidiaries may be deemed executive officers of the company if they perform such policy making functions for the company. Determining who is an executive officer can have important consequences. For example, executive officers are subject to liability for short-swing profits under Section 16 of the Exchange Act of 1934 (**Exchange Act**), as discussed below under "Ongoing Obligations as a Public Company—Section 16," and the company is required to disclose the compensation of the principal executive officer, principal financial officer and three other most highly compensated executive officers, as discussed below in the next section.

Executive Compensation. (S-K Item 402) The executive compensation section discusses the compensation of the company's principal executive officer, principal financial officer and the next three most highly compensated executive officers. The company is not required to disclose the compensation of an employee that is not an executive officer, even if that employee earns more than one or more of the executive officers whose compensation is discussed. Information with respect to former executive officers may also need to be discussed. The persons whose compensation is disclosed are commonly referred to as "named executive officers." This section includes a compensation discussion and analysis (**CD&A**), which is a narrative description of the material information about the compensation objectives and policies for the named executive officers. The company is required to describe what the compensation program is designed to reward, each element of compensation, why the company chose to pay each element, how the company determines the amount for each element and how each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements.

In addition, the company is required, in specified tabular format, to disclose compensation for each of the named executive officers during the past fiscal year (although if the information was previously included in a filing with the SEC, the information could be required for up to three fiscal years) in a summary compensation table that includes salary, bonus, stock awards, option awards, non-equity incentive plan compensation, change in pension value and non-qualified deferred compensation earnings and all other compensation. Other required tables show for the named executive officers, grants of plan-based awards during the most recently completed fiscal year, outstanding equity awards at the end of the most recently completed fiscal year, option exercises and stock vested during the most recently completed fiscal year, pension benefits as of the most recently completed fiscal year end and nonqualified deferred compensation as of the most recently completed fiscal year. Finally, issuers must disclose amounts that would be payable to the named executive officers upon their termination or a change of control of the company, assuming that the termination or change of control had occurred at the end of the most recently completed fiscal year. Narrative disclosure accompanying certain tables is required to provide additional material factors necessary to understand the information disclosed in those tables.

To the extent that risks arising from the company's compensation policies and practices for its employees are reasonably likely to have a material adverse effect on the company, the company must discuss its policies and practices of compensating its employees, including non-executive officers, as they relate to risk management practices and risk-taking incentives.

SEC rules also require that information regarding director compensation be disclosed in tabular format.

EGCs and smaller reporting companies are not required to present more than two years of information in the summary compensation table and need only provide information for the principal executive officer, next two most highly compensation executive officers and up to two additional persons no longer serving as executive officers at year end. EGCs and smaller reporting are also not required to include a CD&A, the grants of plan-based awards table, the option exercises and stock vested table, changes in present value of pension benefit, a discussion of compensation policies relating to risk management or the pension benefits table.

Related Person Transactions. (S-K Item 404) This section describes any transaction or series of related transactions, during any of the company's last three completed fiscal years and the current year, or any currently proposed transaction, in which the company was or is to be a participant and the amount involved exceeds $120,000 and in which any related person had or will have a direct or indirect material interest. A related person means any officer or director of the company, any immediate family member of a director or executive officer of the company or any beneficial owner of more than five percent of the company's voting securities or any immediate family member of such holder. The company is also required to disclose its policy and procedures relating to the review, approval or ratification of any related person transactions, and identify any transactions for which the policy and procedures were not followed.

The threshold related person transactions disclosure for smaller reporting companies is the lesser of $120,000 or one percent of the average of the smaller reporting companies' total assets at year end for the last two completed fiscal years. The information must be provided for the current and preceding fiscal years. Smaller reporting companies are not required to disclose their procedures for review and approval or ratification of related party transactions. Smaller reporting companies must list all parents of the smaller reporting companies, showing the basis of control and as to each parent, the percentage of voting securities owned or the other basis of control by its immediate parent.

Principal and Selling Stockholders' Table. (S-K Items 403 and 507) The stockholders' table presents in tabular form, before and after the IPO, the number of shares and percentage of any equity securities of the company or its subsidiaries beneficially owned by each of the named executive officers and directors and the executive officers and directors as a group. The company must also show the number of shares and percentage of each class of voting securities of the company for any person or entity known to beneficially own more than five percent of such securities. Similar information must be shown for any stockholder selling shares in the IPO.

Description of Capital Stock. (S-K Item 202) The description of capital stock section describes the company's equity capital structure as set forth in the company's governing documents, with a detailed description of the rights and privileges of the various classes of equity. It also includes a description of any anti-takeover measures that the company may have adopted.

Shares Eligible for Future Sale. This section describes the numbers of shares that will become eligible for sale immediately following the IPO, after the expiration of the lockup period (for those shareholders that signed lockup agreements), upon satisfaction of any applicable Rule 144 period, and after expiration of any other restrictions on transfer that may be applicable to the shares. As sales of substantial numbers of shares into the market can have an adverse effect on the price of the stock, it is important that shareholders be made aware of these dates.

Underwriting. (Items 505 and 508) This section describes the underwriting arrangements between the company and the underwriters, including the makeup of the underwriting syndicate and any underwriter conflicts of interest. It also describes the lock-up agreement and various selling restrictions in jurisdictions where the shares may be offered outside the United States.

Financial Statements. Issuers normally must provide:

- Audited financial statements that cover the latest three financial years, except for the balance sheet for the earliest of the three years.
- Unaudited financial statements that cover any stub periods (3-, 6- or 9-month periods) since the last audited financial statements included in the prospectus and comparative financial statements for the comparable stub period in the preceding financial year.
- Pro forma financial information with respect to any significant events, such as major acquisitions or dispositions.

EGCs and smaller reporting companies are required to include only two years of audited financial statements rather than three years. See Appendix 3.

Financial statements for a non-public company, even if prepared in accordance with GAAP, often don not comply with the SEC's financial statement requirements. Preparing SEC-compliant financial statements and anticipating issues that the SEC may raise is more time consuming than one might expect. See "Getting Ready—Are the Company's Existing Financial Statements Suitable?" above. Therefore, a company should consult its external auditors as soon as possible about the accounting, reporting and compliance implications of a potential IPO.

Other Sections. The prospectus will include other sections, such as a forward-looking statement disclaimer, dividend policy, material tax considerations, legal matters, experts, changes in independent registered public accounting firm and where you can find additional information. In addition, certain industries, such as banking, oil and gas, mining, insurance and real estate, may require another level of industry-specific disclosure as set out under specific SEC disclosure guides. Expert reports may also be required in the prospectus.

PART II – INFORMATION NOT REQUIRED IN A PROSPECTUS

In Part II of the registration statement the company includes:

- A reasonably detailed itemized listing of offering expenses.
- Information concerning the indemnification of directors and officers of the company provided by state law and the company's charter and bylaws or other constituent documents.
- Information about sales of unregistered securities during the two years preceding the date of filing of the registration statement with the SEC.
- Financial statement schedules.
- Undertakings.
- Exhibits, such as the underwriting agreement, the company's charter and bylaws, or other constituent documents, material agreements, legal opinions and consents from experts and legal counsel. The SEC has procedures by which the company can request confidential treatment for commercially sensitive portions of exhibits. It is important to identify early in the IPO process whether a company will seek confidential treatment for portions of any exhibits because these requests take a significant amount of time (typically between two and three months) to resolve with the SEC and the SEC will not declare the IPO registration statement effective until it has granted the confidential treatment or the company discloses the information.
- Signatures. The registration statement must be signed by the principal executive officer, the principal financial officer, the principal accounting officer and at least a majority of the members of the board of directors. The signature page often includes a power of attorney, or there is a separate power of attorney that will be filed as an exhibit to the registration statement, giving power to sign amendments to the registration statement to named officers of the company on behalf of each person who signed the original filing. This avoids the logistics of locating directors on short notice to obtain a signature for an amendment.

The company is not required to deliver Part II of the registration statement to prospective investors.

Form 8-A – Exchange Act Registration Statement

A requirement for listing shares on a securities exchange is that the class of shares be registered with the SEC under Section 12(b) of the Exchange Act. The registration statement for accomplishing this is a Form 8-A. The Form 8-A is very short, typically only three or four pages, primarily because the substance of the disclosure required by the form is incorporated by reference to the description of company's capital stock contained in the registration statement on Form S-1.

A class of shares is registered under the Exchange Act only once (unless the class was de-registered, in which case a new Exchange Act registration statement will be required), unlike registration under the Securities Act, which registers the sale of a specified number or dollar amount of shares. When the dollar amount or number of shares has been sold, the company must file a new Securities Act registration statement before additional shares are sold to the public.

By registering a class of shares under the Exchange Act, the company and its officers and directors and, in some cases, its shareholders will become subject to additional requirements such as the SEC's proxy rules and tender offer rules, Section 16 short swing profit liability and beneficial ownership reporting, which are discussed below under "Ongoing Obligations as a Public Company." The company will also become subject to periodic reporting requirements of the Exchange Act. While a company that has filed a registration statement has an obligation to file quarterly, annual and other reports with the SEC following the effective date of the registration statement, it can cease filing those reports without any further action or consent from the SEC or other third parties provided that certain conditions are met. When the Form 8-A becomes effective, the company is required to file quarterly, annual and other reports under the Exchange Act with the SEC. While a company can take action to deregister under the Exchange Act, the deregistration cannot be effective until the exchange on which the company's securities are listed agrees, thus ensuring that so long as the company's securities are listed on a securities exchange there will be an informed marketplace.

Underwriting Agreement

OVERVIEW

The underwriting agreement is typically entered into at the end of the offering process, usually after the marketing of the shares (i.e., the "roadshow") and when the underwriters and the company are prepared to "price" the offering (i.e., commit to the exact number of shares to be sold and to a fixed price per share) based on the feedback from investors as to the number of shares that they are willing to purchase and at what prices. However, the underwriters usually want the underwriting agreement to be in a final, agreed form earlier than pricing, especially where an engagement letter has not been executed.

The underwriting agreement sets out the relationship and arrangements—in particular the allocation of potential liability arising from the offer and sale of securities—among the underwriters for the IPO, the issuer and any selling stockholder(s). In the underwriting agreement, the company agrees to issue and sell, and any selling stockholders agree to sell, a specified number of shares to the underwriters. Subject to specified conditions, the underwriters agree to purchase the agreed number of shares from the company and the selling stockholders at an agreed price at closing (typically 3-5 business days after the signing of the underwriting agreement).

The underwriting commitment given by the underwriters can take one of two forms:

- A "firm commitment" to underwrite, in which the underwriter takes up any shares that are not purchased by investors, or
- A "best efforts" obligation, where the underwriters are required to use their best efforts to sell the shares but are under no legal obligation to take up any shortfall in sales.

The underwriting agreement also includes numerous representations and warranties made by the issuer covering matters such as the company's business and the completeness and accuracy of the prospectus and other offering materials. One of the most important provisions from the perspective of the underwriters is an agreement by the issuer to indemnify the underwriters for any losses resulting from any material misstatements or omissions in the offering materials. Any stockholders selling shares in the offering are also required to make at least some representations, for example, with regard to their capacity to enter into the underwriting agreement and title in the shares they are selling and are required to indemnify the underwriters with respect to limited information.

Where the selling stockholders hold a significant stake in the company pre-IPO or are otherwise involved in the strategic or day-to-day management of the company, they may also be required to provide representations, warranties and indemnities with regard to the company's business and the completeness and accuracy of the offering materials – at least with regard to those portions of the prospectus that relate to them.

Upon execution of the underwriting agreement, the underwriters take on the risk of distributing the shares to investors where they have given a firm commitment to underwrite.

Should they not be able to find enough investors to acquire the shares that are the subject of the offering, they will have to acquire the shortfall themselves.

The underwriters earn the fees for their services and the underwriting risk they take by underwriting an IPO from the price difference between the price at which they agree to purchase the shares from the issuer and any selling stockholders and the public offering price at which the shares will be sold by the underwriters to investors. This is known as the "underwriting spread" or "underwriting discount."

GREENSHOE OPTION

An underwriting agreement for an offering of common stock usually includes a "greenshoe option" or over-allotment option allowing the underwriters to purchase additional shares from the issuer and/or the selling stockholders. This option facilitates the underwriters' ability to "short sell" shares at the agreed public offering price: that is, to sell more shares to investors than the fixed number of shares initially agreed with the issuer and the selling stockholders in the underwriting agreement. This can help the underwriters stabilize the trading price of the shares in the after-market immediately following the IPO and might therefore have a positive impact on the achievable IPO price, in that the underwriters may be able to agree to a higher/more aggressive IPO price with a greenshoe option rather than without one.

The greenshoe option may vary in size but must not normally exceed 15 percent of the original number of shares offered. This is due to applicable securities laws and requirements of the Financial Industry Regulatory Authority (**FINRA**) and the fact that the sale of more than an additional 15 percent of shares could arguably be considered material information that may require the issuer and underwriters to go back to investors in the IPO and give them an opportunity to reconsider their investment decision. This is particularly the case should the issuer agree to sell additional primary shares pursuant to the greenshoe option because any such additional shares would further dilute the other stockholders. Raising a significant amount of additional capital for the issuer may also be inconsistent with the "equity story" and the "use of proceeds" described in the offering documents. This concern is less relevant for secondary shares, i.e., to the extent the greenshoe option is provided by one or more selling stockholders, although a significant increase in the total offer size, by way of the greenshoe option, could potentially lead to an over-supply of shares in the market – that may ultimately put some downward pressure on the share price.

That said, a greenshoe option can be a valuable tool that can benefit the issuer, any selling stockholders and the underwriters by increasing the overall size of the IPO and facilitating stabilization activities within the 30 days following the listing. Their use, typically at the 15 percent level, has become standard in IPOs.

Lock-Up Agreements

The underwriters usually expect the company, any significant stockholders (whether or not selling shares in the IPO), the directors and executive officers, to agree to "lock-up" up their shares for a specified period of time. In the case of the company, the lock-up restricts its ability to issue any new securities, other than in connection with a greenshoe option or its equity incentive programs or upon conversion of outstanding convertible securities. In the case of stockholders, directors and executives, a lock-up restricts their ability to sell shares for an agreed period after the IPO. The existence and duration of lock-up agreements can be important factors in the investment decision of key institutional investors, especially if there is a large "overhang" (that is, a large existing stockholder that could potentially sell a large stake in close proximity to the IPO, flooding the market with additional shares, thereby increasing pricing pressure on the newly listed shares). In addition to concerns about a potential oversupply and the resulting downwards pressure on the trading price, even smaller volume sales by "insider" stockholders (such as directors, officers or large stockholders) could potentially be misinterpreted as a lack of confidence in the company or share price and disrupt a potentially volatile market in the shares of the company in the period immediately following the IPO.

A lock-up period of 180 days for both the issuer and key stockholders has become an almost universal minimum standard for IPOs, but the period can sometimes be longer. In some instances, lock-up agreements may contain a "waterfall provision" whereby a limited number of shares are released from the lock-up over a period of time. The lead underwriters can also typically waive the lock-up, although this is rarely done, except in connection with a subsequent public offering that occurs within the lock-up period. FINRA rules requires that any waiver by the underwriters of a lock-up period be publicly disclosed.

Legal Opinions and Negative Assurance Letters

Various sections of the US federal securities laws impose liability on an issuer, its officers and directors, the underwriters and other offering participants in a securities offering if the registration statement or the prospectus contains:

- Any untrue statement of a material fact or
- An omission of a material fact.

The nuances of the potential liability are discussed below under "The IPO Process – Liability."

If successful, private litigants may be awarded damages or may seek to rescind the transaction and obtain a refund of the original purchase price. Certain of the liability provisions contain a due diligence defense discussed below. In an action under Section 10(b) or Rule 10b-5, a plaintiff must show (among other things) that the defendant acted with "scienter," meaning an intent to defraud, deceive or manipulate. Generally, courts have found recklessness to satisfy the scienter requirement, but not simple negligence or even inexcusable negligence.

Under the US securities laws, the underwriters and certain other offering participants (such as the officers and directors of the issuer) can avoid liability if they can demonstrate that they have conducted a reasonable investigation into the affairs of the issuer before selling the shares. This is known as the "due diligence defense." See "The IPO Process – Liability." To support the due diligence defense, the underwriters, their lawyers and the lawyers of the issuer conduct a thorough review of the affairs of the issuer. This is known as a "due diligence investigation." While Section 10(b) and Rule 10b-5 do not contain a due diligence defense, the fact that the defendants conducted an effective due diligence investigation can be used to show that the defendants did not act with scienter.

The underwriting agreement will typically provide that the lawyers for both the underwriters and the issuer will deliver "negative assurance letters" to the underwriters as a condition to closing. These letters indicate that, subject to a number of qualifications and exceptions, nothing came to the attention of the lawyers during the course of their work on the offering and as a result of their due diligence investigations to cause them to believe that the prospectus was materially incomplete, inaccurate or misleading.

The underwriting agreement will also typically provide that the lawyers for both the underwriters and the issuer will deliver certain legal opinions to the underwriters as a condition to closing, for example, with regard to due organization of the issuer, due authorization of the shares, no violation of the company's organization documents or of any laws or agreements by which the issuer is bound, accuracy of the disclosure in specified portions of the prospectus and the due authorization, execution and delivery of the underwriting agreement by the company.

Comfort Letters

"Comfort letters" are typically provided by the issuer's auditors upon the "pricing" (signing of the underwriting agreement), representing another key component of the underwriter's due diligence defense. The comfort letter follows a standard format prescribed by the relevant accounting body (e.g., AU Section 634, "Letters for Underwriters and Certain Other Requesting Parties," promulgated by the PCAOB, which is often referred to by its former name, SAS 72 (Statement of Accounting Standards (SAS) 72)). In the comfort letter, the auditors of the issuer typically:

- Reaffirm their independence and that they stand by their audit opinion for the issuer's audited financial statements, included in the prospectus.
- Describe any review procedures they have performed on any interim financial information included in the prospectus or on any internal management accounts for any "stub periods" between the date of the latest audited or reviewed financial statements of the issuer and the date of the prospectus.
- Describe any additional "agreed upon procedures" they have conducted with regard to the issuer's financial information included in the prospectus.
- Provide "negative assurance" as to the absence of material changes with regard to certain specified financial line items, since the date of the most recent financial statements included in the prospectus.

To facilitate the comfort letter process, the lawyers for the underwriters prepare a "circle-up" of the prospectus for the auditors, circling those (financial) figures which they expect the auditors to cover and provide "comfort" on. The exact coverage of the comfort letter as well as the level of comfort on particular figures are then negotiated between underwriters' counsel and the auditors.

At the closing of the offering, the auditors provide a "bring-down" comfort letter to reverify that the original comfort letter is still valid as of the closing date.

Engagement Letter with the Underwriters

Occasionally during the initial phase of the IPO process, the lead underwriters may request that the company enter into an engagement letter. The engagement letter essentially sets out:

- The proposed role of the underwriters.
- The fee structure pursuant to which the underwriters will be remunerated if the IPO closes.
- Whether the underwriters will underwrite the IPO and, if so, on what basis.
- Expenses to be reimbursed by the company, including if the IPO does not occur.
- The protection for the underwriters if legal proceedings are brought against them in connection with the IPO process, typically in the form of a broad indemnity and contribution from the issuer.

Some of these provisions, once agreed in the engagement letter are also mirrored in the underwriting agreement signed later in the process, so it is important that the company is properly advised even at this early stage. In addition, the engagement letter often contains some form of exclusivity provision guaranteeing the lead underwriters participation in any IPO during the exclusivity period at a specified minimum level or percentage of the overall economics for the underwriters. At the same time, the underwriters will not, and cannot, commit to actually underwrite any shares at any price or guarantee a successful IPO in the engagement letter, which may be signed many months before the company is ready for the IPO. The underwriters are only legally bound to participate in the IPO once all preparations have been completed (including a due diligence investigation), the offering document has been prepared and cleared by the SEC and the underwriters and the issuer have entered into a formal underwriting agreement as described above.

However, the underwriters may nevertheless have a very legitimate interest in asking for at least a certain level of exclusivity and protection in the form of the engagement letter before they invest significant time, money and other resources assisting the company to prepare for an IPO. Otherwise, they run the risk that the issuer could bring in other underwriters at the last minute and either significantly dilute their share of the overall IPO fees or replace them altogether once all the "heavy lifting" has already been completed. The underwriters may even have put their own reputation behind the IPO in private/informal conversations with potential investors (known as "pre-marketing"). At the same time, the company may not want to be fully tied to a particular underwriter or set of underwriters too early in the IPO process and may also have an interest in preserving at least some degree of flexibility over other aspects of the IPO process. Companies should consult their legal counsel in connection with the negotiation of the engagement letter and consider the timing of its signing very carefully.

Key Parties

The following discussion provides a brief overview of the various parties involved in IPO.

Issuer

The "issuer" is the legal entity whose shares are offered to investors and subsequently listed on the relevant stock exchange. The sales of newly issued shares by the issuer (where the issuer receives the proceeds from the sale of the shares) is known as a "primary offering."

Selling Stockholders

Existing stockholders of a company may use the IPO as a liquidity event to sell some or all of their shares. These stockholders are commonly referred to as "selling stockholders." The offering of the shares that are sold by the selling stockholders is known as a "secondary offering" (as opposed to a "primary offering").

Selling stockholders will be parties to the underwriting agreement and be asked to give assurances to the underwriters on certain issues in the form of representations, warranties and indemnities. See also "Key Documents—Underwriting Agreement" above.

Selling stockholders who retain shares in the company will be requested to enter into lock-up agreements to prevent them from disposing of more shares in the after-market. See also "Key Documents—Lock-Up Agreements" above.

Management of the Issuer

The issuer's management—particularly the chief executive officer (**CEO**) and the chief financial officer (**CFO**)—will be heavily involved in the IPO process. Their active participation in the process is a key determinant in ensuring that the IPO is successful and is not delayed. An IPO places a heavy time and resource burden on the company's organization, given management has an existing business to run in addition to dealing with the IPO. Senior management must attend management presentations and due diligence sessions focusing on the business. The CEO and the CFO typically attend a number of drafting sessions on the prospectus with their counsel and the broader group of IPO advisers. The CFO will be heavily engaged with the accountants in the preparation of the financial statements and various financial models. The CEO and the CFO also have central roles in the roadshows with investors, where they need to convey information relating to the company's vision for the future and its financial position. Other members of the management team—for example, heads of divisions/product areas, the general counsel (if there is one), the human resources manager, the investor relations officer—also have roles in explaining what their respective departments do, how they function and how they fit into the broader corporate structure and strategy. These team members also need to be available to respond to due diligence queries that may arise.

To manage the IPO process efficiently, some companies appoint an internal project manager responsible for overall coordination both from an internal and external perspective. This person needs to be intimately familiar with the company, its business and personnel and must also have sufficient authority to make decisions and get others to respond to requests.

Auditors

The company's auditors must be independent. In an IPO process, they are responsible for assisting the company in preparing its financial statements and any required pro forma financial information.

They are also required to provide the comfort letters to the underwriters as described under "Key Documents—Comfort Letters" above.

Underwriters

The underwriters play a central role before and following the IPO. Their role goes far beyond the basic agreement to sell shares on either a "firm commitment" or "best efforts" basis (see also "Key Documents—Underwriting Agreement" above). Among other things, the lead underwriters are also responsible for and assist with:

- Conducting due diligence with management and the auditors.
- Attending drafting sessions and raising queries generally.
- Drafting marketing materials (e.g., investor presentations) to address queries that investors may have.
- Developing the "equity story" with the company's management and positioning the company in the market.
- Recommending a particular securities exchange for listing.
- Providing advice on market conditions and on the timing of the IPO.

- Coordinating and organizing roadshow meetings.
- Advising on the optimum allocation of shares.
- Recommending the offer price range.

Following completion of the IPO, the underwriters further assist in maintaining an orderly market in the newly listed shares, including by using "stabilization" techniques.

The lead underwriters responsible for overseeing the entire offering and for coordinating the activities of the other underwriters are sometimes called "lead managers" or "global coordinators." To the extent a single underwriter takes the lead role on an IPO, this can be indicated by appointing this underwriter as "sole" lead manager or global coordinator or by simply listing the name of that underwriter to the top left where the names of the members of the underwriting syndicate are listed on the cover page of the prospectus (the "left lead"). Other underwriters with less prominent roles in the IPO process and a smaller economic stake in the IPO may be referred to as "co-managers." Practices and descriptions of roles can vary considerably depending on factors such as the size of the IPO, the specific nature of the offering and the involvement of a particular underwriter in different aspects or portions of the offering.

In selecting underwriters, the company should consider factors such as the particular underwriter's involvement in offerings by companies in the same industry as the company, the underwriter's commitment to provide post-IPO market support and the standing in the investment community of the underwriter's analyst that will follow the company post-IPO. Given the amount of time that company management and the underwriters will spend together during the IPO process, it is important that management and the underwriters get along and work well together on a personal level.

Legal Advisers

Separate legal advisers are retained by the issuer and by the underwriters. While legal counsel to the issuer may be able to represent the selling stockholders, institutional selling stockholders will typically retain separate counsel. Depending on the jurisdiction of organization of the issuer and proposed securities exchange for listing, there may also be separate "local counsel" to both the issuer and the underwriters.

The legal advisers assist their respective clients in the preparation of the prospectus, conduct due diligence, manage relationships with securities regulators and stock exchanges, draft and negotiate the underwriting agreement and ensure the smooth completion of the transaction. They are also required to provide legal opinions and negative assurance letters to the underwriters as described under "Key Documents – Legal Opinions and Negative Assurance Letters" above. Although any company of sufficient size to consider an IPO will previously have engaged external lawyers for general corporate and commercial matters, potential IPO candidates may often have to find new counsel with the relevant experience and expertise for advice on the IPO.

Other Parties

In addition to the main parties described above, other parties will often be involved in an IPO. For example, the company needs to appoint a registrar and transfer agent to administer its stock transfer records following the IPO, count votes at stockholder meetings, deal with stockholder proxies and corporate representatives who attend meetings, arrange payment of dividends and deal with other corporate actions. A financial printer is typically retained to help with the professional typesetting of the prospectus and to print physical copies of the preliminary and final prospectuses to distribute to potential investors. Other professional parties involved may include internal control advisers, market research consultants and investors/public relations consultants.

The IPO Process

Organizational or "Kick-Off" Meeting

Once a team has been assembled, a kick-off meeting is organized to officially launch the IPO process. This meeting generally includes the following activities:

- *Introduction of the working group:* The working group is introduced and their respective roles and responsibilities are defined.
- *Timetable:* The meeting sets a tentative timetable and sets out the key milestones, as well as deliverables expected from the various working group members.
- *Discussion of key terms of the offering:* These include the size and structure of the offering, use of proceeds, etc.
- *Discussion of other key issues:* These include legal, regulatory, accounting, publicity guidelines and other issues that have implications for the successful completion of the IPO.
- *Presentation by management:* A presentation on the business, financial and other aspects of the issuer is generally given by the senior management of the issuer.

The Due Diligence Review

In order to better understand the business of the issuer and to assist in drafting an accurate and meaningful prospectus, the underwriters, their counsel and the issuer's counsel simultaneously conduct an extensive review of the legal, business and financial aspects of the issuer's operations.

The information received during the due diligence process facilitates the drafting of the prospectus and helps to ensure that all material aspects of the issuer's business are properly disclosed. The due diligence exercise also helps to ensure that disclosure contained in the prospectus is accurate and based on the most current data available.

The due diligence review also serves to establish a record that the underwriters have made a reasonable investigation upon which their defense against potential liability can be based. See "The IPO Process—Liability."

Legal due diligence. The underwriters and their counsel provide the issuer with a list of documents they would like to review. This due diligence request list is comprehensive and broad. As the requesting party is not fully apprised of the issuer's documentation, the list necessarily includes a range of items that counsel would normally expect to find in the data room of a similar company in a similar industry. Areas of interest in most document request lists include the issuer's corporate structure and organization, board minutes, finance and accounting procedures, governmental authorizations, stockholder information, presentations and reports from the issuer, material agreements and other documents relating to intellectual property, tax issues, assets, cybersecurity, environmental issues and current and pending litigation.

After receiving a due diligence request list, the issuer begins preparing a data room containing documents responsive to the due diligence request list as well as any documents not on the due diligence request list but deemed by the issuer to be material. The location of the data room itself varies, based on the location of the documents and the parties that need to review the documents. For most issuers, it is more efficient and economical to make the documents available for review via a secure, password-protected website, accessible only to those parties involved in the offering. For certain issuers, it is more efficient and economical to set up a space at their place of business where all of the documents may be reviewed.

When a critical mass of the documents have been assembled, issuer's counsel and underwriters' counsel will begin reviewing them. The issuer will continue to add material to the data room as documents are located or are created. During the course of the review, counsel may raise questions with company representatives and may request additional documents.

Business due diligence. Underwriters, underwriters' counsel and issuer's counsel will also conduct a series of meetings with senior management of the issuer. These meetings afford the underwriters and their legal counsel the opportunity to understand the operational and strategic aspects of the issuer's business and the industry in which the company operates and to raise issues identified during drafting sessions and the legal due diligence process. These meetings also serve to facilitate review and discussion of the prospectus.

The underwriters may conduct interviews with the major suppliers, subcontractors, customers and bankers of the issuer as well as experts and other professional parties engaged by the issuer. In appropriate circumstances, business due diligence will also involve visits to the company's manufacturing and other important or strategic sites.

Financial due diligence. Financial due diligence involves the issuer's finance, accounting and treasury departments. It typically includes a review of the issuer's full year and interim financial statements, results of operations, projections, cash flow, indebtedness and other aspects of the issuer's financial condition. Underwriters and their counsel focus their review on factors driving the issuer's finances and significant changes in the issuer's financial position from year to year and period to period. In addition, financial due diligence focuses on the issuer's profit and working capital forecasts. The company will be asked to prepare, if it has not already done so, financial projections and models, which will be reviewed and discussed by underwriters with the company's senior management.

It is also customary to have a due diligence meeting with the issuer's external auditors to discuss, among other things, auditor independence from the issuer, any issues identified during the audit or review process and the issuer's internal accounting policies, controls and procedures.

Other due diligence procedures. Company counsel, with input from underwriters' counsel, will prepare a questionnaire to be completed by each of the company's directors, executive officers and holders of five percent or more of the company's common stock. The questionnaire elicits information that counsel will use to prepare portions of the registration statement and also information that underwriters' counsel will use to prepare the underwriters' filing with FINRA, discussed in more detail below.

Underwriters generally request legal counsel to issue a so-called "negative assurance letter," above under the heading "Key Documents – Legal Opinions and Negative Assurance Letters." Obtaining comfort letters from the issuer's independent auditors is another procedure used by underwriters to establish a written record that they have made a reasonable investigation. Comfort letters serve to provide comfort on certain financial and accounting data contained in an offering document—for example unaudited financial statements and other information. For a discussion of comfort letter requirements, see "Key Documents—Comfort Letters" above.

Drafting Responsibility and Drafting Sessions

The issuer and its counsel are responsible for preparing the initial draft of the prospectus. It typically takes two or more weeks to complete the draft of the prospectus to be distributed to the working group. Ideally, to keep up momentum the draft should be distributed prior to the kick-off meeting, which will enable the first drafting session to occur shortly after the meeting.

Among the most effective methods of gathering and processing drafting comments is an in-person drafting session, although drafting sessions are sometimes held electronically or virtually. Drafting sessions typically take place over the course of one or two days, and multiple drafting sessions will be required during the course of the IPO process. Drafting session participants typically include representatives from the issuer that have in-depth knowledge and understanding of the business, issuer's counsel, the independent auditors, underwriters and underwriters' counsel. The issuer and other parties involved in the transaction prepare for drafting sessions by reviewing and commenting on the draft of the prospectus circulated by issuer's counsel. Depending on the status of the disclosure, the drafting sessions may consist of a conceptual review or a more detailed page by page review of the prospectus. At drafting sessions, the majority of the time is devoted to review and redrafting of the summary, risk factors, MD&A and business sections of the prospectus. Considerably less time is spent during drafting sessions discussing the other sections of the prospectus and Part II of the registration statement. Following each drafting session, issuer's counsel has primary responsibility for preparing the registration statement for redistribution to the working group in preparation for the next drafting session.

Filing with the SEC, FINRA, a Securities Exchange and the State Securities Commissions

SEC

Generally, all documents filed with the SEC must be filed electronically via the SEC's Electronic Data Gathering, Analysis and Retrieval system (**EDGAR**). Registration statements and amendments filed with the SEC are available immediately on the SEC's website. Issuers submitting a draft registration statement confidentially may submit their filings through the EDGAR system or through the SEC's secure email system. A confidential submission is not considered a "filing" and is therefore not available on the SEC's website, until it is filed, as described below.

To file electronically on EDGAR, the issuer must have EDGAR access codes. The SEC typically issues access codes within two business days of receipt of a completed and notarized application from the company.

Prior to filing a registration statement, the issuer must wire the filing fee associated with the registration statement to the SEC. The amount of SEC filing fee payable in connection with the IPO is based on the value of the securities to be sold in connection with the IPO. As of October 1, 2016, the current fee rate is US$115.90 per US$1,000,000 of securities registered. The filing fee is reset annually on October 1 of each year. Issuers are not required to pay the fee at the time of the confidential submission of the draft registration statement, but rather when the registration statement is filed with the SEC, as described below.

The Form 8-A may be filed with the SEC concurrently with the registration statement or anytime thereafter but prior to the effective date of the registration statement. Most often, the Form 8-A is not filed until about two weeks prior to the anticipated effective date of the registration statement. This allows time for SEC staff to review the Form 8-A and time for the company respond to any comments that the staff may raise. As discussed above, the Form 8-A is quite short and contains no substantive disclosure, consequently it is uncommon for the SEC to have comments on the document. The Form 8-A must be filed electronically through the EDGAR system. There is no SEC filing fee for a Form 8-A.

FINRA

No later than the business day after the registration statement is filed with the SEC, underwriters' counsel, on behalf of the underwriters, will file with FINRA the registration statement and supporting documents, including the underwriting agreement, when available. Information is filed electronically with FINRA through its Public Offering System. The filing fee, which is paid by the company, must be paid at the time of filing. The current filing fee is $500 plus .015 percent of the proposed maximum aggregate offering price or other applicable value of all securities registered on an SEC registration statement, but not more than $225,500.

FINRA is a self-regulatory organization that regulates certain aspects of the US securities industry. Among other things, it ensures that the underwriting compensation charged by member firms, which includes virtually all US broker-dealers, in a securities offering is fair and reasonable and that any underwriter conflicts of interest are addressed. Member firms are prohibited from participating in an offering unless FINRA has issued a "no objection" opinion on the compensation arrangements. FINRA has not publicly stated the threshold above which underwriter compensation would be deemed unfair or unreasonable. It typically takes two to three weeks for FINRA to issue a "no objection" opinion for an IPO.

FINRA's rules require that anything of value received by an underwriter within the 180-day period preceding the filing date be included in the amount of underwriting compensation. Examples of items of value that would be included as underwriter compensation are: discounts or commissions; reimbursement of expenses; the payment of fees and expenses of underwriter's counsel (other than any fees associated with state securities laws filings, sometimes called "blue sky" laws) by the company; finder's fees; wholesaler's fees; financial consulting and advisory fees; common or preferred stock, options, warrants and other equity securities; special sales incentive items; and rights of first refusal to participate in future public offerings, private placements or other financings. FINRA's list of items of value is extensive and subject to numerous exceptions and qualifications.

If an underwriter involved in the offering has a conflict of interest, FINRA rules require that the nature of the conflict be prominently disclosed and may require that a qualified independent underwriter (which can be a member of the underwriting syndicate that does not have a conflict) has participated in the preparation of the registration statement and the prospectus and has exercised the usual standards of "due diligence" in respect thereto. Among other things, an underwriter has a conflict if (i) the underwriter owns 10 percent or more of the issuer's common stock or preferred stock or otherwise has the power to direct or cause the direction of the management or policies of the company or (ii) at least five percent of the net offering proceeds of the IPO, not including underwriting compensation, will be used to reduce or retire the balance of a loan extended by the underwriter, its affiliates and its associated persons or will otherwise be directed to the underwriter, its affiliates and associated persons.

SECURITIES EXCHANGE

The listing application is typically filed with the applicable securities exchange concurrently with the filing of the registration statement with the SEC. The application is filed with the NYSE in paper and electronically with Nasdaq. The application fee must be paid at the time of filing. It typically takes four to six weeks for the exchange to complete its review and discussions with the company. The SEC will not declare the Form 8-A effective until the applicable securities exchange certifies to the SEC that the securities are approved for listing, which will occur after all of the exchange's questions and comments have been addressed.

STATE SECURITIES COMMISSIONS

Prior to 1996, issuers sometimes needed to make filings with various states under state securities or "blue sky" laws. Some states also undertook a merit review of the offering. Most states, however, had exemptions from their filing and qualification requirements for securities listed or approved for listing on a national securities exchange. In 1996, the US Congress enacted the National Securities Markets Improvement Act which, among other things, preempted states from applying registration and qualification requirements to "covered securities," which includes, among others, securities that are listed or authorized for listing on certain US national securities exchanges. As a result, issuers are not required to file documents with states for IPOs of common stock approved for listing on the NYSE or any of the Nasdaq market tiers, among others.

SEC Review

Following receipt of the registration statement, the SEC's Division of Corporation Finance will assign the filing to one of its disclosure offices. Each disclosure office is responsible for one or more industry groups, so that filings from companies within the same industry group are reviewed by staff in the same office. An IPO registration statement is usually assigned to a lawyer and an accountant who will review the initial filing and any amendments to the registration statement. The staff reviews filings for compliance with the SEC's rules and for deficiencies in explanation and clarity. The staff will often review other public information, including the company's website, as well as the registration statement. The SEC's goal is to complete its review of the initial filing within 30 days of the date of filing or confidential submission. When the staff identifies instances where it believes a company can improve its disclosure or enhance its compliance with the applicable disclosure requirements, it provides the company with written comments. In comments, the staff may request that a company provide additional supplemental information so the staff can better understand the company's disclosure or revise the disclosure in the registration statement. The staff will discuss with the company and its counsel any comments that the company believes are unclear. A company generally responds to each comment in a letter to the staff and, if appropriate, by amending its filings. Depending on the nature of the issue, the staff's concern and the company's response, the staff may issue additional comments following its review of the company's response to its prior comments and any amendment to the registration statement. This comment and response process continues until the staff and the company resolve all comments. The SEC's response time usually becomes shorter with each consecutive amendment. Staff comment letters and the company's responses become publicly available on the SEC's website 20 business days after the effective date of the registration statement. If a company has requested confidential treatment for any information contained in an exhibit, the lawyer reviewing the registration statement will also review the request for confidential treatment request. If the staff has any comments on the confidential treatment request, those comments will be contained in a separate letter. Those comments must be cleared or the company must disclose the information for which confidential treatment is requested before the staff will declare the registration statement effective.

When the company and the underwriters have addressed all of the SEC's comments or are comfortable that responses to any unresolved comments will not result in material changes to the registration statement, the marketing process begins in earnest. Preliminary prospectuses, sometimes called "red herrings" due to the legends printed in red on the cover page of the preliminary prospectus indicating that the preliminary prospectus is not yet complete, are printed. Executives of the company will present to the sales forces of each of the managing underwriters and answer any questions that they may have. After the sales force presentation, investor presentations, called "roadshow" presentations begin. The roadshow consists of a series of group or one-on-one meetings that the senior management of the company and the underwriters hold with key potential investors to present the investment case for the company. A roadshow can be live in person, telephonic, broadcast via the web or recorded. The "red-herring" prospectus is distributed at the same time. The book-building and roadshow processes are described in more detail below.

If an issuer has used the confidential submission process, 15 days before it can begin a roadshow, it must file on the EDGAR system (and make publicly available) the original draft registration statement and all draft amendments and resubmit all previously submitted response letters to staff comments as correspondence on EDGAR. The registration statement and amendments will immediately be available on the SEC's website. The company's correspondence and the staff's comment letters will be available on the same timetable as they are for companies that did not make use of the confidential submission procedure.

When the SEC is satisfied that an amended registration statement adequately addresses its comments and after receipt of clearance from FINRA and the applicable stock exchange, upon written request (called an acceleration request) of the issuer and the managing underwriters following the roadshow, the SEC will declare the registration statement and the Form 8-A effective on a date and at a time requested by the issuer and the underwriters. Sales to the public may commence as soon as the registration statement becomes effective, although offers and other publicity about the proposed IPO are technically permissible as soon as the registration statement has been filed.

The entire process from the initial kick-off meeting for an IPO to final SEC clearance typically takes between three and five months. For a more detailed indicative timeline of both the regular, public SEC review process and the confidential SEC review process, see Appendix 4.

Book-Building and Roadshow

Following any pre-marketing, the book-building process commences. "Book-building" refers to the pricing and underwriting method typically used on an IPO whereby the final offer price is fixed and the offer underwritten, after a book of preliminary orders has been built at the end of the marketing phase/roadshow. Book-building allows the "bookrunner(s)" among the underwriters to compile a comprehensive picture of the strength of institutional demand for the shares over a range of prices by obtaining non-binding expressions of interest from potential investors. The aim is to ensure that the shares are spread across a wide range of high-quality investors and that pricing tension is maximized. "Bookrunner" refers to the underwriter(s) responsible for keeping the books for the offering – the underwriter(s) responsible for the syndication, marketing, book-building, pricing, allocation and stabilization of an offering.

Book-building is usually conducted at the same time as a management roadshow over a period of a few days to two weeks.

Price Determination

SEC rules require that the issuer disclose in the registration statement filed with the SEC a good faith estimate of the range of the maximum offering price and maximum number of shares to be offered. The SEC Staff generally takes the position that a good faith price range means a range no larger than $2 (for ranges below $10) or 20 percent of the high end of the range (for maximum prices above $10).

The offer price is fixed between the issuer and the book-running manager(s) based on the level of interest expressed (the number of shares desired and the price(s) that they are willing to pay) by prospective institutional investors during the book-building process. In a successful offering, the order book contains orders for more shares than the company and selling stockholders, if any, are offering. In that case, the number of shares allocated to investors will be "cut back," potentially leading investors to purchase additional shares in the market leading to a more orderly market.

Prior to fixing the price, the underwriters and legal counsel for the underwriters and the issuer will conduct a bring-down due diligence call with issuer's management to confirm that there has not been any material change to the information contained in the preliminary prospectus and that there have been no material developments concerning the issuer.

The negotiation of the financial terms between the issuer and the underwriters (including the determination of the public offering price) will be completed either immediately before or shortly after the registration statement is declared effective. If these negotiations are completed before the registration statement is declared effective, the underwriting agreement will be executed, a final "pricing" amendment to the registration statement will be filed with the SEC, and, immediately after the registration statement is declared effective, the underwriters will complete sales of shares to investors identified during the pre-effective period. If the offering is successful, all sales will be confirmed within hours, or even minutes, of SEC effectiveness.

Rule 430A under the Securities Act permits registration statements to be declared effective that do not include final pricing information, so long as the registration statement is otherwise complete in all respects. If Rule 430A is being relied upon, the negotiation of the public offering price and underwriting discount will be completed shortly after the registration statement is declared effective. The underwriting agreement will then be executed and sales confirmed immediately thereafter. When the parties are relying upon Rule 430A, a copy of the final prospectus, reflecting the agreed-upon offering price and underwriting discount, must be filed with the SEC within two business days after the date of determination of the offering price.

Following execution of the underwriting agreement, the auditors will deliver a signed comfort letter to the underwriters.

Allocation and Settlement or Closing

After the offering has priced and the underwriting agreement is signed, the underwriters will allocate shares to investors that requested them during the book-building process. Investors are rarely allocated all of the shares in the IPO that they requested, resulting in investors purchasing shares in the secondary market after the IPO to round out their investment. The demand for shares in the secondary market by under-allocated investors is one of the mechanisms relied upon by underwriters to ensure an active secondary market. When allocation is completed, "when issued" trading commences on the listing exchange and settlement will occur.

The book-running manager(s) typically allocate 15 percent more shares than the underwriters agree to purchase from the issuer and/or the selling stockholders to facilitate stabilizing the price of the shares once secondary market trading beings. If the trading price of the shares goes up, the book-running manager(s) will cover the short sales (i.e., the shares they sold in excess of the number they agreed to purchase) with shares obtained under their greenshoe or over-allotment option. The issuance of these additional shares into the market will typically depress the stock press, thus moving the stock price back towards the public offering price. Conversely, If the trading price of the shares goes down, the book-running manager(s) will cover the short sales with shares purchased in the open market. The purchase of shares in the open market will reduce the downward pressure on the stock price thus moving the stock price back towards the public offering price. The over-allotment option may be exercised within a period of 30 days after the offer closes. During this time, the book-running manager(s) or a designated stabilizing manager may be appointed to carry out other permitted stabilization activities in order to maintain or stabilize the market price of the shares. Underwriting syndicate stabilizing activities are governed by SEC and FINRA rules. See also "Key Documents – Underwriting Agreement – Greenshoe Option" above.

"Settlement" or "closing" is the formal issuance and delivery of the shares by the company and the selling stockholders against payment by the underwriters. It takes place a few business days – frequently three to five business days (referred to as "T+3" or "T+5") – after pricing, to allow sufficient time to prepare the necessary documentation and collect payment for the shares from investors. In 2017, the SEC revised its rules so that market transactions settle in T+2 days. As of the date of this guide, it is not clear whether the shorter settlement period will become market practice in underwritten offerings.

Publicity Considerations

During the period from the time the issuer reaches an understanding with the underwriters or makes a decision to undertake an offering until the time that the registration statement is declared effective and the prospectus delivery obligations have expired (the "registration period"), US securities laws place certain restrictions on publicity and the release of information and on other market activities by the issuer and persons associated with, or acting on behalf of, the issuer, including the underwriters. Communications in violation of US securities laws and SEC rules are referred to as "gun jumping."

Subject to certain exceptions discussed below, from the beginning of the registration period and prior to the filing of a registration statement, it is unlawful for issuers to make oral or written offers to sell or to solicit an offer to buy any security. The term "offer" has been broadly construed by the SEC to include not just express offers by an issuer, but other publicity efforts, which "although not couched in terms of an express offer, may in fact contribute to conditioning the public mind or arousing public interest in the issuer or the securities of the issuer," such as any form of communication, whether in written, oral or electronic form, that:

- Relates to or concerns the offering.
- Relates to the performance, assets, liabilities, financial position, revenues, profits, losses, trading record, prospects, valuation or market position of the company.
- Might affect an investor's assessment of the financial position and prospects of the company.
- Otherwise has the purpose, or reasonably could have the effect, of "conditioning the market." ("Conditioning the market" means generating or promoting interest in the offering, or influencing or encouraging an investor's interest in the company/the offering or a decision to purchase the securities in question.)

After a registration statement has been filed and before the registration period ends, it is also unlawful to deliver a prospectus relating to the securities that are the subject of the registration statement unless the prospectus meets the technical and detailed disclosure requirements prescribed by the Securities Act. "Prospectus" is broadly defined under the Securities Act, and has been interpreted by the SEC to include written communications, including e-mails and other electronic documents, that could arguably encourage the purchase of a security during the registration period as part of a selling effort. A quote from an executive of the issuer that appears in a newspaper story or on a radio or television interview can also constitute a "prospectus" in violation of this prohibition. Securities Act rules permit issuers and underwriters to use certain types of written offering materials not meeting the requirements of a prospectus, called "free writing prospectuses," so long as certain conditions are met, including that the information in the free writing prospectus not conflict with information contained in the registration statement, that in some cases the free writing prospectus be accompanied or preceded by a preliminary prospectus or a final prospectus and that in some cases the free writing prospectus be filed with the SEC.

The US securities laws do not require a "news blackout" prior to the completion of the offering. However, communications during the registration period to the press, public or shareholders concerning the offering or other non-factual information concerning the business or future prospects of the issuer should be carefully considered, generally discouraged and, in any case, held to a minimum. Such communications may be construed as part of a selling effort to "condition the market", may result in delays in the offering schedule and may potentially result in serious civil and criminal liability. SEC rules provide that communications made more than 30 days prior to the filing of a registration statement will generally not be considered an offer of a security so long as the communication does not reference a securities offering, provided that reasonable steps are taken to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing of the registration statement.

Securities Act Rule 134, which applies to communications made after a registration statement has been filed, and Rule 135, which applies to all communications made during the registration period, set forth specific information notices regarding an offering that may be publicly disseminated without running afoul of the US securities laws. The information permitted to be disclosed under these rules is quite limited. Any press conference, meeting or press-related materials relating to the offering in any way should be reviewed by counsel.

Issuers must also regulate communications made via the Internet or through their websites. During the registration period, issuers should limit both direct and hyperlinked information on their websites to prospectuses meeting the requirements of the Securities Act and permissible communications under available safe harbors. The posting of regularly released factual information, such as new product announcements, receipt of awards, etc., is generally permitted. Principal factors in determining whether information is publicity are whether its release serves a legitimate business purpose independent of the offering and the issuer's historical track record of conducting similar activities. Issuers undertaking an initial public offering should not establish a website contemporaneously with beginning the IPO process, as the content could be viewed as conditioning the market, without any "ordinary course of business" practice having been established.

In addition, subject to certain exceptions, issuers, underwriters and persons on behalf of whom securities are being distributed are also broadly prohibited by SEC Regulation M under the Exchange Act from bidding for or purchasing, or inducing others to bid for or purchase, certain securities until the subject distribution has been completed. The SEC's trading practices rules, including Regulation M, impose a number of restrictions particularly relevant to the activities of underwriters and their affiliates, such as "stabilization," "passive market-making" and the publication of analysts' research reports. A detailed discussion of these regulations is outside the scope of this guide.

The SEC has an active monitoring program and may raise questions during the review process if any publicity concerning an offering appears in the United States, particularly if statements are attributed to an offering participant. As a practical matter, the SEC may delay or postpone an offering by imposing a "cooling-off" period for the effects of improper publicity to dissipate. The SEC also may demand that underwriters associated with the dissemination of improper publicity be removed from the selling syndicate. In addition, a purchaser may bring a lawsuit to rescind the purchase of the securities—recovering the consideration paid *plus* interest *minus* the amount of any income received—or to recover damages, if the securities are no longer owned. Additional liability may arise if publicity relating to the offering is shown to contain a material misstatement or omission or otherwise to violate the anti-fraud provisions of the US securities laws.

To ensure compliance with all applicable securities laws and regulations, the issuer's counsel will typically prepare publicity guidelines at the outset of a proposed offering. The guidelines are usually reviewed by the underwriters' counsel and must be adhered to by all offering participants. While all issuer representatives and other offering participants that are likely to be approached by, or come in contact with, the press or securities analysts during the course of the offering should be familiar with the publicity guidelines, it is advisable to appoint one issuer representative to serve as the initial point of contact with the press and securities analysts and to handle publicity and other broad-based communications during the offering process. When in doubt whether a proposed communication is permissible or potentially problematic under the publicity guidelines, that individual can arrange for it to be reviewed by the company's lawyers.

The restrictions stated in the publicity guidelines should extend to at least 40 calendar days after the later to occur of the closing of the IPO or completion of the securities distribution.

Nevertheless, an EGC or any person authorized to act on behalf of an emerging growth company may engage in oral or written communications with potential investors that are qualified institutional buyers as defined in Securities Act Rule 144A (generally an institution with US$100 million under management) or institutions that are accredited investors as defined in Securities Act Rule 501(a) (generally an institutional investor with a net worth of US$5 million) either prior to or following the date of filing of a registration statement with respect to such securities with the SEC. These types of communications are often referred to as "test the waters communications." The purpose behind the communications is to enable the company to determine investor interest in investing in the shares prior to the company committing to a public offering. Underwriters and their counsel typically prepare guidelines that specify how offering participants may contact potential investors, the materials that may be used in meetings and the conduct of the meetings for the testing the waters process. The underwriters may not solicit offers during the test the waters process, but they can gauge interest and obtain non-binding indications of interest. Any test the waters communications are not considered "offers" and the company will therefore not have committed a gun-jumping violation.

Liability

Section 11 of the Securities Act

The Securities Act can subject an issuer and its directors and officers and other parties involved in an offering to substantial liability. Section 11 of the Securities Act provides that if any part of a registration statement, when that part became effective under the Securities Act, contained an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements therein not misleading, any person acquiring such a security can sue: (i) the issuer; (ii) every person who signed the registration statement; (iii) every person who was a director of the issuer at the time of the filing of that part of the registration statement, even if the person did not sign the registration statement; (iv) every expert who, with his consent, has been named in the registration statement as having prepared or certified any portion of the registration statement; and (v) every underwriter. Section 11 contains no requirement that any such person have acted with fraudulent intent or that any such misstatement or omission have been relied upon by the investor in connection with its purchase. In addition, civil penalties are provided for under Section 11 and criminal penalties are provided for under Section 24 of the Securities Act.

Liability under Section 11 is absolute against the issuer. However, all other identified persons may be able to avoid liability for any part of the registration statement not purporting to be made on the authority of any expert (e.g., audited financial statements) if such person had, after reasonable investigation, reasonable grounds to believe, and did believe, at the time such part of the registration statement became effective under the Securities Act, that the registration statement contained no material misstatements or omissions. This is referred to as the "due diligence" defense, discussed above in "The IPO Process—The Due Diligence Process."

Section 12(a)(2) of the Securities Act

Section 12(a)(2) of the Securities Act also serves as a basis for liability for participants in a registered public offering of securities. Under Section 12(a)(2), "any person who . . . offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading . . ." is liable for any investment loss suffered by any purchaser of the security. Liability is determined for Section 12(a)(2) purposes as of the "time of sale," which is at the time the investor agrees to purchase the securities being offered (and before delivery of the final prospectus), not the settlement date.

Section 12(a)(2) applies to "offer[ors] or seller[s]" of securities, which US courts have found to include persons who "solicit purchases of securities, motivated by a desire to serve [their] own financial interest." Accordingly, Section 12(a)(2) has been applied to issuers, underwriters, directors, officers and principal shareholders. Section 12(a)(2) does not require fraudulent intent on the part of the seller, nor must a purchaser prove that it relied on the misstatement or omission, though the purchaser cannot have knowledge of the misstatement or omission at the time of the purchase.

Like Section 11, Section 12(a)(2) provides a defendant with a due diligence defense to a lawsuit, although the standard to establish the defense under Section 12(a)(2) differs from the Section 11 standard. Section 12(a)(2) provides that a defendant shall not be liable under that section "if he did not know, and in the exercise of reasonable care, could not have known, of such untruth or omission."

Section 10(b) of the Exchange Act

Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 also subject issuers of securities and other participants in a securities offering to potential liability. Under Exchange Act Rule 10b-5, it is unlawful: "(a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice or course of business that operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Private litigants are entitled to bring actions under Rule 10b-5 against any person alleged to have engaged in the unlawful conduct specified in that rule. In addition to the unlawful conduct, the plaintiff must establish that the defendant acted with "scienter," or an intent to defraud, deceive or manipulate. Generally, courts have found recklessness to satisfy the scienter requirement, but not simple negligence or even inexcusable negligence. In a private action alleging a violation of Rule 10b-5, the plaintiff must also prove that it relied on the wrongful conduct and that such wrongful conduct caused the plaintiff's loss. However, a plaintiff need not prove that he or she directly relied on the wrongful conduct to the plaintiff's detriment. Rather, proof of reliance can also be established indirectly pursuant to the "fraud-on-the-market theory," Under the fraud-on-the-market theory, courts recognize that the wrongful conduct served to inflate the price of the stock artificially, and a plaintiff is permitted to prove reliance indirectly by virtue of his or her dependence on the market to set the stock price. Because the misrepresentation affected the stock price, and the plaintiff bought the stock based on the affected price, the plaintiff indirectly relied on the wrongful conduct that misled the market as a whole.

Section 17 of the Securities Act contains a broad anti-fraud provision, which mirrors closely the language of Rule 10b-5. Unlike Rule 10b-5, however, actions under Section 17 do not require proof of fraudulent intent or recklessness, but may be brought in respect of a person's negligence. Most US courts have held that there is no private right of action under Section 17—actions may only be brought by the SEC. The persons liable and the remedies available under Section 17 are broadly similar to those under Rule 10b-5.

Because of the scienter, reliance and causation elements, an action under Rule 10b-5 is more difficult to sustain than an action under Section 11 or 12(a)(2) under the Securities Act. However, Section 10(b) and Rule 10b-5 have far broader application than Section 11, which applies only to misstatements or omissions in Securities Act registration statements at the time of effectiveness, and Section 12(a)(2), which applies only to prospectuses and oral statements used in a registered public offering of securities. Rule 10b-5 can apply to any purchase or sale of a security, including a private placement of securities, or secondary market transactions, including actions or omissions of the issuer, its officers and directors in violation of that rule that cause a decline in the price of the issuer's stock.

Ongoing Obligations as a Public Company

The disclosure of accurate, comprehensive and timely information about security issuers builds sustained investor confidence and allows an informed assessment of their business performance and assets. This enhances both investor protection and market efficiency.

Listed companies must ensure appropriate transparency for investors through a regular flow of information. This is important not only because they may be required to do so under applicable listing rules or legislation but also to build strong investor relations in order to be able to fully reap the potential benefits of being a public company, such as ready access to the capital markets. To the same end, stockholders, or natural persons or legal entities holding voting rights or financial instruments that result in an entitlement to acquire existing shares with voting rights, will typically also be required to inform issuers of the acquisition of or other changes in major holdings in listed companies so that the latter are in a position to keep the public informed.

The specific nature and extent of the obligations that apply to the company post-IPO is dictated by:

- The stock exchange on which the company's securities are listed.
- The US federal securities laws.

The following section provides an overview of ongoing obligations applicable to US companies choosing to conduct a US IPO. The discussion is not intended to be exhaustive.

The principal ongoing obligations of, or with respect to, listed companies in the United States include:

- SEC reporting.
- Section 16—short-swing profits.
- Beneficial ownership reporting.
- Compliance with corporate governance rules (for example, stipulating numbers of independent directors).
- Disclosure rules (for example, Regulation FD (which is designed to prevent selective disclosure and is discussed below) and rules governing Non-GAAP financial measures).
- FCPA compliance.

SEC Reporting

As a result of either a public offering of securities under the Securities Act or a listing of a company's shares on a stock exchange in the United States, issuers become subject to periodic and ongoing public reporting as well as other obligations under the Exchange Act. These reporting obligations commence immediately upon the effectiveness of a registration statement or a listing and continue until the issuer successfully deregisters or its reporting obligation is suspended.

US domestic issuers must prepare and file annual reports on Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K, as well as a proxy statement in connection with the solicitation of votes for their shareholder meetings.

FORM 10-K

An Annual Report on Form 10-K must be filed with the SEC 60 days after the end of the company's fiscal year end if the company is a large accelerated filer, 75 days after the end of the company's fiscal year end if the company is an accelerated filer and 90 days after the end of the company's fiscal year end for all other companies. A large accelerated filer is a company that has an aggregate worldwide market value of common equity held by non-affiliates of at least $700 million. An accelerated filer is a company that has an aggregate worldwide market value of common equity held by non-affiliates of at least $75 million but less than $700 million. In both cases, the market value is determined as of the last day of the company's second fiscal quarter. To be a large accelerated filers or an accelerated filer, the company must also have been subject to the requirement to file periodic reports for at least 12 months and have filed at least one annual report with the SEC.

The information that must be provided in a Form 10-K is broadly identical to the information required to be included in the initial registration statement on Form S-1. Below are the headings of the items requirements for the Form 10-K. A detailed discussion of the items is beyond the scope of this guide.

Part I

- Description of the company's business.
- Risk factors.
- Unresolved staff comments.
- Description of material properties.
- Legal proceedings.
- Mine safety disclosures.

Part II

- Market for the company's common equity, related stock-holders matters and issuer purchases of equity securities.
- Selected financial data.
- MD&A.
- Quantitative and qualitative disclosure about market risk.
- Audited Financial statements and supplementary data.
- Changes in and disagreements with accountants on accounting and financial disclosure.
- Controls and procedures.
- Information that should have been reported on a Form 8-K during the company's fourth fiscal quarter but was not.

Part III

- Information about directors, executive officers and corporate governance.
- Executive compensation.
- Security ownership of certain beneficial owners and management and related stockholder matters.
- Certain relationships, related transactions and director independence.
- Principal accountant fees and services.

Part IV

- Exhibits and financial statement schedules.
- Form 10-K summary.

FORM 10-Q

Quarterly Reports on Form 10-Q must be filed with the SEC 40 days after the end of the company's first, second and third fiscal quarters if the company is a large accelerated filer or an accelerated filer. All other filers must file within 45 days after the end of the company's first, second and third fiscal quarters.

The information that must be provided in a Form 10-Q is more abbreviated than that required in an registration statement or in a annual report on Form 10-K.

Below are the headings of the items requirements for the Form 10-Q. A detailed discussion of the items is beyond the scope of this guide.

Part I – Financial Information

- Unaudited financial statements.
- MD&A.
- Quantitative and qualitative disclosures about market risk.
- Controls and Procedures.

Part II – Other Information

- Legal proceedings.
- Risk factors.
- Unregistered sales of equity securities and use of proceeds.
- Defaults upon senior securities.
- Mine safety disclosure.
- Information that should have been reported on a Form 8-K during the fiscal quarter but was not and any material changes to the procedures by which shareholders recom-mend nominees to the company's board of directors.
- Exhibits.

While financial statements included in a quarterly report on Form 10-Q do not need to be audited, they do need to be reviewed by the company's auditors.

FORM 8-K

Companies are required to file a current report on Form 8-K within four business days following the occurrence of the following events (other than (i) a Regulation FD disclosure, which must be furnished simultaneously with an intentional public disclosure or promptly for a non-intentional public disclosure and (ii) those described in the last bullet for which there is no deadline):

- Entry into of a material definitive agreement.
- Termination of a material definitive agreement.
- Filing for bankruptcy or receivership.
- Mine Safety—reporting of shutdowns and patterns of violations.

- Completion of an acquisition or disposition of assets.
- Public announcements of results of operations and financial condition.
- Creation of a direct financial obligation or an obligation under an off-balance sheet arrangement.
- The occurrence of triggering events that accelerate or increase a direct financial obligation or an obligation under an off-balance sheet arrangement.
- Commitment to exit or disposal activities that result in material charges.
- Determination that a material charge is required to reflect impairments.
- Receipt of a notice of delisting or failure to satisfy a continued listing rule or standard; transfer of listing.
- Unregistered sales of securities.
- Material modifications to rights of security holders.
- Change in the company's certifying accountant.
- Non-reliance on previously issued financial statements or a related audit report or completed interim review.
- Changes in control of the registrant.
- Departure of directors or certain officers; election of directors; appointment of certain officers; new or modified compensatory arrangements of certain officers.
- Amendments to articles of incorporation or bylaws; change in fiscal year.
- Temporary suspension of trading under the company's employee benefit plans.
- Amendments to the company's code of ethics or waiver of a provision of the code of ethics.
- Change in shell company status.
- Reporting voting results of matters to a vote of security holders.
- Shareholder director nominations.
- Various matters relating to asset-backed securities issuers.
- Regulation FD disclosure.
- Other material events not required by one of the bullets above that the company, at its option, elects to disclose.

A detailed description of these items is beyond the scope of this guide.

PROXY STATEMENT

The US federal securities laws do not require that a public company solicit proxies from its shareholders in connection with a shareholders' meeting—that requirement arises from the securities exchange listing requirements. State corporate law governs the setting of a record date and the amount of time between a record date and the meeting date.

When a company does solicit proxies, SEC rules govern the content of the proxy statement and the form of proxy. The proxy statement contains, among other things: the date, time and location of the meeting and how abstentions and broker non-votes affect the outcome of each matter voted upon, the date by which shareholders must submit proposals for inclusion in the company's next proxy statement and the date by which shareholders must submit potential nominees for consideration by the company for election as a director of the company. Other information required in the proxy statement depends on the matters being voted on at the meeting. For example, if directors are being elected, then the company must include background information on each director, information relating to corporate governance and executive and director compensation information, similar to that included in the company's IPO registration statement, CEO pay ratio disclosure, a "say-on-pay" proposal every one, two or three years, and a proposal (at least once every six years) concerning the frequency of such "say-on-pay" proposals. A detailed discussion of these items and the information required for other matters that shareholders are being asked to vote on are beyond the scope of this guide.

SEC rules exempt smaller reporting companies and the JOBS Act exempts EGCs from the requirement to hold "say-on-pay," "say-on-frequency" and "say-on-golden parachute" votes, as well as from certain other requirements, such as CEO pay ratio disclosures. EGCs and smaller reporting companies are also permitted to comply with less burdensome executive compensation disclosure rules than other US domestic issuers. See Appendix 3.

Section 16

Section 16 of the Exchange Act requires that officers, directors and beneficial owners of more than 10 percent of the equity securities registered under the Exchange Act (**Section 16 Persons**) of a company (the **Subject Company**) file reports on Form 3 with the SEC no later than the effective date of the Form 8-A or if later, within 10 days of becoming a Section 16 Person. With certain exceptions, subsequent acquisitions and dispositions of securities must be reported on a Form 4 within two business days of the date of the transaction. Officers and directors are required to report certain transactions that occur within six months prior to an IPO and within six months after ceasing to be an officer or director of the Subject Company. Form 5 is used to report transactions that should have been reported on an earlier Form 4 but were not or that were exempt from immediate reporting.

Subject to certain exceptions, if a Section 16 Person purchases and then sells, or sells and then purchases, equity securities of the Subject Company within six months resulting in a profit, that Section 16 Person is required to disgorge the profit to the Subject Company. If the Section 16 Person does not disgorge the profits to the Subject Company, another shareholder can request that the Subject Company obtain disgorgement and, if necessary, the shareholder can sue the Section 16 Person to force disgorgement to the Subject Company.

Section 16(c) prohibits a Section 16 person from engaging in short sales of the Subject Company's securities.

The SEC has adopted several rules under Section 16 that, among other things, exempt from reporting certain types of transactions and exempt some types of transactions from the short-swing profit disgorgement provisions of Section 16.

Section 16 and the SEC's rules thereunder are complex, and the treatment of transactions for reporting and disgorgement purposes is not always obvious. In many instances, outside counsel will need to be consulted to analyze the reporting and disgorgement treatment of a transaction by a Section 16 Person before the transaction is executed in order to ensure proper treatment under these provisions.

Beneficial Ownership Reporting

Acquisition or accumulation of a significant stake—more than five percent—in a class of equity securities registered under Section 12 of the Exchange Act (which includes all companies listed on a US securities exchange) gives rise to specific disclosure and filing requirements under US law. Disclosure requirements under Sections 13(d) and 13(g) of the Exchange Act are intended to provide public companies, their stockholders and the marketplace in general with information about actual and potential changes in beneficial ownership by significant stockholders and any plans that such stockholders may have to change or influence the control or management of the issuer.

Section 13(d)(1) of the Exchange Act and Rule 13d-1 requires any "person" who acquires, directly or indirectly, the "beneficial ownership" of more than five percent of a class of equity securities registered under Section 12 of the Exchange Act to file a Schedule 13D with the SEC disclosing certain specified information and send copies of the filing to the issuer of such equity securities and each securities exchange where the securities are traded within calendar 10 days of the acquisition. In certain circumstances, investors who have acquired shares without the purpose or effect of changing or influencing the control of the issuer may qualify to file a short form (much less detailed and onerous) report on Schedule 13G, instead of filing a Schedule 13D. Notwithstanding Section 13(d)(1), an investor that has not acquired more than two percent of the class of registered equity securities within the preceding 12 months need not file a Schedule 13D, even if such investor's acquisitions within such period—when added to shares acquired more than 12 months previously—exceed five percent of the class. As discussed below, however, such investors must file a Schedule 13G not later than 45 days after the end of the calendar year.

A Schedule 13D must be amended "promptly" if there is any material change in the facts that have been disclosed. An acquisition, or disposition, of one percent or more of the class of securities is deemed material, but smaller acquisitions and dispositions, and other changes of plans, could be material, depending on the circumstances. The SEC takes the position that "prompt" could mean as soon as the following business day. The Schedule 13G amendment requirements vary depending on the nature of the filer.

BENEFICIAL OWNERSHIP

Rule 13d-3(a) provides that a person "beneficially owns" a security if it, directly or indirectly, through any contract, arrangement or otherwise, has or shares (1) voting power, which includes the power to vote, or to direct the voting of, such security or (2) investment power, which includes the power to dispose, or to direct the disposition of, such security, or both. In addition, a person is deemed to be the beneficial owner of a security if that person has the right to acquire beneficial ownership of such security within 60 days, for example through the exercise of an option or through the conversion of another security. It follows from these provisions that a security may have multiple beneficial owners—for example, the person who owns the security and the person who has an option to acquire that same security within 60 days. All such 5 percent beneficial owners must file a Schedule 13D or 13G. In addition, multiple entities within a given corporate group may be deemed to own the same shares and may be required to file jointly.

"PERSON" AND "GROUPS"

"Person" is defined broadly and includes corporations and other entities, as well as individuals. Section 13(d)(3) further provides that, when two or more persons act as partners of a general or limited partnership, syndicate, or other group, for the purpose of acquiring, holding, or disposing of securities of an issuer, such group will be deemed one single "person" for purposes of Section 13(d). This means that if these persons, in the aggregate, acquire more than five percent of the equity securities of the issuer, they will either need to file one joint Schedule 13D, or each group member may file a separate Schedule 13D. Individual persons will only be deemed to constitute a group, and thus one single person under Section 13(d)(3), if they have some kind of formal or informal agreement to act together with respect to the equity securities. However, the case law concerning what actions constitute the formation of a group is unsettled. The existence of a group depends on the specific facts and circumstances of the case.

REQUIRED INFORMATION

The information to be disclosed on Schedule 13D includes information about the identity or identities of the beneficial owner(s) of the acquired securities, the sources, and amount of funds used in making the purchases, and the number of shares of such security owned by the beneficial owner(s). In addition, the person filing Schedule 13D is also required to disclose the purpose of the acquisition of the securities and any plans or proposals that the reporting person may have that relate to (i) the acquisition by any person of additional securities of the issuer, or disposition of such securities, (ii) an extraordinary corporate transaction, such as merger, reorganization or liquidation, involving the issuer or any of its subsidiaries, (iii) a sale, or transfer, of a material amount of assets of the issuer or of any of its subsidiaries, (iv) any change in the present board of directors, or management of the issuer, including any plans or proposals to change the number or term of directors, or to fill any existing vacancies on the board, (v) any material change in the present capitalization or dividend policy of the issuer, (vi) any other material change in the issuer's business or corporate structure, (vii) changes in the issuer's charter, bylaws, or instruments corresponding thereto, or other actions which may impede the acquisition of control of the issuer by any person, (viii) causing a class of securities of the issuer to be de-listed or to cease to be authorized to be quoted, (ix) a class of equity securities of the issuer becoming eligible for termination of registration with the SEC, under the Exchange Act, or (x) any action similar to any of those enumerated above. In addition, Schedule 13D must also describe any contracts, arrangements, understandings, or relationships, with respect to any securities of the issuer—including the transfer or voting of any security, loan or option arrangements, puts or calls, and name of the persons with whom such contracts, arrangements, understandings or relationships have been entered into. Finally, the exhibits that the reporting person must file with the Schedule 13D include copies of all agreements relating to the sources of funds used to finance the acquisition of the securities, and copies of all agreements relating to the transactions described above.

SCHEDULE 13G

As mentioned above, certain types of investors acquiring beneficial ownership of more than five percent of a class of registered equity securities may, rather than filing a Schedule 13D within 10 days after the acquisition, file a short-form disclosure statement on Schedule 13G. The main advantage of filing on a Schedule 13G is that it requires significantly less information to be disclosed and therefore is less burdensome to prepare. The required disclosure is essentially limited to information regarding the identity of the filer and the number of shares owned. In addition, the requirements for periodically updating the filing are more limited and depend on the identity of the filer.

Schedule 13G is available to three types of investors: domestic "Qualified Institutional Investors" (QIIs), "exempt investors" and "passive investors." Investors that qualify as QIIs include US registered broker-dealers, banks, savings associations, registered investment companies and employee benefit plans, as well as control persons of such entities. Foreign institutional investors typically do not qualify as QIIs. To qualify for a Schedule 13G, as opposed to a Schedule 13D filing, a QII must be able to certify that the securities were acquired in the ordinary course of business and without having had a purpose or effect of changing or influencing the control of the issuer. An "exempt investor" is a person who holds more than five percent of a class of equity securities at the end of a calendar year, but who has not made any "acquisition" subject to Section 13(d). This includes persons who acquired their securities prior to the issuer registering the securities under the Exchange Act—for example, key founding stockholders that acquired shares prior to a potential IPO, persons who acquired securities in a registered stock-for-stock exchange and persons who have not acquired more than two percent of a class of securities within a 12-month period. "Passive investors" may qualify to file a Schedule 13G if they own more than five percent but less than 20 percent of a class of registered equity securities and can certify that the securities were not acquired, or held, with the purpose or effect of changing or influencing the control of the issuer.

If, after filing a Schedule 13G, a QII or a passive investor subsequently determines that it intends to change or influence the control of the issuer, or if a passive investor's ownership reaches or exceeds 20 percent of the class of equity securities, then such person must file a full Schedule 13D within 10 days of this occurrence, and would be subject to a 10-day "cooling off" period during which the securities may not be voted and beneficial ownership of additional securities may not be acquired.

Corporate Governance

GENERAL

US domestic issuers are subject to a host of corporate governance rules under applicable US securities laws, SEC rules, the rules of the relevant US stock exchanges and applicable state law. These rules cover matters including director independence, required board committees, committee charters, code of ethics, disclosure controls and procedures, loans to insiders, whistle-blower policies and complaint-handling procedures, communication policies (e.g., Regulation FD) and insider trading policies. A summary of the NYSE and Nasdaq non-quantitative listing requirements in contained in Appendix 1 to this guide.

INDEPENDENT DIRECTORS

Under SEC rules, the Sarbanes-Oxley Act, the Dodd-Frank Wall Street Reform Act of 2010 as well as both NYSE and Nasdaq listing rules US domestic issuers are required (subject to limited exceptions, e.g., controlled companies) to have independent directors on their boards of directors and three standing committees comprised solely of independent directors—audit, compensation and nomination/governance. Phase-in rules require only one independent director upon closing of the IPO, two within 90 days and three within one year, in addition to a majority of independent directors within one year of the IPO closing. Even significant ownership of shares in the company does not preclude a director being considered independent, as independence from executive management is seen as the primary issue. However, this does not apply to audit committee members, for which the fully diluted stock ownership of a director, and entities with which he or she is affiliated, should not exceed 10 percent of the total shares of the company outstanding.

As a practical matter, the company and the underwriters, with the assistance of their legal advisers, will confirm the independence status of the current directors of an IPO candidate prior to commencing the application process, based on a variety of regulatory standards and responses to director questionnaires prepared by the issuer's lawyers. Depending on the outcome, it may then be necessary to make changes to the composition of the company's board of directors and to elect new independent directors in connection with the IPO.

Other Considerations

REGULATION FAIR DISCLOSURE (REGULATION FD)

Regulation FD generally requires SEC-registered companies to provide all investors with the same information at the same time (that is, selective disclosure to only some investors is prohibited) if the information is material and not previously available to the public.

As a result, no company spokesperson, including senior management and members of the board of directors of public companies, should personally disclose any information that is material and that has not previously been publicly disclosed. This does not mean that company spokespeople may only repeat words that have been lifted verbatim from press releases or SEC filings, but it does mean that no new material information should be provided unless it has previously been disclosed by press release or other broad dissemination. These rules apply separately from various federal laws that impose both civil and criminal liability for "insider trading," including "tipping."

NON-GAAP FINANCIAL MEASURES

Many companies disclose "Non-GAAP financial measures", or financial measures not taken directly from their financial statements that exclude (or include) amounts, or are subject to adjustments that have the effect of excluding (or including) amounts, that are included (or excluded) in the most directly comparable measure calculated and presented in accordance with GAAP in the company's statement of income, balance sheet or statement of cash flows.

The SEC has adopted a series of regulations—sometimes generically referred to as "Reg. G"—designed to address this practice in public disclosures and in SEC filings. It has taken this step because of perceived abuses and the habit of some companies to disclose what the SEC has humorously called "EBT-BS" or "earnings before the bad stuff." Among other things, the relevant rules require companies, in the case of SEC filings and earnings announcements required to be furnished on a Form 8-K, to:

- Present, with equal or greater prominence, the most directly comparable financial measure calculated and presented in accordance with "GAAP."
- Reconcile the differences between the non-GAAP financial measure and the most directly comparable financial measure calculated and presented in accordance with GAAP.
- Disclose the reasons why management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations.
- To the extent material, disclose the additional purposes for which management uses the non-GAAP financial measure.

In addition, there are certain non-GAAP financial measures that may not be used in a filing with the SEC.

FOREIGN CORRUPT PRACTICES ACT

One of the highest profile and potentially largest dollar compliance risks associated with the US securities laws is the Foreign Corrupt Practices Act (**FCPA**). The FCPA generally prohibits corrupt payments or gifts to foreign (non-US) officials to obtain or retain business. "Foreign officials" includes employees of state-owned entities such as public hospitals, utilities or universities. Companies with US listings, and thus registrations with the SEC, are subject to potential liability under the FCPA for their worldwide operations. Illegal payments or gifts by a non-US employee, or agent of the company, to an official in a developing country, for example, could expose the company to expensive and time-consuming investigations by the SEC or the US Department of Justice (**DOJ**).

Consequences for a breach of FCPA include large monetary penalties and a variety of other sanctions in the United States, including a potential suspension of the right to do business with the US government. Prohibited payments or gifts are often made through middlemen, so the FCPA is drafted broadly to pick up the actions of distributors, brokers, suppliers and other agents. As a result, companies listed in the United States could incur significant liability as a result of actions taken by contract counterparties. For that reason, FCPA compliance efforts cannot stop at a company's own doorstep but must extend to its business partners.

To avoid being held liable for corrupt payments made by third parties, the DOJ encourages companies to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives.

In addition, companies should also be aware of so-called "red flags," including:

- Unusual payment patterns or financial arrangements.
- A history of corruption in the country.
- A refusal by the foreign joint venture partner or representative to provide a certification that it will not take any act that would cause a violation of the FCPA.
- Unusually high commissions or unusual payment terms/deal structures.
- Lack of transparency in expenses and accounting records.
- Apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered.
- Whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.

Appendices

Appendix 1

NYSE and NASDAQ Non-quantitative Listing Requirements

The following table summarizes certain of the NYSE and Nasdaq non-quantitative listing requirements for corporate issuers, primarily corporate governance in nature. Section references under the NYSE column refer to the NYSE Listed Company Manual and references under the Nasdaq column refer to the Nasdaq Listing Rules. The following table is only a high level summary of the requirements and should be read in connection with the full text of the applicable rule or regulation. In addition, many of the requirements set forth below contain exceptions for companies in bankruptcy proceedings, controlled companies, cooperatives, foreign private issuers, investment companies registered under the Investment Company Act of 1940, limited partnerships, passive investment entities and smaller reporting companies. You should review the text of the applicable rules or regulations for any such exceptions.

REQUIREMENT	NYSE	NASDAQ
INDEPENDENT DIRECTORS	A company's board of directors must have a majority of independent directors. A company has one year from the date of listing to comply if the listing is in connection with its IPO. (*Sections 303A.01 and 303A.00*) Independence is defined in *Section 303A.02*.	Same. (*Rule 5605(b)*) Independence is defined in *Rule 5605(a)(2)* and *IM 5606*.
EXECUTIVE SESSIONS OF NON-MANAGEMENT DIRECTORS	Regularly scheduled executive sessions are required of either: • non-management directors or • independent directors. If a company chooses to hold meetings of non-management directors, the NYSE recommends that the independent directors hold a separate meeting at least once a year. (*Section 303A.03*)	Independent directors must have regularly scheduled meetings at which only independent directors are present. Nasdaq expects that the executive sessions will occur at least twice a year, in conjunction with regularly scheduled board meetings. (*Rule 5605(b)(2) and IM 5605-2*)
AUDIT COMMITTEE	A company is required to have an audit committee consisting of at least three members, each of whom: • satisfies the requirements of SEC Exchange Act Rule 10A-3; • is independent as defined in the NYSE's independence requirements; and • is financially literate (or will become financially literate within a reasonable time after appointment). In addition, at least one member of the audit committee must have accounting or related financial management expertise. (*Sections 303A.06 and 303A.07*) A company that is listing in connection with its IPO must have at least one independent member by the listing date, at least a majority of independent members within 90 days of the effective date of its registration statement and a fully independent committee within one year of the effective date of its registration statement. (*Section 303A.00*)	A company is required to have an audit committee consisting of at least three members, each of whom: • satisfies the requirements of SEC Exchange Act Rule 10A-3; • is independent as defined in Nasdaq's independence rules; • did not participate in the preparation of the financial statements of the company or any of its current subsidiaries during the past three years; and • can read and understand fundamental financial statements. In addition, one member of the audit committee must have experience that results in his or her financial sophistication. (*Rule 5605(c)*) A company that is listing in connection with its IPO must have at least one independent member at the time of listing, a majority of independent members within 90 days of listing and be fully independent within one year of listing. (*Rule 5615(b)(1)*)

REQUIREMENT	NYSE	NASDAQ
AUDIT COMMITTEE CHARTER	A company must have a written audit committee charter that sets out: • The purposes of the committee, which at a minimum must include: (i) assisting the board's oversight of the company's financial statements, legal and regulatory compliance, the auditors' qualifications and independence, and performance of the company's internal audit department (or third-party providers) and auditors; and (ii) preparing the audit committee report required by Item 407(d)(3)(i) of Regulation S-K. • An annual evaluation of the performance of the audit committee. • The audit committee's duties/responsibilities, which must at a minimum include: » the requirements of Rule 10A-3: – oversight of registered public accounting firms; – complaints relating to accounting, internal accounting controls, or auditing matters; – authority to engage advisors; and – funding. » At least annually, obtaining and reviewing a report by the company's auditors on the auditors' internal quality control procedures, any material issues arising from the auditor's most recent internal quality control review or any investigation by governmental or professional authorities within the preceding five years of audits completed by the auditors and any steps taken to deal with any such issues, and any relationships between the auditors and the company; » reviewing and discussing the company's financial statements and MD&A disclosure with management and the auditors; » reviewing and discussing the company's earnings releases and any financial information or earnings guidance given to financial analysts and credit rating agencies; » reviewing and discussing the company's risk assessment and risk management policies; » holding separate meetings with management, the company's auditors and the company's internal audit department or third-party provider; » reviewing any audit problems or other issues and management's responses with the auditors;	A company must have a written audit committee charter that specifies: • The scope of the committee's responsibilities and how it carries out those responsibilities, including its structure, processes, and membership requirements. • The committee's responsibility for receiving a written statement from the outside auditors regarding all relationships between the auditor and the company, discussing with the auditor any relationships or services that may affect the objectivity and independence of the auditor, and taking or recommending that the board take action to oversee the independence of the auditor. • The committee's purpose of overseeing the accounting and financial reporting processes of the company and the audits of the financial statements. • The committee's specific responsibilities and authority to comply with Rule 10A-3(b)(2) - (5) of the Exchange Act regarding: » oversight of registered public accounting firms; » complaints relating to accounting, internal accounting controls, or auditing matters; » authority to engage advisors; and » funding. *(Rule 5605(c)(1) and (3))* The audit committee must review and reassess the adequacy of the audit committee charter annually. *(Rule 5605(d)(1))*

REQUIREMENT	NYSE	NASDAQ
AUDIT COMMITTEE CHARTER	» setting specific policies for hiring employees or former employees of the company's auditors; and » reporting regularly to the board of directors any issues that arise regarding the company's financial statements, legal and regulatory compliance, the auditors' qualifications and independence, and performance of the company's internal audit department (or third-party providers) and auditors. (*Section 303A.07(b)*) For those companies that do not yet have an internal audit function (because they are relying on the one year transition period), the audit committee charter must also provide that the committee must: • Assist with board oversight of the design and implementation of an internal audit function; • Meet periodically with the company personnel primarily responsible for designing and implementing the internal audit function; Review with the independent auditors the company's plans for implementing the internal audit function, including management's plans for internal audit's budget, staff, and responsibilities; and • Report regularly to the board regarding the design and implementation of internal audit. (*Section 303A.07(b)*)	
COMPENSATION COMMITTEE	A company is required to have a compensation committee comprised entirely of independent directors within the meaning of the NYSE's rules. (*Section 303A.05(a)*) In addition, the board must consider all factors relevant to determining whether a director has a relationship to the company which is material to that director's ability to be independent, including: • the source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the company to such director; and • whether the director is affiliated with the company, a subsidiary of the company or an affiliate of a subsidiary of the company. A company that is listing in connection with its IPO must have at least one independent member by the earlier of the date of the IPO closing or five business days from the listing date, at least a majority of independent members within 90 days of the listing date and a fully independent committee within one year of listing. (*Section 303A.00*)	A company is required to have a compensation committee comprised of at least two directors, each of whom is independent within the meaning of Nasdaq's rules. In addition, the board must consider all factors relevant to determining whether a director has a relationship to the company which is material to that director's ability to be independent, including: • the source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the company to such director; and • whether the director is affiliated with the company, a subsidiary of the company or an affiliate of a subsidiary of the company. (*Rule 5605(d)*) A company that is listing in connection with its IPO must have at least one independent member at the time of listing, a majority of independent members within 90 days of listing and be fully independent within one year of listing. (*Rule 5615(b)(1)*)

REQUIREMENT	NYSE	NASDAQ
COMPENSATION COMMITTEE CHARTER	A company must have a written compensation committee charter that sets out: • The purpose and responsibilities of the committee, which must at a minimum include direct responsibility to: » review and approve corporate goals and objectives for CEO compensation, evaluate the CEO's performance in light of these goals and objectives, and either as a committee or together with the other independent directors of the board, determine and approve CEO compensation; » make recommendations to the board regarding compensation of the other executive officers and incentive compensation and equity-based plans that are subject to board approval; and » prepare the disclosure required by Item 407(e)(5) of Regulation S-K (the compensation committee report). • An annual evaluation of the performance of the compensation committee. *(Section 303A.05(b))* In addition: • The committee may, in its sole discretion, retain or obtain advice of a compensation consultant, independent legal counsel, or other adviser. • The compensation committee must be directly responsible for the appointment, compensation, and oversight of any compensation consultant, independent legal counsel, or other adviser. • The company must provide appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel, or other adviser. • Before selecting or obtaining advice from any compensation advisers (other than in-house counsel), the compensation committee must take into consideration all factors relevant to that person's independence from management, including: » the provision of other services to the company by the person who employs the compensation adviser; » the amount of fees received from the company by the person who employs the compensation adviser, as a percentage of that person's total revenue;	A company must have a written charter for its compensation committee that includes, among other provisions: • The scope of the committee's responsibilities and how it will carry out its responsibilities, including structure, processes and membership requirements. • The committee's responsibility for determining, or recommending to the board of directors for determination, the compensation of the CEO and other executive officers. • That the CEO may not be present during voting or deliberations on his or her compensation. • That the committee in its sole discretion may retain or obtain the advice of a compensation consultant, legal counsel or other adviser. • That the committee is directly responsible for the appointment, compensation and oversight of the work of any compensation consultants, legal counsel, and other advisers retained by the committee. • That the company must provide appropriate funding for payment of reasonable compensation to a compensation consultant, legal counsel or adviser retained by the committee; and • The responsibility and authority of the committee to consider the factors below before selecting or receiving advice from any compensation consultant, legal counsel or adviser to the committee (other than in-house counsel or an adviser that provides only specified information): » the provision of other services to the company by the person who employs the compensation consultant, legal counsel or adviser; » the amount of fees received from the company by the person who employs the compensation consultant, legal counsel or advisor; » the policies and procedures of the person who employs the compensation consultant, legal counsel or adviser that are designed to prevent conflicts of interest; » any business or personal relationship of the compensation consultant, legal counsel or adviser with a member of the compensation committee; » any stock of the company owned by the compensation consultant, legal counsel or adviser; and

<table>
<tr><th>REQUIREMENT</th><th>NYSE</th><th>NASDAQ</th></tr>
<tr><td>COMPENSATION COMMITTEE CHARTER</td><td>» the conflict of interest policies and procedures of the person who employs the compensation adviser;
» any relationship of the compensation adviser with a member of the compensation committee;
» any stock of the company owned by the compensation adviser; and
» any relationship of the compensation adviser with an executive officer of the company.
Compensation advisers do not need to be independent, but the compensation committee must undertake an evaluation of their independence (Section 303A.05(c) and related commentary).</td><td>» any business or personal relationship of the compensation consultant, legal counsel or adviser or the person employing the adviser with an executive officer of the company.
Compensation advisers do not need to be independent, but the compensation committee must undertake an evaluation of their independence.
(Rule 5605(d)(1) and Rule 5605(d)(3))
The compensation committee must review and reassess the adequacy of the compensation committee charter annually. (Rule 5605(d)(1))</td></tr>
<tr><td>NOMINATING/ CORPORATE GOVERNANCE COMMITTEE</td><td>A company must have a nominating/corporate governance committee composed entirely of independent directors. (Section 303A.04(a))
A company listing in connection with its IPO must have at least one independent member by the earlier of the date of the IPO closing or five business days from the listing date, at least a majority of independent members within 90 days of the listing date and a fully independent committee within one year of listing. (Section 303A.00)</td><td>Director nominees must either be selected, or recommended for the board's selection, by either:
• Independent directors constituting a majority of the board's independent directors in a vote in which only independent directors participate; or
• A nominations committee comprised solely of independent directors.
A company that is listing in connection with its IPO must have at least one independent member at the time of listing, a majority of independent members within 90 days of listing and be fully independent within one year of listing. (Rule 5615(b)(1))</td></tr>
</table>

REQUIREMENT	NYSE	NASDAQ
NOMINATING/ CORPORATE GOVERNANCE COMMITTEE CHARTER	A nominating/corporate governance committee must have a written charter that sets out: • The purpose and responsibilities of the committee, which must at a minimum include: » identifying individuals qualified to become board members, consistent with criteria approved by the board, and selecting, or recommending that the board select, the director nominees for the next annual meeting of stockholders; » developing and recommending to the board a set of corporate governance guidelines for the company; and » overseeing the evaluation of the board and management. • An annual evaluation of the performance of the nominating/corporate governance committee. (*Section 303A.04(b)*) The NYSE states that the nominating/corporate governance committee's charter should, but does not require it to, also include: • The qualifications of committee members. • Appointment and removal of committee members. • The structure and operations of the committee, including its authority to delegate any of its responsibilities to any subcommittees. • Reporting to the board of directors. • The sole authority of the committee to engage, determine the fees and other retention terms of, and dismiss a search firm to identify director candidates. (*Section 303A.04(b)*)	A company must adopt a written charter or board resolution, as applicable, addressing the nominations process and such related matters as may be required under the US federal securities laws. (*Rule 5605(e)*)

REQUIREMENT	NYSE	NASDAQ
CODE OF BUSINESS CONDUCT AND ETHICS	A company must adopt and disclose a code of business conduct and ethics for directors, officers and employees. Waivers of the code for directors and executive officers may be made only by the board or a board committee. Any such waivers must be promptly disclosed to shareholders within four business days. Each company may determine its own policies, but all listed companies should address the most important topics, including: conflicts of interest, corporate opportunities, confidentiality, fair dealing, protection and proper use of company assets, compliance with laws, rules and regulations and encouraging the reporting of any illegal or unethical behavior. The code of business conduct and ethics must contain compliance standards and procedures that will facilitate the effective operation of the code, including prompt and consistent action against violations of the code. (*Section 303A.10*)	A company must adopt a code of conduct for directors, officers and employees that addresses the following matters: • honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships; • full, fair, accurate, timely and understandable disclosure in the periodic reports required to be filed by the company; and • compliance with applicable governmental rules and regulations. The code must also provide for an enforcement mechanism. Waivers of the code for directors and executive officers must be approved by the board. Any such waiver must be disclosed to shareholders within four business days. (*Rule 5610*)
CONFLICTS OF INTEREST/ RELATED PARTY TRANSACTIONS	A company must review and evaluate all related party transactions (including transactions between officers, directors, principal shareholders, and the company). The review can be conducted by the audit committee or another comparable body. Following the review, the company should determine whether or not a particular relationship serves the best interests of the company and its shareholders and whether the relationships should be continued or terminated. (*Section 314.00*)	Each company must conduct appropriate review and oversight of all related party transactions for potential conflict of interest situations by the company's audit committee or another independent body of the board of directors. (*Rule 5630*)
CORPORATE GOVERNANCE GUIDELINES	A company must adopt and disclose corporate governance guidelines addressing: • Director qualification standards; • Director responsibilities; • Director access to management and, if applicable, independent advisors; • Director compensation; • Director orientation and continuing education; • Management succession; and • Annual performance evaluation of the board. (*Section 303A.09*)	Not addressed.
INTERNAL AUDIT FUNCTION	A company must have an internal audit function, which may be outsourced to a third-party service provider other than its independent auditor. Companies applying for a listing in connection with an IPO must have an internal audit function in place within one year of the listing date. (*Sections 303A.07(c) and 303A.00*)	Not addressed.

REQUIREMENT	NYSE	NASDAQ
ANNUAL SHAREHOLDER MEETINGS	A company is required to hold an annual shareholders' meeting during each fiscal year. (*Section 302.00*)	A company is required to hold an annual meeting of shareholders no later than one year after the end of its fiscal year. (*Rule 5620(a)*)
QUORUM	A quorum sufficiently high to insure a representative vote is required for any meeting of the holders of common stock. In authorizing a listing, the NYSE gives careful consideration to provisions fixing any proportion less than a majority of the outstanding shares as the quorum for shareholders' meetings. In general, the NYSE has not objected to reasonably lesser quorum requirements in cases where companies have agreed to make general proxy solicitations for future meetings of shareholders. (*Section 310.00(A)*)	A company must provide for a quorum not less than 33 1/3 percent of the outstanding shares of its common voting stock for any meeting of the holders of its common stock. (*Rule 5620(c)*)
SOLICITATION OF PROXIES	Actively operating companies are required to solicit proxies for all meetings of shareholders. (*Section 402.04*)	A company is required to solicit proxies for all shareholder meetings. (*Rule 5620(b)*)
VOTING RIGHTS	The voting rights of existing shareholders of listed common stock cannot be disparately reduced or restricted through any corporate action or issuance, including the adoption of time-phased voting plans, the adoption of capped voting rights plans, the issuance of super voting stock or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer. (*Section 313.00(A)*)	Same. (*Rule 5640*)
SHAREHOLDER APPROVAL OF SECURITIES ISSUANCES	A company must obtain shareholder approval for certain issuances of securities, including: • With limited exceptions, if the common stock has, or will have upon issuance, voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of such stock or of securities convertible into or exercisable for common stock or if the number of shares of common stock to be issued is, or will be upon issuance, equal to or in excess of 20 percent of the number of shares of common stock outstanding before the issuance of the common stock or of securities convertible into or exercisable for common stock. (*Section 312.03(c)*) • Issuances resulting in a change of control (*Section 312.03(d)*); • Equity compensation plans and any material revisions to those plans (*Sections 303A.08 and 312.03(a)*); and • Certain related party transactions greater than 1 percent of the number of shares of common stock or 1 percent of the voting power outstanding before the issuance, unless the company qualifies as an "early stage company" and the transaction involves a sale of stock for cash (*Section 312.03(b)*).	A company is required to obtain shareholder approval of certain issuances of securities, including: • Acquisitions where the issuance equals 20 percent or more of the pre-transaction outstanding shares (or 5 percent or more when a related party has a 5 percent or greater interest in the acquisition target) ((*Rule 5635(a)*); • Issuances resulting in a change of control (*Rule 5635(b)*); • Equity compensation, including establishing or materially amending a plan or other arrangement (*Rule 5635(c) and IM-5365-1*); and • Private placements where the issuance (together with sales by officers, directors or substantial shareholders) equals 20 percent or more of the pre-transaction outstanding shares at a price less than the greater of book value or market value. (*Rule 5635(d) and IM-5635-3*)

REQUIREMENT	NYSE	NASDAQ
NOTIFICATION OF NON-COMPLIANCE	A company's CEO must promptly notify the NYSE in writing after any executive officer of the company becomes aware of any non-compliance with any applicable provision of Section 303A. (*Section 303A.12*(*b*))	A company must promptly notify Nasdaq after an executive officer of the company becomes aware of any non-compliance by the company with any requirements of Rule 5600. (*Rule 5625*)
WRITTEN AFFIRMATION	A company must submit an executed written affirmation each year (within 30 days after annual meeting). It must also submit an interim written affirmation as and when required by the NYSE's interim written affirmation form. (*Section 303A.12*(*c*))	Not addressed.
ANNUAL CERTIFICATION	A company's CEO must certify to the NYSE each year (within 30 days after annual meeting) that he or she is not aware of any violation by the company of NYSE corporate governance listing standards, qualifying the certification to the extent necessary. (*Section 303A.12*(*a*))	A company must certify to Nasdaq that it is complying with certain corporate governance listing standards at the time of listing. After the initial certification, an updated certification form only needs to be filed if the prior certification is no longer accurate due to a change in the company's status.

Appendix 2

NYSE And NASDAQ Quantitative Listing Standards

NYSE

Initial Quantitative Listing Criteria

US domestic companies, other than real estate investment trusts, closed-end management investment companies and business development companies, listing on the NYSE are required to meet **one** of the following IPO financial standards.

FINANCIAL STANDARDS	I: EARNINGS TEST	II: GLOBAL MARKET CAPITALIZATION TEST
ADJUSTED PRE-TAX INCOME	At least $10 million in the aggregate for the last three fiscal years, with at least $2 million in each of the two most recent fiscal years. Amounts in all three fiscal years must be greater than or equal to $0; or If the third fiscal year shows a loss, then at least $12 million in the aggregate for the last three fiscal years with at least $5 million in the most recent fiscal year and at least $2 million in the next most recent fiscal year. EGCs that have filed only two fiscal years of financial statements – at least $10 million in the aggregate for the last two fiscal years, with at least $2 million in each year.	
GLOBAL MARKET CAPITALIZATION		$200 million.

US domestic companies are also required to meet all of the following distribution standards.

DISTRIBUTION STANDARDS	
SHAREHOLDERS	400 round lot
PUBLICLY HELD SHARES	1.1 million
MARKET VALUE OF PUBLICLY HELD SHARES	$40 million
MINIMUM SHARE PRICE	$4.00

CONTINUED QUANTITATIVE LISTING CRITERIA

A US domestic company can remain listed on the NYSE as long as it satisfies the NYSE's continued listing requirements. The NYSE will consider delisting a company if it falls below any of the following criteria:

MINIMUM STOCKHOLDING STANDARD	
NUMBER OF TOTAL STOCKHOLDERS	400
OR:	
NUMBER OF TOTAL STOCKHOLDERS	1,200
AND	and
AVERAGE MONTHLY TRADING VOLUME (FOR THE MOST RECENT 12-MONTH PERIOD)	100,000 shares
OR:	
NUMBER OF PUBLICLY HELD SHARES	600,000
MINIMUM PRICING STANDARD	
AVERAGE CLOSING PRICE (OVER A CONSECUTIVE 30-TRADING-DAY PERIOD)	$1.00
MINIMUM FINANCIAL STANDARD	
AVERAGE GLOBAL MARKET CAPITALIZATION (OVER A CONSECUTIVE 30-TRADING-DAY PERIOD)	$50 million
AND	and
TOTAL STOCKHOLDERS' EQUITY	$50 million

Even if a company meets the thresholds above, the NYSE will take steps to suspend and delist a company if it is determined that the company has an average global market capitalization over a consecutive 30-trading-day period of less than $15 million.

NASDAQ

The Nasdaq Stock market has three tiers, the Nasdaq Global Select Market, the Nasdaq Global Market and the Nasdaq Capital Market. The initial and continued quantitative listing requirements for each tier are summarized below.

NASDAQ GLOBAL SELECT MARKET

Initial Quantitative Listing Criteria

Companies must meet all of the criteria under at least one of the four financial standards below and the applicable liquidity requirements in the table on the next page. These requirements apply to listing the primary class of securities for an operating company. Nasdaq has separate listing requirements for closed-end funds, structured products and secondary classes of securities.

FINANCIAL REQUIREMENTS	STANDARD 1: EARNINGS	STANDARD 2: CAPITALIZATION WITH CASH FLOW	STANDARD 3: CAPITALIZATION WITH REVENUE	STANDARD 4:ASSETS WITH EQUITY
PRE-TAX EARNINGS (INCOME FROM CONTINUING OPERATIONS BEFORE INCOME TAXES)	At least $11 million in the aggregate in the prior three fiscal years **and** no losses in the prior three fiscal years **and** at least $2.2 million in each of the two most recent fiscal years			
CASH FLOWS		At least $27.5 million in the aggregate in the prior three fiscal years **and** no losses in any of the three prior fiscal years		
MARKET CAPITALIZATION		Average of at least $550 million over the prior 12 months	Average of at least $850 million over the prior 12 months	$160 million
REVENUE		At least $110 million in the previous fiscal year	At least $90 million in the previous fiscal year	
TOTAL ASSETS				$80 million
STOCKHOLDERS' EQUITY				$55 million
BID PRICE	$4	$4	$4	$4

LIQUIDITY REQUIREMENTS	
ROUND LOT SHAREHOLDERS OR TOTAL SHAREHOLDERS	450 or 2,200

Continued Quantitative Listing Criteria

Once listed, companies must meet all of the criteria under at least one of the following three standards below to remain listed.

FINANCIAL REQUIREMENTS	EQUITY STANDARD	MARKET VALUE STANDARD	TOTAL ASSETS/TOTAL REVENUE STANDARD
STOCKHOLDERS' EQUITY	$10 million	--	--
MARKET VALUE OF LISTED SECURITIES	--	$50 million	--
TOTAL ASSETS AND TOTAL REVENUE (IN LATEST FISCAL YEAR OR IN TWO OF THE LAST THREE FISCAL YEARS)	--	--	$50 million and $50 million
PUBLICLY HELD SHARES	750,000	1.1 million	1.1 million
MARKET VALUE OF PUBLICLY HELD SHARES	$5 million	$15 million	$15 million
BID PRICE	$1	$1	$1
TOTAL SHAREHOLDERS	400	400	400
MARKET MAKERS	2	4	4

NASDAQ GLOBAL MARKET

Initial Quantitative Listing Criteria

Companies must meet all of the criteria under at least one of the four standards below.

REQUIREMENTS	INCOME STANDARD	EQUITY STANDARD	MARKET VALUE STANDARD*	TOTAL ASSETS/ TOTAL REVENUE STANDARD
INCOME FROM CONTINUING OPERATIONS BEFORE INCOME TAXES (IN LATEST FISCAL YEAR OR IN TWO OF THE LAST THREE FISCAL YEARS)	$1 million			
STOCKHOLDERS' EQUITY	$15 million	$30 million		
MARKET VALUE OF LISTED SECURITIES			$75 million	
TOTAL ASSETS AND TOTAL REVENUE (IN LATEST FISCAL YEAR OR IN TWO OF THE LAST THREE FISCAL YEARS)				$75 million and $75 million

REQUIREMENTS	INCOME STANDARD	EQUITY STANDARD	MARKET VALUE STANDARD*	TOTAL ASSETS/ TOTAL REVENUE STANDARD
PUBLICLY HELD SHARES	1.1 million	1.1 million	1.1 million	1.1 million
MARKET VALUE OF PUBLICLY HELD SHARES	$8 million	$18 million	$20 million	$20 million
BID PRICE	$4	$4	$4	$4
SHAREHOLDERS (ROUND LOT HOLDERS)	400	400	400	400
MARKET MAKERS	3	3	4	4
OPERATING HISTORY		2 years		

*Currently traded companies qualifying solely under the Market Value Standard must meet the $75 million Market Value of Listed Securities and the $4 bid price requirement for 90 consecutive days before applying.

Continued Quantitative Listing Criteria

The continued listing requirements for companies listed on the Nasdaq Global Market are the same as those described above for companies listed on the Nasdaq Global Select Market.

NASDAQ CAPITAL MARKET

Initial Quantitative Listing Criteria

Companies must meet all of the criteria under at least one of the three standards below.

REQUIREMENTS	EQUITY STANDARD	MARKET VALUE OF LISTED SECURITIES STANDARD*	NET INCOME STANDARD
STOCKHOLDERS' EQUITY	$5 million	$4 million	$4 million
MARKET VALUE OF PUBLICLY HELD SHARES	$15 million	$15 million	$5 million
OPERATING HISTORY	2 years		
MARKET VALUE OF LISTED SECURITIES		$50 million	
NET INCOME FROM CONTINUING OPERATIONS (IN THE LATEST FISCAL YEAR OR IN TWO OF THE LAST THREE FISCAL YEARS)			$750,000
PUBLICLY HELD SHARES	1 million	1 million	1 million
SHAREHOLDERS (ROUND LOT SHAREHOLDERS)	300	300	300
MARKET MAKERS	3	3	3
BID PRICE OR CLOSING PRICE**	$4 $3	$4 $3	$4 $3

* Currently traded companies qualifying solely under the Market Value Standard must meet the $50 million Market Value of Listed Securities and the applicable bid price requirement for 90 consecutive days before applying.

** To qualify under the closing price alternative, a company must have (i) average annual revenues of $6 million for three years, or (ii) net tangible assets of $2 million and a 3-year operating history, in addition to satisfying the other financial and liquidity requirements listed above.

Continued Quantitative Listing Criteria

Once listed, companies must meet all of the criteria under at least one of the following three standards below to remain listed.

FINANCIAL REQUIREMENTS	EQUITY STANDARD	MARKET VALUE OF LISTED SECURITIES STANDARD	NET INCOME STANDARD
STOCKHOLDERS' EQUITY	$2.5 million	--	--
MARKET VALUE OF LISTED SECURITIES	--	$35 million	--
NET INCOME FROM CONTINUING OPERATIONS (IN LATEST FISCAL YEAR OR IN TWO OF THE LAST THREE FISCAL YEARS)	--	--	$500,000
PUBLICLY HELD SHARES	500,000	500,000	500,000
MARKET VALUE OF PUBLICLY HELD SHARES	$1 million	$1 million	$1 million
BID PRICE	$1	$1	$1
PUBLIC HOLDERS	300	300	300
MARKET MAKERS	2	2	2

Appendix 3

EGC and Smaller Reporting Company Disclosure Accomodations

SCALED DISCLOSURE REQUIREMENT	EMERGING GROWTH COMPANY	SMALLER REPORTING COMPANY
AUDITED FINANCIAL STATEMENTS REQUIRED	• 2 years in a Securities Act registration statement for an IPO of common equity • 3 years in an IPO of debt securities. • 3 years in an annual report or Exchange Act registration statement, unless the company is also a smaller reporting company.	2 years.
DESCRIPTION OF BUSINESS (S-K ITEM 101)	Standard disclosure requirements apply.	• Development of its business during the most recent three years, including: » Form and year of organization; » Bankruptcy proceedings; » Material reclassification, merger, sale or purchase of assets; and » Description of the business. • Not required: » Seasonality » Working capital practices » Backlog; or » Government contracts. • Names of principal suppliers. • Royalty agreements or labor contacts. • Need for government approval of principal products and services. • Effect of existing or probable governmental regulations.
MARKET PRICE OF AND DIVIDENDS ON THE REGISTRANT'S COMMON EQUITY AND RELATED STOCKHOLDER MATTERS (S-K ITEM 201)	Standard disclosure requirements apply.	Not required to provide the stock performance graph.
SELECTED FINANCIAL DATA (S-K ITEM 301)	Not required to present selected financial data for any period prior to the earliest audited period presented in initial registration statement.	Not required.
SUPPLEMENTARY FINANCIAL DATA (S-K ITEM 301)	Not required until after IPO.	Not required.
MD&A (S-K ITEM 303)	May limit discussion to those years for which audited financial statements are included.	• May limit discussion to those years for which audited financial statements are included. • Not required to comply with contractual obligations table requirements in S-K Item 303(a)(5).

SCALED DISCLOSURE REQUIREMENT	EMERGING GROWTH COMPANY	SMALLER REPORTING COMPANY
QUANTITATIVE AND QUALITATIVE DISCLOSURE ABOUT MARKET RISK (S-K ITEM 305)	Standard disclosure requirements apply.	Not required, but related disclosure may be required in MD&A.
EXTENDED TRANSITION FOR COMPLYING WITH NEW OR REVISED ACCOUNTING STANDARDS	• May elect to defer compliance with new or revised financial accounting standards until a company is not an "issuer"[1] as required to comply with such standards. • Any decision to forego the extended transition period is irrevocable.	Standard disclosure requirements apply.
COMPLIANCE WITH PCAOB REQUIREMENTS APPLICABLE TO THE AUDITS OF PUBLIC COMPANIES	• Need not comply with any PCAOB requirements for auditor rotation or auditor discussion and analysis reports. • Do not need to comply with other PCAOB requirements adopted after April 5, 2012 unless the SEC determines the new requirements are necessary for protection of the public.	Standard requirements apply.
INTERNAL CONTROL OVER FINANCIAL REPORTING (S-K ITEM 308)	• Not required to provide attestation report of the registered public accounting firm. • Not exempt from S-K Item 308(a), but newly public company is not required to comply until it either has filed or has been required to file an annual report for the prior fiscal year.	Non-accelerated filers, a category that includes smaller reporting companies, are not required to provide an attestation report of the registered public accounting firm.
EXECUTIVE COMPENSATION DISCLOSURE (S-K ITEM 402)	• Permitted to follow requirements for smaller reporting companies. • Exempt from principal executive officer pay ratio disclosure.	• 2 years of summary compensation table information, rather than 3. • Limited to principal executive officer, two most highly compensated executive officers and up to two additional individuals no longer serving as executive officers at year end. • Not required: » Compensation discussion and analysis; » Grants of plan-based awards table; » Option exercises and stock vested table; » Change in present value of pension benefits; » CEO pay ratio; » Compensation policies as related to risk management; or » Pension benefits table. • Description of retirement benefit plans.

SCALED DISCLOSURE REQUIREMENT	EMERGING GROWTH COMPANY	SMALLER REPORTING COMPANY
CERTAIN RELATIONSHIPS AND RELATED PARTY TRANSACTIONS (S-K ITEM 404)	Standard disclosure requirements apply.	• Lower threshold to disclose related party transactions in certain cases. • Not required to disclose procedures for review, approval or ratification of related party transactions. • Additional requirements to disclose certain controlling entities. • Required to disclose related party transactions not only since the beginning of the last fiscal year, but also for preceding fiscal year.
CORPORATE GOVERNANCE (S-K ITEM 407)	Standard disclosure requirements apply.	Not required to disclose whether it has an audit committee financial expert until its second annual report following IPO. Exempt from requirements to disclose compensation committee interlocks and insider participation and to provide a compensation committee report.
RISK FACTORS (S-K ITEM 501(C))	Standard disclosure requirements apply.	Not required in periodic reports.
RATIO OF EARNINGS TO FIXED CHARGES (S-K ITEM 503(D))	Required for same number of years for which it provides selected financial data disclosures.	Not required.
SAY ON PAY VOTE UNDER SECTION 14A OF THE EXCHANGE ACT.	Not required.	Required.
SAY ON GOLDEN PARACHUTES UNDER SECTION 14A OF THE EXCHANGE ACT	Not required.	Required.
PAY FOR PERFORMANCE UNDER SECTION 14 OF THE EXCHANGE ACT	Not required.	Final rules have not been adopted by the SEC. The proposed rules require disclosure, with certain modifications from the requirements for large reporting companies.
REQUIREMENT TO REPORT CERTAIN UNREGISTERED SALES OF SECURITIES ON FORM 8-K	Standard disclosure requirements apply.	Do not need to report unless the amount of securities sold exceed 5 percent of the number of shares outstanding, rather than the standard 1 percent threshold.

Appendix 4

Indicative IPO Timetables

PUBLIC SEC REVIEW PROCESS

The following is an indicative IPO timetable. It assumes a public filing of the Form S-1 registration statement as part of the regular public SEC review process and a reasonably fast overall process. This requires a high level of preparedness by the company and no material, or unusually extensive SEC comments, following the formal kick-off meeting. A company will normally have spent significant time and effort getting ready for an IPO before the formal kick-off meeting. See "Getting Ready" above. While the timeline below gives the impression that certain of the items occur in a short period of time, some of those items may actually occur over the course of several weeks.

WEEK	
0	• Kick-off meeting • Discuss timing and marketing mechanics
1	• Begin due diligence review
2	• Begin drafting Form S-1
3	• Continue due diligence • Continue drafting Form S-1 • Draft underwriting agreement • Draft comfort letter • Draft legal opinions • Draft stock exchange application • Select co-managers/syndicate • Obtain board approval
4	• Finalize pre-filing due diligence • Continue drafting underwriting agreement • Continue drafting comfort letter • Continue drafting legal opinions • File Form S-1 with SEC • File with FINRA
5-6	• Prepare roadshow materials
7	• Finalize underwriting agreement • Finalize comfort letter • Finalize legal opinions • Co-manager due diligence • Obtain lock-ups
8	• Receive and prepare to respond to SEC comments
9	• Respond to SEC comments and file Amendment No. 1
10	• File Amendment No.1 with FINRA and respond to FINRA comments, if any • Finalize free writing prospectus, if any • Finalize roadshow materials • Update due diligence, as needed

11	• Receive SEC comments on Amendment No.1 • Finalize valuation, determine price range • Respond to SEC comments and file Amendment No.2 • Print red herrings
12	• Commence roadshow • Sales force meetings
13	• Receive SEC comments on Amendment No.2 • Respond to SEC comments and file Amendment No.3
14	• Roadshow continues
15	• Clear SEC • Clear FINRA • Clear stock exchange • File Forms 3 • SEC declares Form S-1 "effective" • Bring-down due diligence call • Pricing • Sign underwriting agreement • Deliver comfort letter • File 424 prospectus with SEC
16	• Bring-down due diligence call • Close and settle IPO

CONFIDENTIAL SEC REVIEW PROCESS

The expected timeline under the confidential SEC review process is similar to the timeline for the regular (public) SEC review process outlined above. However, under the confidential SEC review process, the (public) roadshow for the IPO cannot commence until 15 days after the registration statement has been formally filed with the SEC. Despite this, if the company qualifies as an EGC, it and any authorized person acting on its behalf may engage in "test-the waters" communications with potential investors that are qualified institutional buyers (as defined in Rule 144A) or institutions that are "accredited investors" (as defined in Rule 501). See also "SEC Registration Process" above.

The following indicative timetable assumes that the company makes its first public filing of the IPO registration statement once:

- The bulk of SEC comments have been resolved through the confidential review process and there is a strong expectation that it will be possible to complete the review process and finalize the registration statement relatively quickly.
- The underwriters advise the company that market conditions are favorable for a successful IPO and that it is advisable to commence the roadshow.

The following indicative timetable also assumes that the company makes its first public filing in week 9 or 10 to permit commencement of a public roadshow, consistent with the indicative timetable for the regular, public SEC review described above. While the timeline below gives the impression that certain of the items occur in a short period of time, some of those items may actually occur over the course of several weeks.

WEEK	
0	• Kick-off meeting • Discuss timing and marketing mechanics
1	• Begin due diligence review
2	• Begin drafting Form S-1
3	• Continue due diligence • Continue drafting Form S-1 • Draft underwriting agreement • Draft comfort letter • Draft legal opinions • Draft stock exchange application • Select co-managers/syndicate • Obtain board approval
4	• Finalize pre-submission due diligence • Continue drafting underwriting agreement • Continue drafting comfort letter • Continue drafting legal opinions • Initial confidential submission of draft Form S-1 with SEC • File with FINRA
5-6	• Prepare roadshow materials
7	• Finalize underwriting agreement • Finalize comfort letter • Finalize legal opinions • Co-manager due diligence • Obtain lock-ups
8	• Receive and prepare to respond to SEC comments

9	• Respond to SEC comments and file Amendment No. 1 (FIRST PUBLIC FILING OF FORM S-1 WITH THE SEC) • Update due diligence, as needed
10	• File Amendment No.1 with FINRA and respond to FINRA comments, if any • Finalize free writing prospectus, if any • Finalize roadshow materials
11	• Receive SEC comments on Amendment No.1 • Finalize valuation, determine price range • Respond to SEC comments and file Amendment No.2 • Print red herrings
12	• Commence roadshow • Sales force meetings
13	• Receive SEC comments on Amendment No.2 • Respond to SEC comments and file Amendment No.3
14	• Roadshow continues
15	• Clear SEC • Clear FINRA • Clear stock exchange • File Forms 3 • SEC declares Form S-1 "effective" • Bring-down due diligence call • Pricing • Sign underwriting agreement • Deliver comfort letter • File 424 prospectus with SEC
16	• Bring-down due diligence call • Close and settle IPO

[1] An "issuer" is defined in Section 2(a) of the Sarbanes-Oxley Act to mean an issuer whose securities are registered under Exchange Act Section 12, that is required to file reports under Securities Act Section 15(d) or that has filed a registration statement that has not yet become effective and that it has not withdrawn.

About Mayer Brown

Mayer Brown is a global legal services organization advising clients across the Americas, Asia and Europe. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

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