



WHAT'S THE DEAL?

Initial Public Offerings: Filing and Post-Filing Period

Here's the deal:

- Filing the registration statement is a crucial part of an initial public offering ("IPO"), and during the filing period the company must engage with the SEC Staff and respond to its comments with responsive amendments.
- After the preliminary prospectus has been distributed, the company should be prepared to complete its road show, marketing the proposed IPO.
- Once the registration statement is finalized, the company, underwriters and the other parties will need to prepare for the pricing and closing of the offering, which will typically take place in the two weeks after the commencement of the road show.
- Throughout the IPO process, a company should carefully consider what information is included in the registration statement in order to avoid material misstatements or omissions of fact in the registration statement, which may give rise to liability under the Securities Act.

What's the Deal?

One of the most important steps in completing an IPO is publicly filing the registration statement, marking the commencement of the post-filing period. Within the post-filing period, there is the pre-effective period, or "waiting period," which refers to the period from the date of filing of the registration statement to its "effective date." Subsequently, the post-effective period is the period from the date the registration statement has been "declared effective" by the Securities and Exchange Commission ("SEC") to the completion of the offering.

Pre-effective Period

During the pre-effective period, a company is permitted to make oral offers and certain written offers, but may not enter into binding agreements to sell the offered security. During the waiting period, marketing will typically begin, subject to the limitations of the Securities Act of 1933, as amended (the "Securities Act"). Once the SEC Staff comments on the registration statement have been resolved, or it is clear that there are no material open issues, the company and its underwriters will undertake a one- to two-week "road show" during which company management will meet with prospective investors. The length of the road show will vary depending on many factors. Underwriters commonly arrange for a number of test-the-waters meetings with potential institutional investors with the company. Often the underwriters will advise the company to delay a public filing of the registration statement until the underwriters have received positive feedback from these test-the-waters meetings. The test-the-waters meetings may limit the need for a long road show. Also, for a smaller offering, the road show may be shorter than for a



larger offering, and may be limited to domestic meetings. Of course, as a result of the COVID-19 pandemic, many road shows are taking place virtually.

After the underwriters have assembled indications of interest for the offered securities, the company and its counsel will request that the SEC declare the registration statement “effective” at a certain date and time, usually after the close of business of the US securities markets on the date scheduled for pricing of the IPO.

The Filing Process and SEC Review

The SEC’s review of the registration statement is an integral part of the IPO process. Once a registration statement is filed, a team of SEC Staff members is assigned to review the filing. The team consists of accountants and lawyers, including examiners and supervisors. The SEC’s objective is to assess the company’s compliance with its registration and disclosure rules. In addition to assessing compliance with applicable requirements, the SEC considers the disclosures through the eyes of an investor in order to determine the type of information that would be considered material to an investor. The SEC’s review is not limited to just the registration statement. The SEC Staff will closely review websites, databases, and magazine and newspaper articles, looking in particular for information that they think should be in the prospectus or that contradicts information included in the prospectus.

The review process is time-consuming. The review depends on the complexity of the company’s business and the nature of the issues raised in the review process. Initial comments on Form S-1 are provided in about 30 days—depending on the SEC’s workload and the complexity of the filing, the receipt of first-round comments may take longer. The SEC Staff generally tries to address response letters and amendments within 10 days, but timing varies considerably. This timing is the same whether the registration statement is filed publicly or submitted confidentially.

Registration Statement

A registration statement contains the prospectus, which is the primary selling document, as well as other required information, written undertakings of the issuer and the signatures of the issuer and at least a majority of the issuer’s directors. It also contains exhibits, including basic corporate documents and material contracts. US companies generally file a Form S-1 registration statement, while most non-Canadian foreign private issuers use a Form F-1 registration statement, although other forms may be available. There are also special forms available to certain Canadian companies. A registration statement is filed electronically with the SEC through its Electronic Data Gathering, Analysis and Retrieval (“EDGAR”) system. Before the company can file via the EDGAR system, it must create an account with the SEC by obtaining a Central Index Key (“CIK”) number and associated security codes. The CIK number is a unique number assigned to individuals and companies who file reports with the SEC. Once the company files the registration statement via the EDGAR system, it becomes publicly available.

In addition to a registration statement, a company is required to file certain exhibits with the registration statement, including its certificate of incorporation, bylaws, material agreements (including the underwriting agreement) and consents of experts. Since information filed via the EDGAR system with the SEC will be publicly available, if the company wants to keep any information confidential, it must file redacted versions of the exhibits with the SEC. Redactions should be based on information that may



involve trade secrets or commercial or financial information that could harm the company competitively if disclosed to the public.

Financial Information Included in the Registration Statement

As part of filing the registration statement, the SEC rules require the following information in the prospectus of an issuer:

- Audited balance sheets as of the end of the issuer's last two fiscal years;
- Audited statements of operations, statements of cash flows, statements of comprehensive income and statements of changes in shareholders' equity of the company's last three fiscal years, or two years in the case of an emerging growth company ("EGC"); and
- Depending on the length of time from the end of the last fiscal year and the date of filing, an unaudited balance sheet for the most recent fiscal interim period and statements of operations, statements of cash flows and statements of changes in shareholders' equity for the interim period and for the corresponding period of the prior fiscal year.

These statements must be prepared in accordance with US GAAP or IFRS in accordance with the IASB, and they will be the source of information for "Management's Discussion and Analysis of Financial Condition and Results of Operations" ("MD&A"). In addition, a prospectus may contain audited and unaudited financial statements relating to acquisition of assets and companies as well as pro forma financial information giving effect to the acquisition.

The SEC will review and comment on the financial statements and the MD&A. The SEC's areas of particular concern are:

- Revenue recognition;
- Business combinations;
- Segment reporting;
- Financial instruments;
- Impairments of all kinds;
- Deferred tax valuation allowances; and
- Compliance with debt covenants, fair value and loan losses.

Companies and their auditors should also review their accounting policies and potential areas of concern before filing the registration statement. The SEC encourages discussions with its accounting staff of accounting concerns early in the preparation process, thus avoiding potential problems once the registration statement is filed and publicly available.

Prospectus

The prospectus describes the offering terms, the anticipated use of proceeds, the company, its industry, business, management and ownership, and its results of operations and financial condition. Although it is principally a disclosure document, the prospectus is also crucial to the selling process.



The principal sections of the prospectus are identified below ("smaller reporting companies," as defined by the SEC), EGCs and foreign private issuers have less onerous disclosure obligations, particularly with respect to executive compensation:

- **Summary.** The summary is a short overview of the more important aspects of the offering and the company. The summary will cover the type of security offered, a brief description of the company, the amount of securities offered, the trading market for the securities and the use of the proceeds.
- **Financial Statements.** The prospectus will include audited financial statements of the company, including balance sheets for each of the last two completed fiscal years and income statements for each of the last three completed fiscal years. The prospectus must also include unaudited financial statements for any interim periods subsequent to the last completed fiscal year.
- **MD&A.** The MD&A section describes the company's liquidity, capital resources and results of operation. It also includes a discussion of known trends and uncertainties that may have a material impact on the company's operating performance, liquidity or capital resources. The SEC has identified three principal objectives of the MD&A section: (i) to provide a narrative explanation of the company's financial statements enabling investors to view the company through management's eyes; (ii) to enhance the overall financial disclosure and provide context within which the company's financial information should be analyzed; and (iii) to provide information about the quality of, and potential variability of, the company's earnings and cash flow, so that investors can assess the company's future performance.
- **Risk Factors.** The risk factors section usually includes risks pertaining to the offering; risks pertaining to the issuer; and risks pertaining to the issuer's industry. The SEC requires that the risk factors section include only risks specific to the company.
- **Business.** The business section describes the company's business, including its products and services, key suppliers, customers, marketing arrangements and intellectual property.
- **Management.** Officers and directors must be identified in the management section and brief biographical descriptions must be included.
- **Executive Compensation.** The company must disclose the executive compensation of its five highest paid executive officers, which must include the CEO and CFO. Most of this disclosure is presented in tabular format. The executive compensation section must also include directors' compensation and employee benefit plans. The SEC requires a compensation disclosure and analysis in which the company discloses the company's executive and board compensation matters. An EGC will have reduced compensation disclosure requirements.
- **Related Party Transactions.** This section must include any material business transaction between the issuer and its executive officers, directors, significant shareholders and other key personnel.
- **Security Ownership.** This section includes a tabular presentation of the company's officers' and directors' beneficial share ownership as well as the beneficial ownership of each holder of more than 5% of the company's outstanding stock.



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- **Plan of Distribution.** The plan of distribution section describes the underwriting arrangements, including the underwriters' plans for distributing the shares in the offering.
- **Counsel and Experts.** These two sections identify counsel to the company and the underwriters and the accountants who have audited the company's financial statements. "Experts" will also identify any other entity that has "expertized" any information in the prospectus.

A prospectus should not include "puffery" or overly optimistic or unsupported statements about the company's future performance. Rather, it should contain a balanced discussion of the company's business, along with a detailed discussion of risks and operating and financial trends that may affect its results of operations and prospects.

Specific Disclosures Required for an EGC

The JOBS Act has created an "on-ramp" of scaled disclosure requirements for EGCs. Generally, an EGC will have the flexibility to choose the scaled disclosures with which it can comply, with the exception of complying with new or revised accounting standards on time.

- **Financial Statements and MD&A.** An EGC is required to present only two years of audited financial statements in its IPO registration statement. An EGC may also limit its MD&A to cover only those audited periods presented in the audited financial statements. The SEC will also not object if an EGC presenting two years of audited financial statements limits the selected financial data included in its IPO registration statement to only two years. An EGC should consider, together with its advisors, whether it makes strategic sense to include additional years of financial information.
- **Executive Compensation.** An EGC may comply with the executive compensation disclosures applicable to a "smaller reporting company," which means that an EGC need provide only a Summary Compensation Table (with three rather than five named executive officers and limited to two fiscal years of information), an Outstanding Equity Awards Table, and a Director Compensation Table, along with some narrative disclosures to augment those tables. EGCs are not required to provide a Compensation Discussion and Analysis, or disclosures about payments upon termination of employment or change in control.
- **Compliance with New or Revised Accounting Standards.** An EGC may elect an extended transition to compliance with new or revised accounting standards. However, if an EGC chooses to comply with such standards to the same extent that a non-EGC is required to comply with such standards, the EGC must (1) make such choice at the time it is first required to file a registration statement, periodic report or other report under the Exchange Act and notify the SEC of such choice; (2) comply with all such standards to the same extent that a non-EGC is required to comply with such standards; and (3) continue to comply with such standards to the same extent that a non-EGC is required to comply with such standards for as long as the company remains an EGC.



- **EGC Status.** The SEC Staff has explained that an EGC must identify itself as an EGC on the cover page of its prospectus. In addition, SEC Staff comments on EGC registration statements have requested the following disclosures:
 - (i) a description of how and when a company may lose EGC status;
 - (ii) a brief description of the various exemptions available to an EGC, such as exemptions from Sarbanes-Oxley Section 404(b) and the Say-on-Pay/Say-on-Golden Parachute provisions; and
 - (iii) the EGC's election for extended transition to new or revised accounting standards.

The SEC Staff requests that if the EGC has elected to opt out of the extended transition period for new or revised accounting standards, then it must include a statement that the election is irrevocable. If the EGC has elected to use the extended transition period, then risk factor disclosure must explain that this election allows an EGC to delay the adoption of new or revised accounting standards that have different effective dates for public and private companies until those standards apply to private companies. The SEC Staff requests the EGC state in the risk factors that, as a result of this election, the EGC's financial statements may not be comparable to issuers that comply with public issuer effective dates. A similar statement is also requested in the EGC's critical accounting policy disclosures in MD&A.

Post-effective Period

The post-effective period is the period from the date the registration statement has been "declared effective" by the SEC to the completion of the offering. In the majority of IPOs, after the road show, representatives of a company and its underwriters will meet to price the offering. The IPO price will be determined based on the demand for the stock, current market conditions and the price range stated in the preliminary prospectus. If the number of shares will be significantly increased or decreased or the offering will not be priced within the range, a free writing prospectus is often issued at this point to make sure that investors have the necessary information before deciding to purchase the shares. Additional information will also be determined at this time, including the underwriters' fees and commissions.

After the offering is priced, the issuer and its managing underwriters execute the underwriting agreement, and the auditor delivers the executed comfort letter. The company will proceed to file a final prospectus with the SEC that contains the final offering information. On the second or third business day following the pricing transaction, the closing occurs, the shares are issued, and the issuer receives the proceeds. The closing completes the offering process. Then, for the next 25 days, aftermarket sales of shares by dealers must be accompanied by a final prospectus or a notice with respect to its availability. If during this period there is a material change that would make the prospectus misleading, the company must file an amended prospectus.

Pricing

The IPO price will be determined based on the demand for the stock, current market conditions and the price range stated in the preliminary prospectus. If the number of shares will be significantly increased or decreased, or the offering will not be priced within the range, a free writing prospectus is often issued at



this point to make sure that investors have the necessary information before deciding to purchase the shares.

Most “firm commitment” equity public offerings include an “over-allotment option” or “green shoe” (the latter name references a case about these kinds of options). This option enables the underwriters to purchase additional shares (usually 15% of the “firm” shares purchased by the underwriters) from the company if there is substantial demand for the offered shares. The option is typically exercisable for 30 days after the pricing of the IPO and the underwriters may purchase the additional shares at the same price per share as those sold in the IPO.

Closing

The closing of the offering usually takes place three or four business days (T+3 or T+4) after the pricing of the IPO, typically T+4 because offerings are usually priced after the close of the market. Immediately prior to the closing, the underwriters will also hold a bring-down diligence call with the company to confirm that no material changes in the company’s business or finances have occurred since the date of pricing and that the statements in the prospectus remain accurate. At the closing, the company will deliver the documents required by the underwriting agreement, including a bring-down comfort letter, certificates of officers and one or more opinions of counsel. Upon satisfaction of the closing conditions, the underwriters will wire transfer the net proceeds of the offerings to the company and upon receipt, the company will instruct its transfer agent to release the shares to the underwriters.

Liability Concerns

One final important consideration, that a company should consider during an IPO, is the civil and criminal liability that may arise in connection with the registration statement when it becomes effective or in a preliminary prospectus upon which a contract for sale of shares of a company’s stock is based. Liability can range from material misstatements or omissions in the registration statement or the failure to comply with registration requirements or to supply or make available a final prospectus to investors.

Purchasers of a company’s stock in a registered public offering have a right of action under Section 11 of the Securities Act for an untrue statement of material fact or an omission to state a material fact in a registration statement. Section 11 imposes liability on the issuer, each person who signs the registration statement, each director, the company’s accountants (and certain other experts) and the underwriters. Purchasers also have a right of action under Section 12(a)(2) for false or misleading statements that are material in a prospectus and in oral statements. The SEC may bring actions under Section 17 of the Securities Act and Section 10(b) and Rule 10b-5 under the Exchange Act.

If a company’s registration statement contains an untrue statement of a material fact or omits to state a material fact required to be stated in it (or that is necessary to make the statements not misleading), any purchaser of the company’s stock can sue the issuer and the following persons:

- Anyone who signed the registration statement (the registration statement is signed by the company’s chief executive, principal financial and accounting officers, and at least a majority of the company’s directors);



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- Anyone who was a director of the issuer (or anyone who consented to be named as a director) at the time the registration statement was filed;
- Every accountant, engineer, appraiser or other expert who consented to be named as having prepared or certified the accuracy of any part of the registration statement, or any report or valuation used in the registration statement (but liability is limited to that information); and every underwriter.

A purchaser of a security can also sue any person who:

- Offered or sold the company's stock to that purchaser in violation of Section 5 of the Securities Act;
- Offered or sold the company's stock to that purchaser by means of a prospectus or oral communication that included an untrue statement of a material fact or omitted to state a material fact necessary to make a statement, in light of the circumstances under which it was made, not misleading; and
- Every person who controls (through share ownership, agreement or otherwise) any other person that is liable under Section 11 or 12 of the Securities Act is jointly and severally liable with that other person, unless the controlling person had no knowledge of, or reasonable grounds to believe in, the existence of the facts that resulted in the alleged liability.

Under the Securities Act, the company is absolutely liable for material misstatements or omissions in the registration statement, regardless of good faith or the exercise of due diligence. Directors and officers of the company, however, may have certain due diligence defenses, as do underwriters, the company's accountants and other experts and controlling persons. No person will serve as a director or officer without indemnification from the company and appropriate directors' and officers' insurance, and a company usually represents that it has such insurance in the underwriting agreement.

Since its early history, the SEC has consistently stated that indemnification of directors, officers and controlling persons for Securities Act liabilities is against public policy and is therefore unenforceable. Every registration statement is required to set forth the SEC's position. Nonetheless, companies have always provided such indemnification and courts have upheld such contract rights.



Checklist of Key Questions

- Will the company and its underwriters arrange test-the-waters meetings with institutional investors in advance of the IPO's marketing?
- Has the company carefully considered the disclosure requirements applicable to it?
- Has the company considered the material contracts that will need to be publicly filed as exhibits to the IPO registration statement?
- Has the company reviewed available comment letters/responses from prior reviews from the SEC of peer companies in their preparation of the registration statement?
- In light of the projected timeline, has the company budgeted sufficient time for the filing, marketing, pricing and closing?
- Has the company taken the necessary precautions to mitigate liability concerns under the Securities Act and the Exchange Act?