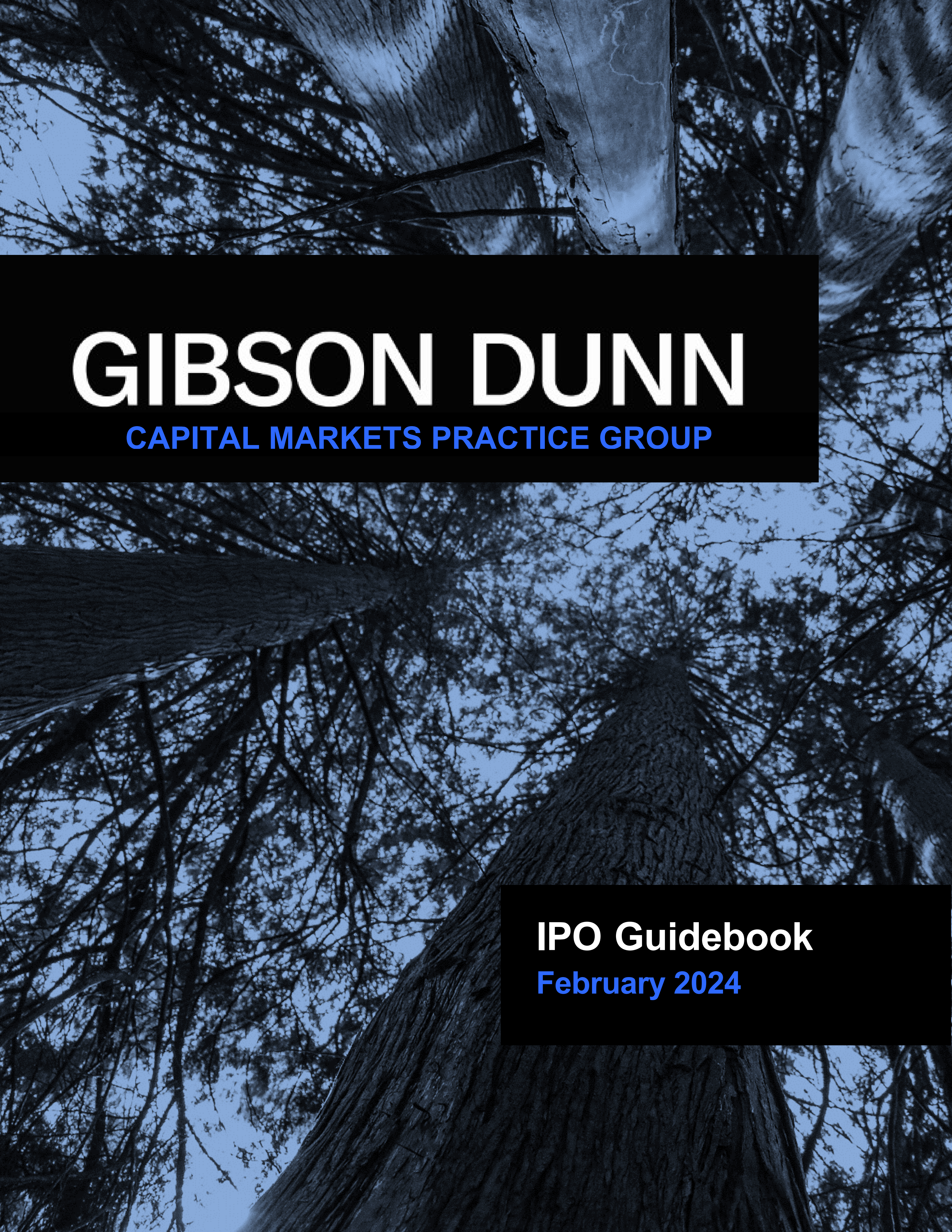

GIBSON DUNN

CAPITAL MARKETS PRACTICE GROUP

IPO Guidebook

February 2024

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Initial Public Offering Preparation

Key Considerations

- Position the business to be well received by public investors
  - Investors are looking for companies that have the potential to perform positively over the long term
- Show a “clean” company with a positive marketing story
  - Ensure financial statements accurately reflect business
  - Establish reliable financial reporting systems
  - Ensure key members of management and finance teams are in place
  - Establish appropriate board composition and corporate governance
  - Focus on predictability of earnings and meeting forecasts
- Select an IPO structure
  - Simplify capital structure if preexisting equity structure not conducive to an IPO
  - Analyze tax implications of being a public company
  - Align control considerations with pre-IPO investor exit strategies
- Choose an Exchange
  - For U.S. IPOs, the most common exchanges are the NYSE and Nasdaq
- Governance Considerations
  - Select the appropriate governance structure to support execution of long-term strategy

Going Public: Advantages

- Potential to raise significant capital
  - In addition to capital raised in IPO, provides access to the public capital markets for future financings, including for debt and hybrid securities
  - Once an issuer becomes eligible to use shelf registration, it can access the public markets very rapidly and with less cost
- Greater liquidity for investors
  - Provides opportunity for pre-IPO investors to register shares for sale that otherwise would be subject to holding periods and/or volume restrictions
  - Creates a liquid market into which shares can be sold
  - Easy determination of market value
- Creation of a liquid equity currency
  - Enables a company to use its publicly traded securities for various purposes, such as for acquisitions, strategic transactions and employees compensation
- Prestige
  - Greater visibility and enhanced corporate image as a public company
  - Helps facilitate dealings with customers, suppliers, financing sources, etc.
  - Attracts top level management and other employees
- Ability to benchmark operations against other public companies within the same industry
- Retire debt/strengthen balance sheet

Going Public: Potential Disadvantages

- Heavy ongoing legal compliance obligations
  - Ongoing public reporting and substantive governance obligations under SEC and securities exchange rules, particularly in light of recent rulemaking
  - Greater exposure to securities litigation
- Expenses of going public are high
  - Increases cost of internal administrative function
- Disclosure obligations
  - Regular filings can sometimes require public disclosure of corporate objectives/strategic transactions earlier than the company desires
  - Financial statements become readily available to competitors, customers and suppliers
- Loss of control by pre-IPO stockholders
  - Dilution of current stockholder interest
  - Increased risk of takeover
  - Management may have different incentives in a public company versus a privately held company
- Distraction of management from operations during pendency of IPO
  - Typical IPO can take four to six months (or longer) to complete
- Effect on management decisions
  - Management may focus on the stock price of the company as a proxy for performance
  - Risk of focus shifting to short-term stock price performance versus building long-term value

Alternatives to IPOs

Sale of the Company

- Sales of the company are the traditional alternative to IPOs
  - Sales are generally made to either a strategic buyer or a financial sponsor
- A sale can be a great opportunity for sponsors that want to make a complete exit or for companies that are not ready to be a public company
- Advantages:
  - Often provides a complete exit for company's existing investors
  - Generally faster transaction timeline than an IPO
  - Sponsors typically have more control over sale process and valuation
  - No or minimal (if buyer is public company) public reporting obligations
- Disadvantages:
  - No liquid market for shares, so valuation work by company or its advisors is key
  - Management team may change
  - Delay in company's existing investors receiving any proceeds placed in escrow
  - Risk in bidding process that competitors only enter bids to determine the company's value or gain access to confidential information

SPACs

- Special purpose acquisition companies (“SPACs”) are public companies that complete a capital raise through an IPO with the goal of using IPO proceeds to later complete a business combination
- SPACs generally have 18-24 months to complete a business combination to avoid liquidation of the SPAC
- **Advantages**
  - Offers potentially faster timeline to public markets for SPAC target than traditional IPO (assuming some level of public company readiness)
    - Note, however, that in January 2024 the SEC adopted rules to “level the playing field” by more closely aligning SPAC offerings with the traditional IPO process
  - Can facilitate going public during periods of market instability
  - SPAC sponsor may offer operational expertise and investor access
  - Post-combination entity has access to public markets
  - Ability to structure transaction in a manner not available in IPO or traditional sale structure, including cash-out of existing owners and earn outs
- **Disadvantages**
  - Business combination transaction subject to SEC review and SPAC shareholder approval
  - Enhanced scrutiny by the SEC on subsequent business combinations between SPACs and target companies
  - No PSLRA safe harbor protections for forward-looking statements
  - Recently adopted SEC rules impose Section 11 liability on target companies and their officers and directors as co-registrants
  - Recently adopted SEC rules extend the current SEC disclosure guidance on projections, dilution, sponsors and conflicts to SPACs and the target company at the moment of the business combination

- Public company readiness important for SPAC targets, particularly because they may have a short runway to being a public company
- Target company's management will need to partner with existing SPAC management and sponsors
- Due to SPAC's former status as a shell company, post-combination entity subject to SEC requirements that may impact future capital raising and monetization of original investor stakes

Direct Listings

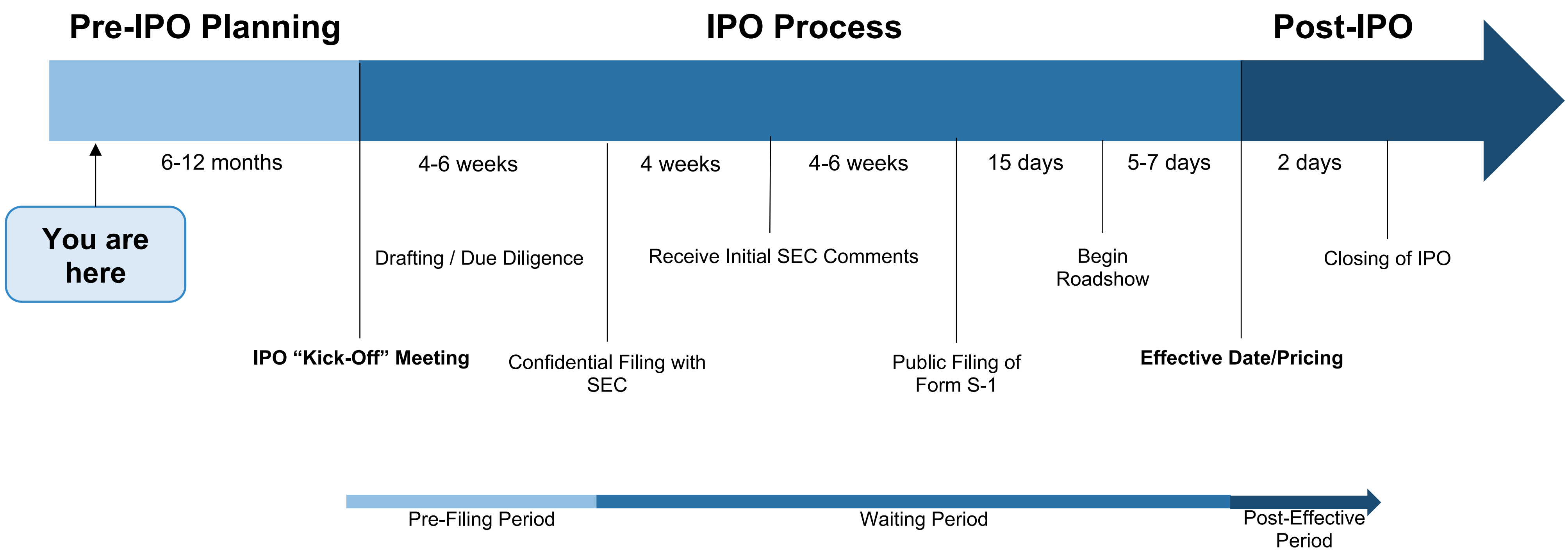
- Similar SEC registration and listing process as traditional IPO
- Market-based price discovery designed to avoid company and existing shareholders leaving money on the table as compared to the traditional IPO “pop”
- Offers equal access for all investors, not only large institutions and others investors that traditionally have access to IPO shares
- Limited execution history — generally high profile companies thus far — still likely most available to well-known companies
- Rules are evolving
  - Recent rule changes by both the NYSE and Nasdaq regarding the issuer’s stock price at the time of listing are meant to enhance the prospects for primary direct listings

Timing Overview

Going Public: Three Main Phases

- **Pre-Filing Period**
  - Begins when the issuer seriously contemplates a public offering—usually when bankers are mandated in preparation for the organizational meeting—and continues until the first public filing of a registration statement with the SEC. (Confidential submissions under the JOBS Act are not considered public filings)
  - Offers to sell, and solicitations of offers to buy, are usually prohibited ("gun jumping")
  - Companies have the ability to "test the waters" by conducting meetings with qualified institutional buyers ("QIBs") and accredited investors prior to, or following, the filing of a registration statement
  - Ordinary course press releases regarding factual business/financial developments, advertisements and stockholder communications are generally permitted
- **Waiting Period**
  - Begins with the first public filing of a registration statement with the SEC and continues while the company addresses SEC comments prior to effectiveness
  - Issuer and underwriters may solicit offers to buy with a preliminary prospectus that includes a price range, but no sales can occur
  - Written materials, other than the preliminary prospectus, must be preceded or accompanied by a statutory prospectus that includes a price range and must be filed as free writing prospectuses
  - "Tombstone" ads and certain limited press releases/statements are allowed; media interviews are permitted, but generally must be filed as media free writing prospectuses
- **Post-Effective Period**
  - Extends from effectiveness of the registration statement to completion of distribution of the securities
  - Offers and sales of securities are permitted; a full and final prospectus must precede or accompany delivery of the security or confirmation of the sale

Going Public: Offering Timeline*



* Timing above is for illustrative purposes only. Market, regulatory and other factors will impact actual timing.

Liability in Public Offerings

Specific Provisions of the Law

Sections 11 and 12 of Securities Act of 1933 (as amended, "Securities Act")

- Sections 11 and 12 are similar to Rule 10b-5, but only protect buyers in the offering
- These are strict liability statutes – they require no showing of "scienter" (an intent to deceive, manipulate or defraud) by the issuer or other parties involved in the offering on behalf of the issuer, nor any showing that the purchaser relied on the misstatement
- Remedies are rescission and damages based on loss of market value

Rule 10b-5 under Securities Exchange 1934 Act ("Exchange Act")

- Rule 10b-5 is the fundamental disclosure rule at the core of the U.S. securities laws that makes it illegal to:
    - employ any device, scheme or artifice to defraud;
    - make any untrue statement of a material fact, or fail to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
    - 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 of any security
- In private actions, remedies consist of rescission and damages based on loss of market value
- In civil or administrative actions, the SEC may obtain money penalties, disgorgement and injunctions, cease-and-desist orders or consent decrees obligating the defendant to undertake specified changes in conduct
- In criminal prosecutions, the DOJ may obtain penalties that include imprisonment, fines and disgorgement

Sarbanes-Oxley Act of 2002

- CEO & CFO must "certify" the contents of each Exchange Act periodic report and the accompanying financial statements; separate certifications are required under Sections 302 and 906 of Sarbanes-Oxley

- Criminal penalties for certifying misleading fraudulent financial reports of up to $5,000,000 and 20 years imprisonment

- Accounting restatements due to material noncompliance with securities laws as a result of misconduct will require CEO and CFO to reimburse company for all bonus, incentive-based and equity-based compensation received from the issuer, and all profits on sales of securities, during the 12-month period after non-complying disclosure or filing

Considerations for Emerging Growth Companies

Overview

- "Emerging growth company" or "EGC" is a category of issuer that is exempt from compliance with, or subject to reduced burdens with respect to, certain SEC rules and other regulatory requirements under the U.S. securities laws
- An EGC is a company with less than $1.235 billion in annual gross revenues in its most recently completed year that has not sold common equity securities under a registration statement
- EGC status provides issuers with benefits both during the IPO "on-ramp" and for up to its first five fiscal years after completing an IPO
- Planning required for transition away from EGC status

Emerging Growth Company Benefits

- **Research Reports and Public Appearances by Research Analysts**
  - Permits publication and distribution by brokers or dealers of research reports about an EGC that is the subject of a public offering, even if the brokers or dealers are participating in the offering
  - Investor protection such as Section 501 of Sarbanes-Oxley regarding potential conflicts of interest remain in effect
  - Pre-offering research has not been widely adopted by investment banks due to liability concerns and the terms of a legal settlement that affects the largest banks; post-offering blackout periods for research have been shortened but not eliminated for the same reasons
  - Most large banks still impose a 25-day blackout period (following the IPO pricing) on the syndicate in IPOs in which they are bookrunners
- **Less Required Financial Information**
  - Two years of audited financial statements (and unaudited interim financials)

- **Accounting Standards**
  - May elect not to comply with new financial accounting standards until such standards apply to private non-reporting companies (one-time election is binding)
  - EGCs may choose to comply fully with non-EGC accounting standards, but may not selectively comply
- **Audit Firm Rotation and Potential Other Future PCAOB Rules**
  - Exempt from any PCAOB mandatory audit firm rotation requirements and PCAOB rules relating to supplements to the auditor's report in which the auditor would be required to provide additional information. PCAOB has not yet adopted any rules that are affected by this provision
- **EGCs May Comply with Smaller Reporting Company Disclosure Requirements**
  - Reduced executive compensation disclosure requirements, including no narrative compensation discussion and analysis (CD&A) section
  - Disclosure for only CEO and two other most highly paid executive officers
  - Only two required tables (summary compensation table and outstanding equity awards table)
  - No quantification of termination/change-of-control benefits
  - Internal pay comparison and pay versus performance disclosure not required
  - Widely adopted by EGCs, with some variation in amount of voluntary information included
- **Say-on-Pay/Say-on-Frequency Votes**
  - Exempt from requirement to hold nonbinding advisory stockholder votes on executive compensation arrangements and related stockholder votes on the frequency of such "say-on-pay" votes (i.e., every one, two or three years)
  - Widely adopted
- **Auditor Attestation on Internal Controls**
  - Exempt from auditor attestation requirements relating to internal controls as long as the issuer is an EGC

WHEN DOES A COMPANY STOP BEING AN EMERGING GROWTH COMPANY?

Upon the earliest of:

- Last day of first fiscal year in which total annual gross revenues are > $1.235 billion
  - If EGC exceeds this limit prior to completion of IPO process, it may retain benefits through IPO completion or up to a year, if earlier

- Last day of fiscal year that is five years after date of first public equity sale

- Date on which the company has issued more than $1 billion in nonconvertible debt in the preceding three-year period

- Last day of fiscal year in which the company becomes a large accelerated filer, which requires:
  - Equity held by non-affiliates of $700 million or more (measured as of the last business day of the issuer’s most recently completed second fiscal quarter)
  - Subject to reporting requirements for 12 calendar months
  - Filed at least one annual report
  - Not a smaller reporting company

Pre-IPO Housekeeping and Preparation Considerations

Overview

- The IPO process requires significant planning and preparation
  - Extensive company effort to draft the registration statement, prepare financial statements, collect documentary diligence materials and implement governance and other changes required for public company status
  - Careful coordination among management, investment bankers, auditors, legal counsel and others is important throughout the process
- Anticipating and addressing issues prior to “kick-off” can improve execution
  - Advanced planning can help speed the process, allowing greater optionality with respect to market windows and minimizing the distraction of management and disruption of the underlying business
  - Form S-1 drafting and diligence prior to SEC filing/submission can take one to two months; SEC review process can take two to three months (or, in the event of significant issues, longer)
- Issues to consider and address in advance include accounting, financial statements, internal controls, communications strategy and corporate housekeeping
  - Burden on finance and accounting staff is especially intense and time-consuming
  - Time required to prepare financial statements can result in delays and lengthen timeline

Accounting/Finance Issues

- IPO process and public company reporting obligations will result in intense and ongoing scrutiny of financial statements
  - Accounting issues that arise during the IPO process can add considerable time to preparation of the financial statements and SEC review, and can also result in unfavorable accounting treatment of financial results
- Meet with outside auditors and attorneys to review and plan to address issues including:
  - Auditors' public company experience and independence; access to auditors' specialized **national SEC practice group**
  - Expectations regarding use of **non-GAAP financial measures** after the IPO; SEC rules limit use of non-GAAP financial measures; underwriters will provide guidance with respect to how industry non-GAAP financial metrics are derived
  - **Critical accounting policies** and use of estimates; benchmark comparable public companies and review industry-specific challenges – revenue recognition remains an area of focus for the SEC
  - Effect of **acquisition plans or history**, including accounting treatment for any predecessors, acquired companies or probable acquisitions; analyze need for audited financial statements of the target and pro forma financial statements
  - Appropriate **segment reporting**; SEC frequently examines determination of segments and may seek to require disclosure more detailed than company is comfortable making public
- Determine **which financial statements are required**
  - Comply with "age of financial statements" requirements under SEC rules
  - Refer to Gibson Dunn's Financial Statements Staleness Calendar (Link)
  - May omit financials that will not be included in the registration statement at the time of the launch of the offering for EGCs (or at the time of public filing for non-EGCs), although older financials may be desired for testing the waters or other purposes such as showing financial trends
- Plan for **accelerated schedule** for preparation of financial statements
  - Companies should evaluate adequacy of finance and accounting staff well in advance

of the IPO

- Companies will need to have required annual and quarterly financial statements available in a timely manner (with audits/reviews completed by auditors)
- Underwriters will generally require preparation and review of historical quarterly financial information (six to eight quarters) for marketing purposes
- The timeline for quarterly close and availability of financial information will accelerate as the launch of the IPO nears, as investors will demand information regarding recently completed fiscal periods before investing in the IPO. Disclosure of estimates of quarterly results (referred to as “flash” numbers) will be necessary if complete financial information regarding a recently completed period is not available
- Companies will need to be prepared for financial forecasting/guidance process
- Evaluate whether financial/accounting and other information reporting systems should be updated/outsourced in advance of IPO

Internal Controls

- Section 404 of the Sarbanes-Oxley Act requires executives and auditors to attest to the adequacy of internal controls
  - Under the JOBS Act, a company is exempt from the auditor attestation requirement while it is an EGC
- For non-EGCs, attestation is required for first complete fiscal year following IPO; preparation should start well in advance of the first filing of registration statement
  - Early compliance is important to ensure accuracy of IPO offering document, as implementation of internal control procedures may reveal material information and affect reporting compliance post-IPO
  - Implementation costs are considerable and should be reflected in finance and legal department budget forecasts
- Internal controls diligence during IPO process includes review of:
  - Tone at the top
  - Risk assessment procedures
  - Policies and procedures relating to authorization, approval and access
  - Information gathering, reporting and retention systems
  - Ongoing monitoring and evaluation processes
- A “material weakness” in internal controls and plans for its remediation will be disclosed in registration statement or future SEC reports and may harm the company’s reputation among investors

Compensation

- Review past equity grants and compensation programs for future awards
  - Compliance with securities laws and any reporting obligations for prior grants; due authorization and proper documentation of grants
  - Consider suspending or modifying any grants that include IPO-vesting trigger
  - Obtain private company stockholder approval for equity incentive plans and future pool
  - Consider timing of potential future grants in light of recently adopted SEC accounting guidance and insider trading rules
- SEC rules require detailed disclosure and analysis of compensation program
  - For non-EGCs, compensation of CEO, CFO and three other most highly compensated officers will be publicly disclosed, including itemization of perks in excess of $10,000 as well as CEO pay ratio and pay-for-performance disclosures
- As previously noted, EGCs may comply with smaller reporting company disclosure requirements:
  - Reduced executive compensation disclosure requirements, including no narrative compensation discussion and analysis (CD&A) section
  - Disclosure for only CEO and two other most highly compensated executive officers
  - Only two required tables (summary compensation table and outstanding equity awards table)
  - No quantification of termination/change-of-control benefits
  - CEO pay ratio and pay-for-performance disclosure not required
  - Widely adopted by EGCs, with some variation in amount of voluntary information included

Cheap Stock

- "Cheap stock" is an issue that companies may encounter during the SEC review process
- The issuance of stock options or other share-based grants is generally required to be treated as compensation expense
- The SEC scrutinizes stock and option grants in the period leading up to an IPO and typically asks companies to justify the fair market value determination used
- "Cheap stock" issues arise from recent option grants or other share-based grants at valuations below the expected IPO valuation
  - Where options or other share-based grants are subsequently viewed to have been issued below the fair market value at the time of issuance, the corresponding compensation expense reflected in the financial statements may be understated. This understatement can result in a need to revise upward the amount of recorded compensation expense and correspondingly reduce recorded net income and EPS in the period in which the issuance was made, and may require the restatement of previously issued financial statements
  - Separately, if fair market value determination for prior grants is called into question, employees whose options (or other share-based grants) were issued at below fair market value may be subject to additional taxes under Section 409A
- Companies should carefully consider fair market value in making stock and options grants, and should consult with their outside auditors both when making the grants and when reporting the events in the financial statements
- The "cheap stock" issue is generally addressable in a timely manner with proper planning; however, there is a possibility of delay in deal timing if the issue is not addressed early:
  - Be prepared to provide support to the SEC regarding valuations: contemporaneous independent third-party valuations are the "gold standard" to support a valuation
  - File a confidential side letter with the SEC providing the expected IPO range before the public filing that includes the price range, which will allow the SEC to evaluate potential "cheap stock" issues prior to public disclosure of the range

Management and Board of Directors

- Consider allocation of duties of public company officers and hiring needs
  - Identify public company experience among current management
  - Plan to hire investor relations and SEC reporting staff, including accounting personnel
- Independent directors
  - Stock exchange rules generally require majority independence of the board and independence of all directors on key committees one year after the IPO (unless the issuer is a controlled company as addressed below)
  - Specifically, under the phase-in rules, a company listing in connection with an IPO generally must have:
    - at least one independent member on: (i) its audit committee by the effective date of the registration statement (Nasdaq) or the listing date (NYSE) and (ii) each of its compensation and nominating committees by the listing date (Nasdaq) or the earlier of the date the IPO closes and five business days from the listing date (NYSE);
    - at least a majority of independent members on each committee within 90 days of the (i) effective date of the registration statement for the audit committee and (ii) listing date for each of compensation and nominating committees;
    - fully independent (i) audit committee within one year of the effective date of the registration statement and (ii) compensation and nominating committees within one year of the listing date; and
    - majority of independent board members within one year of the listing date
  - Some investment banks may prefer that the company not rely on the phase-in rules and establish a majority independent board and fully independent committees at the time of the IPO
  - Controlled company exemption (when a person or group owns more than 50% of the voting securities of an issuer) permits a company to delay compliance with independence requirements, other than audit committee requirements
  - Issuers should identify potential board and committee candidates early, including an audit committee financial expert

- The search for suitable candidates may be lengthy, especially given proxy advisory firms' and investor focus on overboarding (i.e., simultaneous service on an excessive number of public company boards); and independence analysis can also be complicated given different regimes (listing exchange, SEC (Section 16 and Rule 10A-3) and proxy advisory firms) and, where applicable, sponsor affiliations

- Failure to have strong audit committee member(s) at the IPO can negatively affect investor perception

- Board diversity is an area of focus from investors and policymakers (see, e.g., Nasdaq's board diversity rule and the policies of proxy advisory firms and institutional investors)

• Consider Section 8 of the Clayton Act analysis regarding director and officer interlocks between competitors

• Evaluate insurance needs, including "errors and omissions" liability insurance, D&O insurance and indemnification agreements with directors and officers

  - D&O insurance costs have increased significantly in recent years and companies should budget accordingly

Communications Strategy

IPO Communications Before and During the Registration Period

- Securities laws impose strict limitations on communications during the registration period
  - Registration period commences at least 30 days prior to first public filing of registration statement
  - Violation of the communications rules (or “gun-jumping”) can result in civil liability and significant delay in the IPO
- Review all current public relations activities in light of restrictions, including planned speaking engagements, product announcements and communications on the company website
- Public relations activities generally should not be more extensive than they were prior to the commencement of the registration process
  - Must not refer to offering, except in strictly limited communications
  - Release of historic, factual information, consistent with past practice, is permitted
  - Avoid references to growth prospects of company or overly “bullish” language
- Carefully plan communications with employees, suppliers and customers relating to the IPO (especially at the time of the first public filing)
- Discuss pre-IPO publicity issues with sales, marketing, public relations, social media and executive staff
- Avoid talking to the financial press or other mass media
  - Cannot control the timing of their publications
  - Cannot prevent statements from being taken out of context
- Identify investor relations team (internal and external) early

IPO Communications Before and During the Offering Process

- Written and oral “test the waters” communications to institutions that are accredited investors and QIBs are permitted
  - Section 12 liability will still apply to these communications
- The testing the waters process has become an important part of the investor communications process in IPOs
- Testing the waters materials should be reviewed with the same level of attention as the registration statement and other IPO materials, and generally serve as a basis for the roadshow presentation
- Testing the waters materials will be submitted to the SEC for review related to consistency with the registration statement
- Testing the waters was originally permitted only for EGCs pursuant to the JOBS Act, but was subsequently extended to all issuers

Related Person/Related Party Transactions

- Any loans to officers must be repaid prior to initial filing of registration statement unless outstanding as of, and not modified since, July 30, 2002
- SEC rules require disclosure of related person transactions (including loans that have been repaid) as defined under Item 404 of Regulation S-K within the three years prior to the effectiveness of the registration statement (or two years for smaller reporting companies), which is a longer lookback than for proxy statements that will be filed following the IPO. Separately, outside auditors will be focused on “related party” transactions as defined under the accounting rules, which, in some ways are broader than “related person” transactions under the SEC rules (although only material “related party” transactions would actually have to be disclosed in the notes to the financial statements)
  - Eliminate related person transactions where practical, especially any that are not on standard terms
  - If related person/related party transactions cannot be terminated, consider modifying terms
- Consider the impact of related person transactions on director independence (such as for purposes of the more stringent independence standards utilized by proxy advisory firms)

Organization & Capitalization

- Evaluate corporate structure to, where possible, simplify and maximize investor understanding and valuation
  - Consider Delaware reincorporation, if necessary
  - Determine if stock split/reverse stock split is necessary to achieve appropriate price per share; normally do not determine the appropriate split until near the end of the IPO process when proposed valuation is determined
  - Evaluate share structure, whether to reduce outstanding classes and securities or implement multi-class arrangements in advance of IPO
- Review registration and other investor rights
  - Determine which stockholders, if any, have the right to participate in an IPO and on what terms; obtain advice from underwriters about inclusion of selling stockholders; determine whether the company can impose terms on selling stockholders, including lock-up and execution of a customary underwriting agreement
  - Examine conversion and anti-dilution rights of existing notes, preferred stock and warrants to buy shares; warrants often survive IPO
  - Consider whether certain stockholders have a veto right of any deal under a specific size and valuation (common in most tech and biotech companies with venture investors). Note that some veto rights may continue post-IPO (subject to any applicable limitations under Delaware law)

Environmental, Social and Governance (ESG)

- "ESG" can refer to a wide range of subjects, ranging from traditional corporate governance to climate change, greenhouse gas emissions, employee health and safety, employee benefits and welfare, diversity, equity & inclusion measures, community impact, cybersecurity risks and beyond
- ESG disclosure has been a heightened focus of SEC rulemaking, enforcement action and comment letters, including:
  - Human capital disclosure rules implemented rules in August 2020
    - Item 101 of Regulation S-K requires IPO prospectus to discuss human capital resources to the extent material to an understanding of the company's business taken as a whole
    - Additional, more prescriptive, rules on human capital disclosures are expected to be proposed in the near term
  - Climate-related rules proposed in March 2022 that would, if adopted as proposed, increase disclosure reporting burden for public companies
  - Cybersecurity rules implemented in July 2023 mandating specified disclosure, including as to cybersecurity risk management, governance and incident history
- Pre-IPO companies should:
  - Review and evaluate any existing or proposed ESG-related disclosure and marketing, including any standalone "Sustainability Report" or similar material
    - In light of U.S. Supreme Court's invalidation of universities' race-based affirmative action policies in *Students for Fair Admissions v. University of North Carolina* and *Students for Fair Admissions v. Harvard University*, companies should consider steps to mitigate risk and reinforce existing obligations under federal and state anti-discrimination laws
  - Establish or enhance cybersecurity policies and risk oversight
    - Although not required in the IPO prospectus under the SEC new rules, cybersecurity disclosure is frequently included in the prospectus
    - Once public, company will become subject to mandatory reporting of material cybersecurity incidents

Other Housekeeping

- Consider settling outstanding litigation before IPO commences to avoid disclosure and the possibility of increasing an opposing party's leverage
- Evaluate status of various internal risk management and compliance programs, such as those relating to cybersecurity, privacy, export controls, anti-money laundering and anticorruption
- Prepare (or update, as applicable) public company documents, policies and procedures, including, but not limited to, certificate of incorporation, bylaws, committee charters, governance guidelines, codes of conduct, insider-trading policy, related person transactions policy, whistleblower procedures, public communications policy (i.e., Regulation FD) and other audit-related policies
- Collect backup support for qualitative and quantitative statements about the company and its industry that may be included in the prospectus
- Identify material contracts and other documents that may be required to be filed and for which confidential treatment may be sought
    - Limited ability to protect confidential information; only pinpoint requests for the confidential treatment of specific, commercially sensitive terms are permitted under SEC guidance
- Prepare for due diligence review – gather minute books, confirm board action ratifying all significant transactions; stock ledger; compliance with applicable laws in prior securities issuances

Choosing an Exchange

	Nasdaq	NYSE
Overview	• Largest electronic equity securities market in the U.S. in terms of listed companies and traded share volume • Trades are made by multiple market makers through an automated system • Utilized by over 4,000 companies • Market capitalization: $23 trillion	• Largest market globally by dollar volume • Trades are made in a continuous auction format, managed by a Designated Market Maker (DMM) selected by the listing company • Utilized by over 2,300 companies • Market capitalization: $25 trillion
Cost Considerations	• Initial fee: $295,000 (flat fee) for Global Select and Global Market $ 50,000 to $75,000 (TSO based) for Capital Market • Annual fee (TSO based): $52,500 to $182,500 for Global Select and Global Market $49,500 to $85,000 for Capital Market	• Initial fee (flat fee): $300,000 • Annual fee (TSO based): Maximum of $500,000
Advantages	• Fastest average transaction speed for executions • Nasdaq companies generally trade more shares for a given float size • Computerized system facilitates trading and provides price quotations • Less stringent listing standards with more interpretive guidance • Slightly less expensive than NYSE	• Historically regarded as the premier brand name of exchanges • Order-driven process creates pricing transparency • Direct public interaction reduces transaction costs

Disadvantages	• Fragmentation of order flow inhibits competition • Market makers have no obligation to commit capital or provide liquidity to dampen volatility • Generally more volatility than NYSE	• More stringent listing standards • Slightly more expensive than Nasdaq • Less interpretive guidance

Additional Governance Considerations

Board of Directors and Committees: Key Listing Exchange Requirements

	Nasdaq Companies	NYSE Companies
Board Composition [1]	• Majority of directors must be independent [2]	• Majority of directors must be independent [2]
Audit Committee	• All members must be independent in accordance with heightened Audit Committee Standards [3] • No audit committee member can have participated in the preparation of the company's or any subsidiary's financial statements during the past three years • Each member must be able to read and understand fundamental financial statements, including a company's balance sheet, income statement and cash flow statement	• All members must be independent in accordance with heightened Audit Committee Standards [3] • Each member must be "financially literate," as interpreted by the board of directors in its business judgment
Nominating Committee	• Director nominees must be recommended or selected by (a) nominating committee composed solely of independent directors or (b) a majority of the board's independent directors [2]	• All members must be independent [2]
Compensation Committee	• CEO and executive officer compensation must be determined or recommended to board by a compensation committee composed solely of independent directors and having at least two members. CEO may not be present for voting or deliberations regarding his/her pay [2]	• All members must be independent [2]

Committee Charters	• Must certify that audit and compensation committees have written charters that address responsibilities and outline procedures for annual performance evaluation	• All committees must have written charter that addresses committee's purpose and responsibilities, and outlines procedure for annual performance evaluation
Board Diversity	• Must have, or explain why it does not have, at least two members of its board of directors who are diverse, including (i) at least one diverse director who self-identifies as female; and (ii) at least one diverse director who self-identifies as an underrepresented minority or LGBTQ+[4]	• Not required
Governance Principles	• Not required (but best practice to adopt)	• Required

[1] Nasdaq director independence standards require more monitoring of directors' investments
[2] Subject to one-year phase-in for IPO companies—exception for companies using the controlled company exception
[3] Subject to one-year phase-in for IPO companies
[4] Subject to one-year phase-in for IPO companies with respect to having one diverse director and two-year phase-in with respect to having two diverse directors for IPO companies on the Nasdaq Global Select Market or Nasdaq Global Market. Subject to two-year phase-in with respect to having two diverse directors for IPO companies on the Nasdaq Capital Market.

Typical Anti-Takeover and Other Key Charter/Bylaw Provisions for Newly Public Company

Defensive Provision	Description[1]
Classified Board	• Establish a subset of directors to be elected in a given year by dividing directors into classes (typically three). In a three-class staggered board, it would take two election cycles for an activist to gain majority control of the board. This is a common provision for a newly public company. Given investor and proxy advisory firms' policies, some companies are now adopting these provisions with sunsets (typically, three to seven years following the IPO).
Removal of Directors Only for Cause	• Prevents removal of directors for any reason other than fraud, criminal acts, etc. This is the default provision for classified boards under Delaware law. This provision is not available if the board is not classified.
Number of Directors Fixed only by Board / Directors' Right to Fill Vacancies	• Prevents activists from adding directors or "packing" the board by increasing its size. This is a common provision for a newly public company. The charter should make clear that the ability to fix the number of directors and fill vacancies is vested solely with the board.
Voting Standard for Director Elections	• Most companies going public continue to utilize plurality voting for the election of directors (i.e., directors obtaining the most votes get elected, regardless of whether they receive a majority of votes). Investors and proxy advisory firms have increasingly advocated for "majority voting" provisions for director elections, whereby election of directors requires an affirmative vote of a majority of votes cast. A starting middle ground could be "plurality-plus," i.e., plurality with a resignation policy if majority of votes are not received.
No Cumulative Voting	• Requires stockholders to cast one vote per seat up for election rather than apportion the total number of votes they can cast in any manner (such as casting all votes for one director). Newly public companies typically do not allow cumulative voting, which is the default rule under Delaware law.

[1] Some of the provisions summarized in the table (e.g., filling vacancies, no stockholder ability to act by written consent, no stockholder right to call special meetings) may be "springing" upon sponsor ownership falling below a certain threshold if it is a sponsor-backed IPO and the company is going to be a controlled company post-IPO.

Defensive Provision	Description[1]
Board Authority to Amend Bylaws	• Allows the board to amend bylaws without stockholder approval. This is a common provision for a newly public company. To be available under Delaware law, this provision has to be included in the certificate of incorporation as well.
Bar on Action by Written Consent	• Denies stockholders the ability to act to remove/replace directors or amend bylaws or otherwise act by written consent without a stockholder meeting.
Bar on Stockholder Ability to Call Special Meeting	• Limits the board's "window of vulnerability" to the annual meeting, particularly if in conjunction with a bar on the ability of stockholders to act by written consent.
Advance Notice Provisions	• Gives the board advance notice of an activist's intent to make director nomination and bring other proposals to a stockholder vote.
Supermajority Vote to Amend Charter/Bylaws Provisions	• Limits the ability of stockholders to change company's governing documents.
Dual Class	• Continuing stockholders will hold a class of stock with higher voting rights versus newer public holders; without support from the holders of the high vote stock, an activist cannot gain control of the company. Dual-class structures are not the norm for newly public companies overall, but are used more frequently in founder-run companies. However, such structures have come under scrutiny and criticism from proxy advisory firms and other various market actors. Underwriters should be consulted on marketing at the start of the IPO process if dual class stock is being considered
Blank Check Preferred Stock	• Board authority to issue preferred stock. Can be used in the context of a stockholder rights plan or to place an investment with a friendly third-party investor. This is a common provision for a newly public company.
Exculpation of Officers and Directors	• Eliminates monetary damages for breach of fiduciary duty of care for certain specified claims.

Defensive Provision	Description[1]
Stockholder Rights Plan (Poison Pill)	• Grants stockholders (excluding the triggering party) rights to purchase the stock of company at deep discount upon occurrence of a triggering event, diluting the voting power of the third party that triggered the rights plan. In light of pressure from proxy advisory firms and various investors, most public companies in the last few years have let their rights plans expire, opting instead for an "on the shelf" strategy, whereby a rights plan is prepared but only implemented in response to a specific takeover threat. It is highly unusual for a newly public company to implement a rights plan in connection with its IPO.
State Anti-Takeover Laws	• Delaware General Corporation Law ("DGCL") Section 203 generally prohibits a Delaware corporation from engaging in any business combination with any interested stockholder (those who own 15% or more of the company's voting stock) for a period of three years after the date such stockholder became an interested stockholder, unless the board approved the transaction that resulted in the stockholder initially becoming an interested stockholder. Newly public companies typically choose not to opt out of DGCL 203 (or they opt out and create "synthetic" Sections 203 to exempt certain "interested stockholders" (such as sponsors)).
Exclusive Forum Provision	• Requires that certain stockholder lawsuits against the company be brought in Delaware to limit the plaintiff's ability to forum shop. This is a common provision for a newly public company. Most recently, these provisions are also extended to complaints under the Securities Act with the forum being U.S. federal district courts.

Note: Other provisions imposing restrictions on squeeze-out mergers, and other transactions with interested stockholders, are not common among companies going public. Certain additional considerations (e.g., corporate opportunities waiver) apply to controlled companies.

Document Drafting and Filing

Initial Public Offering Preparation

Key IPO Documentation

- Registration statement
  - Includes the prospectus and audited financial statements that will be delivered to potential investors
- Lock-up agreements
- SEC comment letters and written responses to SEC comments
- Certificate of incorporation and bylaws
- NYSE/Nasdaq listing application
- Road show and testing the waters presentations to investors
- Underwriting agreement
- Accountants’ comfort letter
- Officers’ certificates and other closing documents
- Legal opinion and Rule 10b-5 letters
- Transfer agent documentation
- Governance documents and corporate policies

Prospectus and Registration Statement

- Must file a Registration Statement on Form S-1 (and amendments) with the SEC, and must be declared effective by the SEC prior to pricing the offering
  - Registration statement includes the prospectus and a small amount of additional information that is not included in the prospectus (Part II information)
- Confidential Submission of Draft IPO Registration Statement
  - All issuers are permitted to submit a draft registration statement (and amendments) for confidential review by the SEC prior to public filing
  - Most issuers elect to file confidentially
  - All prior confidential submissions become public at the time of the public filing
  - All confidential submissions (not comment letters) must be publicly filed at least 15 days prior to commencement of the road show
- Main sections of an IPO prospectus include:
  - Box Summary (including summary business description, strengths and strategies, summary financials and an overview of the offering terms)
  - Risk Factors
  - Capitalization and Dilution
  - Management's Discussion and Analysis of the Financial Statements ("MD&A")
  - Business Description
  - Management (including executive officer and director bios, committee composition and certain other governance matters)
  - "Back Half": Executive Compensation, Related Person Transactions, Beneficial Ownership Table (including information about selling stockholders, if any), Description of Capital Stock and tax disclosures
  - Description of Underwriting Arrangements
  - Financial Statements

- In addition to the IPO Prospectus, the Registration Statement includes:
  - Historical sales of stock, options and other securities
  - Signatures of the CEO, CFO, CAO and at least a majority of the Board (typically signed by all Board members)
  - Exhibits, such as material contracts (which may be redacted to omit immaterial information that the company customarily and actually treats as private or confidential)
- An issuer may omit from initial submissions financial statements covering historical periods that will not be required at the time of offering or public filing
  - All required information must be provided to investors at the time a preliminary prospectus is distributed and included in registration statement in time for clearance by the SEC prior to launch
  - This benefit was previously limited to EGCs, but has been extended to any issuers pursuant to SEC guidance

Overview of IPO Lock-Up Structures

- Lock-ups are an important aspect of a successful IPO
  - Potential investors may express concern at the potential overhang from future secondary sales by private equity partners or other stockholders immediately after the IPO
  - Lock-up agreements align the interests of company executives, existing stockholders and the new public stockholders in the period immediately after the IPO
- At the time of an IPO, the company and other pre-IPO stockholders (including officers and directors) will enter into a lock-up agreement with the bookrunners:
  - The company agrees not to issue any additional equity during the lock-up period
  - The existing stockholders agree not to sell their shares during the lock-up period
- In most situations, an IPO lock-up is 180 days. This time frame can be modified in rare circumstances depending on the needs of the company and other pre-IPO stockholders and applicable FINRA regulations, with consideration of market impact
- Recently, many companies have negotiated for early lock-up release rights, which provide the company and its stockholders with flexibility to trade ahead of the traditional 180-day expiration date. Early lock-up release rights can be based on earnings dates or blackout periods that are undetermined at the time of the IPO. The release date may also be a moving target, dependent upon the share price hitting a certain threshold
- Any primary or secondary sales by the Company or other pre-IPO stockholders during the lock-up period require a waiver of the lock-up by the bookrunners. Waivers may be required to be announced by press release when granted
- In some structures such as the “direct listing” process, formal lock-ups may not be required, although other methods may be employed to restrict the flow of shares to the market post-IPO

10b-5 Negative Assurance Letter

- Both issuers and underwriters have a potential liability in relation to the registration statement and prospectus
- In order to assist in establishing a potential due diligence defense, underwriters request delivery of a Rule 10b-5 disclosure letter from both counsel to the company and counsel to the underwriters
- The rule 10b-5 disclosure letter is essentially a statement by counsel, based on its participation in the offering process, that nothing has come to its attention that causes it to believe that the prospectus contains a material misstatement or omission
- The due diligence conducted by counsel in an offering and participation in all meetings and drafting sessions serves as the basis for delivery of the 10b-5 disclosure letter

Comfort Letter

- Similar to the 10b-5 disclosure letter, a comfort letter pursuant to AU 634 is a standard part of the due diligence process
  - Obtaining a comfort letter from the auditors is market standard, and helps provide a defense for the underwriters against Section 11 liability
- The AU 634 comfort letter supports the financial due diligence, just as the 10b-5 disclosure letter supports a due diligence defense for nonfinancial disclosure
- The AU 634 comfort letter is provided by the issuers' auditors to the underwriters and the issuer
- In the letter, the auditors:
  - State the work they have performed in order to arrive at their audit opinion, and describe the other processes they have performed
  - Confirm the accuracy of financial statements as reported in the registration statement and prospectus
- Underwriters will also generally request confirmation that the auditors have performed AU 722 reviews of all quarterly information included in the registration statement and prospectus

SEC Filing Requirements

- SEC filings prior to the IPO:
  - The Registration Statement on Form S-1, including the Prospectus: Registers the shares to be sold in the IPO transaction
- SEC filings concurrent with an IPO:
  - Form 8-A: Registers the class of equity to be traded on a national exchange
  - Initial Form 3 filings (due on the day the registration statement is declared effective by the SEC): Report stock ownership for all directors, Section 16 officers and 10%+ stockholders
  - The Final Prospectus: Filed after effectiveness and delivered to purchasers
- SEC filings after an IPO (deadlines depend on filer status):
  - Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q and Current Reports on Form 8-K
  - Proxy Statement for Annual Stockholders Meeting (timing of the first Annual Stockholders Meeting will depend on the listing exchange and the timing of the IPO)
  - Forms 3, 4 and 5:
    - Directors, Section 16 officers, and 10%+ stockholders must report transactions in the company's securities on Form 4 by the end of the second business day following the transaction (note that some Forms 4 may be due in connection with IPO if there are IPO grants or purchases/sales in connection with the IPO)
    - Form 3 must be filed within 10 days of a person becoming an officer, director, or 10% owner (other than in connection with the IPO)
    - Form 5 must be filed within 45 calendar days after the end of the company's fiscal year to report certain transactions eligible for deferred reporting or transactions that should have been, but were not, reported on an earlier form
  - Form S-8: Registers shares under stock compensation plans
  - Schedules 13G or 13D: Reports required for holder of 5% or more of a class of listed securities

- FINRA Filings
  - Obligation of underwriters; completed during the registration process
  - Requires investigation into FINRA-defined affiliations of directors, officers, 5% shareholders and persons who have received issuer’s securities in the 180-day period preceding filing

OUR OFFICES

Abu Dhabi
Al Sarab Tower, Floor 10
ADGM Square
Al Maryah Island
P.O. Box 5100634
Abu Dhabi
United Arab Emirates
+971 (0)2 234 2600

Beijing
Unit 1301, Tower 1
China Central Place
No. 81 Jianguo Road
Chaoyang District
Beijing 100025, P.R.C.
+86 10 6502 8500

Brussels
Avenue Louise 480
1050 Brussels
Belgium
+32 (0)2 554 70 00

Century City
2029 Century Park East
Suite 4000
Los Angeles, CA 90067-3026
+1 310.552.8500

Dallas
2001 Ross Avenue
Suite 2100
Dallas, TX 75201-2923
+1 214.698.3100

Denver
1801 California Street
Suite 4200
Denver, CO 80202-2642
+1 303.298.5700

Dubai
Building 5, Level 4
Dubai International
Financial Centre
P.O. Box 506654
Dubai, United Arab Emirates
+971 (0)4 318 4600

Frankfurt
Taunustor 1
60310 Frankfurt am Main
Germany
+49 69 247 411 500

Hong Kong
32/F Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
+852 2214 3700

Houston
811 Main Street
Suite 3000
Houston, TX 77002-6117
+1 346.718.6600

London
Telephone House
2-4 Temple Avenue
London EC4Y 0HB
United Kingdom
+44 (0) 20 7071 4000

Los Angeles
333 South Grand Avenue
Los Angeles, CA 90071-3197
+1 213.229.7000

Munich
Marstallstrasse 11
80539 Munich
Germany
+49 89 189 33-0

New York
200 Park Avenue
New York, NY 10166-0193
+1 212.351.4000

Orange County
3161 Michelson Drive
Suite 1200
Irvine, CA 92612-4412
+1 949.451.3800

Palo Alto
310 University Avenue
Palo Alto, CA 94301-1744
+1 650.849.5300

Paris
16, avenue Matignon
75008 Paris
France
+33 (0)1 56 43 13 00

Riyadh
Building S4
Riyadh Business Front
Airport Road
Riyadh, Saudi Arabia
+966 11 827 4046

San Francisco
One Embarcadero Center
Suite 2600
San Francisco, CA 94111-3715
+1 415.393.8200

Singapore
One Raffles Quay
Level #37-01, North Tower
Singapore 048583
+65.6507.3600

Washington, D.C.
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
+1 202.955.8500

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