

Preparing for a Smooth IPO Process – a Guide for In-House Counsel

Preparing a company for an IPO can be a very time-consuming task for the in-house legal team, but the process can be much smoother with advanced planning. The following is an overview of general issues that in-house counsel should consider as a company begins to be positioned for an IPO.

12-18 Months in Advance of IPO Organizational Meeting

Equity Awards

- Equity awards should be granted at fair market value, to avoid both accounting charges and issues under Section 409A of the Internal Revenue Code. To support the value of awards in the absence of a liquid market for the equity, obtain third-party stock valuation reports on a quarterly basis, and seek to grant awards based on the most recent valuation report while it is current. Avoid granting awards while a new valuation report is in progress, as these reports are typically dated one to two months before the delivery date, which could lead to a mismatch between the value at which an award is granted and the value supported by the new report that may be dated in close proximity to that award.
- Document ongoing compliance with securities laws governing equity awards, in particular Rule 701 under the Securities Act of 1933 (the “Securities Act”), which can impose limits on the aggregate value of awards and create disclosure obligations. The registration statement filed with the Securities and Exchange Commission (the “SEC”) will be required to identify the securities law exemption relied on for awards made within three years preceding the IPO and the documentation for these awards may be subject to scrutiny.

Document Organization

- Consider whether you have an adequate system for making company records, including operating agreements, licenses, investment agreements, equity award documentation and other key records, available for review by outside counsel. Consider implementing a document management system if your company does not already have one. While it may be premature to organize a “due diligence” room, familiarize yourself with an underwriters’ due diligence list, so that you understand the scope of information that will be requested. Generally, the due diligence request will seek records for the past three fiscal years and any subsequent interim period.

Communications

- Encourage the senior management team to evaluate corporate marketing and public relations efforts, looking ahead to the anticipated time of an IPO, and plan to implement any significant new campaigns or efforts before the IPO process is formally commenced. Gun-jumping considerations (discussed in our memo [\[here\]](#)) can raise questions about new corporate-level marketing launched around the time of the IPO, because the timing may suggest the marketing is intended to support the offering. To the extent there is a clear history of the company undertaking comparable marketing and public relations activities prior to the IPO, this track record can help alleviate those concerns. Similarly, consider the anticipated timing of industry reports or similar “thought leadership” materials that the company may be interested in publishing, as they may raise similar questions.
- Counsel senior management to avoid discussing any potential IPO plans with reporters or in any public forums or large groups. Mentioning an IPO can prevent a company from relying on corporate communications safe harbors under the securities laws.

CFO Discussion Items

- While not the direct responsibility of in-house counsel, you should begin a dialog with the CFO regarding IPO planning. Topics may include:
 - the reporting structure and level of staffing in the finance and accounting groups;
 - review of internal controls over financial reporting, including whether to bring in an outside consultant to assist with this review;
 - the company’s forecasting process, as accuracy of forecasting will be important in the underwriters’ valuation process, as well as after an IPO, when forward-looking guidance may be publicly disseminated; and
 - whether the company would propose to make any change in its independent public accounting firm prior to an IPO, so that the new firm would have time to complete new audit work and potentially audit prior fiscal years.

Insurance

- Begin to plan for appropriate levels of D&O insurance at the time of the IPO, and consider other relevant risks that could potentially be mitigated by insurance coverage. Consult a broker that specializes in coverage of IPO-ready and public companies.

Patent/IP Strategy

- If you have not yet begun a program of evaluating patentable inventions and determining your general IP protection strategy at your company, and intellectual property is important in your

industry, begin that exercise. An IPO can draw attention from potential patent plaintiffs, so it is helpful to have built an intellectual property defensive arsenal prior to making public filings.

6-9 Months in Advance of Organizational Meeting

CFO Discussion Items

- Is the company's independent auditor performing quarterly "SAS 100" reviews of the company's results? It is customary to include 6-8 reviewed quarters in the IPO prospectus and commencing SAS 100 reviews of this information early can avoid delays and additional costs at the time of the IPO. Discuss with the CFO whether there are any accounting policies that may not be appropriate for a public company, and strategize with your outside auditors on these issues.
- Has the company's independent public accounting firm consulted with its national SEC office on any accounting policies that may be subject to question or differing interpretations?
- Are any non-GAAP financial or operational metrics common in the industry or unique to the company that the CFO believes must be presented to investors in order to provide an appropriate view of the company's performance? SEC rules can limit the use of certain non-GAAP financial metrics and thus present disclosure challenges.
- Are there any acquisitions completed or pending that are sufficiently large to trigger the need to file separate audited financial statements of the target? If so, be sure to obtain access to the records and personnel necessary to prepare the audit for public filing.

Acquisitions

- If the company regularly considers acquisitions or has an acquisition pipeline, consider the potential timing implications on the IPO disclosure. The company should not plan to enter into any significant acquisitions during the active IPO process without active consideration of potential disclosure, accounting and marketing issues.

Investment Banking Pitches

- Review any formal pitch materials provided by investment banks. Keep your equity valuation firm apprised of any relevant material from these pitches, including any IPO timing and valuation information, as this information may affect the valuation report discussed above under "Equity Awards." Pitch materials may also be a useful source of industry and other information when the company begins to prepare its registration statement or other investor materials.

Structural Discussion Items

- Begin to consider and discuss some key structural and governance matters:

- Is there a founder who may want “high-vote” stock as a means to perpetuate control after the IPO?
- Is there a private equity sponsor that will continue to have a significant stake and that may want special rights post-IPO?
- Does the board have any/enough independent directors? Will any existing directors leave the board prior to or after the IPO? Are there any directors who are qualified to act as the company’s audit committee financial expert?
- What will the board committee structure look like?
- Does the company have any loans outstanding to executive officers? They will need to be eliminated by the time of filing of the registration statement.

2-3 Months in Advance of Organizational Meeting

Communications

- If not already in place, centralize the approval process for external corporate communications, including press releases, blogs, social media posts and other external communications. Update the company-wide communication policy to reflect the “gun-jumping” considerations discussed in our [\[memo\]](#) and advise senior management on the importance of adhering to guidelines designed to avoid gun-jumping issues. A sample company-wide communication policy is [\[here\]](#).

CEO/Senior Management Discussion Items

- Suggest to the CEO and senior management team that they begin to consider some of the key messages about the business that they will want to communicate in the prospectus. For example, begin to develop a list of the company’s top five or six competitive strengths and top five or six growth strategies. Review the annual reports or IPO prospectuses of public company peers to see how they describe and position themselves for investors. Begin to think about what studies and statistics may be useful to support assertions about market position and opportunity, company success and comparative strengths.

Document Organization

- Begin to collect documents for a due diligence data room so that the data room can be made available around the time of the IPO organizational meeting. Consider whether any of the company’s contracts will need to be filed as exhibits to the registration statement and, if so, whether they contain competitively sensitive information that should be protected through a confidential treatment request.

Drafting Team

- Consider how to divide roles so that the IPO process will be smooth without sacrificing operational focus. An IPO process can take a great deal of time and attention from management. The company will need to identify the people who will participate in drafting sessions. It is important that these individuals fully understand the company's business, so they can help guide and answer questions during the drafting process. Of course, the company will need to continue to ensure that its business continues to operate and that the demands of the IPO process do not impede the company's progress in achieving its business goals.

Draft S-1

- If management is reasonably confident the company will proceed with an IPO, consider preparing an initial draft registration statement on Form S-1 prior to the organizational meeting. This can help to shorten the group drafting process and make sure that management's vision is reflected early in the process.

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