Key Considerations and Deal Challenges

Going Public: Advantages

- Obtain capital to grow business
  - Access to the public capital markets for future financings
  - Once an issuer becomes eligible to use shelf registration, it can access public markets very rapidly and with less cost
- Liquidity for investors
  - Ability to register shares for sale that otherwise would be subject to holding periods and/or volume restrictions
  - 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 compensating employees
- Prestige
  - Greater visibility and enhanced corporate image as a public company
  - Can facilitate dealings with customers, suppliers, financing sources, etc.
  - Attracting top level management and other employees
- Retire debt/strengthen balance sheet

Key Considerations and Deal Challenges

Going Public: Disadvantages

- Heavy ongoing legal compliance obligations
  - Ongoing public reporting and substantive governance obligations under SEC and securities exchange rules
  - Greater exposure to securities litigation
- Expenses of going public are high
- Disclosure obligations
  - Requirements for disclosure in 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, as well as to investors
- Loss of control by current stockholders
  - Dilution of current stockholder interest
  - Risk of takeover
  - Management may have different incentives in a situation in which the stockholder base is concentrated
- 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 on short-term stock price performance versus building long-term value

Key Considerations and Deal Challenges

Typical Challenges that should be anticipated in the IPO Process

Key Deal Challenge	Strategies in Response
Preparing for an IPO while also growing the business	The IPO process requires extensive management participation in drafting disclosure, preparing financial statements and collecting due diligence materials. We work with management and the company's other advisors to streamline the IPO process and efficiently achieve the timeline set by the company. As a partner with management, the advanced planning we undertake prior to the deal "kick-off" will not only mitigate potential issues before they negatively affect deal timing, but will also minimize the distraction of management throughout the process.
Evaluating and Managing Risk Areas	Because of the scrutiny that a company will undergo during and after the IPO process, a company should begin to evaluate and manage areas of risk well in advance of an IPO. The areas of focus will depend on the company and its industry, but may include anything from cybersecurity and privacy matters, to compliance matters in areas such as export controls or anticorruption regulation, to implementation of an intellectual property protection program. We assist companies with identifying areas of risk, implementing appropriate policies and procedures, and developing an appropriate disclosure strategy for underwriter due diligence and public disclosure in the IPO process.

Key Considerations and Deal Challenges

Evaluating Post-IPO Governance	Companies undergoing an IPO will want to consider carefully their post-IPO governance. The nature of the pre-IPO stakeholders are an important factor in determining what, if any, special control features may be appropriate. A company with one or more founders heavily involved may have different goals for post IPO governance and control than a private equity sponsor. We will assist companies in evaluating the options for post-IPO governance in the near term, as well as strategies for adjusting governance over time as the company's profile changes.
Ensuring no "gun-jumping" communications are disseminated	A company's communication strategy during the IPO process is critical to ensuring that the strict limitations on communications during the registration period are not violated. We work with our issuer clients before and throughout the IPO process to develop and maintain a communications protocol that complies with the securities laws while permitting regular business communication with customers and other constituents.

Key Deal Challenge	Strategies in Response
Preparing for financial statement requirements	The availability of audited / reviewed financial statements can often affect the timing of an IPO. Delays can occur when audits and reviews of financial statements are not ready in a timely manner, particularly if a company has made a material acquisition and audited financials of the target company and pro forma financial information are required. Timing of the launch of the IPO is often affected by how quickly financial information (including "flash" estimates of quarterly results) can be available. We work with issuers and their accountants to understand how financial statement availability will affect deal timing, as well as liability issues that may arise.
Navigating the "Cheap Stock" Problem for Prior Equity Grants	The SEC is very alert for "cheap stock" problems relating to prior equity grants at valuations lower than the potential public company valuation, and these differences in value can be particularly pronounced for fast-growing companies. We work with issuers early in the IPO process to document and support the valuation of prior grants. We also work in close contact with the accounting and banking teams as the company valuation is determined, and through the SEC "cheap stock" evaluation process to ensure inclusion of appropriate disclosure in the prospectus that satisfies SEC comments in a timely manner.

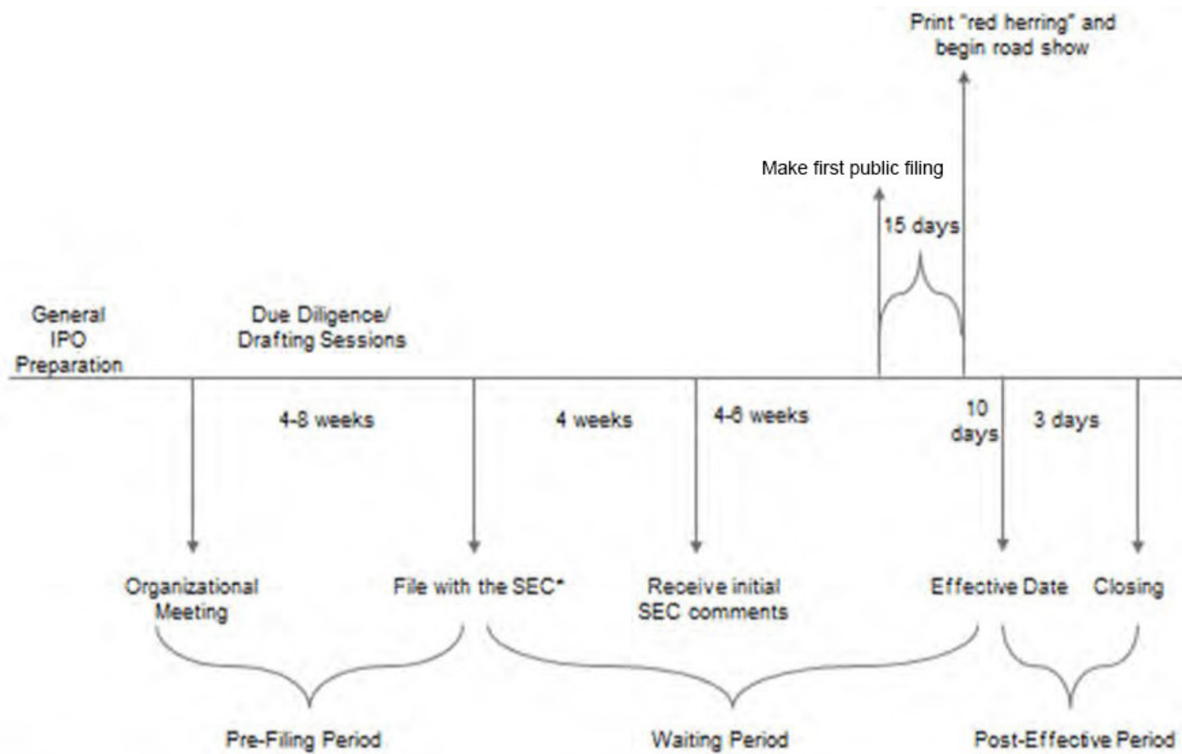
Timing Overview

Going Public: Three Main Phases

- Pre-Filing Period
  - Begins as soon as the issuer seriously contemplates a public offering, usually when bankers are mandated in preparation for the organizational meeting
  - Offers to sell, and solicitations of offers to buy, are usually prohibited ("gun jumping")
  - Emerging Growth Companies ("EGCs") ~ voo[illegible] have the ability to "test the waters" and conduct meetings with QIBs and accredited investors
  - Ordinary course press releases regarding factual business / financial developments, advertisements and stockholder communications are generally permitted
- Waiting Period
  - Begins when a company publicly files or confidentially submits a registration statement with the SEC and addresses SEC comments in preparation for effectiveness of the registration statement
  - 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

Timing Overview

Going Public: Offering Timeline



Liability in Public Offerings

Specific Provisions of the Law

Rule 10b-5 (1934 Act)

- The fundamental disclosure rule at the core of the U.S. securities laws, Rule 10b-5 makes it illegal:
  - to employ any device, scheme or artifice to defraud;
  - to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
  - to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase of any security.

Sections 11 and 12 of 1933 Act

- Similar to Rule 10b-5, but only protects buyers in the offering
- These are strict liability statutes – they require no showing of "scienter" by the issuer or other party involved in the offerings on behalf of the issuer, nor any showing that the purchaser relied on the misstatement
- Provide for rescission and damages based on loss of market value as remedy

Sarbanes-Oxley Act of 2002

- CEO & CFO must "certify" the contents of each 1934 Act periodic report and the accompanying financial statements; separate certifications are required under Sections 302 and 906
- Criminal penalties 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

JOBS Act and Emerging Growth Companies

- The JOBS Act significantly reformed U.S. securities laws
- Key features of the JOBS Act include:
  - IPO "on-ramp" for Emerging Growth Companies ("EGCs"), making it easier for these companies to access the U.S. IPO market and less burdensome to be a public company
  - Changes to the private offering process that make it easier for public and private companies to raise capital privately
  - Changes that make it easier for companies that do not want to go public to remain private longer
- The FAST Act, adopted in December 2015, included further reforms to U.S. securities laws under the section entitled "Improving Access to Capital for Emerging Growth Companies":
  - EGCs may publicly file confidential submissions with the SEC only 15 days before a roadshow (reduced from 21)
  - Issuers that lose EGC status prior to consummation of their IPO may retain EGC status until consummation of their IPO or for up to one year, whichever is earlier
  - EGCs may omit from their Form S-1 or F-1 audited financial information that does not relate to a period that would be required to be presented at the time they intend to consummate their IPO
- Over time, many elements of the JOBS and FAST Act IPO on-ramp are being extended to all IPO issuers, not just EGCs. In 2017, the Division of Corporation Finance of the SEC announced that it would expand the availability of several accommodations to all IPO companies, not just EGCs, including the confidential submission process and permission to omit financial information that will not be required at the time the registration statement is publicly filed

JOBS Act and Emerging Growth Companies

Emerging Growth Company Status

A Category of Issuer Subject to Reduced Regulation

- An EGC is a company with less than $1.07 billion in annual gross revenues in its most recently completed year
- EGCs are exempt from compliance with, or subject to reduced burdens with respect to, certain regulatory requirements

WHEN DOES A COMPANY STOP BEING AN EMERGING GROWTH COMPANY?
Upon the earliest of:
• Last day of first fiscal year in which revenue is > $1.07 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
• Date on which the company becomes a large accelerated filer: – Equity held by non-affiliates of $700m or more – Subject to reporting requirements for 12 calendar months – Filed at least one annual report – Not a smaller reporting company

JOBS Act and Emerging Growth Companies

Emerging Growth Company Benefits

The IPO Process

- 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
  - Used by issuers, particularly those in industries in which the issuer's growth thesis, strategy or regulatory environment is more complex and investors may benefit from more time to understand the investment opportunity
  - Effective December 3, 2019, the SEC expanded the right to "test the waters" to all IPO issuers, not just EGCs

JOBS Act and Emerging Growth Companies

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 shortened, but have not been eliminated, for the same reasons. Most large banks still impose a 25-day blackout period on the syndicate in IPOs in which they are bookrunners.

JOBS Act and Emerging Growth Companies

Emerging Growth Company Benefits

Registration Statement Disclosure

- Less Required Financial Information
  - Two years of audited financial statements (and unaudited interim financials)
  - Two years of selected financial data

JOBS Act and Emerging Growth Companies

Emerging Growth Company Benefits

- 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
  - Not widely adopted due to concerns about compatibility of financial statements with peers (a specific concern with respect to research analyst models)
- Audit Firm Rotation and Potential Other Future PCAOB Rules
  - Exempt from any PCAOB mandatory audit firm rotation requirements and PCAOB rules relating to supplements
  - Investor protection such as Section 501 of Sarbanes-Oxley regarding potential conflicts of interest remain in effect
  - PCAOB has not yet adopted any rules that are affected by this provision

JOBS Act and Emerging Growth Companies

Executive Compensation Disclosure

- EGCs may comply with smaller reporting company disclosure requirements:
  - No CD&A
  - 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 not required
  - Widely adopted by EGCs, with some variation in amount of voluntary information included

JOBS Act and Emerging Growth Companies

Emerging Growth Company Benefits

Post-IPO Matters under the JOBS Act

- Say-on-Pay Votes
  - Exempt from requirement to hold non-binding advisory stockholder votes on executive compensation arrangements
  - Widely adopted
- Auditor Attestation on Internal Controls
  - Transition period for compliance up to five years, but could be substantially less (i.e., for so long as the issuer is an EGC)
  - Planning required for transition away from EGC status

Pre-IPO Housekeeping Considerations

Initial Public Offering Preparation

- IPO process requires significant planning and preparation
  - Extensive company effort to draft the registration statement, prepare financial statements, collect due diligence and implement changes required for public company status
  - Careful coordination among management, investment bankers, auditors, legal counsel and others is important throughout process
- Anticipating and addressing issues prior to "kick-off" can improve execution
  - Advance planning can help speed process, allowing greater optionality with respect to market windows and minimizing the distraction of management and disruption of underlying business
  - Drafting and diligence prior to SEC filing 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 (required by the SEC or for marketing purposes) can result in delays and lengthen timeline

Pre-IPO Housekeeping Considerations

Accounting/Finance Issues

- IPO process and public company reporting obligations will result in intense 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
  - "SEC GAAP" may differ from private company GAAP
- Meet with outside auditors and attorneys to review and plan to address issues including:
  - Auditors' public company experience; reputational benefit of using a "Big Four" firm; access to auditors' specialized **SEC practice group**
  - Expectation 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

Pre-IPO Housekeeping Considerations

Accounting/Finance Issues

- Plan for **accelerated schedule** for preparation of financial statements
  - Companies should evaluate adequacy of finance and accounting staff well in advance of 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 (6-8 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 IPO. Disclosure of estimates of quarterly results (referred to as "flash" numbers) may 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 through the IPO as well as after the IPO
  - Evaluate whether systems should be updated/outsourced in advance of IPO

Pre-IPO Housekeeping Considerations

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 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 will be disclosed in registration statement or future SEC reports and may harm the company's reputation among investors

Pre-IPO Housekeeping Considerations

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
- SEC rules will require detailed disclosure and analysis of compensation program
  - Compensation of CEO, CFO and other three most highly compensated officers will be publicly disclosed, including itemization of perks in excess of $10,000
    - EGCs may choose to provide disclosure for only three named executive officers (instead of five)
  - Disclosure will include discussion of compensation philosophy, future bonus targets and benchmarks
    - EGCs are relieved from obligation to provide a compensation discussion and analysis

Pre-IPO Housekeeping Considerations

Cheap Stock

- "Cheap stock" is an issue that many companies 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 possibly 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 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
- Recommended strategy:
  - 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 filing the Form S-1 amendment that includes the price range, which will allow the SEC to evaluate potential "cheap stock" issues prior to public disclosure of the range. This mitigates the market risk of filing a range publicly solely to provide the SEC information to allow it to conduct its "cheap stock" analysis (the preferred timing strategy is to file the Form S-1 amendment that includes the price range immediately before the roadshow; this avoids a potential range revision due to changes in market conditions prior to the commencement of the roadshow)

Pre-IPO Housekeeping Considerations

Management and 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 will require majority independence of board and independence of all directors on key committees one year after IPO
  - Under the phase-in rules, at least one independent director is required at the IPO; a second independent director is required within 90 days following the IPO in order to meet applicable committee independence requirements; some investment banks may prefer that the company not rely on the phase-in rules and have a fully independent board and committees at the time of the IPO
  - Identify potential candidates and committee composition early, including a financial expert for the audit committee
  - The search for suitable candidates may be lengthy
  - Failure to have strong audit committee member(s) at the IPO can affect investor perception
  - Board diversity is an area of increasing focus from investors and policymakers (including recent California law requiring minimum numbers of female directors for all companies headquartered in California)
  - 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
- Evaluate insurance needs, including errors and omissions liability insurance; key man insurance; and indemnification agreements with directors and officers

Pre-IPO Housekeeping Considerations

Communications Strategy

- Securities laws impose strict limitations on communications during registration period
  - Violation of the communications rules (or "gun-jumping") can result in civil liability and significant delay in the IPO
  - Registration period commences at least 30 days prior to first filing of registration statement
- Review all current public relations activities, including planned speaking engagements, product announcements and communications on the company website in light of restrictions
- 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, permitted
  - Avoid references to growth prospects of company
- Carefully plan communications with employees, suppliers and customers relating to IPO (especially at the time of the initial public filing)
- Discuss pre-IPO publicity issues with sales, marketing, public relations and executive staff
- Avoid talking to the financial press or other mass media
  - You cannot control the timing of their publications
  - You cannot prevent your statements from being taken out of context
- Identify investor relations team (internal and external) early

Pre-IPO Housekeeping Considerations

Related Party Transactions

- Any loans to officers must be repaid prior to first filing of registration statement unless outstanding as of and not modified since July 30, 2002
- SEC rules will require disclosure of related party transactions (including loans that have been repaid) within the past three years
  - Disclose transactions in excess of $120,000 with a person sharing household of officer or director
  - Eliminate related party transactions where practical, especially any that are not on standard terms
  - If related party transactions cannot be terminated, consider modifying terms
- Proxy advisor services' guidelines may impose stricter limits

Pre-IPO Housekeeping Considerations

Organization & Capitalization

- Evaluate corporate structure to maximize where possible investor understanding and valuation
  - Delaware reincorporation, if necessary
  - Determine if stock split/reverse stock split is necessary to achieve appropriate price per share
  - 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; determine whether the company can impose terms on selling stockholders, including lock-up and execution of a customary underwriting agreement
  - Conversion and anti-dilution rights of existing notes, preferred stock and warrant holders
  - Consider whether certain stockholders have a veto right of any deal done under a specific size (common in some tech and biotech companies with venture investors)

Pre-IPO Housekeeping Considerations

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, anticorruption
- Implement required public company policies and procedures, including insider-trading, related party and public communications 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, sensitive terms are granted by SEC
- 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

	NASDAQ	NYSE
Overview	• Largest electronic equity securities market in the U.S. in terms of listed companies and traded share volume • Multiple market makers trading through an automated system • Utilized by over 3,300 companies • Market capitalization: $12.0 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 • Over 2,800 companies listed • Market capitalization: $24.2 trillion
Cost Considerations	• Initial fee: $125,000 to $225,000 • Annual fee: Minimum of $45,000 TSO based	• Initial fee: $150,000 to $295,000 • Annual fee: Minimum of $65,000 TSO based
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 and 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 and slightly more expensive than NASDAQ • Less interpretive guidance

Governance Considerations

Board of Directors: Independence Requirements for Board Committees

	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]	• All members must be independent in accordance with heightened Audit Committee Standards [3]
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
Governance Principles	• Not required	• 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.

Defensive Provisions

Typical Provisions for Company Going Public: Board Election & Composition

Defensive Provision	Description
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.
Removal of Directors Only for Cause	• Prevents removal of directors for any reason other than fraud, criminal acts, etc. This common provision for newly public companies is the default provision for classified boards under Delaware law.
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.
Plurality Voting 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). Corporate governance groups have increasingly advocated 'majority voting' provisions for director elections, whereby election of directors requires an affirmative vote of a majority of shares voted; several formulations of majority voting exist, including resignation of directors that do not receive sufficient votes.
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.
Board Authority to Amend Bylaws	• Allows board to amend bylaws without stockholder approval. This is a common provision for a newly public company.

Defensive Provisions

Typical Provisions for Company Going Public: Stockholder Action

Defensive Provision	Description
Bar on Action by Written Consent	• Denies stockholders the ability to act to remove / replace directors or amend bylaws 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; recent versions include required disclosure regarding derivative positions at the time a nomination or proposal is made.
Supermajority Vote to Amend Charter/Bylaws Provisions	• Limits ability of stockholders to change company's governing documents without the board's consent.

Defensive Provisions

Other Defensive Provisions

Defensive Provision	Description
Dual Class	• Continuing stockholders will hold class of stock with higher voting rights versus newer public holders; without buy-in from the holders of the high vote stock, a raider cannot gain control of the company. Dual-class structures are not the norm for newly public companies overall, but are being used more frequently, particularly in founder-run tech companies. However, such structures have come under scrutiny and criticism from various market actors (for example, dual class companies are now excluded from some stock market indices).
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.
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 ISS and corporate governance groups, 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.

Defensive Provisions

Other Relevant Provisions

Defensive Provision	Description
State Anti-Takeover Laws	• Delaware 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.
Exclusive Forum Provision	• Requires that stockholder lawsuits against the Company be brought in Delaware to limit the plaintiff's ability to forum shop. This has become common in charters of newly public companies.

Note: Other provisions imposing restrictions on squeeze-out mergers, and other transactions with interested stockholders, are not common among companies going public.

Document Drafting and Filing

Initial Public Offering Preparation

Key IPO Documentation

- Registration statement
  - Includes the prospectus and audited financial statements that will be printed and delivered to potential investors
- Lock-up agreements
- SEC comment letters and written responses to SEC comments
- NYSE/Nasdaq listing application
- Road show presentation to investors
- Underwriting agreement
- Accountants' comfort letter
- Officers' certificates and other closing documents
- Legal opinion and Rule 10b-5 letters

Document Drafting and Filing

Prospectus and Registration Statement

- Must file a Registration Statement on Form S-1 (and amendments) with the SEC prior to offering
  - Registration statement includes the prospectus and a small amount of additional information that is not included in the glossy prospectus
- Confidential Submission of Draft IPO Registration Statement
  - Under the JOBS Act and related rules, EGCs are permitted to submit a draft registration statement for confidential review by the SEC prior to public filing
  - Under SEC guidance, the confidential filing process has been extended to all issuers
  - Most issuers elect to file confidentially
  - All prior confidential submissions will become public at the time of the public filing
  - All 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, summary financials and an overview of the offering terms)
  - Risk Factors
  - Capitalization and Dilution
  - Management's Discussion and Analysis ("MD&A") of the Financial Statements
  - Business Description
  - Audited Financial Statements
  - "Back Half:" Executive Compensation, Related Party Transactions and the Beneficial Ownership Table

Document Drafting and Filing

- Description of underwriting arrangements
- Management and Board Biographies

- In addition to the IPO Prospectus, the Registration Statement includes:
  - Historical sales of stock, options and other securities
  - Signatures of the CEO, CFO and the Board
  - Exhibits, such as material contracts
- An issuer may omit from initial submissions audited financial information covering historical periods that will not be required at the time of offering
  - 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 (for non-EGC's, by the time of public filing)
  - Right to omit does not apply to unaudited interim financials for a period included in a fiscal year for which audited financial statements will be included in the preliminary prospectus
  - This benefit was previously limited to EGCs, but has been extended to any issuers pursuant to SEC guidance

Document Drafting and Filing

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 interest 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 depending on the needs of the company and other pre-IPO stockholders and applicable FINRA regulations, with consideration of market impact
- Any primary or secondary sales by the Company or other pre-IPO stockholders require a waiver of the lock-up by the bookrunners. Waivers may be required to be announced by press release when granted
- A separate legal opinion is also typically delivered by each of counsel to the company and counsel to the underwriters
- In some structures such as the "direct listing" process used by Spotify or "Up-C" structures, no formal lock-ups may be executed, though other methods may be employed to restrict the flow of shares to the market post IPO

Document Drafting and Filing

10b-5 Negative Assurance Letter

- Rule 10b-5 under the US Securities Exchange Act of 1934 imposes liability on any person who, directly or indirectly, in connection with the purchase or sale of any security, makes any untrue statement of a material fact or omits a material fact necessary to make the statements made not misleading
  - This rule applies whether or not the statements or omissions are made recklessly, or with intent to deceive, manipulate or defraud
- As a result of this, 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 omission or misstatement. The due diligence conducted by counsel in an offering serves as the basis for delivery of the 10b-5 disclosure letter

Document Drafting and Filing

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 for the auditors is market standard, and helps provide a defense for the underwriters against liability under rule 10b-5 in a US court
- The AU 634 comfort letter supports the financial due diligence, just as the 10b-5 disclosure letter supports a due diligence defense for non-financial 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

Document Drafting and Filing

Initial Public Offering Preparation: SEC Filing Requirements

- SEC filings prior to the IPO:
  - The Prospectus and Registration Statement on Form S-1: 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
  - The Final Prospectus: Filed after effectiveness and delivered to purchasers
- SEC filings after an IPO:
  - Annual Reports on Form 10-K
  - Quarterly Reports on Form 10-Q
  - Current Reports on 8-K (usually due by the end of the fourth business day following the day of certain material events)
  - Proxy Statement for Annual Stockholders Meeting
  - Forms 3, 4 and 5: Directors and certain officers and stockholders must report transactions in the company's securities by the end of the second business day following the transaction
  - Form S-8: Registers shares under stock compensation plans
- 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 180 day period preceding filing

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