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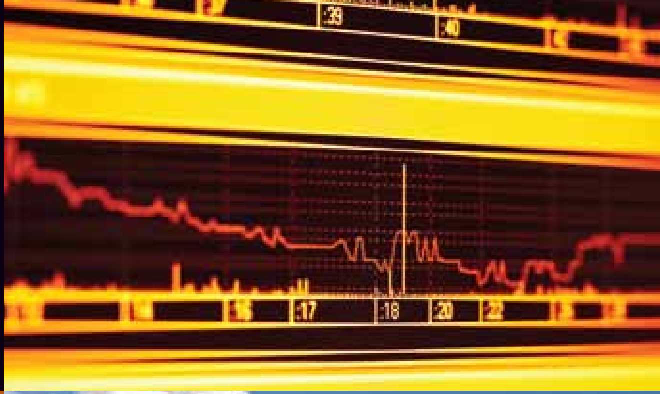


So You Want To Be Public:

Some Considerations

The number of U.S. companies going public has increased in recent years and we expect to see this trend continue. "Going public" refers to the initial public offering *(IPO)* of a class of a company's securities, typically its common stock, to the public through a registration statement prepared in compliance with the Securities Act of 1933, as amended *(the Securities Act)*, and filed with the Securities and Exchange Commission *(the SEC)*. The IPO process involves a series of steps leading to the sale of shares to the public, the listing of the shares on a national securities exchange and the establishment of a public market for the company's shares. Following the completion of an IPO, the new public company will be subject to reporting obligations under the Securities Exchange Act of 1934, as amended *(the Exchange Act)*.

An IPO inevitably brings about significant changes to a company, its employees, the risks it is subject to and its growth prospects. It is important for a company considering going public (among its other financing alternatives) to understand the IPO process in order to be prepared for an IPO and being a public company. Jackson Walker is uniquely situated to counsel companies and their boards in making the decision to go public and navigate the IPO minefield and in dealing with their reporting and compliance obligations thereafter. We have experience in all aspects of the securities laws affecting both the public and private securities offering process, including dealing with the requirements of the SEC, Financial Industry Regulatory Authority *(FINRA)* and national securities exchanges. This publication provides an overview of the IPO process, summarizes the advantages and disadvantages of going public and the ongoing reporting and compliance obligations of being public, and surveys the key corporate governance decisions and other preparations that a company would need to make before proceeding with an IPO.

WHAT WE DO:

- Registered securities offerings
- Mergers and acquisitions
- Private equity transactions
- Going-private transactions
- Management buyouts and other leveraged buyouts
- Corporate governance
- Executive compensation
- Advise board and board committees regarding fiduciary duties
- Securities law and stock exchange compliance

INDUSTRIES WE REPRESENT:

- Energy
- Real estate and construction
- Healthcare
- Restaurant
- Technology
- Retailing
- Telecommunications
- Publishing
- Defense
- Media
- Insurance
- Bottling and distribution of alcoholic and other beverages
- Banking and finance
- Manufacturing
- National and regional investment banking firms

Why Go Public: Advantages and Disadvantages

The decision to become a public company is an important one. Although the advantages of going public may seem obvious, the costs and risks of being a public company are less so. Companies should carefully consider the advantages and disadvantages of being public before moving forward with an IPO.

Advantages

Cash: The proceeds of an IPO can be substantial and can have a significant positive impact on the financial position of a company, allowing it to grow more quickly, hire more employees, and invest more in infrastructure, research and development, and business development.

Improved Access to Capital: The typical public offering will improve the company's net worth, often making new capital or borrowing available from a broader range of sources and on more favorable terms. If the company's stock performs well and market conditions permit, the company may have the ability to raise additional capital through both public and private financings.

Use of Common Stock as Acquisition Currency: An IPO provides a company with a public market for its common stock, which gives the company the option to use its stock as a form of currency to pursue acquisitions.

Increased Public Profile: An increased public profile can boost product sales, facilitate the recruitment of personnel, and lead to greater brand recognition and customer confidence. Customers and suppliers of the company will have the ability to invest in the company and track the company's performance.

Increased Ability to Attract Personnel: A public market for the company's common stock may make stock options and other forms of equity compensation offered through incentive plans more attractive to potential employees, executives and board members.

Stockholder Access to Liquidity: Following a successful IPO, there will be a public market for the company's common stock that will provide a source of liquidity for the company's stockholders.

Disadvantages

Cost: The total cost of an IPO can be high depending on the complexity of the disclosure, the size of the offering, and the length of the process. The typical costs for an IPO include legal and accounting fees, printing costs and filing fees, and underwriters' commissions. Further, the IPO will require members of senior management to devote several hundred hours of time over the typical three to six-month IPO process. And the IPO is just the beginning—once the company is public, it will be subject to a number of reporting and compliance obligations and related costs.

Mandatory Public Disclosure: After the company completes its IPO, it will be required to file regular reports with the SEC and disclose not only the status of its business operations but also the compensation of its top executives; to describe and file its material business contracts (subject to very limited exceptions for information that the SEC may allow to remain confidential); and to report the stock ownership of its principal stockholders, executives, and directors.

Restrictions on Communications with the Investment Community: As a public company, the company will have to monitor its disclosures to third parties (such as analysts) to avoid "selective disclosure." Management decisions and flexibility will likely be affected by the constant stockholder scrutiny, quarterly earnings announcements, and analyst focus on short-term performance.

Constraints on Trading in the Company's Securities: Even after an IPO creates a public market for the company's common stock, shares of the company's stock acquired prior to the IPO or held by designated insiders will remain restricted by "lock-up" agreements and restrictions under Rules 144 and 701 promulgated under the Securities Act, as well as the requirements of Section 16 of the Exchange Act—which imposes trading restrictions and reporting requirements for directors, executive officers and 10% stockholders—and the general Exchange Act prohibitions against trading on material non-public information.

Increased Potential Liability: A public company and its officers and directors may also be subject to stockholder derivative lawsuits claiming that the company made material misstatements or failed to disclose material information in its public statements and filings. Company insiders will also be subject to Section 16 of the Exchange Act, which imposes liability for buying and selling the company's stock within any six-month period, regardless of whether the transactions were based on the use of material non-public information.

Increased Corporate Governance Requirements: Following the passage of the Sarbanes-Oxley Act in 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, public companies have become subject to many more stringent corporate governance requirements, particularly with respect to the independence of directors, composition of certain board committees, and executive compensation arrangements.

The IPO Process

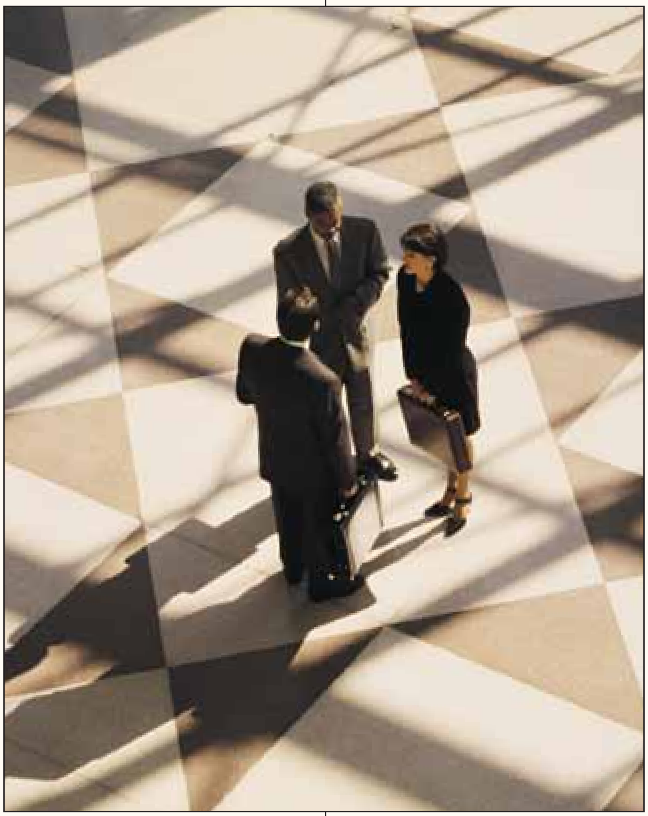
The steps to be completed for a successful initial public offering include the following:

- **The company must select an underwriting team to manage the public offering of securities; the underwriters will undertake a due diligence process and negotiate an underwriting agreement that is reviewed by FINRA**
- **The company must complete an audit of its financial statements for the last two to three years**
- **The company, working with its underwriters, auditors, and counsel, must prepare a registration statement and file it with the SEC along with amendments thereto necessitated by comments received from the SEC**
- **The company, working with its underwriters, must market its securities to potential investors (the road show)**
- **The company must file a listing application and take other necessary steps for listing its common stock on a national securities exchange, such as the New York Stock Exchange or the NASDAQ Stock Market**

A typical IPO takes three to six months after selecting the managing underwriter: five to eight weeks to prepare and file the registration statement;

eight to ten weeks after filing to clear the SEC review process, complete the road show, and become "effective"; and three or four business days thereafter to close. A typical timeline of an IPO is included herein. The actual amount of time required for an IPO depends upon a number of factors, including the complexity of disclosure, the availability and quality of the financial statements, the workload of the SEC staff, the status of the company's business and the experience of the working group, as well as general market conditions. This typical timeline is subject to potentially significant delay should the company face market, disclosure, regulatory, accounting or other issues during the process. Many of these factors are outside the company's control.

One of the most time-consuming and important tasks in the IPO process is the preparation of the offering document for the company's shares *(the Prospectus)*, which is part of the registration statement filed with the SEC. The SEC will review the registration statement and issue comments; typically the filing will go through several rounds of comments before the SEC declares the registration statement effective. Because a preliminary Prospectus is used to market the offering and is also filed with the SEC, all participants in the process must cooperate to ensure that the Prospectus provides accurate and balanced disclosure.



The Organizational Meeting

Once the underwriters have been selected, the next step is the "organizational" or "all-hands" meeting. The purpose of the organizational meeting is to identify the principal issues that must be addressed in preparing the registration statement, as well as in structuring the offering. The typical groups involved in the IPO process include the following:

- **Company Management Team**
- **Company Board of Directors**
- **Company Counsel**
- **Managing Underwriters**
- **Underwriters' Counsel**
- **Independent Accountants**
- **Additional Patent, Litigation, Regulatory or Other Experts**
- **SEC, FINRA and National Securities Exchange**

Structuring the Offering

Management and the underwriters must reach early agreement on a number of substantive and procedural issues concerning the IPO, including the following:

Size of the Offering and Valuation: The size of the offering will be determined by the company and the underwriters, taking into account the amount of money the company intends to raise, the level of dilution the company is willing to accept, the number of shares necessary to ensure a liquid trading market, and general market conditions. Although valuation of the company will be discussed early in the underwriting process, the actual price of the offering will usually not be set until after the road show has been completed and the underwriters have a proposed "book" of interested purchasers.

Directed Share Program: The underwriters and the company must also determine whether the company wishes to have a directed share program. Under such programs, often referred to as "friends and family" programs, a portion of the offering, usually not more than 5% of the shares proposed to be sold, will be reserved by the underwriters for sale directly to certain investors designated by the company, such as customers, suppliers, or employees.

Participation of Selling Stockholders: The IPO may include not only new shares issued by the company, but also shares held by existing stockholders of the company. The underwriters will advise the company whether market conditions will permit existing stockholders to sell shares in the IPO. Since investors in venture-backed companies often have contractual rights to register their shares in an IPO, these rights must be reviewed, and may need to be amended or waived if selling stockholders are not going to be part of the offering.

Lock-Up Agreements: In an IPO, the managing underwriter will typically request that certain stockholders and option holders, as well as all officers and directors, enter into agreements with the underwriters whereby these persons agree not to sell their shares for a specified period of time after the effective date of the IPO (typically 180 days). The purpose of these lock-up agreements is to allow the development of an orderly trading market in the company's securities by reducing the "overhang" of shares that might be publicly sold but are not included in the registration statement.

Due Diligence Process

An examination of the company's records is essential in preparing the registration statement. Counsel for the company and the underwriters will conduct an extensive review of the company's documents in close consultation with the company and the underwriters. To assist in gathering information, counsel will usually send a questionnaire to the officers, directors and significant stockholders of the company, and schedule interviews and meetings with management. The underwriters and their counsel will visit the company's facilities and may interview divisional heads, as well as corporate partners, customers, suppliers, commercial bankers and others having material relationships with the company. In addition, the underwriters will conduct a thorough business review of the company's records, financial statements and business practices.

Pre-IPO Corporate Governance Issues

Prior to embarking on an IPO, the company will want to review its corporate governance policies and procedures and determine whether it should consider reincorporating in Delaware or adopting one or more anti-takeover devices. The company will need to review its Board and committee structure and determine if any additional independent directors will need to be recruited to the Board. The company will need to review the systems it has in place for producing financial statements, with an eye towards the more rigorous public company requirements. Finally, the company should review the corporate governance requirements for listing on the stock exchange of its choice.

Reincorporation in Delaware

Many companies incorporated elsewhere choose to reincorporate in Delaware just prior to an IPO. The Delaware General Corporation Law *(the DGCL)* is a modern and internationally recognized corporation statute that is updated annually to take into account new business and legal developments. There is a well-developed body of case law interpreting the DGCL, which facilitates certainty in business planning. The Delaware Court of Chancery is considered by many to be the nation's leading business court, where expert judges in business law matters deal with business issues in an impartial setting. In addition, Delaware offers an efficient and user-friendly Secretary of State's office permitting, among other things, prompt certification of filings of corporate documents.

Consideration of Anti-Takeover Devices

A new public company will be more vulnerable to hostile takeovers than it was as a private company. The Board and management of the company must decide whether the additional risk justifies the adoption of certain anti-takeover strategies, including one or more of the following:

- **Adoption of a "classified" or "staggered" Board, providing that directors are elected for 2- or 3-year terms instead of running for re-election every year; this provision makes it more difficult to acquire control of a company by taking over the Board**
- **Elimination of the ability of stockholders to take action by written consent**
- **A Stockholder Rights Plan–commonly known as a "poison pill"–providing that, in the event of attempted hostile takeover, pre-acquisition stockholders will receive a massively dilutive issuance of new shares, which is intended to make the company prohibitively expensive to acquire; the threat of this issuance usually forces the buyer to negotiate with the company**

Board and Committee Independence

The rules of the SEC and the stock exchanges contain specific requirements with respect to Board composition and structure. Specifically, the rules require that a majority of the Board members be independent, that the Board conduct regular executive sessions of the independent directors, and that the Board establish certain committees composed entirely of independent directors, including an Audit Committee, a Compensation Committee and usually a Nominating Committee. The determinations of which directors may be considered "independent" are complex and vary by the exchange and also by Committee assignment. In general, a director may not be considered independent with respect to Board or specified Committee service if he or she has been recently employed by the company or its auditors, is or represents a significant stockholder of the company, has material transactions with the company, or is in a control position with respect to an entity that has a significant business relationship with the company. In addition, the rules include separate financial literacy and sophistication requirements for Audit Committee members. The Audit Committee must also include a "financial expert," as defined by SEC rules, or the company will have to disclose the absence of such an expert in its public filings.

Since many privately held companies operate with a relatively informal Board structure, and many do not have a majority of independent directors on their Board, most companies considering an IPO will have to recruit one or more new directors that meet the regulatory independence and knowledge requirements. Recruiting new directors can require a significant amount of lead time. Although many exchanges allow newly listed companies a phase-in period during which full compliance with the rules is not required, the company should be in a position at the time of the IPO to know how it will meet the independence requirements once the phase-in period is complete. The company will also need to develop a director compensation policy, which typically includes an annual cash retainer, chair retainers and meeting fees, as well as equity awards.

(cont.)

Continuing Compliance Obligations After Going Public

The IPO is just the beginning. Whether a company is contemplating its first public offering or has been a reporting issuer for years, Jackson Walker is well-positioned to assist with the full range of continuing reporting and compliance obligations imposed on public companies.

Periodic and Current Reporting Obligations

Once the company becomes public, it will be subject to the periodic and other reporting requirements of the Exchange Act. A public company must file annual proxy or information statements, annual reports on Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K with the SEC which contain information similar to that included in the Prospectus, including:

- **Operations**
- **Officers, directors and certain shareholders, including salary, various fringe benefits and transactions between the company and management**
- **Financial condition of the business, including financial statements**
- **Competitive position and material terms of material contracts**

Officer Certifications, Financial Reporting and Controls

In connection with the above reporting obligations, the company's Chief Executive Officer and Chief Financial Officer will need to make certifications regarding the completeness and accuracy of each quarterly and annual report. The company's senior management will need to make quarterly evaluations of the company's disclosure controls, (i.e., the processes that help to ensure that the company's disclosure documents are accurate, timely and complete). In addition, beginning with its second annual report as a public company, the company's senior management will have to evaluate annually the effectiveness of the company's internal control processes that help to ensure the accuracy of the company's financial statements. Subject to some exceptions, the company's auditors will do a separate annual evaluation and attestation of the internal controls and management's evaluation of them.

Although many privately held companies have systems in place to provide regular quarterly and annual reports to investors, the amount of detail included in the reports will generally have to be increased to meet SEC requirements. In addition, the company will need to develop a workable system of disclosure controls and internal controls prior to the IPO.

The requirement to evaluate the company's internal controls was added by Section 404 of the Sarbanes-Oxley Act of 2002. The internal control evaluation is a particularly complex and expensive undertaking. Few privately held companies have documented and tested their internal controls at a level rigorous enough to meet public company standards. Private companies considering an IPO should be cognizant of the requirement and build in substantial lead time to bring their financial reporting up to public company standards.

Section 16 Reporting Obligations

Section 16 of the Exchange Act imposes ownership reporting requirements and trading restrictions upon a public company's directors, officers, and principal stockholders. Section 16 requires that all such "reporting persons" file an initial statement on Form 3 within 10 days of their becoming a director, officer or 10% stockholder, and file a statement of changes to beneficial ownership on Form 4 within two days of any additional purchase or sale of the company's securities. Generally, short-swing profits (i.e., profits from buying and selling company stock within a six-month period) must be repaid to the company.

Other Governance Issues

The rules of the SEC and the individual stock exchange rules require that companies comply with certain governance standards. The company should make a decision early in the process about which stock exchange it would like to be listed on following the IPO. Most IPO companies choose to list with the NASDAQ Stock Market, either on the NASDAQ Global Market or the NASDAQ Capital Market (for smaller capitalization companies). Although the listing requirements and fees are different for the two NASDAQ markets, the corporate governance standards for listing are the same.

NASDAQ requires its listed companies to adopt a Code of Ethics applicable to all directors, officers and employees that covers company policy on honest and ethical conduct (including rules for restricting or handling conflicts of interest), corporate disclosure, compliance with applicable laws, and procedures for reporting violations of the Code. The rules also require that the Audit Committee adopt a policy for the receipt, retention and proper handling of complaints about financial or auditing matters. The policy must include procedures under which employees can submit such complaints anonymously. NASDAQ rules also require the Audit Committee (or another independent committee) to regularly review "related party transactions" between the company and its insiders.

Although not specifically required by the rules, most companies will want to review their executive compensation arrangements and stock plans prior to an IPO. The arrangements must be fully disclosed in the Prospectus.

Public Companies And Securities

Knowledge. Experience. Commitment.

Timeline of IPO Process

Timing	Steps
6-12 months prior to IPO	Company rounds out management team (if needed); Focus on "corporate cleanup"
4-6 months prior to IPO	Company decides formally to do IPO; Appoint underwriter; Publicity restrictions commence
2 months prior to first SEC filing	Conduct due diligence; Complete prospectus drafting; Adopt public company policies, controls, and procedures, if not already done; Complete audit and review of financials; Address corporate governance matters
Initial SEC filing	File Form S-1 with SEC and submit application to National Securities Exchange
4 weeks after filing	Receive first SEC comments
2-3 weeks after receipt of SEC comments	File revised Form S-1
Comments at 2-4 week intervals	Receive and respond to follow-on rounds of SEC comments
Typically 2 to 4 months after first filing	Resolve material SEC comments; National Securities Exchange approval; Bulk print preliminary (red) prospectus
Typically 2 to 3 weeks	Road show
IPO becomes effective	Form S-1 declared effective; Price deal; Shares commence trading
3-4 days following pricing	Close offering

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