NASDAQ OMX

GOING PUBLIC

A Guide for North American Companies to Listing on the US Securities Markets

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Going Public

Taking your company through a public offering for the US securities market is a major undertaking for any entrepreneur. The event is a source of pride, an opportunity for business growth and a serious legal responsibility. This edition of *Going Public: A Guide for North American Companies Listing on the US Securities Markets* brings together valuable perspectives from key organizations involved in a public offering to ensure that readers are aware of the principal issues that arise. Of course, this publication is not intended to be exhaustive and should not be relied upon as a substitute for specific legal or financial advice.

This guide assumes that while you may be seriously considering a listing, you may not have selected a stock market – or decided what type of listing is right for your company.

Whatever your specific plans, *Going Public* can help you to anticipate what may be required from your company in dealings with the US Securities and Exchange Commission, other US regulators, investors and securities analysts. Designed to clarify the various steps involved in listing on the US markets, the book examines the arguments for and against going public, takes you step by step through the initial public offering process – from the people involved to the timeline for a launch – and then looks at what you can expect as a public company, including ongoing reporting commitments.

The NASDAQ OMX Group hopes that you find this publication helpful and wishes you great success.

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Introduction

The NASDAQ Stock Market®

A listing on NASDAQ® gives North American companies high visibility and access to a wide pool of investors worldwide. NASDAQ promotes corporate growth and entrepreneurship by providing companies, market participants and investors with one of the highest-quality equity markets in the world.

Taking a company through a public offering on a US securities market is a major undertaking – a source of pride, an opportunity for business growth and a significant legal responsibility. In anticipation of going public, it is a good idea to establish and develop the corporate environment and infrastructure necessary to support a publicly held company prior to listing. This includes addressing housekeeping issues, such as organizing financial records, establishing or reviewing internal controls, and reviewing company bylaws and stock option plans.

Before going public, a company should consider establishing and reviewing policies for corporate communications, developing an investor and public relations program and setting aside resources to communicate with new constituents. It is also necessary to develop standards for timely annual and quarterly Securities and Exchange Commission (SEC) filings and disclosure of material information.

Going public: A guide for North American companies to listing on the US securities markets, which was developed by its sponsors to help companies negotiate the complicated initial public offering (IPO) process, covers these topics and more. It explains the various steps to listing and offers a brief overview of the benefits of listing on the NASDAQ Stock Market, the US listing market of the NASDAQ OMX Group, Inc. Royal Bank of Canada outlines the role of the investment bank in facilitating an IPO, while Simpson Thacher & Bartlett covers legal issues that should be considered. An accountancy perspective is provided by PricewaterhouseCoopers and Lippert/Heilshorn, which offer an insight into building a solid investor relations program. The importance of insurance is covered by Ace, Inc, while RR Donnelley discusses the unique conditions that often surround the printing and filing of SEC documents. We hope the information in this guide is of benefit to companies seeking to list on a US equities market.

Listing on the NASDAQ Stock Market – an overview

NASDAQ OMX's mission is to promote corporate growth and entrepreneurship by providing companies, market participants and investors with the highest-quality equity market in the world – a market that is fast, reliable, highly transparent and deeply liquid, that has state-of-the-art trading efficiency and the highest standards for regulatory oversight and corporate governance.

The NASDAQ OMX Group is the world's broadest and most diverse exchange company. It delivers trading, exchange technology and public company services across six continents, and with over 3,600 companies it is number one in worldwide listings among major markets. NASDAQ OMX offers multiple capital-raising solutions to companies around the globe, including its US listings market, the NASDAQ Stock Market and the OMX Nordic Exchange, including First North. The company offers trading across multiple asset classes including equities, derivatives, debt, commodities, structured products and exchange-traded funds. NASDAQ OMX technology supports the operations of over 70 exchanges, clearing organizations and central securities depositories in more than 50 countries. OMX Nordic Exchange is not a legal entity, but describes the common offering from NASDAQ OMX exchanges in Helsinki, Copenhagen, Stockholm, Iceland, Tallinn, Riga and Vilnius. For more information about NASDAQ OMX, visit www.nasdaqomx.com.

The NASDAQ Stock Market, NASDAQ OMX's US listings market, lists over 3,000 companies, representing $4.6 trillion in total market value. Seventy-one percent of C-levels polled say that NASDAQ is the exchange for innovation. The NASDAQ Stock Market is home to two of the three largest US companies, three of Fortune's top five World's Most Admired Brands and seven of Fortune's Top 10 Fastest Growing Companies. It is home to companies that are leaders across all areas of business, including technology, retail, communications, financial services, transportation, media and biotechnology. Historically, NASDAQ has attracted more IPOs than any other US exchange.

Trades are executed through a sophisticated computer and telecommunications network – a system that transmits timely, critical trading information to every investor. Over 150 registered market makers support NASDAQ companies by providing liquidity to facilitate trading in their stock. An average of 29 market makers cover each NASDAQ Global Select and NASDAQ Global Market company; as many as 75 are registered market makers in some securities and many others make markets without registering. No other US market can match this.

Through the NASDAQ Select Market Maker Program, listed companies gain greater transparency into the role that market makers play in the trading of their stock and allow for more interaction between the market-making community and listed companies. The NASDAQ Select Market Maker Program helps listed companies, traders, institutional investors and individual investors by creating a metric beyond volume.

Exclusive services for NASDAQ-listed companies

NASDAQ-listed companies benefit from a portfolio of exceptional services and information programs geared to provide value in all stages of accessing the capital markets. From one-to-one personal contacts to fully automated online access, companies can choose from several different services and information channels from its wholly owned subsidiaries and proprietary services. NASDAQ OMX Global Corporate Solutions also works with various strategic alliance partners to offer companies value-added products and services that public companies require.

NASDAQ OMX Corporate Solutions focuses on corporate activities that are critical to any public company. As the first and only exchange dedicated to owning and operating Corporate Solutions, NASDAQ OMX provides public and private companies with technology that powers global business communications, including a suite of tools such as solutions for investor relations, corporate communications and board support. In listening to companies' needs, NASDAQ OMX Corporate Services has developed four key areas of focus:

- intelligence;
- governance;
- communications; and
- visibility.

Intelligence solutions

By utilizing solutions from NASDAQ OMX's intelligence suite, you will never have to worry about missing out on a valuable opportunity for your business. Monitor the markets, your stock performance and that of your peers with powerful analytic tools to support your internal and external workflow.

Relationship Manager

The NASDAQ Relationship Manager is an integral part of the value-added services that NASDAQ-listed companies receive. Every listed company receives one dedicated, day-to-day point of contact who is experienced and knowledgeable on market matters and other issues that affect a company's business.

Market Intelligence Desk (MID)

A team of market professionals working with leading technology delivers stock updates and trading analysis in real time, so you will always be in the know. Listing with NASDAQ means you will have a dedicated MID director on call and ready to provide you with detailed information on market activity at all times.

Factset with NASDAQ OMX Corporate Intelligence

This incorporates the broadest scope of data, customizable specifically to your workflow and available in one easy-to-use product at your desk or on the go.

Corporate Intelligence

This integrates all of the key elements that an investor relations officer needs to manage corporate shareholder communications, capital market information, investor contact management and board-level reporting in an easy-to-use workflow environment.

Advanced Intelligence

An unprecedented stock surveillance solution that keeps you and your management team apprised of what is driving your stock's trading activity in real time. Get immediate analysis in both text and graphical format delivered straight to your inbox, including a proprietary five-star ranking system of major institutional investors and exclusive 24/7 'push' and 'pull' reports triggered automatically by defined trading thresholds.

Investor Analytics

These combine experienced stock surveillance analysts with NASDAQ OMX technologies to provide insight into institutional activity, patterns and historical tendencies by utilizing a mosaic of public, subscription and issuer-based data sources to monitor daily movement of your stock, as well as to alert you to any significant changes.

NASDAQ online

A comprehensive window into stock performance, www.nasdaq.net is an effective strategic equity management and decision-making tool. Easily manage your investor relations functions, understand how your stock is perceived in the marketplace, see how stock is trading, follow competitors and track the market's activity at any given moment. Automatic system-generated reports and spreadsheets ensure that your communication efforts with senior management will be clear and informative.

Morningstar Alliance

Morningstar Alliance is one of the largest and leading sources of independent investment research. With this partnership, NASDAQ OMX is the first US-based exchange to provide complimentary research to all listed companies, with reports that include information regarding estimates, valuations, insightful analysis and company profiles.

Rivel Research

Rivel Research provides your company with a continuous series of investor sentiment assessments. Each month we interview three or more key investors and other targeted stakeholders to understand how they are viewing and valuing your company. This insight is then synchronized with NASDAQ OMX's surveillance service to provide the most comprehensive view of your trading activity.

Governance solutions

Today's business environment is influenced by a fluctuating economy, greater scrutiny and increased regulatory requirements, all of which are creating challenges and increased responsibilities for boards of directors.

Directors Desk

A complete turnkey, fully hosted online board management solution, Directors Desk streamlines your board's workflow while minimizing the time and paperwork involved in keeping directors informed. Intuitive, customizable and secure, it enables your board to stay connected and organized at all times.

National Association of Corporate Directors

NASDAQ OMX's strategic partnership with the National Association of Corporate Directors provides boards with the education and services necessary for improved governance in today's more transparent environment. Together, we will collaborate on several initiatives designed to bring the exchange and board members together through discounted educational programs and events, as well as superior content integrated with NASDAQ OMX's online board portal, Directors Desk.

Whistleblower Hotline

The hotline provides employees and others with a secure means of reporting incidents, while providing you with a comprehensive report of incidents without any human interference. Auditable, cost efficient and easy to use, the Whistleblower Hotline also meets the requirements of the Sarbanes-Oxley Act, the Ontario Securities Commission and the Audit Committee Rule of the Canadian Securities Administrators Guidelines (Multilateral Instrument 52-110).

Aon D&O Peer Benchmarking Survey Report

The report provides valuable insights on the directors' and officers' (D&O) insurance purchasing practices of NASDAQ-listed companies, along with key data on industry issues and trends. Providing the requisite due diligence needed to demonstrate your company's D&O coverage comparable to other firms in a similar market cap or industry sector, this report keeps your team in line to put you ahead of the competition.

XBRL Filing Solutions

This offers a robust suite of eXtensible Business Reporting Language (XBRL) tagging services to ensure that your XBRL instance documents are filed concurrently with your standard quarterly and annual reports (10-Qs and 10-Ks). Using proprietary XBRL translation software and technology to tag financial statements, you will save the time and money usually required to complete these filings.

CRD Analytics Solutions

CRD Analytics Solutions allow you to create financial indexes, sustainability ratings, analytical reports and portfolio diagnostics to help your company manage risk and determine opportunity in the marketplace.

Communications solutions

How you choose to present your brand and corporate message is one of the most important things you can do for your business. The NASDAQ OMX Communications suite of services includes all the necessary tools you need to communicate with your investors and build relationships with stakeholders, investors and the financial community alike.

GlobeNewswire

One of the world's largest press distribution networks just became even bigger as a result of strategic partnerships with Osaka Securities Exchange, Japan's largest derivatives exchange. With self-serve or editorial models, search engine optimization, customized targets and Edgar filing services, GlobeNewswire is an easy-to-use and cost-effective way to distribute your news, earnings, announcements, press releases and media advisories directly to journalists, analysts, newswires, newsrooms, databases, websites and business professionals.

Webcenter Solution

A one-stop shop for investor relations (IR) and public relations website development, Webcenter Solution helps ensure that your websites include all the necessary content to tell your story online. Our developers work with your design team to match seamlessly the look and feel of your corporate site, maintaining brand continuity and maximum flexibility in content, features and navigation.

Interactive Media Solutions
Interactive Media Solutions can help capture the energy of your message with both live and produced video that takes branding to a whole new level. Share videos on your IR website, social media platforms and conferences; while event tracking captures attendee statistics to keep your team in the know about who is accessing your information.

Print and Mail Distribution Solutions
Whether fulfilling requests from your IR website or collating and shipping materials to an investor conference, we handle all the details and provide a comprehensive reporting tool so that you never run out of inventory.

SocialStream
Our one-stop social media solution allows you to create a unique, customizable, multimedia experience from a single platform that combines content, videos, product demos, real-time audience response and so much more to your corporate and IR websites. Post blogs, press releases, white papers, videos and any external communication while including live streaming feeds from your Facebook and Twitter sites. Include links to all your social outlets and provide your customers with simple syndication options that allow them to keep track of every post or area of interest.

Visibility solutions
Stay on your shareholders' radar by leveraging our visibility channels, which bring valuable, authoritative information to millions of institutional and retail investors every day.

NASDAQ MarketSite
Located in the heart of Times Square, the NASDAQ MarketSite is the epicenter for news and events. Each day some of the world's most prestigious business leaders preside over the market's open and close. With spectacular, panoramic views and the ultimate high-visibility setting, the NASDAQ MarketSite is a one-of-a-kind venue for your corporate meetings, product launches, press conferences and analyst days.

Advertising solutions
Helping to bring your messaging to the next level, you can make a huge impact with online advertising opportunities on NASDAQ.com and NASDAQ.net that target the millions of users who visit our sites every day for in-depth trading analysis and quotes. Seven stories tall and viewed by over 750,000 people daily, advertising on the MarketSite Tower creates the ultimate outdoor consumer experience.

CEO Signatures series
The series helps you to connect with the investment community through a high-profile webcast interview hosted at the NASDAQ Marketsite. A face-to-face interview with a veteran financial journalist puts your company front and center with institutional and retail investors on a platform where they can discuss their vision, strategies and new initiatives.

International investor programs
NASDAQ OMX has a range of programs and services to raise investor interest and provide a forum to engage international investors one on one. NASDAQ-listed companies have access to these international programs, as well as the NASDAQ OMX Institutional Investor Center℠.

Phoenix-IR Road Show Program
Phoenix-IR is one of Europe's leading independent IR consulting firms, offering a bespoke European road show service to NASDAQ-listed companies with $1 billion in market cap or more. Half of the top 20 largest asset managers in the world are now based in Europe and Europeans have the highest proportion of their portfolios invested in international equities. Phoenix-IR's bespoke road show and targeting service provides quality contact building while using senior management time effectively.

NASDAQ Core Services Program
This program provides companies with a complimentary portfolio of services currently offered through NASDAQ OMX Corporate Services. The Core Services Program is designed to help companies minimize risk, maximize efficiency and increase transparency – at no extra cost. To review and register for the complimentary services that you would like to use, visit NASDAQ Online at www.nasdaq.net.

Steps for listing on NASDAQ
To list securities on the NASDAQ Stock Market, a company is required to meet certain initial quantitative and qualitative requirements and to submit an application. These requirements are outlined in the tables, along with the basic steps regarding the application process to list securities initially on the NASDAQ Global Select Market, the NASDAQ Global Market or the NASDAQ Capital Market®.

Listing standards

Companies that choose to list their securities on the NASDAQ Stock Market must meet minimum initial and continued inclusion financial requirements. These requirements are designed to facilitate capital formation for companies worldwide and, at the same time, protect investors and prospective investors in those companies. NASDAQ's quantitative listing requirements generally require that companies meet higher thresholds for initial listing than continued listing, thus helping to assure that companies have reached a sufficient level of maturity prior to listing. NASDAQ also requires listed companies to meet stringent corporate governance standards, standards to which NASDAQ itself adheres. NASDAQ-listing standards are transparent to companies and investors alike, and are rigorously enforced. Companies can find listing forms and instructions for applications online at www.nasdaqomx.com.

At NASDAQ, we believe your listing should represent more than just membership in a stock market – it should provide tangible value back to your company and your shareholders. That is why we offer listing on three different tiers, providing a broad cross-section of companies' opportunities to increase liquidity and reach. In fact, NASDAQ's Global Select Market has the highest initial listing standards of any market in the world. Over 1,000 NASDAQ-listed companies qualify under these standards to create a prestigious, world-class, top-tier marketplace. NASDAQ itself adheres to these most stringent standards, setting an example of best-in-class governance.

Disclaimers

This publication is designed to provide accurate and authoritative information, but is provided with the understanding that the publisher is not engaged in rendering legal, accounting or other professional advice. If legal or other expert assistance is required, the services of a competent professional should be sought.

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Contacting NASDAQ OMX

For information regarding the strategic advantages of listing on NASDAQ, companies are encouraged to contact NASDAQ OMX Global Corporate Client Group management.

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For information regarding NASDAQ-listing standards or the application process, please contact:

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NASDAQ Global Select Market Initial Listing Requirements[1]				
Requirements	**Standard 1 Listing Rules 5315(e) and 5315(f)(3)(A)**	**Standard 2 Listing Rules 5315(e) and 5315(f)(3)(B)**	**Standard 3 Listing Rules 5315(e) and 5315(f)(3)(C)**	**Standard 4 Listing Rules 5315(e) and 5315(f)(3)(D)**
Pre-tax earnings[2] (income from continuing operations before income taxes)	Aggregate in prior three fiscal years ≥ $11 million and each of the two most recent fiscal years ≥ $2.2 million and each of the prior three fiscal years ≥ $0	N/A	N/A	N/A
Cash flows[3]	N/A	Aggregate in prior three fiscal years ≥ $27.5 million and each of the prior three fiscal years ≥ $0	N/A	N/A
Market capitalisation[4]	N/A	Average ≥ $550 million over prior 12 months	Average ≥ $850 million over prior 12 months	$160 million
Revenue	N/A	Previous fiscal year ≥ $110 million	Previous fiscal year ≥ $90 million	N/A
Total assets[5]	N/A	N/A	N/A	$80 million
Stockholders equity[5]	N/A	N/A	N/A	$55 million
Bid price[6]	$4	$4	$4	$4
Market makers[7]	3 or 4	3 or 4	3 or 4	3 or 4
Corporate governance[8]	Yes	Yes	Yes	Yes

1. These requirements apply to all companies, other than closed-end management investment companies. A closed-end management investment company, including a business development company, is not required to meet the financial requirements of Rule 5315(f)(3). If the common stock of a company is included in the NASDAQ Global Select Market, any other security of that same company, such as other classes of common or preferred stock that qualifies for listing on the NASDAQ Global Market, shall also be included in the NASDAQ Global Select Market. A company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time, as described in IM-5101-2, is not eligible to list on the NASDAQ Global Select Market.
2. In calculating income from continuing operations before income taxes for purposes of Rule 5315(f)(3)(A), NASDAQ will rely on a company's annual financial information as filed with the SEC in the company's most recent periodic report and/or registration statement. If a company does not have three years of publicly reported financial data, it may qualify under Rule 5315(f)(3)(A), provided that it has:
   - reported aggregate income from continuing operations before income taxes of at least $11 million; and
   - positive income from continuing operations before income taxes in each of the reported fiscal years.

   A period of less than three months shall not be considered a fiscal year, even if reported as a sub-period in the company's publicly reported financial statements.
3. In calculating cash flows for purposes of Rule 5315(f)(3)(B), NASDAQ will rely on the net cash provided by operating activities reported in the statements of cash flows, as filed with the SEC in the company's most recent periodic report and/or registration statement, excluding changes in working capital or in operating assets and liabilities. A period of less than three months shall not be considered a fiscal year, even if reported as a stub period in the company's publicly reported financial statements.
4. In the case of a company listing in connection with its IPO, compliance with the market capitalization requirements of Rules 5315(f)(3)(B) and 5315(f)(3)(C) will be based on the company's market capitalization at the time of listing.
5. In computing total assets and stockholders' equity for purposes of Rule 5315(f)(3)(D), NASDAQ will rely on a company's most recent publicly reported financial statements subject to the adjustments described in Rule 5310(j).
6. The bid price requirement is not applicable to a company listed on the NASDAQ Global Market that transfers its listing to the NASDAQ Global Select Market.
7. A company that also satisfies the requirements of Rule 5405(b)(1) or 5405(b)(2) is required to have three market makers. Otherwise, it is required to have four market makers. An electronic communications network (ECN) is not considered a market maker for the purpose of these rules.
8. In addition to the above quantitative requirements, companies must comply with all corporate governance requirements as set forth in the Rule 5600 Series.

NASDAQ Global Market Initial Listing Requirements[1]				
Requirements	**Income Standard Listing Rules 5405(a) and 5405(b)(1)**	**Equity Standard Listing Rules 5405(a) and 5405(b)(2)**	**Market Value Standard Listing Rules 5405(a) and 5405(b)(3)[2]**	**Total Assets/Total Revenue Standard and 5405(a) and 5405(b)(4)**
Income from continuing operations before income taxes (in latest fiscal year or in two of last three fiscal years)	$1 million	N/A	N/A	N/A
Stockholders' equity	$15 million	$30 million	N/A	N/A
Market value of listed securities[3]	N/A	N/A	N/A	N/A
Total assets and total revenue (in latest fiscal year or in two of last three fiscal years)	N/A	N/A	N/A	$75 million and $75 million
Publicly held shares[4]	1.1 million	1.1 million	1.1 million	1.1 million
Market value of publicly held shares	$8 million	$18 million	$20 million	$20 million
Bid price	$4	$4	$4[2]	$4
Shareholders (round lot holders)[5]	400	400	400	400
Market makers[6]	3	3	4	4
Operating history	N/A	2 years	N/A	N/A
Corporate governance[7]	Yes	Yes	Yes	Yes

1. Companies must meet the bid price, publicly held shares and round lot holders' requirements as set forth in Rule 5405(a) and at least one of the standards in Rule 5405(b).
2. Seasoned companies (those companies already listed or quoted on another marketplace) qualifying only under the Market Value Standard must meet the market value of listed securities and the bid price requirements for 90 consecutive trading days prior to applying for listing.
3. The term 'listed securities' is defined as "securities listed on NASDAQ or another national securities exchange".
4. 'Publicly held shares' are defined as total shares outstanding, less any shares held directly or indirectly by officers, directors or any person that is the beneficial owner of more than 10% of the total shares outstanding of the company. Entities in which an officer, director or owner of 10% has voting and/or dispositive power, such as a typical employee stock option plan, are excluded from publicly held shares.
5. Round lot holders are shareholders of 100 shares or more. The number of beneficial holders is considered in addition to holders of record.
6. An ECN is not considered a market maker for the purpose of these rules.
7. In addition to the above quantitative requirements, companies must comply with all corporate governance requirements as set forth in the Rule 5600 Series.

NASDAQ Capital Market Initial Listing Requirements[1]			
Requirements	**Equity Standard Listing Rules 5505(a) and 5505(b)(1)**	**Market Value of Listed Securities Standard Listing Rules 5505(a) and 5505(b)(2)[2]**	**Net Income Standard Listing Rules 5505(a) and 5505(b)(3)**
Stockholders' equity	$5 million	$4 million	$4 million
Market value of publicity held shares	$15 million	$15 million	$5 million
Operating history	2 years	N/A	N/A
Market value of listed securities[3]	N/A	$50 million	N/A
Net income from continuing operations (in the last fiscal year or in two of the last three fiscal years)	N/A	N/A	$750,000
Bid price	$4	$4	$4
Publically held shares[4]	1 million	1 million	1 million
Shareholders (round lot holders)[5]	300	300	300
Market makers[6]	3	3	3
Corporate governance[7]	Yes	Yes	Yes

1. Companies must meet the bid price, publicly held shares, round lot holders and market makers requirements as set forth in Rule 5505(a) and at least one of the standards in Rule 5505(b).

2. Seasoned companies (those companies already listed or quoted on another marketplace) qualifying only under the Market Value of Listed Securities Standard must meet the market value of listed securities and the bid price requirements for 90 consecutive trading days prior to applying for listing.

3. The term 'listed securities' is defined as "securities listed on NASDAQ or another national securities exchange".

4. 'Publicly held shares' are defined as total shares outstanding, less any shares held directly or indirectly by officers, directors or any person who is the beneficial owner of more than 10% of the total shares outstanding of the company. In the case of alternative dispute resolution, at least 400,000 shall be issued. Entities in which an officer, director or owner of 10% has voting and/or dispositive power, such as a typical employee stock option plan, are excluded from publicly held shares.

5. Round lot holders are shareholders of 100 shares or more. The number of beneficial holders is considered in addition to holders of record.

6. An ECN is not considered a market maker for the purpose of these rules.

7. In addition to the above quantitative requirements, companies must comply with all corporate governance requirements as set forth in the Rule 5600 Series.

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The pros, cons and prerequisites of going public

Joe Morea and Michael Noonan, RBC Capital Markets

A successful initial public offering allows a company to raise funds from the private equity markets, generally considered to be the deepest source of funding. However, while going public has many advantages, a company must consider a number of issues carefully before taking this step.

A successful initial public offering (IPO) allows a company to raise funds from the public equity markets, generally considered to be the deepest source of funding. IPO benefits include:

- access to institutional and retail investors around the globe. This broad investor base helps to ensure a diverse, balanced ownership structure, which can also translate to an optimal capital structure;
- the ability to access global capital markets through subsequent equity offerings;
- greater flexibility in funding for those companies able to balance equity and debt, and the ability to obtain more favorable borrowing terms than their private counterparts;
- the option of using public company shares as currency when engaging in merger or acquisition transactions;
- increased financial transparency, created by the disclosure requirements of US regulatory agencies, allowing for further growth in investor confidence;
- increased liquidity – a public company offers a liquid market in company investments for shareholders and employees alike;
- employee recruitment and retention – public companies can employ tools such as stock options, directed share programs and stock purchase plans to align employees' interests with those of the company. These tools can then help to attract and retain talent, as employees can share in the company's growth; and
- enhanced profile – a company embarking on an IPO can use the process as an opportunity to create or enhance its brand through the following:
  - opening day listing events, which can be used to generate publicity;
  - ongoing public exposure with worldwide media coverage through the financial markets, which provides constant coverage of publicly traded companies; and
  - broker-dealer analyst research, which increases the company's visibility and competitive position, thus potentially helping to create greater market share.

Going public offers many advantages; however, there are several issues that a company should consider before going public:

- additional costs – IPOs are expensive, with both high initial and ongoing costs such as compliance with the Sarbanes-Oxley Act of 2002;
- greater compliance requirements;
- loss of privacy and control; and
- public shareholder scrutiny.

Once the company has determined that it stands to benefit from the advantages enjoyed by public companies, it is critical to determine whether it is capable or mature enough to complete an initial offering.

Prerequisites include a solid financial performance and a well-articulated growth story, which includes the following:

- a clearly defined vision for the company;
- a strong balance sheet;
- consistent future growth prospects;
- products or services with proven market appeal;
- a broad customer base; and
- the potential for ongoing market acceptance.

Company history and growth prospects should be clearly and credibly articulated within a comprehensive business plan. This plan should cover the company's business strategy, capabilities and growth objectives, along with its product lines, markets, and market position *vis à vis* its competitors. A summary of historical financial performance and detailed financial projections must be included in the plan. All assumptions used in the projections must be fully described and explained, and should allow both the lead underwriters and analysts to assess their feasibility.

The value of the company depends in part on the existence of a strong, successful leadership team, which can be counted on to use the capital raised from an IPO to enhance further growth and shareholder value.

3

The initial public offering process

Mike Gould, Don Rupprecht, Erin Cahill, Scott Gorrell and Tracy Herrmann, PricewaterhouseCoopers

Joe Morea and Michael Noonan, RBC Capital Markets

Joshua Ford Bonnie and Kevin Kennedy, Simpson Thacher & Bartlett LLP

The initial public offereing process can seem daunting for a company wising to go public. This chapter will help to guide you through the process and get you ready to start a successful transaction.

The team

Underwriters

The lead underwriters are crucial to the success of an initial public offering (IPO). They advise the company and its shareholders on offering structure and strategic direction, and coordinate a number of critical functions. Those functions include, but are not limited to:

- analyzing the company's industry to assess investor demand;
- structuring and valuing the offer;
- positioning the company; and
- developing the investment story necessary to market the issue.

The company should consider several factors when selecting a lead managing underwriter:

- reputation – a top-tier underwriter can lend credibility to an offering;
- experience – the more issues an underwriter has successfully managed, both in total and within the company's sector, the more likely it will be to understand and execute successfully the elements required for the IPO to succeed;
- industry expertise – an underwriter with industry knowledge can provide an edge when launching and marketing an offering;
- team focus – since the IPO process is time intensive, it is important to select a lead underwriter with adequate resources for meeting important deadlines;
- distribution capabilities – the more widely an underwriter can distribute an offering to institutional and retail investors, the higher the likelihood of success;
- range of services – an underwriter with a full platform of products and services, such as equity, debt and advisory capabilities, foreign exchange management and prime brokerage, can assist an issuer with its IPO and also with other products and services as the company grows; and
- potential for research coverage.

The responsibility of a co-manager is to focus on supporting the deal throughout the IPO process. Co-managing banks conduct due diligence, provide additional research coverage and aid in market making after the public offering. They are also responsible for helping to build an order book.

Lawyers

The company and the underwriters typically each have their own legal counsel. The role of the company's legal counsel is to help navigate through the complex regulatory requirements connected with going public, and to facilitate and coordinate the activities of the other parties involved in the process (eg, accountants, underwriters and regulators). Close coordination during the IPO process among the members of the working group is essential to ensure a successful transaction. The company's legal counsel also helps the company to understand and comply with the constraints on publicity with which it and its employees must live during the IPO process. The company's legal counsel draft, among many other documents, the registration statements and prospectus, while the underwriters' legal counsel typically drafts the underwriting agreements. Both sets of counsel are integrally involved in the due diligence process. The legal counsel also typically have experience interacting with the US Securities and Exchange Commission (SEC), which helps in the effort to anticipate potential areas of SEC concern and to address them in the initial filing. This can reduce the degree to which the SEC will request revisions to the registration statement and prospectus and expedite the IPO process.

Independent auditors

As strategic and technical advisors, a company's independent auditors will play a key role throughout the registration process. Therefore, at the start of the IPO process a company will need to ensure that it has selected an audit firm that is registered with the Public Company Accounting Oversight Board. Selection of an auditing firm should also be based on:

- its experience with public company financial reporting;
- expertise in US generally accepted accounting principles (GAAP) and the board's auditing standards;
- its reputation and the engagement team's experience with IPOs and other capital markets transactions; and
- its ability to continue to service the company appropriately throughout its growth and global expansion.

Other factors to consider are the size of the firm's local and global resources and its experience in the company's industry. Some of the specific services the independent auditor will provide include:

- strategic advice in the planning stage of the process to establish a realistic plan to enter the capital markets;
- the requisite technical expertise in US GAAP and SEC requirements so that it can advise a company on preparing the registration statement and obtaining SEC

clearance. Guidance on the identification of potentially sensitive or problematic accounting issues (eg, cheap stock considerations), financial disclosure issues and the overall transparency of financial reporting is particularly important;
- audits of the financial statements – the process of auditing multiple years of financial statements and related disclosure requirements for public offerings can be extensive. An established relationship with an auditor that knows a company's business well, coupled with thorough preparation on the company's part, should enable it to complete the process faster and more effectively, which can be crucial to the success of the offering;
- a comfort letter to assist the underwriter in its due diligence efforts – this details certain procedures that the company's external auditor performed at the request of the underwriter, along with other representations the auditor made concerning the financial statements or other information contained in the prospectus;
- auditor due diligence, which consists of a conference call, or meeting, with the auditor, management, underwriters and their counsel, in which the auditor provides responses to a series of questions about its relationship with the company and other information deemed necessary by the auditor to share based on its experience with the company; and
- a review of the registration statement or prospectus, and assistance in responding to the SEC comment letter process.

The importance of engaging a qualified and experienced independent auditor long before the IPO cannot be overstated, particularly if a company has never had its financial statements audited before. The first audit of many young and expanding companies often discloses accounting and financial reporting issues that must be resolved before the initial registration statement can be filed.

Advisory accountant

Companies often seek transaction support and advisory services from a second accounting firm that is not restricted by professional and statutory independence standards. An advisory accountant can offer assistance to organizations with limited experience in IPOs and executing capital markets transactions by providing an objective view of the critical issues involved in accessing a particular capital market. Some of the principal ways in which an advisory accountant can assist a company going through a capital-raising transaction include:

- advice on project management – companies must define the transaction requirements and the roles and responsibilities of management and their advisors at the outset. Failure to do so early on can jeopardize control and effective management of the transaction;
- strategic advice – companies must evaluate alternative approaches and establish a realistic plan to enter the capital markets;
- Section 404 of Sarbanes-Oxley companies should obtain assistance from their advisory accountants regarding the design, documentation and testing of internal controls over financial reporting to ensure compliance with Section 404;
- issue resolution – the advisory accountant can advise and assist with complex financial reporting and deal execution matters;
- technical advisory – the advisory accountant can and should have extensive experience with complex capital markets transactions; and
- post-transaction services – a knowledgeable advisory accountant can provide advisory assistance with:
  - implementing new financial reporting protocols necessary to meet public company reporting requirements, along with ongoing technical advice on these requirements;
  - corporate governance;
  - the adoption of new accounting, reporting and disclosure standards;
  - training of accounting and finance staff; and
  - ongoing compliance with Section 404 of Sarbanes-Oxley.

Financial printer

Financial printers are experts at providing integrated communication solutions for finance-related activity on a worldwide scale. The main role of the financial printer during the IPO process is to create, manage, produce and distribute various documents for a wide range of capital markets and investor communications-related activities. Compared to a commercial printer, a financial printer is designed to meet the unique needs of a time-critical and rapidly changing financial community.

The financial printer composes the documents that are being created between the company, lawyers, underwriters, legal teams and accountants in real time and in the correct format required by the SEC. Additionally, the financial printer is an expert at using the SEC's Electronic Data Gathering

Analysis and Retrieval (EDGAR) system and supports the company's needs in regard to SEC electronic filings during and after the IPO process. Many leading financial printers also offer extensive translation services and supply foreign-language typesetting for language-specific prospectuses.

Investor relations firm

When going public, a company should consider hiring an investor relations firm if the company itself is not capable of performing such a function. The investor relations firm can play an important role in establishing and maintaining relationships within the financial community. That is why many companies choose to hire a firm that specializes in such tasks.

The investor relations advisors can assist the company in developing its message for investors and preparing its roadshow presentation. After the IPO, the investor relations firm can act as the point of contact between the company, interested investors and members of the press by answering questions and providing information about the company. This task is accomplished through internet resources, press releases, webcasts and phone calls.

Insurance broker

The company should consider two main reasons to procure directors' and officers' (D&O) insurance: high risk associated with an IPO and the need to recruit talented managers to the board of directors of a company. Due to the fact that directors and officers face personal liability when serving as board members in a public company, D&O insurance plays an important role in protecting individuals and the corporate entity. Many companies contract private D&O insurance even before going public so that they have insurance during the IPO process. For many board members, a solid D&O insurance is often a prerequisite to joining a public company or a company that is in the process of going public.

The role of the insurance broker is to develop the D&O placement strategy well before the registration statement is filed. The insurance broker goes through an extensive risk-profiling exercise with the company to market the D&O placement to the carriers and reviews the carriers that are best suited for the company. The better the company can show, with the help of the insurance broker, that it has a low-risk profile, the more choices of carriers it will have. The company should look for a specialist broker well familiarized with the important nuances of this market to procure state-of-the-art D&O iinsurance.

Transfer agent

The transfer agent plays an important role as publicly traded companies often have many investors, which each own a small portion of the company. The transfer agent's main role is to handle the transfer of the company's common stock and other publicly traded securities.

The transfer agent also acts as an intermediary for the company and maintains records of investors, account balances and transactions for the company. The transfer agent handles the sale of any shares in the accounts of the shareholders, cancels and issues certificates and processes investor mailings. Companies hire transfer agents to assist their shareholders with any questions and issues the shareholders may have, and to keep track of ownership of all company shares.

Exchange

The selection of the exchange is a critical decision for a company pursuing an IPO. NASDAQ OMX's mission is to promote growth and entrepreneurship by providing companies, market participants and investors with the highest-quality equity market in the world – a market that is fast, reliable, highly transparent and deeply liquid; a market with state-of-the art trading efficiency; and a market with the highest standards for regulatory oversight and corporate governance.

An IPO timetable

A successful IPO requires the coordination of many parties, including the company, along with its legal team, lead underwriter, auditors and printers. Although the preparation for becoming a public company can take significant time and effort prior to the organizational meeting, the steps required to complete an IPO once the transaction has "kicked off" typically take between 12 and 20 weeks; this timeline may vary depending on the complexity of the offering, market conditions and the extent of preparations that the company already has completed. The stages proceed roughly as follows.

Prior to the IPO launch

Prior to launching the process to go public, the company should make a thorough assessment of the key factors important to the success of any IPO, which include:

- ensuring that the process of establishing internal controls complies with Sarbanes-Oxley and SEC regulations;
- appointing a board of directors to lead the company through the IPO process ; and
- commissioning audited financials from a

recognized firm that has a national practice and has experience executing IPOs.

The company then needs to select advisors that it will work with to execute the IPO. These will include:

- The investment banks (underwriting syndicate) that advise on the marketing and execution of the transaction. The underwriting syndicate includes the lead investment bank(s) (lead managing underwriter or book running manager) that leads the IPO process as well as the co-manager(s) who play a supporting role in the transaction; and
- The company counsel who leads the company through the regulatory process of going public.

Week one

Conduct organizational meeting

The purpose of this meeting is to introduce all the parties involved in the IPO, including the company's management team, lead underwriters, corporate counsel and accountants. The company will ensure that each party understands the structure and timing of the offering, and how the responsibilities will be distributed. The lead underwriter presents a detailed organizational book covering these assignments.

Weeks two through five

Conduct due diligence

The company's executive team and its professional advisors conduct due diligence to ensure the accuracy, truthfulness and completeness of the registration statement, and to understand any nuances associated with the company. Each party takes a slightly different role:

- Company management provides information on the company, including its products or services, customers, performance, industry, competitive position, prospects, risks, governance and corporate structure.
- The company's finance team provides audited and interim financial statements, along with a summary of the capital structure and debt covenants. Additional responsibilities include:
  - performance breakdown by customer and region;
  - detailed reviews of monthly or quarterly budgets going back two years;
  - three to five-year budget projections;
  - developing a detailed financial model;
  - key business assumptions, including five-year forecasts; and
  - clarifying the proposed uses of the IPO proceeds.
- The lead underwriter's legal team reviews the company's legal records, title to principal assets, larger contracts, and compliance with applicable laws and regulations. The team also reviews any current litigation, environmental concerns, regulatory correspondence, material related to intellectual property, and the controls and code of ethics already in place.
- The lead underwriter and/or co-managers focus on the company's business strategy and potential for growth. They analyze the company's operations, performance, pricing structure, distribution channels, management and financial projections, often conducting on-site visits and interviewing company officials, suppliers, customers and creditors. The lead underwriter also looks closely at the company's industry, competitive position, intellectual property, corporate governance and employee base. With this information, the lead underwriter can work effectively with management to draft a strong statement and growth story to support their efforts to market the issue or growth story.

Research analyst diligence session

The company will host a diligence session with the respective research analyst(s) from each underwriter. At this meeting, the management team will provide an overview of its business, strategy and financial model. This session is necessary for the research analysts to build their financial models. The company should expect ongoing follow-up work after the session as the analysts develop and finalize their financial models and assumptions

Draft registration statement or prospectus

The company must prepare and file a preliminary registration statement with the SEC. The registration statement is the primary document that contains extensive information about the company. It typically takes five to eight weeks to draft.

Conduct additional preparations with lead underwriter

Management and the lead underwriter continue to work together to prepare the company to file the registration statement. To that end, they:

- conduct ongoing discussions on its valuation, considering any changes within the markets and the company;
- finalize the composition of the board of directors and board committees;

- develop internal controls that comply with the requirements of the exchange; and
- secure approval of the transaction from the underwriter's commitment committees.

During this period, the executive team verifies that the company is eligible to list on NASDAQ.

Analyze public image
Management needs to evaluate the perception of the company within its industry, the broader business and regulatory environment, with analysts and media outlets, and with current and potential customers. Part of this evaluation should include a review of currently published communications materials, including those going to employees.

Develop a financial communications strategy
Once the company's current profile has been examined, management should identify ways in which future communications can effectively articulate the company's value and build confidence in the management team, as these are critical to the success of the IPO. These steps may include:

- identifying investor groups to target;
- establishing guidelines for communicating with investors, analysts, media and employees, bearing regulatory limitations in mind; and
- if appropriate, ensuring that management obtain training.

Week six
File Form S-1 electronically with the SEC as well as an application to list on NASDAQ.

Updated valuation and market conditions
Throughout the IPO process, the management team and lead underwriter must regularly assess the company's likely valuation. These discussions should consider any changes in the market and with the company's operations or expected future performance. If significant changes occur, the company's valuation could change accordingly.

Weeks seven through 14
Respond to SEC comments on the registration statement
Approximately 30 days after Form S-1 is submitted, the SEC typically responds to the company with a comment letter requesting any revisions it deems necessary. The company works with its advisors to revise the statement, file an amendment and send a response to the SEC. Typically this amendment and revision process continues for between six and eight weeks, until the review process is complete. Typically a company is required to make at least two additional submissions to the SEC before all comments and concerns are considered addressed. The IPO cannot be priced until all issues with the SEC are resolved and the registration statement is declared effective.

Obtain approval from NASDAQ for listing
If the company meets all the criteria for listing, NASDAQ will notify it when it is approved.

Establish preliminary offering size and structure
The lead underwriter assesses preliminary interest in the IPO based on prevailing market conditions.

Factors influencing the offering's size, number of shares to be issued and filing range include, but are not limited to:

- valuation of the broad peer group;
- the company's objectives – the amount of capital it needs to raise and the amount of control it wants to retain;
- the company's financial performance and prospects for growth;
- the competitive market environment;
- general equity market conditions and requirements; and
- the anticipated level of interest from institutional and retail investors.

Develop marketing strategy
The lead underwriters develop a comprehensive marketing plan for the offering, taking into consideration the company's investment themes and targeting specific investors.

Road show preparation/management presentation
A road show consists of a series of meetings with potential investors in key cities across the country; in certain cases these may extend outside the United States. Top company executives deliver a management presentation covering the company's business and financial performance, along with its products, services and markets. A typical road show can include meetings with more than 100 potential investors.

The lead underwriter will assist in determining the cities to visit and mapping the road show itinerary and logistics.

Management presentations should

include:

- a summary of the offering;
- an introduction/biography for each presenting executive; and
- an overview of the company, its financial performance and business strategy, the competitive landscape and investment highlights.

The lead underwriter assists management in a road show's preparation by helping to prepare the slides, rehearsing the presentation with management and preparing educational materials for the sales force.

Weeks 15 through 18

File a red herring

The preliminary prospectus included in the registration statement prior to the launch of the road show is called the "red herring." This document contains the proposed stock price range; the term "red herring" refers to the notice that must be printed on the cover, in red, stating that the company is not attempting to sell shares before the SEC has approved the issue.

After the red herring is filed, the deal is launched with the following primary activities:

- road show presentations are made to the investment bank's sales force;
- a two-week road show commences, consisting of investor meetings;
- the offering is priced and allocations determined;
- the stock is opened for trading on NASDAQ; and
- the IPO is closed.

The IPO marketing, pricing, listing and closing process

Teach-in

During the teach-in, an underwriter's research analyst presents to the global equity sales force. A teach-in includes the following information:

- transaction details and timeline;
- company description, independent research financial model and competitive landscape;
- key educational points on the company;
- trading comparables; and
- investment risks and concerns

In order to increase the potential for a successful offering, the lead underwriter will determine the most important regions for company management to visit. The goal will be to reach the largest number of high-quality investors, which will become long-term shareholders for the company.

Management presentation (launch of the IPO)

The company's management conducts a presentation to the underwriter's global equity sales force. The presentation signifies the launch of the IPO and the start of the road show.

The initial management presentation is traditionally recorded and then available for viewing on NetRoadshow. The presentation can be viewed by potential investors around the globe until the offering is priced.

Investor meetings

Equity capital markets and the institutional sales force begin the process of targeting investors to meet with and begin to scheduling one-on-on meetings. The lead underwriter and the company's management team conduct a road show to meet with potential investors; traditional road shows run for between eight and 12 days. During the course of the roadshow, the sales force builds a book of orders. "Book building" refers to the process of assessing institutional and retail demand for the issue from investors. Throughout this stage, the lead underwriter determines the appropriate size and price of the offering.

A traditional road show consists of a combination of meetings in the following regions/cities:

- London;
- Frankfurt and/or Milan;
- New York;
- mid-Atlantic (Philadelphia, Baltimore);
- mid-West (Chicago, Minneapolis, Denver);
- Texas (Dallas, Houston); and
- West Coast (San Francisco, Los Angeles, Seattle).

Typically a road show day involves five to seven one-on-one meetings and/or conference calls, a group breakfast and/or lunch, and travel to the following day's city.

At this time, the underwriters identify market orders, or those that have not set price limits for their orders, as well as investors with scaled orders at different prices. The underwriters also "scrub" the orders, eliminating any quick-flip investors that have not demonstrated a commitment to support the company over the long term.

In addition to generating demand from institutional investors, the underwriters will solicit demand from retail investors. Retail investors have the ability to generate substantial demand and are less price sensitive than institutions.

Determine price and allocation

Before the offering can be priced, the company's board of directors must establish a pricing committee to approve formally the proposed price.

The lead underwriter attempts to achieve the most appropriate price for the company, while building a high-quality shareholder base. High-quality investors are sought in an attempt to achieve an attractive valuation for the company as well as to provide the best framework for the stock to trade well when the IPO prices and onward.

Once an IPO price is established and approved, the lead underwriter begins the process of identifying those investors that will receive shares and the amount allocated to each. The allocation of shares at the IPO represents the core of a company's shareholder base. A high-quality initial shareholder base creates long-term partnerships and attracts other quality investors. Typically between 80% and 90% of shares in an IPO are allocated to institutions, with the remaining 10% to 20% going to retail investors.

At the conclusion of the allocation process and before the market opens, the lead underwriter contacts the investors to let them know how many shares they will receive and at what price. Each investor must confirm that it will take delivery of the shares.

After all the IPO shares have been allocated and confirmed with accounts, the underwriters break the syndicate and the deal can begin trading.

Stock opens for trading

To achieve efficient execution, NASDAQ assigns opening time slots for IPO clients. On the first day of trading, the stabilization agent, on behalf of the lead underwriter, requests a time slot. During the 15-minute window before the assigned time slot, buy and sell orders begin flowing to the trading desk. The trader pairs up these orders to arrive at an appropriate market opening price for the stock to start trading. For instance, while the offering price may be $10, an issue may actually start trading at $10.50.

The stabilization agent is the investment bank which opens the trading in the stock post the offering and provides support to the stock price. It may commit capital to provide liquidity if the stock comes under selling pressure in the after-market and use shares purchased in the after-market to cover the syndicate short position. On the contrary, if there is strong after-market demand for the stock, the stabilization agent can exercise its overallotment option (or "greenshoe") to purchase up to 15% more of the issue directly from the company to cover the syndicate short position.

Print final prospectus

Once the IPO is priced, the lawyers will revise the prospectus to include final price and size information and a copy will be filed with the SEC. After it is printed, the underwriter(s) will distribute copies of the final prospectus to investors.

Closing the IPO

The IPO closes three days after the day on which shares initially traded. Funds are transferred from the investors to the lead manager – the lead underwriter that is billing and delivering. The lead underwriter deducts the underwriting fees and transfers the net amount to the company on the settlement date. If the greenshoe is exercised before settlement, the total amount is transferred at once. If it is exercised post-settlement, funds are transferred on a secondary basis.

Closing the offering

All remaining legal documents are completed and delivered. Three days after the offering is priced, the exchange of securities for funds occurs

IPO readiness assessment

An IPO is a transformational event – perhaps the most important a company can undertake. It can change the lives and fortunes of its owners, investors and employees. Like any large transformational event, a successful IPO requires careful planning and preparation, considering both the registration and offering process (going public) and the organizational changes required to operate as a public company (being public). By undertaking a structured exercise to analyze a company's state of preparedness for both of these objectives, management can obtain a full understanding of the key IPO issues. Once completed, this assessment provides a basis to develop a project plan to address these issues and identify resources to perform the necessary remediation work. Going public is the process of:

- taking the company through the steps of gathering the necessary financial, marketing and business information;
- determining optimal tax and legal structure;
- filing the registration statement with the SEC;
- responding to SEC comments; and
- marketing the business and selling the shares in the road show.

The registration process ends when the offering is sold and the company and/or its shareholders receive the proceeds. Being public is the process of transforming the organization so that it can operate as a public company. Among the many tasks involved are:

- upgrading, sustaining or enhancing financial reporting capabilities;
- creating an investor relations function; and
- meeting the governance, reporting and internal controls standards and listing requirements of the SEC and of the selected exchange.

While some of these elements will not come into play until after the IPO launch, it is critical that companies establish a process to identify essential action items, create an achievable plan for completion and commence execution while still a private company.

A typical IPO readiness assessment would address the company's financial results and historical track record, and the preparedness of its financial statements and reporting function for being a public company, including the following questions:

- What additional information is needed for the prospectus, such as additional financial statements of acquired and to-be-acquired properties?
- Are the accounting policies suitable for a listed company?
- How do they compare to the peer group?
- What additional disclosures will be required as a listed entity?

An evaluation of readiness could also address deal structuring, including tax planning, and assess:

- corporate structure;
- board structure and sub-committees;
- board and senior management capabilities;
- corporate governance arrangements; and
- stock exchange listing eligibility issues.

Management should:

- review its objectives and capital needs;
- understand the advantages and disadvantages of going public;
- understand its available options;
- understand the differences between the respective stock exchanges (including SEC requirements);
- obtain insights into costs and cultural changes that will be involved;
- obtain an understanding of the entire IPO process and pitfalls; and
- work to establish a reasonable timetable.

The key areas of a readiness assessment include:

- preparing a project plan, including project governance for an IPO;
- completing a financial control review;
- performing a corporate governance gap analysis;
- assessing media, analyst and investor relations needs;
- assessing human resources and benefit
- needs to retain and motivate employees;
- understanding the company's compliance with tax requirements; and
- reviewing the IT system's ability to support the new timely demands of a public company.

Throughout the assessment process, issues can be identified and dealt with at an early stage in order to save time and money.

Early planning allows a company to react quickly, minimizes potentially unpleasant surprises and ensures the company can take advantage of any positive market movements. Businesses that have undertaken a full pre-IPO readiness assessment to identify the key issues are those that gain the most from an IPO and entry into the capital markets.

Constraints on publicity during the IPO process

During the IPO process, certain restrictions apply to a company's publicity and employee communications while it is "in registration" with the SEC. These restrictions can be divided into three time periods:

- the period beginning when the company reaches an understanding with an underwriter to pursue an IPO and ending upon filing of the registration statement with the SEC, commonly referred to as the "pre-filing period;"
- the period between filing the registration statement and the time that the registration statement is declared effective by the SEC, commonly referred to as the "waiting period;" and
- the period beginning when the registration statement is declared effective by the SEC and ending 25 days later, commonly referred to as the "post-effectiveness period." As a group, these three periods are often referred to as the "quiet period."

Pre-filing period

Under the Securities Act of 1933, a company is generally not allowed to offer to sell any of its securities before filing a registration statement. The SEC construes an "offer to sell" broadly. The phrase includes the publication of information and publicity efforts made in advance of a proposed offering that have the effect of "conditioning the public mind" or "arousing public interest" in the company or in its securities. The SEC may construe a communication as an offer to sell even if it does not make reference to the securities being offered or the offering. Unauthorized efforts to offer securities before filing are generally labeled "gun jumping." Among other things, gun jumping may cause the SEC to delay the effectiveness of the registration statement, thereby creating practical marketing problems and delaying the transaction.

While the SEC's rules permit a company, subject to a number of significant limitations, to continue to advertise its services or products in accordance with established, pre-existing practices and to continue to release factual (but not forward-looking) information about its business in a manner consistent with past practice to persons (eg, clients) other than in their capacities as investors or potential investors in the company's securities, the company is advised to take steps during the pre-filing period to ensure that its public relations and other departments do not inadvertently issue announcements, releases or other information that the SEC might construe as an attempt to stimulate the market for the common stock. Communications by the company made more than 30 days prior to filing the registration statement that do not reference the proposed offering are generally permissible under a safe harbor, provided that the company takes reasonable steps to prevent further distribution or publication of the communication within this 30-day period. Before filing this registration statement, the company may also issue a very limited press release regarding the proposed offering. Commencing 30 days before the initial filing of the registration statement, communications must be extremely limited.

The company should consult legal counsel about all press communications, including press releases, and all speaking engagements by senior personnel during the quiet period.

Waiting period

During the waiting period, the same principles discussed above generally continue to apply, with some exceptions. Written offers may be made through the use of a preliminary (or red herring) prospectus containing a valid estimated price range for the IPO. In contrast to the pre-filing period, oral offers can be made during this time. In addition, indications of interest may be solicited from prospective purchasers, provided that specified conditions are met. Oral solicitations by phone or in person can be made because they are not included within the definition of a "prospectus," but it is important to note that an offer cannot be accepted until after the registration statement becomes effective. In addition, the company may issue a somewhat more detailed press release during this period (which must contain an SEC-mandated legend) that names the underwriters and provides more information about the offering. Any communications regarding the company or the offering, oral or written, during this period should be consistent with the information disclosed in the prospectus.

In conclusion, two points need to be stressed relating to the waiting period:

- No written communications (including recorded electronic media), other than the prospectus filed with the SEC and the press release mentioned above, that might be viewed by the SEC as an "offer to sell" securities are generally allowed during this period, other than an "electronic road show" that meets a number of specific legal requirements, including the requirement that it be preceded or accompanied by the prospectus. While SEC rules permit written offers other than the traditional prospectus, referred to as "free writing prospectuses," in certain circumstances, IPO issuers are subject to significant constraints on the use of these non-traditional offering documents and counsel should be consulted if consideration is being given to the use of any such documents. Except in the context of ordinary-course business activities consistent with past practice, no written material about the company or its personnel, services or products should be distributed, including to employees, without first consulting with counsel. The company may continue to advertise its services or products in accordance with established pre-existing practices. In any event, ordinary-course communications:
  - should be consistent with the information in the preliminary prospectus filed as part of the registration statement with the SEC; and
  - should not include forward-looking information, including forecasts, projections or predictions of the company's financial results, prospects or investment.
- Even though offers and solicitations are permissible under the conditions specified above, during the waiting period no agreement can made to sell securities, no sales or delivery of securities can be

made and no funds can be received.

Internal employee communications
The company may continue to communicate with employees orally and in writing in accordance with established pre-existing practices. The company should be careful, however, to avoid any written communications (including by video, voice mail, the Internet, email and replay of conference calls, all of which the SEC may view as written) outside of the IPO working group that discusses the IPO, as these could be viewed as an attempt to stimulate interest in the offering. Members of the IPO working group should be advised not to distribute any IPO-related information outside the working group. Counsel should be consulted regarding communications with employees if the company is considering implementing a directed share or "friends and family" program.

Underwriters' counsel, rating agencies
Management should be fully forthcoming with underwriters and underwriters' counsel and rating agencies in the context of due diligence, but should confirm that no research analysts are participating in due diligence discussions before discussing or handing out projections.

Analysts
Company personnel should not communicate with research analysts without prior consultation with counsel.

Media
Except for communications constituting ordinary business activities consistent with established pre-existing practices that do not relate in any way to the IPO or to the company's business or prospects, all requests from the media should be met with a statement that the company is unable to comment or respond to inquiries. Counsel should be consulted prior to any communications with the media.

Incomplete preliminary prospectus
The version of the registration statement initially filed with the SEC will contain a preliminary prospectus that omits certain information, including a price range for the offering. As a result, the SEC will view the incomplete preliminary prospectus (sometimes referred to as a "pink herring") as not conforming with the SEC's rules on prospectuses. Accordingly, until the preliminary prospectus has been amended by a future filing with the SEC to include this information, the registration statement should not be distributed by the company or the underwriters outside of the IPO working group. The registration statement, including the incomplete version of the preliminary prospectus, will be accessible to the public on the SEC's website; however, the company should not direct potential investors or others to any website for access to the preliminary prospectus until it is complete.

Website
The SEC now routinely reviews a company's website in connection with its review of that company's registration statement. The SEC has urged "issuers to take special care in what they put on their websites during the pre-filing and waiting periods." Accordingly, the company's website should be reviewed to confirm that it does not contain information, or links to other websites, that might be viewed by the SEC as an attempt to stimulate the market for the company's common stock. Information included on the company's website relating to its services, products and factual business developments that are directed at customers, potential customers and business partners in accordance with past practice should not pose any problems. Projections or other forward-looking information and information promoting the company's business and financial prospects, and links to other websites containing this type of information, should be avoided.

Press releases
The company may issue press releases regarding factual business developments in accordance with established pre-existing practices. Counsel should be consulted before the issuance of any press releases to ensure that they would not be viewed by the SEC as an attempt to stimulate the market for the company's common stock.

Speeches
Senior company personnel should not solicit opportunities to speak and should consult with counsel before accepting invitations to speak or giving a speech pursuant to a pre-existing obligation. Of particular concern are speeches given at financial conferences or those made with the financial press in attendance. In any event, the content of speeches should be reviewed with counsel before the speech is delivered. Copies of speeches and other promotional written materials should not be distributed.

The period after effectiveness of the registration statement
Generally, for 25 days after the pricing of an IPO, securities dealers are required to deliver a prospectus in connection with any trades they make in the company's common stock. The company will have an obligation

under the underwriting agreement to update the IPO prospectus for any material developments occurring while securities dealers are subject to this prospectus delivery requirement.

Accordingly, during this period the company should avoid publicity, both oral and written, that would require the prospectus to be updated. Many companies take a conservative approach and limit publicity during this period to ordinary-course business activities, consistent with past practice. To the extent that the company issues press releases, counsel should be consulted in advance. Similarly, counsel should be consulted before any senior personnel accept invitations to make speeches or give presentations or interviews during this period.

Preparing the registration statement

Preparing and filing the registration statement is a relatively complicated, time-consuming and technical process requiring substantial planning and coordination in order to provide the information specified by the SEC form being used and to comply with the applicable SEC rules in the most efficient manner possible. The working group will expend a great deal of effort to prepare a registration statement that portrays the company as accurately, transparently and as positively as possible, while also disclosing any negative risk factors.

The determination of the SEC form to be used for registration purposes is a legal one and should be made by the company in consultation with its counsel and underwriters. A detailed description of each of the SEC forms can be found on the SEC's website. The SEC Registration Statement on Form S-1 is the basic registration form for a US company's initial registration statement. (Canadian registration forms are also discussed below.)

Often the preparation process for the initial registration statement can take longer than expected, causing a delay in the anticipated filing date. It is therefore imperative that the entire team:

- be thoroughly familiar with the registration statement requirements;
- be cognizant of the deadlines;
- regularly assess the status of sections of the registration statement; and
- ensure that reviews of each section are completed in a timely manner.

Form S-1 consists of two principal parts. Part I contains the essential facts regarding the company's business operations, financial condition and management, which must be included in the prospectus, along with the company's financial statements. Part II presents additional information that need not be included in the prospectus. The prospectus should be a comprehensive narrative document prepared in plain English that tells the story of the company and gives investors a balanced view of why they should invest, along with the associated risks of the offering.

The information required for Form S-1 includes the following.

Information required in the prospectus

Prospectus summary

This appears at the beginning of the prospectus and is a short summary describing the company, its business, the type of securities being offered, the amount of estimated proceeds, the intended use of the proceeds and the principal risk factors. It may also include certain summary financial information. The section also includes the complete mailing addresses and telephone numbers of the company's principal executive offices. Although not required, companies often include their website address here as well. The summary should not merely repeat the text of the prospectus, but should also provide a brief overview of the key aspects of the offering.

Risk factors and the risks associated with the business and industry

Risk factors should be specific to the company and not to any other company or offering. Risk factors that make the offering speculative or risky must be disclosed. These may include the following:

- recent adverse developments or operating losses;
- the need for additional financing;
- dilution to public investors;
- industry trends or business seasonality;
- the existence of significant competition;
- the company's dependence on a few customers, suppliers or key members of management;
- information regarding significant contracts or licences;
- the impact of current or proposed legislation (eg, in communications or healthcare);
- technological changes;
- the effectiveness of the internal control structure; or
- litigation.

Use of proceeds

A company must disclose and discuss the planned use of the proceeds from the offering. This section of the registration statement should be carefully drafted because the SEC requires disclosure of the actual disposition of the proceeds after the offering is completed. Because the actual use of proceeds may change between the filing date and the effective date as the company's plans change, it may be necessary to revise this section of the registration statement on the effective date. Typical uses might include debt reduction, acquisitions, capital purchases, research and development expenditures and marketing expenses.

Dividend policy and restrictions

A company must disclose its current dividend policy, any anticipated changes to that policy and any restrictions on its ability to pay dividends. For example, it is not uncommon for many new public companies not to pay dividends, but rather to retain earnings to finance operations and expansion. Restrictions might be based on debt, contractual agreements or the regulatory environment in which the company operates.

Capitalization

Although not specifically required, the capital structure of a company, both prior to the offering and after all securities offered are sold, is usually presented in a tabular format.

Dilution

When a disparity exists between the IPO price and the net book value per share of tangible assets, dilution results. The effects of any material dilution on prospective investors must be disclosed; this is usually presented in a dilution table.

Underwriting and distributing securities

Information must be provided about:

- the price of the securities being offered;
- the members of the underwriting syndicate;
- the type of underwriting; and
- any relationship between the company and any of the underwriters.

Information about the company's business

The company must make extensive disclosures about its business, including:

- its business plan, particularly if it has less than three years' operating results;
- a description of principal segments, products and services and markets for the company's products and services;
- a description of its properties;
- information relating to foreign operations, if any;
- the amount of research and development expenditure;
- regulations affecting the industry and company;
- pending or threatened legal proceedings; and
- revenues, profits, assets, products and services, product development, major customers, order backlog, inventory, patents, suppliers and the competitive position of each major industry and geographic segment of the company.

Financial information

The SEC has specific and sometimes complex rules regarding the content and age of the financial statements that must be presented in a registration statement, and the company's accountants can be invaluable in assisting with compliance and interpretation of these rules. In preparing a Form S-1, a company must generally present the items listed below:

- audited balance sheets as of the end of the two most recent fiscal years;
- audited statements of income, cash flows and changes in shareholders' equity for each of the past three fiscal years;
- selected financial information (typically summarized from the company's balance sheets and income statements) for the past five fiscal years; and
- interim financial statements, required if the fiscal year-end financial statements are more than 134 days old at the expected effective date of the registration statement, except for third-quarter financial statements which are timely through the 45th day after the most recent fiscal year end. After the 45th day, audited financial statements for the fiscal year must be included. Interim financial statements can be presented in a condensed format and generally are not audited. However, a review of the interim financial statements is typically performed by the independent accountants. Interim financial statements include a balance sheet as of the end of the most recent interim fiscal quarter, statements of income and cash flows for the period between the latest audited balance sheet and interim balance sheet and corresponding period of the preceding year.

It should also be noted that:

- the latest audited financial statements cannot be more than one year and 45 days old at the date the registration statement becomes effective;

- separate financial statements of businesses acquired, or that will likely be acquired, and that meet certain significance requirements. The financial statement requirements range from one to three years of audited financial statements (and potentially unaudited interim fianancial statements), depending upon whether certain criteria are met;
- separate financial statements of significant equity investees of the registrant. Insofar as practicable, the financial statements shall be for the same dates and the same periods as the audited consolidated financial statements. However, these financial statements need be audited only for periods in which the equity investment is deemed to be significant (as defined by the SEC rules); and
- separate standalone (unconsolidated) financial information of the registrant, in instances where restrictions prevent its subsidiaries from freely transferring funds to it.

Pro forma *financial information*

Pro forma financial information includes financial statements, or financial tables, with applicable footnotes, prepared as though certain transactions have already occurred. While the need for *pro forma* financial information most frequently occurs in connection with business combinations, the rule also applies to other events. For example, the use of proceeds from the IPO to repay outstanding debt obligations also necessitates *pro forma* financial information. In addition, there could be other events or transactions for which *pro forma* financial information may be required if it would be material to investors, including situations in which:

- a significant portion of a business is being disposed of;
- the registrant's financial statements are not indicative of the ongoing entity (eg, tax or cost-sharing agreements will be eliminated);
- dividends are declared by a registrant subsequent to the balance-sheet date;
- redeemable preferred stock or debt will convert to common stock at either the effective or closing date of an IPO;
- other changes in capitalization will occur at or prior to the closing date of an IPO; or
- an issuer was formerly a sub-chapter S corporation, a partnership or a similar tax-exempt enterprise.

The basic guidelines for *pro forma* adjustments are as follows:

- Balance sheet – *pro forma* presentation should be based on the latest historical balance sheet included in the filing. However, a *pro forma* balance sheet is not required if the transaction is already reflected in a historical balance sheet.
- Income statement – *pro forma* presentation should be based on the latest fiscal year and interim period included in the filing.

Information about company officers, directors and principal shareholders

Form S-1 requires that a company identify and describe:

- the business experience of its executive officers and directors;
- the security holdings of directors and principal shareholders;
- transactions with and indebtedness of officers, directors and principal shareholders; and
- the identity of transactions with, and compensation paid to, its promoters.

Recent amendments have required

	Assumed date of transaction	Adjustments are directly attributable to transaction	Adjustments are factually supported	Adjustments are expected to have ongoing impact
Balance sheet	Balance sheet date	Yes	Yes	No
Income statement	Beginning of earliest *pro forma* period presented	Yes	Yes	Yes

further disclosure around the following:

- the relationship of a company's compensation policies and practices to risk management;
- the background and qualifications of directors and director nominees;
- how the board (or its nominating committee) considers diversity when identifying director candidates;
- board leadership structure (eg, one person serving as both chair of the board and chief executive officer (CEO), as opposed to those roles being split);
- the board's role in risk oversight; and
- potential conflicts of interest of compensation consultants.

Executive compensation

The SEC requires extensive disclosures which are intended to ensure that investors and other parties receive clear, comprehensive and transparent disclosures regarding executive and director compensation and related matters.

The executive and director compensation disclosures have received particular attention in recent years. The rules are meant to ensure that companies disclose relevant information so that investors and other parties can readily determine the total amount of compensation that is actually awarded to executive officers.

The executive compensation disclosures include:

- expanded disclosure related to named executive officers, including the CEO and chief financial officer (CFO), as well as the next three most highly compensated officers of the company;
- a compensation discussion and analysis section, which requires disclosure of the roles of management and the compensation committee in making underlying compensation decisions and the methodologies and rationales used in establishing the type and amount of executive compensation;
- a summary compensation table, accompanied by six supplemental tables, to disclose compensation components relating to salaries, bonuses, stock awards, option awards, non-equity incentive plan compensation, pensions, non-qualified deferred compensation and all other compensation (including perquisites);
- disclosure related to amounts payable to executive officers upon termination of employment and, separately, upon a termination of employment following a change in corporate control; and
- enhanced related-person disclosures, including disclosure of the policies for the review, approval or ratification of transactions with related persons.

Recent rules adopted under the Dodd-Frank Act require say-on-pay votes by shareholders to approve executive compensation at least once every three years and additional disclosures regarding golden parachute compensation arrangements with certain executive officers in connection with merger transactions.

A key consideration for management when preparing such executive compensation disclosures is the transparency provided to shareholders and the general public with certain types of compensation information and decisions. Transparent disclosure of all compensation and financial relationships with management and directors has been a focus of regulators in recent years and is essential to good corporate governance.

In addition, the specific requirements on preparation of such disclosures will require companies to broaden their level of involvement beyond the company's human resources and legal departments and accordingly involve their accountants, tax professionals and actuaries in the disclosure drafting process.

Management's discussion and analysis of financial condition and results of operations

In this section, management provides investors and users with information relevant to the assessment of the financial condition, results of operations, liquidity and capital resources of the company, with particular emphasis on its prospects for the future. Management's discussion and analysis (MD&A) of financial condition and results of operations continues to be an area of focus for the SEC staff when reviewing registration statements and inevitably results in comments (particularly the lack of forward-looking information required by each of the major sections of MD&A). It is therefore imperative that this section be carefully drafted. It must be written as objectively as possible, pointing out both favorable and unfavorable developments, and should be written from the point of view of the management of the company. Best practice MD&A reporting includes:

- contextual information that enables a more complete understanding of current and prospective financial results;
- expanded information on both financial and non-financial performance;
- forward-looking information for assessing

prospective performance; and
- information on key performance indicators that companies use to manage their business (with appropriate non-GAAP disclosures).

At a minimum, an MD&A statement must include the following:

- Results of operations – a comparison of the income statement amounts for each period presented and an explanation of the reasons for any material changes should be incorporated. The MD&A should also discuss reasons for any recent positive or negative trends, as well as the quality of the company's earnings. Any known trends or uncertainties that have had or are expected to have a material impact on the company should be analyzed as well. Changes in significant balance-sheet items must also be discussed. The objective of this section is to analyze and explain results qualitatively, not simply to present quantitative changes in financial statement line items. The discussion should focus on relevant reportable segments or other sub-divisions of the business that have materially impacted results.
- Liquidity – any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably certain to result in the company's liquidity increasing or decreasing in any material way should be identified. Any course of action that the company has taken or proposes to take to remedy any deficiencies should be indicated. Also, the internal and external sources of liquidity should be identified and described, and any material unused sources of liquid assets should be briefly discussed. This section should include a thorough analysis of operating, investing and financing cash flows.
- Capital resources – a description of the registrant's material commitments for capital expenditures, the general purpose of such commitments and the anticipated source of funds needed to fulfill such commitments, should be included in the MD&A. Further, any known material trends, favorable or unfavorable, in the company's capital resources should be divulged.
- Disclosure about off-balance sheet arrangements, aggregate contractual obligations and other matters – this section should include, among other things, an explanation of off-balance sheet transactions and arrangements, including relationships of the company with unconsolidated entities or other persons that have or are reasonably likely to have a current or future material effect on the company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity or capital resources.
- Critical accounting policies and estimates – this section should provide greater insight into the quality and variability of the company's financial condition and operating performance resulting from key accounting policies, assumptions and estimates. It should supplement, not duplicate, the description of significant accounting policies in the notes to the financial statements and include quantitative and qualitative disclosures, a sensitivity analysis and critical estimates by segment if necessary. This section continues to be an area of significant focus for the SEC.
- Specific industry information – the SEC staff requires specific industry disclosures in the MD&A for oil and gas, mining, banking, insurance and real estate companies. Such disclosures include the discussion of oil reserves for oil and gas companies, and loss development tables for certain insurance companies. To provide a more complete understanding of the business, companies must also present the above information on the basis of multiple segments, as defined by the accounting rules.
- Other disclosures – other disclosures that are required in a registration statement include the following:
  - principal and selling stockholders;
  - description of capital stock;
  - shares eligible for future sale;
  - legal proceedings, if any;
  - interests of named experts and counsel; and
  - certain relationships and related transactions.

Information not required in the prospectus

This part of Form S-1 includes the following:

- disclosures regarding the expenses associated with the issuance and distribution of the securities;
- the indemnification of directors and officers acting for the company;
- any sales of unregistered securities within the last three years;
- undertaking representations made by the company acknowledging that it will keep the registration statement and prospectus current;
- various exhibits (eg, certain material contracts entered into by the company, articles of incorporation and bylaws,

underwriting agreements); and
- various required financial statement schedules.

Sources of SEC technical requirements
The form and content of registration statements, including the requirements for most financial statements and other financial information to be included in the registration statement, are contained in the following SEC rules, regulations and interpretations:

- Regulation S-X is the principal accounting regulation of the SEC. It specifies the financial statements to be included in filings with the SEC and provides rules and guidance on their form and content.
- Regulation S-K contains the disclosure requirements for the non-financial statement portion of filings with the SEC (including the industry guides) and non-GAAP financial and performance measures, otherwise referred to as the "forepart" of the document.
- Financial reporting releases are designed to communicate the SEC's positions on accounting and auditing principles and practices. They are used to adopt, amend or interpret rules and regulations relating to accounting and auditing issues or financial statement disclosures.
- Staff accounting bulletins represent interpretations and practices followed by SEC staff. Although not formally approved by the SEC commissioners, they are generally required to be followed by registrants.
- Industry guides are intended to assist registrants in the preparation of registration statements; they outline policies and practices required by the SEC staff relative to specific industries. Industries covered by the guides include oil and gas, mining, banking, insurance and real estate.
- Regulation S-T governs the preparation and submission of documents filed via the SEC's EDGAR system.
- Regulation G governs the disclosure of certain financial information that is calculated and presented on the basis of methodologies other than in accordance with GAAP. The regulation requires public companies that disclose or release non-GAAP financial measures to include a statement disclosing the reasons why management believes that presentation of the non-GAAP financial measure provides useful information to investors and a presentation of the most directly comparable GAAP financial measures, as well as a reconciliation of the disclosed non-GAAP financial measures to the most directly comparable GAAP financial measures.

Commencing in 1996, virtually all documents processed by the SEC, including filings by first-time issuers, must be submitted electronically via EDGAR. Copies of documents filed with the SEC using EDGAR may be obtained by accessing online at the SEC's website (www.sec.gov). The general and specific instructions to the relevant forms (eg, Form S-1) are also helpful.

The SEC review process

Filing and SEC review

Once the draft registration statement has been completed, it is sent to the printer. This draft should be as final as possible in order to avoid unnecessary reprinting/amending costs at the printing stage. However, it is common for several lengthy drafting sessions to occur during the printing stage. When the registration statement has been completed (and the company has received its independent auditor's consent for the use of its report is a public filing), the document – including exhibits – is filed with the SEC by electronic transmission through EDGAR. The registration statement must contain appropriate signatures in typed form; each signatory must manually sign a signature page acknowledging inclusion of his or her typed signature in the electronic filing. This signature page must be retained by the company for five years.

Once filed with the SEC, registration statements become public information and are processed and reviewed by the staff of the Division of Corporation Finance, generally consisting of an attorney, an accountant and/or a financial analyst. The group may also consult with other staff members familiar with a particular industry (eg, mining or petroleum engineers). After the registration statement has been filed, the SEC generally takes 30 days (this is not a stated deadline, but the SEC's goal and common practice) to perform the initial review and provide comments on the registration statement. The SEC reviews the documents to determine whether there is full and fair disclosure, particularly to determine whether the document contains misstatements or omissions of material facts. However, review by the SEC staff cannot be relied upon to ensure the accuracy or completeness of the data.

The review of financial data is performed by a staff accountant who reads the entire prospectus and the remainder of the registration statement to become familiar with the company and its business. The staff accountant may also refer to published annual and interim reports, newspaper articles, the company's website and other internet resources for information regarding the company and its industry. This review is primarily directed at the financial statements, other financial data and the independent registered public accountant's report. Its purpose is to determine whether the data complies with SEC regulations and all applicable authoritative accounting literature, as well as with various SEC staff interpretations and policies dealing with accounting and auditing issues.

The Division of Corporate Finance currently uses a risk-based selective review process whereby it reviews the filing to decide whether it wants to review further. If a document is selected for review, the review can be a full legal and accounting review, a full accounting review or a targeted review. Further, upon becoming a registrant, Sarbanes-Oxley requires that a company be reviewed at least once every three years.

Maintaining open communication with the SEC serves to expedite the registration process. To save time, company counsel generally maintains close telephone contact with the SEC while the registration statement is being reviewed.

Registration statements should be complete at the time the document is filed. At times, the SEC has received incomplete registration statements in an attempt to "get in line" for the review process. In general, it will not review incomplete registration statements. If a registrant believes there are extenuating circumstances and the SEC should review an incomplete filing, the matter should be approved by the SEC prior to submission.

Responding to a letter of comment and preparing an amended registration statement

After reviewing the registration statement, the staff typically issues a letter that sets forth questions, possible deficiencies and suggested revisions. The letter, referred to as a comment letter, is generally mailed or faxed to the company's legal counsel.

The submission of a carefully prepared registration statement usually limits SEC comment. While there can be differences of opinion as to the propriety of a particular comment or request, most of the comments and suggestions made by the SEC prove to be constructive.

Each comment in the SEC's letter of comment must be addressed and resolved in writing before the registration statement can become effective. If revisions are necessary, they are made in an amended registration statement which is also filed via EDGAR. The independent registered public accounting firm is required to perform keeping-current procedures in connection with each amendment in order to issue its consent for the inclusion of its audit report in the amended registration statement. As part of the SEC's intention to expand the transparency of the comment process and to disseminate this information to a broader audience, upon satisfactory completion and effectiveness of the registration statement, all SEC comment letters and related company responses are made publicly available by the SEC via EDGAR. A company should consult with its legal counsel when requesting that certain information not be made public because it is deemed to be proprietary in nature and may harm the company competitively.

In addition, significant developments often occur during the period subsequent to filing of the initial registration statement and prior to final SEC approval, and these must be reported. For example, if a development is materially adverse, it will obviously affect the offering's attractiveness. Conversely, a positive development, such as the favorable settlement of a major pending lawsuit, might remove uncertainty about a company and its future. In other words, any interim developments that materially affect a company and its prospects must be disclosed via amendments to the initial registration statement.

In addition to filing the registration statement with the SEC, filings must be made in the states in which the company intends to offer the securities, as well as with the National Association of Securities Dealers.

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Life as a public company

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Once listed, a company is under far greater public scrutiny – the initial public offering is not the end of the story, it is only the beginning.

Once your company has been taken public, considerable effort must be expended to maintain your market position. If investor enthusiasm for your company is not maintained, trading will decline. Should that happen, and as a consequence your company's shares are thinly traded, the benefits sought from the initial public offering (IPO) for example, liquidity through a future secondary offering – will not be realized. Thus, effective distribution and support of the stock, as well as continuing security analyst interest, are necessary after the IPO.

A strategy for after-market support can be determined with the assistance of a financial public relations firm. This strategy usually includes choosing an individual within your company to handle shareholder relations. This process will ensure that your company releases information that is uniform and accurate.

A public company's performance, as perceived by the market, is reflected in the value of its stock. Management faces the pressure of balancing short-term productivity with long-term goals. Negative developments – such as the release of lower-than-expected earnings, restatements or even missing earnings deadlines – may adversely affect the stock's value. Management will need to ensure that all communications with external parties explain fully the company's results. This transparency in reporting will in turn create greater market trust.

Earnings are not the only factor that affects public perception of your company. Even after your company goes public, it should strive to maintain (or improve) the characteristics that it desired to possess before becoming a public company.

These characteristics, modified for a post-IPO company, are:

- whether the company demonstrates a sustained or increasing growth rate that is high enough to attract/satisfy investors – your company must continue to grow at a rate satisfactory to investors as its share value will be determined, to a large extent, by the company's earnings potential;
- whether the company's products or services are highly visible and of interest to the consuming and investing public – your company should project a positive image to its investors, customers and community, as the public's attitude may sway the stock's value; and
- whether management is capable and committed – management plays a key role in the way a company performs; therefore, it is essential that it remain innovative, committed and capable.

The IPO is not the end of the story – it is only the beginning. Once listed, a company will be under far greater public scrutiny and will have a range of continuing obligations with which to comply. Any weakness in systems or failure to comply with regulations could cause management public embarrassment and reputational damage, as well as opening the potential for company and personal fines. It is the first 12 months post-IPO where the benefits of careful preparation and planning will be realized.

As a public company, you will be required to comply with a host of reporting and other requirements. The most significant change for many companies is the need to close and report publicly your financial results on an accelerated timeline, and to comply with the previously mentioned Sarbanes-Oxley Act of 2002 requirements.

Closing and reporting on a quarterly basis, as well as complying with the annual filing requirements, is a process that the company will need to be fully prepared to meet; an inability to meet these requirements will shake investor confidence or subject the company to delisting. As such, the company must be sure that it can comply with these requirements from the start.

The preparation for going public should happen in parallel with the process the company undertakes for going public. The company should take stock of its processes and its infrastructure so that it can make any necessary changes in advance of the IPO date. Key questions to consider include the following:

- Do we have the ability to close our books accurately each quarter and report the results to the public in accordance with the Securities and Exchange Commission (SEC) timeline and guidelines (outlined below)? Do we currently have a repeatable monthly and quarterly close process?
- Does our finance department have the expertise with SEC accounting and reporting requirements to allow us to comply with regulations we did not need to consider before as a private company (eg, stock compensation, segment reporting, earnings per share and management discussion and analysis (MD&A)?
- Does our planning and analysis function have the ability to forecast accurately our results to allow for more effective interaction with the investor community, and to assist in analysis of the current

period results for reporting purposes?

- Are all our processes and controls adequately documented and tested to comply with our Sarbanes-Oxley requirements?
- Does our technology infrastructure adequately support our compliance efforts above?
- Have we established an ethics and compliance process and communicated it throughout the organization?

The preparation process can often be lengthy, depending on the maturity of existing processes. It is vital that the company understand and address any gaps in advance of going public. How significant the required improvements are will determine the number of resources required. Many companies have resource constraints during the going public process, where there is so much attention being paid to the initial filing documents and the marketing efforts that other efforts may find themselves de-prioritized. Management will need to find a way to keep these efforts at the forefront, as regulatory compliance is non-negotiable.

Ongoing SEC reporting

It is generally recommended that a company should begin acting like a public company as early as two years before the IPO. This means getting comfortable with the rhythm of quarterly and annual reporting requirements, their content and costs, including quarterly certification requirements, and preparing for the demands of complying with Section 404 of Sarbanes-Oxley. It also means actively managing the company's reputation through regular communication with analysts, investors and the financial media to ensure that its story is accurately reported.

The public's perception of a company has a direct effect on the value of its stock. Do not underestimate it.

Reporting requirements

Form	Description	Due date
Form 10-K	This is the annual report to stockholders (conforming to SEC specifications). It discloses detailed information about the company's activities, risks, financial condition and results of operations. It also contains the company's audited annual financial statements, which includes the external auditor's opinion on financial statements and Section 404 of Sarbanes-Oxley (required only from the second Form 10-K filed after going public).	Large accelerated filer – 60 days after fiscal year end. Accelerated filer – 75 days after fiscal year end. Non-accelerated filer – 90 days after fiscal year end.
Form 10-Q	This is the quarterly report required for each of the first three quarters of the fiscal year. It includes condensed financial data and information on significant events. In addition, SEC rules require that the interim financial information included in the quarterly report be subject to a review by an independent accountant prior to filing.	Large accelerated filer – 40 days after fiscal quarter end. Accelerated filer – 40 days after fiscal quarter end. Non-accelerated filer – 45 days after fiscal quarter end.
Form 8-K	This is a report filed for significant events such as an acquisition or disposal of assets; a change in control; bankruptcy; a change in independent accountants; the resignation of directors because of disagreement with the registrant; the entry into a material definitive agreement; the creation of direct obligations or obligations under off-balance sheet arrangements; a commitment to a plan involving exit or disposal activities; or asset impairments. It is to be used when a registrant concludes or is advised by its independent accountants that previously issued financial statements should no longer be relied on.	Generally four business days after the event, except for certain events as provided in the form.
Proxy or information	This contains data furnished to shareholders so they can decide how to assign their statements proxies (votes).	Due dates vary.

Meeting continuous reporting requirements

As a public company, under the Securities Exchange Act of 1934 Act and Sarbanes-Oxley, the SEC requires public companies to file certain periodic reports such as Form 10-K and Form 10-Q, which keep the investing public informed. This requirement will continue as long as investor and asset tests are met. Preparing to meet these requirements should be a focus for the company as it creates its filings. Further, the company should have discussed its obligations under the various regulations with its attorneys and accountants, even before beginning the going-public process, to be certain that these obligations can be met. A company should consult its legal counsel to confirm SEC requirements concerning the form, content and timing of specific reports. A financial public relations firm can assist with furnishing the company's annual reports to its shareholders. The table above includes an overview of the basic SEC reporting requirements for public companies based on their designated filer status.

XBRL reporting

All SEC registrants must provide their financial statements and financial statement schedules to the SEC and post on their corporate websites in interactive data format using eXtensible Business Reporting Language (XBRL). The requirement will be phased in, with all domestic and foreign large accelerated filers reporting their financial information in XBRL after June 15 2010 and all other remaining registrants by June 15 2011 (see below for definition of "filer status").

SEC-designated filer status

The SEC designates companies into three categories of filer in order to determine the filing deadlines for Forms 10-K and 10-Q, as identified in the table above. Additionally, the SEC has designated a "smaller reporting company" filer option. The distinction among the different categories is based on the non-affiliated (eg, excluding large institutional investors, directors and officers) market capitalization (also known as public float) of companies as of the last business day of the company's most recently completed second fiscal quarter. The company's categorization should be discussed in detail with counsel and its accountants. However, the general guidelines for the categories are as follows.

Large accelerated filer

This is a company with non-affiliates holding a common public equity float valued at $700 million or more as of the last business day of the company's most recently completed second fiscal quarter.

Accelerated filer

This is a company with non-affiliates holding a common public equity float valued at $75 million or more, but less than $700 million, as of the last business day of the company's most recently completed second fiscal quarter.

In addition to the market capitalization requirements, in order to be designated as a large accelerated filer or an accelerated filer, as of the end of its fiscal year a company must meet all of the following conditions:

- have been subject to SEC reporting requirements (specifically Section 13(a) or 15(d) of the Exchange Act) for a period of at least 12 calendar months;
- have previously filed at least one annual report pursuant to Section 13(a) and 15(d) of the Exchange Act; and
- be ineligible to use the requirements for smaller reporting companies for its annual and quarterly reports.

Non-accelerated filer

Companies that are neither large accelerated filers nor accelerated filers are considered non-accelerated filers. Companies will generally be considered non-accelerated filers in the first year of operation as a public company, as the requirements are calculated at the fiscal year end, and a newly public company will generally not have filed an annual report for the prior year.

Accelerated filer status must be considered at each year end to determine whether the designated filer status has changed and will govern the deadlines for the annual report to be filed for that fiscal year end, and the quarterly and annual reports to be filed subsequently (until the filing status changes).

Smaller reporting company

The SEC has created this designation in order to streamline and simplify the disclosure requirements. Companies qualify as "smaller reporting companies" if they:

- have a common equity float of less than $75 million;
- had a public float of less than $75 million, in the case of an initial registration statement, as of 30 days of the date of the filing of the registration statement, computed by multiplying the aggregate worldwide number of such shares held by non-affiliates plus the number of such shares included in the registration statement by the estimated public offering price of the shares; and
- have annual revenues of $50 million or less during the most recently completed fiscal year for which audited financial statements are available.

This designation will allow such companies to qualify for the disclosure requirements that are scaled to reflect the characteristics and needs of smaller companies and their investors, and to make it easier and less costly for smaller companies to comply with disclosure requirements.

Sarbanes-Oxley

Sarbanes-Oxley (enacted in July 2002) significantly reformed securities laws in the United States and prescribed fundamental changes in how audit committees, management and auditors interact and carry out their responsibilities.

Sarbanes-Oxley has had a profound impact on public companies, affecting financial reporting in two important ways. Sections 302 and 906 require that the chief executive officer (CEO) and chief financial officer (CFO) of a public company certify the company's financial statements. Section 404 requires the management of a public company to test internally and issue a report on its assessment of the effectiveness of internal control over financial reporting. The company's independent registered public accounting firm must then independently test and issue an attestation report on both management's assessment and the company's effectiveness of internal controls over financial reporting, in addition to the opinion on the fair presentation of the financial statements. Substantial work will be required to implement appropriate processes, document the system of internal control over key processes, assess their design, remediate any deficiencies identified and test their operation. These processes can be both costly and challenging.

Certification by management under Section 302

Section 302 requires the CEO and CFO of a public entity to certify that, based on their knowledge:

- the annual and quarterly reports contain no untrue statement of a material fact or omit any material fact which would make the statements in the annual or quarterly reports misleading in light of the circumstances under which they were made;
- the financial statements and other financial information included in the report fairly present, in all material respects, the financial condition and operating results of the issuer as of and for the periods presented in the report; and
- the CEO and CFO are responsible for establishing, designing and maintaining disclosure controls and procedures and internal control over financial reporting and disclosing any changes or deficiencies in those controls to the auditors and the audit committee of the board of directors.

The certification under Section 302 is filed as an exhibit (generally Exhibits 31.1 (CEO) and 31.2 (CFO)) to the annual or quarterly report to which it relates.

Certification under Section 906

Section 906 mandates that any annual or quarterly public company report that contains financial statements filed with the SEC be accompanied by a written statement by the issuer's CEO and CFO (or the equivalent thereof) certifying that:

- the report fully complies with the related requirements of the Exchange Act; and
- the information contained in the report fairly presents, in all material respects, the financial condition and results of operations of the issuer.

Section 906 expressly creates new criminal penalties for a knowingly or willfully false certification. Section 906 certifications are to be filed as an exhibit (generally Exhibits 32.1 (CEO) and 32.2 (CFO)) to the report to which they relate.

Reporting under Section 404

Section 404 – management assessment of internal controls – may be the most challenging aspect of Sarbanes-Oxley and requires most publicly registered companies and their external auditors to report on the effectiveness of the company's internal control over financial reporting. A company's internal control report must contain the following information and be included in its annual report on Form 10-K:

- a statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting for the company;
- management's assessment of the effectiveness of the company's internal control over financial reporting as of the end of the company's most recent fiscal year, including a statement as to whether internal control over financial reporting is effective;
- a statement identifying the framework management used to evaluate the effectiveness of the company's internal control over financial reporting (eg, the internal control integrated framework issued by the committee of sponsoring organizations); and
- a statement that the independent registered public accounting firm that audited the company's financial statements included in the annual report has issued an attestation report on the effectiveness of the company's internal

control over financial reporting.

The process of documenting, management testing and auditing a company's internal control is time consuming and detailed. Appropriate planning before a company's registration with the SEC is a key to success. A company's external auditors are a good source of information regarding the Section 404 requirements.

As a newly public company, management is not required to provide a report on internal control over financial reporting or the auditor's report on internal control over financial reporting until its second annual report. Newly public companies are, however, required to disclose the fact that neither management's report nor the auditor's report is included in the Form 10-K.

Design of the financial reporting function

Companies that are considering going public should assess the current state of their finance function and their financial accounting and reporting group to ensure they can meet the SEC's reporting requirements, and maintain shareholder confidence and overall stakeholder value. Companies should assess their finance functions in order to identify necessary changes and improvements that should be made prior to going public. Becoming a public company is not a destination; it is the start of a new phase in the company's evolution.

High-level issues that newly public companies face when assessing transforming their finance function include:

- identifying new and changed roles; and
- determining the impact on processes, systems and people

Identifying new and changed roles

On day one after completion of the IPO, the newly public company should already operate as a public organization. With this expectation, the company must quickly identify how best to approach and manage impending changes.

In order to begin this transformation, the company must first understand its "as is" position across finance activities and the ability of existing staff to meet the company's new reporting needs as a public company. Using the results of the finance function assessment, management can identify gaps in its existing resource capabilities and subsequently design, plan and implement the necessary changes through the use of certain key initiatives. Key initiatives typically include the following:

- clearly defining competency profiles for each finance position, including decision rights and areas of accountability – upgrading skills and filling new positions is usually required;
- streamlining the close process by improving first-time quality and eliminating non-value activity; and
- strengthening controls by levering automated controls in transaction processing systems and reporting systems.

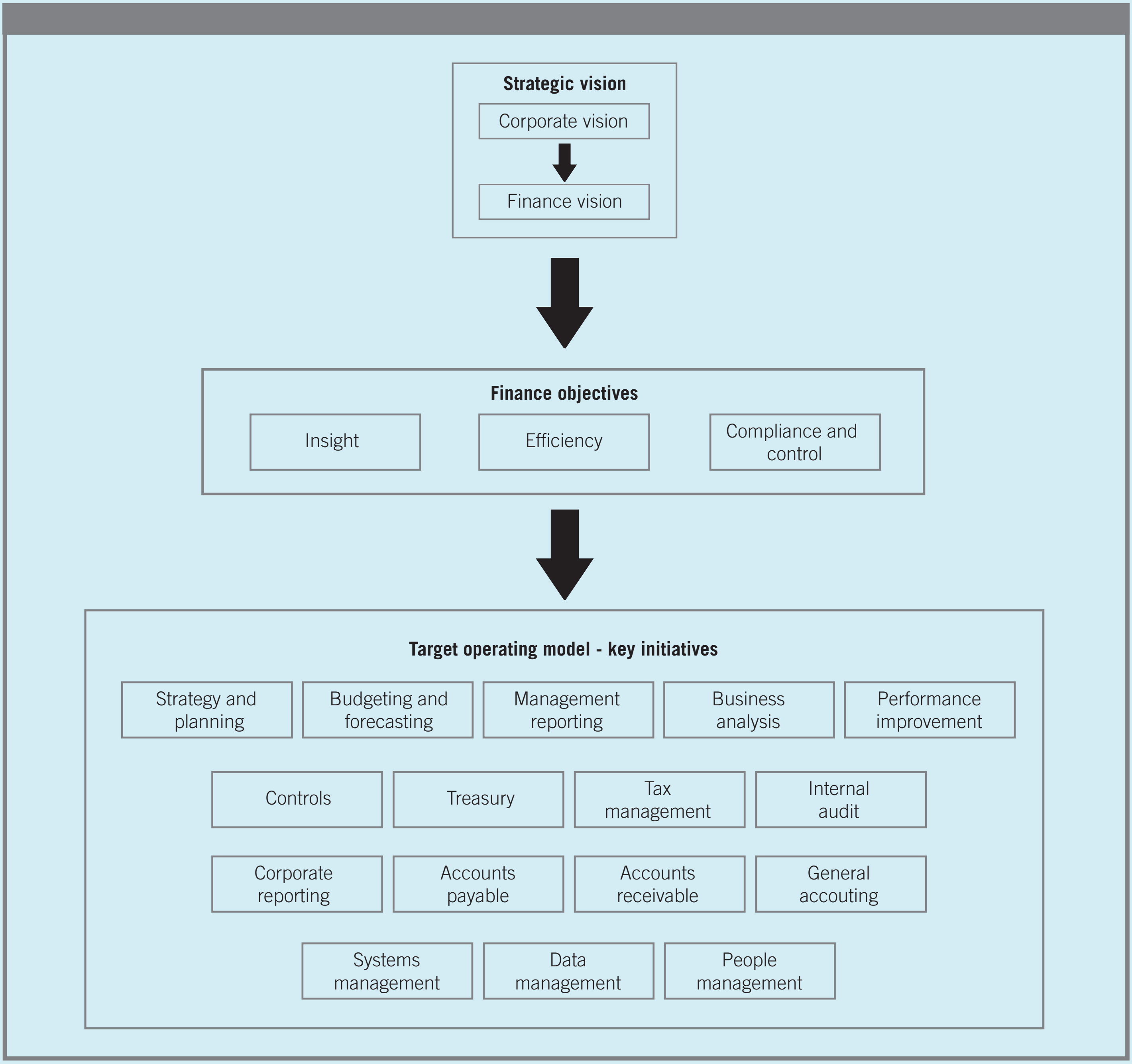
Having to comply with Sarbanes-Oxley and new reporting requirements while managing the expectations of shareholders, management and the board places increased accountability on both the CFO and the controller of a newly public company. Collectively, these two roles must set quality standards that effectively "set the tone at the top," all the while ensuring that the public company's emphasis on compliance, management of risk and adherence to controls is readily apparent throughout the entire finance function. In addition, the CFO and controller must construct the vision of the finance function, define its objectives and establish a target operating model that ultimately defines key activities and roles of the finance function. With such initiatives clearly defined, the daily management and operations of the finance function can be completed by the assistant controller or business unit controllers and top management across the organization. Key activities of the evolved finance function include:

- external reporting and technical accounting;
- internal controls/Sarbanes-Oxley reporting and certifications;
- management reporting;
- strategy and planning;
- budgeting and forecasting;
- business analysis; and
- performance improvement.

Other functions are in Figure 1. Overall, the most imperative role of a public company's finance function is to:

- ensure the timely and efficient production of quality financial statements that accurately disclose the right information to the general public and comply with SEC requirements; and
- ensure that quarterly and year-end reports are timely, complete and reliable. A best practice for public companies is to perform a close of accounting records (ie,

Figure 1


Strategic vision
Corporate vision
Finance vision
Finance objectives
Insight
Efficiency
Compliance and control
Target operating model - key initiatives
Strategy and planning
Budgeting and forecasting
Management reporting
Business analysis
Performance improvement
Controls
Treasury
Tax management
Internal audit
Corporate reporting
Accounts payable
Accounts receivable
General accouting
Systems management
Data management
People management

the general ledger and sub-ledgers) at the end of each month. By performing a monthly close, the finance team can establish a routine of performing analysis of monthly results throughout the quarter rather than letting it pile up until the end of the quarter.

In addition to external reporting requirements, timely internal reports that support management decisions should be regularly and easily generated. In doing so, management is supplied with the right information at the right time when working to meet business needs.

The key components that enable timely, high-quality and efficient internal and external reports include robust standardized accounting policies and procedures, use of automated controls and processes, and a commitment to providing high-quality information to the organization. With these components, the reporting process is less taxing for the finance function and will require less effort from multiple management and executive resources.

Determining the impact on processes, systems and people

To determine the full impact that going public will have on current processes, systems and people, management must examine best practices in conjunction with the assessment of the status quo. Doing so will identify ways to enable the finance function to operate in a manner that protects shareholder value, meets regulatory requirements and ensures more efficient operations.

Upon completion of management's assessment of the existing processes and systems, changes to the current organizational structure may be necessary. Financial organizational structures vary, but basic models include:

- centralized finance activities – finance operates out of the headquarters, with the majority of policies and directives issued from the home office, which has close control over finance officers servicing local operating units;
- decentralized finance functions – local finance units operate largely autonomously, reporting directly to local business units and secondarily to headquarters;
- outsourced finance functions – selected finance operations are managed by a third-party service provider; and
- shared services center – finance operations are managed at internally operated, centralized functions that serve large geographic regions.

With the model selected, the company can determine the competency level of existing staff, outline roles and determine whether additional resource are needed within the finance function.

When considering current processes, these should all align with the newly created vision, strategy and business objectives outlined by the CFO and/or controller. Such processes should be straightforward, standardized, documented and clearly articulated throughout the finance function.

Processes should incorporate a minimal use of complex accounting and should utilize a standardized chart of accounts, as well as clearly defined roles and responsibilities, and proper segregation of duties. Such elements will promote the efficient processing of transactions, reduce errors, strengthen controls and reduce the time needed to complete the monthly close-to-report process and completion of quarterly/annual filings.

After establishing the processes of the finance organization, additional investments in technology and systems that enable such processes may be required. Fully leveraged and integrated technology, coupled with a single enterprise-wide data warehouse and reporting architecture, enables efficient reporting and promotes a sound internal control structure. Continued reliance on manually entered data and journal entries, spreadsheets, disconnected systems and *ad hoc* reporting will only promote human error, constrain the reporting process and risk not meeting control standards and other SEC requirements.

In order to comply with Section 404 of Sarbanes-Oxley, leadership must also establish adequate business processes, IT and entry-level controls across functions. Such oversight will enable the newly public company to operate with lower risk of financial loss, utilize resources more efficiently and produce accurate and transparent financial reports.

NASDAQ reporting obligations

Once public, not only will a US company be subject to SEC reporting requirements, but the stock exchange on which the shares are listed will also impose certain reporting requirements. NASDAQ, for example, requires timely disclosure of material news, notification of certain company actions, and filing of all reports and other documents filed with the SEC (for more information see "NASDAQ Regulatory Requirements, July 2010" at www.nasdaq.com/about/RegRequirements.stm).

Disclosure of material news

NASDAQ requires the disclosure of material news that would reasonably be expected to affect the value of the company's securities or influence investors' decisions. To that effect, NASDAQ recognizes all Regulation FD-compliant methods when it comes to disclosing such material news. Regulation FD-compliant methods include broadly disseminated press releases, filing a Form 8-K or Form 6-K with the SEC, conference calls, press conferences and webcasts, as long as adequate notice and access is granted to the public and/or disclosure is made on the company's website.

The public company must also provide NASDAQ MarketWatch, a real-time surveillance service of listed company activity in the NASDAQ stock market, with at least 10 minutes' advance notice of certain news before its public release during market hours. MarketWatch evaluates whether the new announcement is material and might affect the value of the company's securities or influence investors' decisions. Whenever it deems appropriate, MarketWatch can implement temporary trading halts so that an even dissemination of the material news is guaranteed. MarketWatch considers the timing of the material disclosure by the company and the importance of the news when making a decision to halt trading. Once it is determined that a trading halt is necessary, MarketWatch, together with the company, will assess the appropriate timing and place for the dissemination of the material news to ensure the equal distribution of the material news among all market participants and guarantee that all trading is based on publicly available facts. In cases where the event's confidentiality can be maintained or immediate public disclosure would result in prejudice for the company, it is exempt from disclosing the material news.

The company must notify MarketWatch of the following events:

- financial-related disclosures, including quarterly or annual earnings, earnings restatements, pre-announcements or guidance;
- corporate reorganizations and acquisitions, including mergers, tender offers, asset transactions, and bankruptcies or receiverships;
- new products or discoveries, or developments regarding customers or suppliers (eg, significant developments in clinical or customer trials and receipt or cancellation of a material contract or order);
- senior management changes of a material nature or change in control;
- resignation or termination of independent auditors or withdrawal of a previously issued audit report; and
- events regarding the company's securities (eg, defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, public or private sales of additional securities).

However, NASDAQ encourages companies to give advance notification to MarketWatch in situations other than those specified above if the company believes that a temporary trading halt might be necessary or appropriate due to the significance of the information.

Notification of certain company's actions

NASDAQ requires a company to notify the stock exchange when it takes certain actions. Each notification must be made on specific forms, in compliance with specific deadlines and sometimes include additional documentation. The following list shows company actions that trigger the NASDAQ notification requirement:

- the listing of additional shares;
- forward stock splits, stock dividends and rights offerings;
- a reverse stock split;
- cash dividends and other cash distribution;
- a change in the number of shares outstanding (5% or more);
- a change in trading symbol or company name;
- a change in title of security or par value;
- a change in transfer agent or registrar;
- substitution listing events;
- a change in the state of incorporation or the company's place of organization;
- mergers or tender offers;
- redemption/extensions of derivative securities; and
- non-compliance with corporate governance rules.

Periodic reporting requirements

Companies listed on NASDAQ are required to file with the stock exchange three copies of all reports and documents filed with the SEC. These include Section 16 filings, Schedules 13-D and 13-G and Form 144 filings, considering, however, that the filings relate to NASDAQ-listed securities. However, if the company files its reports with the SEC through the SEC's Electronic Data Gathering Analysis and Retrieval, its reporting requirements with NASDAQ are considered fulfilled.

Obligations of directors, officers and principal shareholders

The Securities Act of 1933, the Exchange Act and the rules promulgated thereunder, as revised periodically by the SEC, impose certain reporting obligations upon principal stockholders of a company with publicly traded equity securities, and on directors and officers of such a company.

Section 16 of the Exchange Act

Section 16 of the Exchange Act requires directors, senior officers and beneficial owners of 10% or more of a class of registered equity securities of the company to file reports with the SEC, the company and, if the equity security is listed on a national securities exchange, such exchange as to holdings and transactions in equity securities of the company. For purposes of determining status as a 10% beneficial owner, a person is deemed to own securities beneficially over which he or she (or any other member of any group in which that person is a member) exercises or shares voting control or investment control. Forms 3, 4 and 5 must be submitted to the SEC in electronic format, which also satisfy the obligation to file with many stock exchanges.

The senior officers of the company who will be deemed to be subject to Section 16 are:

- the company's president, CFO, principal accounting officer (or, if there is no such accounting officer, the controller);
- any vice president in charge of a principal business unit, division or function (eg, sales, administration or finance);
- any other officer who performs a policy-making function; or
- or any other person (eg, an officer of a subsidiary or a parent) who performs similar policy-making functions for the company.

As Section 16 reporting rules are complicated and exemptions may apply. Legal counsel should be consulted to review these rules with all the company's executive officers and directors before the IPO.

Reporting obligations

Each reporting person who is such on the date the company's registration under the Exchange Act becomes effective will be required by Section 16(a) to file a Form 3 on or before such date. The Form 3 is an initial report of a reporting person's holdings in the company's equity securities. Other reporting persons must file a report on Form 3 within 10 days of becoming a reporting person, although the SEC encourages reporting persons to file a Form 3 sooner if a reportable transaction occurs.

A reporting person must report all changes in beneficial ownership of any class of equity securities of the company or security-based swap agreements (other than certain changes permitted to be reported on Form 5) by filing a Form 4 with the SEC, generally within two business days of the date on which the transaction is executed.

Within 45 days of the end of the company's fiscal year (or earlier on Form 4 if the reporting person chooses), a reporting person must report on Form 5 changes in beneficial ownership of the company's equity securities or security-based swap agreements that either are subject to reporting but are not required to be reported on Form 4 or should have been previously reported but were not. Examples of transactions which are reportable on Form 5 include the acquisition or disposition of shares by gift or by will or devise.

Short-swing transaction liability

Reporting persons are liable to pay the company any profits realized from any non-exempt purchase and sale, or non-exempt sale and purchase, of the company's equity securities or security-based swap agreements within a period of less than six months. That is, any such purchases and dispositions within a period of less than six months (regardless of which occurred first and regardless of whether the transactions are related) will be matched, and the reporting person will be liable to disgorge to the company any profit resulting from such matched transactions.

Section 16 liability does not depend on the possession of inside information or any bad faith by the reporting person effecting the trades. Neither financial necessity nor other equitable considerations will constitute defenses to liability under this provision. Transactions between a director or officer who is a reporting person and the company will be exempt from Section 16(b) liability under Rule 16b-3 if specific prior approval is received from the compensation committee of the board of directors (so long as it consists solely of two or more non-employee directors, as defined in Rule 16b-3), the board of directors itself or the company's stockholders. Acquisitions of company securities from the company by a director or officer who is a reporting person will also be exempt if subsequently ratified at the next annual meeting of stockholders. Alternatively, an acquisition of company securities from the company will be exempt if the securities acquired in this way are held for a period of six months following the date of such acquisition.

Prohibition of short-sale transactions

Reporting persons are not permitted to engage in "short sales" (ie, sales of securities of the company which the seller does not own or sales which are consummated by the delivery of a security borrowed by, or for the account of, the seller) or delayed delivery sales in the company's equity securities. "Delayed delivery" sales by such persons are also prohibited, requiring that delivery of shares of securities of the company be made within 20 days of sale or that such shares be deposited in the mail or some other usual channel of transportation within five days of sale.

Section 13(d) and 13(g) of the Exchange Act

Schedule 13(d)

Generally, any person who acquires 2% or more of the shares of a class of equity security of the company within a 12-month period and thereafter beneficially owns more than 5% of a registered class of equity security will have to file a Schedule 13(d) with the SEC disclosing such person's identity, the means of payment for such acquisition, and his or her intentions concerning control of the company, among other things, within 10 days of such acquisition. Shareholders who currently own more than 5% of a registered class of equity security of the company without having made an acquisition of shares subsequent to the registration of the security under the Exchange Act will not have to file a Schedule 13(d) unless and until they acquire, directly or indirectly, additional equity securities. However, such a person must file a "short form" statement on Schedule 13(g), as described below. In addition, as described below, certain other persons are also permitted to file a Schedule 13(g) rather than a Schedule 13(d). The main purpose of the Section 13(d) and 13(g) reporting requirements is to put a company and its stockholders on notice of a possible attempt by a stockholder to acquire stock in an effort to control or take over the company.

Schedule 13(g)

Each person who beneficially owns more than 5% of a registered class of equity security of the company at the end of the calendar year and who is not required to file a Schedule 13(d) is required to file a Schedule 13(g) within 45 days of the end of the calendar year. This statement is a short form Schedule 13(d) and, most notably, does not require the reporting person to disclose his or her intentions with respect to the company. A Schedule 13(g) would be required to be filed by a 5% holder who did not acquire shares subsequent to the registration of the class under the Exchange Act. This situation frequently arises in the context of IPOs. Schedule 13(g) may also be filed in lieu of a Schedule 13(d) by certain categories of person (eg, broker/dealers, banks, insurance companies, investment companies and certain employee benefit plans) and by persons who have not purchased the securities to change or influence control of the company and who beneficially own less than 20% of the registered class.

Prohibition against fraud, deception and misleading statements

Section 10(b) of the Exchange Act prohibits the use of any "manipulative" or "deceptive" device in connection with the purchase or sale of any security. Liability under Section 10(b) is not directly related to any of the registration provisions of the securities laws and violations can occur in purely private transactions involving unregistered securities.

Section 10(b)5 prohibits, in connection with the purchase or sale of any security:

- the use of any device, scheme or artifice to defraud;
- the use of any untrue statement of a material fact;
- the omission of any material fact without which the statement is misleading; and
- the engaging in "any act, practice or course of business" which would operate to deceive any person.

The courts have utilized the broad scope of this language to apply Section 10(b)5 to a wide range of securities transactions.

A corporation and its employees or agents may be liable for disseminating false or misleading material information or failing to disclose material information about it. The question of whether the company has an affirmative duty under the securities laws or stock exchange rules to disclose material information and/or whether such disclosure should be made for business reasons regardless of the duty to disclose is complex and must be made in light of all prevailing facts and circumstances. The company's counsel should be consulted if such questions arise.

Insider trading

Section 10(b)5 prohibits insider trading in securities while material information remains undisclosed. Insiders are also prohibited from disclosing material non-public information (tipping) to third parties, regardless of whether such persons intend to realize a profit from the information. The Section 10(b)5 prohibition includes transactions involving the company's securities, as well as those involving securities of other corporations about which undisclosed material information is learned. Officers, directors and other employees of the company with access to inside information should be particularly careful to avoid engaging in securities transactions if they are aware of material non-public information. As a result of these concerns, there will often be long periods of time during which officers and directors should refrain entirely from engaging in purchases or sales of the company's securities. Generally, anyone aware of material inside information must abstain from trading in or recommending the particular securities while such inside information remains undisclosed.

In certain circumstances, the existence of a pre-existing written plan, contract or instruction pursuant to which the trade was effected will constitute a defense to liability under Section 10(b)5 (often referred to as a 10(b)5 plan). In order to take advantage of this defense, the contract or instruction must be established when the person entering into the plan or contract or giving the instruction is not in possession of any material non-public information. Companies will often develop a single 10b5-1 plan template for use by its executive officers and directors. This can help where sufficient safeguards for the company and its insiders are utilized and the plan is in sync with the company's insider trading policy. In circumstances where a different form is used, the plan should be reviewed by the company's counsel prior to adaption.

Rule 144

Rule 144 under the Securities Act provides a safe harbor for "affiliates" of the company or other persons to sell "restricted securities," or for affiliates to sell any other of the company's securities, without having to file a registration statement under the Securities Act. Restricted securities are securities acquired directly or indirectly from the issuer or its affiliates in a transaction or transactions not involving a public offering. The term "affiliate" is defined under Rule 144 to mean any person who, directly or indirectly, "controls, or is controlled by, or is under common control with" the company. Although Rule 144 does not provide a definition of "control," Rule 405 under the Securities Act defines the term as the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.

In order for the company's directors, executive officers and other affiliates to effect a sale of securities pursuant to Rule 144, all of the following requirements must be met:

- There must be adequate public information available with respect to the company;
- If the securities sold in reliance upon Rule 144 are restricted, the person selling them must have held them for a period of six months prior to such sale;
- The amount of securities sold must be within prescribed limits;
- The sales must be made in *bona fide* "brokers' transactions" in certain transactions directly with a market maker or certain "riskless principal transactions;" and
- In many cases, a notice of the proposed sale must be filed with the SEC.

Regulation M

Rule 102 of Regulation M under the Exchange Act, among other things, restricts transactions in an issuer's securities by a director or officer that are deemed to be inconsistent with transactions engaged in by the issuer at such time. In general, the company's directors and officers should not be buyers of its equity securities at a time when the company is deemed to be engaged in a "distribution" (ie, selling) of any of its equity securities. "Distribution" means an offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods.

Insider lending provisions

Sarbanes-Oxley prohibits an issuer from extending or maintaining credit, or arranging for or renewing an extension of credit, to directors and executive officers. Any such arrangement must be addressed and outstanding loans must be repaid prior to the initial filing of the IPO registration statement.

Composition of the board of directors

One issue that is always of particular interest to companies contemplating an IPO is the composition of its board of directors.

Subject to the exceptions for IPO issuers and "controlled companies" described below, a company listed on NASDAQ must have a board of directors comprising a majority of independent directors and an independent audit committee composed of independent directors. Companies that are listed on NASDAQ are not required to have separate compensation, corporate governance and nominating committees. However, companies that do not form committees to fulfill these functions are required to have independent director oversight by a majority of the board's independent directors over executive officer compensation and director nominations. Accordingly, it is unusual for NASDAQ issuers to operate without the benefit of a compensation committee. The SEC recently proposed new rules to enhance independence requirements for company compensation committees in order to implement the new requirements under the Dodd-Frank financial reform law. These new rules are designed to ensure that compensation committees are independent by requiring stock exchanges to adopt certain listing standards.

If the issuer is listing on NASDAQ in connection with an IPO, then it may meet the board of directors and committee independence requirements on a phased-in schedule. The issuer will be considered to be listing in connection with its IPO for purposes of compliance with the majority independent board member requirement and the requirement to have independent director oversight by a majority of the board's independent directors over executive officer compensation and director nominations if, immediately prior to listing, it does not have a class of common equity registered under the Exchange Act. For the purposes of audit committee independence requirements, an issuer will be considered to be listing in connection with its IPO if the issuer was not, immediately prior to the effective date of its registration statement, required to file reports with the SEC pursuant to Section 13(a) or 15(d) of the Exchange Act.

On the listing date, the issuer must have at least one independent director on its audit committee and, if it uses such other committees, also on its compensation and corporate governance and nominating committees. Within 90 days of listing, the issuer must have a majority of independent directors on each of the audit, compensation and corporate governance and nominating committees. Finally, within 12 months of listing, the issuer must have in place fully independent committees and a majority of independent board members.

If the issuer is a "controlled company" and elects to rely on the applicable exemptions, then it will not be required to have a majority of independent directors on its board of directors; nor will its board be required to have independent director oversight by a majority of the board's independent directors over executive officer compensation and director nominations. However, the issuer must still comply with the audit committee requirements described below. Under NASDAQ rules, a "controlled company" is a company in which more than 50% of the voting power for the election of directors is held by an individual, a group or another company.

For the purposes of NASDAQ rules, a director qualifies as "independent" if the issuers' board of directors has affirmatively determined that such director has no relationship with the issuer which, in the opinion of the issuer's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. In making this determination, the board of directors should broadly consider all of the relevant facts and circumstances surrounding a candidate's relationships with the issuer from the standpoint of the director as well as that of persons or organizations with which the director has an affiliation. In addition to requiring an affirmative determination of "independence" by the board of directors of the issuer, NASDAQ rules provide that a director cannot be independent for NASDAQ purposes if:

- except for a limited exception for interim service by a director as an executive officer, the director is, or at any time during the past three years was, employed by the issuer;
- the director has accepted, or has a family member who accepted, any compensation from the issuer in excess of $120,000 during any consecutive 12-month period within the three years preceding the determination of independence, (other than compensation for board or board committee service, compensation paid to a family member who is an employee (other than an executive officer) of the issuer or benefits under a tax-qualified retirement plan, or non-discretionary compensation). NASDAQ rules define "family member" as a person's spouse, parents, children, siblings, mother and father-in-law, sons and daughters-in-law, brothers and sisters-in-law, whether by blood, marriage or adoption, or anyone residing in such person's home;
- the director is a family member of an individual who is, or at any time during

- the past three years was, employed by the issuer as an executive officer;
- the director is, or has a family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the issuer has made, or from which the issuer has received, payments for property or services in the current year or any of the past three fiscal years, in an amount that exceeds the greater of 5% of the recipient's consolidated gross revenues for a particular year, or $200,000. This requirement also applies if the issuer makes payments to a charity that are in excess of the greater of 5% of the charity's revenues or $200,000;
- the director is, or has a family member who is, employed as an executive officer of another entity where at any time during the past three years any of the issuer's executive officers have served on the compensation committee; or
- the director is, or has a family member who is, a current partner of a firm that is the issuer's outside auditor, or was a partner or employee of the issuer's outside auditor who worked on the issuer's audit at any time during any of the past three years.

Because NASDAQ does not believe that ownership of company stock by itself would preclude a board finding of independence, it is not included in the aforementioned objective factors.

The identity of the independent directors and the basis for a board determination that a relationship is not material must be disclosed in the issuer's annual report on Form 10-K or proxy statement. Pursuant to Item 407(a)(3) of Regulation S-K, for each director that is identified as independent, the issuer must describe, by specific category or type, any transactions, relationships or arrangements not otherwise disclosed as a related party transaction that were considered by the board in determining that the director is independent.

To be independent for audit committee purposes, a committee member must meet the general NASDAQ independence standards for directors described above and the following additional SEC requirements for audit committee members. SEC rules define an "independent" director, for the purposes of serving on an audit committee, as a director who, except in his or her capacity as a director or board committee member:

- does not accept directly or indirectly any consulting, advisory or other compensatory fee in any amount from the issuer or any of its subsidiaries. This includes acceptance of a fee by:
  - an entity in which the director is a partner, member or officer such as a managing director occupying a comparable position or executive officer, or occupies a similar position (except limited partners, non-managing members and those occupying similar positions who, in each case, have no active role in providing services to the entity), and that provides accounting, consulting, legal, investment banking or financial advisory services to the issuer or any of its subsidiaries; or
  - a spouse, a minor child or stepchild, or a child or stepchild sharing a home with the director; and
- is not an "affiliated person" of the issuer or any of its subsidiaries. A director is an "affiliated person" of the issuer or any of its subsidiaries if he or she, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the issuer or any of its subsidiaries.

Under NASDAQ rules, no members of an audit committee can have participated in the preparation of the financial statements of the issuer or any of its current subsidiaries during the past three years, and they must be able to read and understand fundamental financial statements, including the issuer's balance sheet, income statement and cash-flow statement. NASDAQ rules also require that at least one member of the audit committee have past employment experience in finance or accounting, a requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a CEO, CFO or other senior officer with financial oversight responsibilities.

In addition, the issuer must disclose, in its annual report on Form 10-K or proxy statement, that the board of directors of the issuer has determined that the issuer has at least one "audit committee financial expert" serving on its audit committee, the name of the expert and whether the expert is "independent." Alternatively, the issuer must disclose that it does not have at least one audit committee financial expert serving on its audit committee and provide an explanation of why not. The term "audit committee financial expert" means an audit committee member with the following attributes:

- an understanding of GAAP and financial statements;

- an ability to assess the general application of GAAP in connection with the accounting for estimates, accruals and reserves;
- experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the issuer's financial statements, or experience actively supervising one or more persons engaged in such activities;
- an understanding of internal controls over financial reporting; and
- an understanding of audit committee functions.

An audit committee financial expert must have acquired these attributes through:

- education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;
- experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;
- experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or
- other relevant experience.

5

The role of the investor relations firm

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This chapter offers an overview of the role and objectives of an investor relations firm, both during a company's pre-initial public offering process and throughout its life as a public company.

The objectives of a strong investor relations (IR) program are to:

- create consistent, credible communications practices in compliance with NASDAQ listing rules and requirements, and Securities and Exchange Commission (SEC) legal requirements;
- elevate the entity's standing as a public company to be at least commensurate with its industry positioning; and
- achieve full valuation in the public market arena.

An IR firm applies best practice to developing an IR program, just as accountants do to preparing and reporting financial statements and attorneys do when overseeing corporate practice. Specifically, an external IR advisor provides:

- a bridge between management and the financial community to enhance management's relationship with analysts and investors;
- sophisticated guidance on key topics, such as:
    - shaping the company's message to prospective investors and the financial community;
    - communicating news and events;
    - determining the timing and content of disclosure, including financial guidance; and
    - maximizing financial community relations;
- market intelligence, including tracking investor and analyst perceptions regarding the company;
- marketing impetus and support to increase visibility of the company's public image; and
- support for administrative tasks, such as issuing press releases, communicating with the NASDAQ surveillance team and maintaining the IR infrastructure.

This chapter looks at the following specific steps in the the pre-initial public offering (IPO) process and the IR firm's role in each step:

- establishing a messaging platform;
- creating a workable IR infrastructure and communications procedure;
- disclosure and marketing communications;
- the first post-IPO quarterly results process; and
- post-IPO IR opportunities.

Establishing a messaging platform

Once the decision has been made to pursue a listing on the NASDAQ Stock Market, one of the first steps the company should take is to build the investment case that will be marketed to investors. Working together with the company's investment bank, the IR firm's role at this stage is to help the company (also known as the issuer) to establish a strong and accurate message positioning that can be sustained after the IPO. Although it may seem obvious, many a new public company has seen its valuation fall because the investment thesis that was sold to Wall Street, upon which investors bought IPO stock, did not match its sustainable fundamentals. This disparity becomes abundantly clear when the new issuer makes its initial quarterly results report as a public company and may be a particular concern for foreign-based issuers that may be less familiar with the idiosyncrasies of the US investment community. An IR firm's primary objective during this stage is to support a new issuer's story by:

- reviewing, with management, IPO messages created by the investment bankers to ensure that the messaging platform accurately represents the company's positioning and opportunities;
- creating a set of reportable metrics that, together with its financial results, demonstrate the issuer's progress with regard to its strategic plan over time;
- setting guidance policy and helping a company to determine whether forward-looking guidance should be given to investors and, if so, which financial measures and operational metrics will be used for forward-looking statements;
- coaching management on presentation skills for the financial audience;
- developing a list of questions that management is likely to be asked on the roadshow by investors and collaborating on developing answers;
- auditing peer group disclosure practices; and
- providing information, as appropriate, on roadshow meeting participants.

Many of these activities will be expanded in the later stages of the pre-IPO phase.

Publicizing an IPO

The SEC has established rules for issuers on communications that take place during the IPO process. These emphasize the continuation of normal business practices for communications, media outreach and public relations, which are established well before the beginning of the IPO process. Under these rules, the greatest degree of openness is afforded primarily to larger, well-known companies, but all issuers can avail themselves of a "free writing prospectus" during the registration period. It is a good idea to consult with legal counsel well in advance of an IPO on the best way to establish a suitable pattern of normal course communications that can carry the company through its exchange listing.

Once an issuer is public, there are numerous opportunities to publicize its public status, including the first quarter reported post-IPO, the announcement of a major piece of positive news or another corporate event. An IR firm can assist a new issuer by organizing media outreach in conjunction with other activities at the NASDAQ MarketSite (in Times Square, New York), including the bell ringing, which can help create more visibility for a new IPO. This is particularly useful for management teams not used to dealing with the press, as it can help senior staff to build media-handling skills which will benefit the issuer later. These activities include:

- coordinating with a NASDAQ representative to arrange a bell-ringing ceremony at the NASDAQ MarketSite; and
- organizing media-related activities, including developing media-focused talking points, coaching management in press question and answer sessions, and marketing the pricing release to news outlets to create interview opportunities where appropriate.

Creating a workable IR infrastructure and communications procedure

During the pre-IPO phase, an IR firm can help a new issuer to put in place a practical, workable internal IR infrastructure. This is crucial to managing post-IPO IR procedures and to ensuring compliance with SEC regulations, including the Sarbanes-Oxley Act, Regulation FD, Form 8-K and Regulation G disclosure requirements, and NASDAQ listing rules. In addition, implementing the IR infrastructure should include instituting mandatory education programs for employees on the company's responsibilities as a newly public entity. An efficient communications development pipeline process should also be established during this period to support these infrastructure elements. Amid the rush of IPO preparations, new issuers sometimes neglect this step and have to fill in the gaps after the company has gone public; an IR firm will be instrumental in helping with most of this planning. This is particularly applicable to foreign issuers, for which an added layer of safety can be critical in ensuring continued compliance with US regulations and NASDAQ listing requirements.

The IR infrastructure combines simple administrative tasks with a complex decision-making process that has significant implications for an issuer's public company identity. Once all the functioning elements of the infrastructure have been established, it will be ready to go live on the first day of trading and operate smoothly in real time once public company reporting and communications begin. Grouped by type, the elements of the IR infrastructure include the following.

Determining the composition of the IR working group to manage the messaging and disclosure process

The IR working group should comprise members of the issuer's management (in particular, the chief executive officer (CEO), the chief financial officer (CFO), the controller, the internal IR officer, the marketing communications executive and the general counsel) and the IR firm.

The IR messaging and disclosure process must include the creation of a mechanism that will keep this working group updated on the scope of company information in and out of the public domain on an ongoing basis. This mechanism is essential to ensure that communications opportunities and obligations are anticipated and developed in a smooth and timely fashion. An IR firm helps to:

- educate the working group members as to issuer regulations, NASDAQ listing requirements, Regulation FD and Form 8-K rules and best practice during the pre-IPO phase; and
- shape disclosure and non-disclosure planning and messaging, and incorporate market intelligence on an ongoing basis once the IPO is completed.

In addition, the SEC recommends, as part of issuers' documentation of key reporting controls, instituting a press release approval procedure under which all releases are reviewed and approved, at a minimum, by the CFO and chief legal officer, and all quarterly earnings releases are additionally approved by outside legal counsel and the controller or vice president of corporate planning.

Creating Sarbanes-Oxley and SEC compliant financial reporting systems and procedures

A company should work with its attorneys and accountants to ensure that its internal financial controls and reporting systems are Sarbanes-Oxley compliant. Further, to smooth the process of reporting quarterly results as a public company, it is a good idea for a company to begin the practice of closing the books and reporting to the board as if it were a public company and creating results-related messages together with its IR consultants while it is still private.

The company must also create a whistleblower voice mailbox.

Establishing a disclosure policy

Sarbanes-Oxley recommends and SEC guidelines support the establishment of a disclosure committee to oversee the financial control process and provide guidelines for decision making. This committee should include the chief executive, financial and legal officers, the IR officer, the IR firm and other executives and advisors at management's discretion.

Both Regulation FD and Sarbanes-Oxley recommend that issuers have a written disclosure policy document; although not specifically mandated, this has become a component of IR best practice. Creating a disclosure policy is a project that the IR firm can spearhead. Such a document:

- records internal guidelines and rules for employee behavior with respect to communicating with reporters, family, friends, colleagues and business contacts;
- sets insider trading guidelines;
- communicates regulations surrounding a lock-up expiration;
- creates a process to educate employees on internal rules and the responsibilities of working for a public company;
- for filers under Section 16 (which governs stock trading by the issuer's directors, officers and principal stockholders), includes a gating process in which corporate counsel must approve insider transactions not governed by a Rule 10b-5(1) trading plan before they take place, based on information disclosed in the public domain;
- establishes communications development and approval procedures; and
- determines whether the company will observe quiet periods, which were effectively rendered obsolete by Regulation FD.

The pre-IPO process is the time to think through the appropriate guidelines that are likely to apply to future press release disclosures. A company should consider:

- internal materiality parameters specific to the company that serve as future guidelines for when a disclosure must be made;
- whether to espouse or ignore communications practices already established among the issuer's public peers for non-material (voluntary) disclosures;
- the incorporation of Form 8-K rules into disclosure criteria and procedures; and
- instituting the press release approval procedure mentioned above at this time.

Establishing a guidance policy

The decision of whether to issue guidance is a far-reaching one that will influence a new issuer's disclosure policy, its relationships with analysts and investors, and its public company image. While some larger capitalization issuers no longer give financial guidance, micro and small-cap issuers generally find that the lack of sufficient publicly available sector information, combined with analysts' and investors' unrelenting demands for greater transparency, places the burden of shaping an outlook back on management's shoulders, in a Regulation FD approved manner. An IR firm can help to sift through the factors affecting this choice, including the company's financial visibility, sector dynamics and peer company behavior. Whichever choice is made, a guidance policy that includes the following elements should be set up:

- guidance parameters, including which specific financial metrics and associated timeframes will be subject to forward-looking statements (if guidance will indeed be issued);
- a consideration of SEC Regulation G under Sarbanes-Oxley, which defines disclosure rules requiring the reconciliation between generally accepted accounting principles (GAAP) information and non-GAAP information, including forward-looking measures;
- a safe harbor statement that incorporates a clause indicating no duty to update guidance;
- an internal policy on updating guidance when results appear to differ materially from guidance issued; and
- a pre-announcement policy, which includes the identification of hurdles to determine whether revised guidance will be issued (some companies choose not to pre-announce unexpectedly high or

low results as a policy, but this is really a viable option only for large-capitalization companies).

Creating a mechanism for responding to incoming investor enquiries

The company should set up an IR voice mailbox for incoming investor enquiries. It should also create a ‘contact us’ page in the IR section of its website, where investors can request information and ask questions.

Assigning public company spokespeople and defining their roles and responsibilities

To keep external messaging focused and consistent, only a few key company representatives should be permitted to speak publicly on behalf of the issuer. In general, these spokespeople include the CEO, the CFO, senior executive vice presidents and marketing communications representatives.

Of these, at most three (usually the CEO, the CFO and the internal IR officer, if the issuer has one) should be responsible for and involved in direct contact with analysts, investors and the financial media. During the pre-IPO process, an IR firm helps to:

- identify key company representatives to all external audiences;
- identify key company representatives to the investment community; and
- train spokespeople in post-IPO communications, teaching them to converse comfortably with analysts, investors and the media while reinforcing the story and preventing accidental disclosures of non-public information, including:
  - managing expectations – avoiding unintentionally creating expectations;
  - conveying strong leadership, confidence, capability and knowledge to the listener in both overt and subtle ways;
  - keeping messaging consistent over time and across spokespeople;
  - understanding the dos and don’ts of speaking to Wall Street and reporters;
  - fielding questions effectively while staying on message; and
  - educating spokespeople on issuer regulations, SEC disclosure rules and IR best practice.

All other employees should be prohibited by company policy from speaking publicly and should be advised on how to direct incoming inquiries.

Setting up an administrative press release procedure

During the pre-IPO phase, an IR firm can help to establish press release procedures so that releases are ready to be issued and distributed upon pricing. These procedures relate to the approval procedure mentioned above. An IR firm can draft or edit release drafts, as the company prefers. Once the release has been finalized, the IR firm will handle the NASDAQ MarketWatch alert, issue the release to the newswire and distribute it to analysts and investors.

Web-based disclosure

SEC regulations now allow issuers to use IR websites as their sole disclosure method under Regulation FD if the site is considered a recognized distribution channel in advance. Doing so eliminates the use of wire services to disseminate press releases, but comes with a number of requirements and replacement costs. The determination of whether a website has been established as a distribution channel is the responsibility of the issuer and requires a thorough, consistent and systematic approach towards using the site as a communications tool that offers a comprehensive information set and is supported through active promotion to raise awareness. Additionally, recent highly publicized disclosure gaffes have highlighted that tight security and disclosure posting procedures are crucial to achieving compliance with regulations. As a result, a few disclosure models have emerged that combine traditional and web-based communications, and are more appropriate for issuers that are less well known and can benefit from the visibility that issuing press releases confers.

Disclosure and marketing communications

Once the internal IR infrastructure has been established, a robust external communications program can be created. Ideally, a company should complete this phase by the time of the IPO pricing so that the program can be fully implemented once the stock begins trading. As a preliminary step, the IR firm will take the following steps.

Perform an audit of the IR practices of companies in the peer group

This includes looking at:

- disclosure and guidance policies;
- reportable metric sets;
- earnings release dates and conference call times;
- conference call protocols and content;
- tone, content and frequency of press

releases;
- use of websites for financial disclosure audiences; and
- participation in brokerage-sponsored conferences.

Begin developing an IR calendar
The calendar will contain the following events:

- quarterly reporting dates;
- board of directors' meetings;
- appearances at industry/investor conferences;
- quiet periods, if any, to be observed;
- insider trading black-out periods;
- analyst/investor roadshows; and
- trade shows.

Develop collateral materials
A well-crafted set of collateral materials is an integral component of a strong IR program. These materials create visual images that reinforce the story, support investors' conceptualization of the company's strategy and help to achieve legal compliance. The primary elements of collateral materials are:

- the IR page on the company's website;
- a two-page fact sheet; and
- the investor presentation.

The IR firm guides the company through the development of the following.

IR website
There is no need to spearhead the development of or maintain the IR section of the corporate website in house – there are providers that can do this and the IR firm can help a company to choose one. The provider and the IR consultant can help the company to develop required and discretionary content for the initial launch of the IR page and the addition of content thereafter. This should include:

- a presentation of all disclosure communications;
- a corporate governance section – regulatory and NASDAQ guidelines mandate an explanation of the composition of the board of directors and its committees, identification of outside directors and the inclusion of a code of ethics and other governance documents;
- Sarbanes-Oxley Regulation G reconciliations;
- CEO and CFO certification of financial statements in accordance with Section 302 of Sarbanes-Oxley, which can reinforce investor confidence;
- disclosures of insider transactions;
- a web enquiry page allowing investors, particularly retail investors, to request more information from the company;
- the company's SEC filings, which can be efficiently distributed through the IR web page;
- an online investor kit, the contents of which can be determined by the IR firm, including recent SEC filings, earnings and strategic press releases, and a fact sheet;
- other investor information, including real-time and historical stock prices, dividend reinvestment programs and transfer agent contact information;
- frequently asked IR questions; and
- a list of events, quarterly webcasts and upcoming and past conference and trade show presentations.

Investor presentations and fact sheets
After the IPO, the company's investor presentations will need to evolve with its story, its strategy and the passage of time. Investor presentations often serve as the backbone of an issuer's messaging and should be developed with the help of the IR firm. A fact sheet, developed from the investor presentation, is an attractively laid out, one-page, double-sided verbal snapshot of a company. It states the investment case and lays out statistics vital to the investment decision-making process. It should be updated at least quarterly and also reflect any significant events (eg, an acquisition or senior management hire), and therefore has a fixed shelf life. The IR firm creates this document, ensuring that it fits with the story told by the company's post-IPO marketing roadshow.

Create an IR contact distribution list
The last element of the external communications program is the IR distribution list containing analyst and investor contacts. This database enables timely delivery and notification of news to the company's most important Wall Street contacts. It is important that it is put in place immediately after pricing so that this audience can begin receiving news about public company developments. The IR firm spearheads this project and the distribution list contains:

- key sell-side contacts, including underwriting firm analysts and other influential analysts which cover the issuer's peers. The IR firm targets these and can help cultivate such relationships;
- key buy-side contacts, including investors met on the IPO roadshow, those that bought stock during the offering, peer holders, and buy-side targets suitable for potential future investments that the IR

firm will identify. It is critical to maintain close contact with these new and potential investors and keep them updated on corporate events; and
- other contacts – the contact list also offers an efficient disclosure dissemination vehicle for other important corporate contacts, including members of the board of directors and the company's venture capitalists, investment bankers and attorneys. The IR firm will help the company to identify and include suitable contacts on the list.

First post-IPO quarterly results process

A NASDAQ issuer's first quarterly results report usually represents its first real disclosure event as a public company, so it is crucial. Investors often look to the first quarterly results release as a validation of their investment in the IPO and a determining factor in their continued shareholding. Therefore, this event acts as a state of the union address, setting the tone for the new public company's story, establishing its future plans and identifying associated milestones and catalysts to reach corporate objectives. Particularly for non-US issuers, this event firmly fixes the issuer's intention to communicate in a robust fashion with the US investment community. The IR firm is the company's partner in preparing for this important post-IPO event. It will:

- schedule the quarterly conference call and webcast, and issue an advisory of the call to the newswires and contact distribution list;
- review and analyze the quarterly results and strategic progress to be reported against expectations set during the IPO process, as well as the quarterly performances of the company's publicly traded peers;
- develop messages and metrics from these analyses that accurately describe results, strategic development and successes as well as challenges, and provide any necessary bridging between roadshow expectations and actual results and business trends to be reported;
- draft and edit quarterly materials, including releases, conference call scripts and presentation slides for all management speakers, and draft potential questions that management may encounter from the investment community during the conference call, as well as answers to them;
- rehearse the delivery of the script with management and practice questions and answers to ensure that the team is comfortable delivering the messages and speaking in both scripted and impromptu situations;
- issue the results release to NASDAQ MarketWatch and newswires, and conduct the call and webcast; and
- gather and analyze feedback on the conference call from call participants and determine which messages resonated with analysts and investors, where messages can be made clearer and what opportunities can be captured during future calls, all of which will be presented in a written report.

Post-IPO IR opportunities

Once the issuer has completed a NASDAQ listing, the IR firm will take on the management of the company's IR program. Since up to 40% of a CEO's time can be taken up with responsibilities relating to the company's public status, having a resource in place to strategize, prioritize and keep this process running efficiently can be invaluable, particularly for foreign-based issuers. After the IPO, the following IR activities are important.

Messaging and communications

After the IPO, the key messages of a NASDAQ issuer's story and slide presentation will need to be modified from a transaction sales approach to an educational and strategic positioning approach. In addition, the story should be updated to include any issues raised by investors during the IPO roadshow, as well as news reported since pricing, and should be modified over time to include corporate milestones and major corporate events. The IR firm will collaborate closely with the company's management on this task, incorporating first-hand knowledge of Wall Street's perceptions to date, as well as information about competitors' and peers' strategic progress to keep the company's investment case and supporting collateral materials fresh, relevant and in step with the strength of its fundamental performance.

Investment community outreach

At some point after the investment banking research analysts have begun research coverage after the company's NASDAQ IPO, the responsibility for investment community outreach will begin to transfer gradually from the investment bankers and research analysts to the issuer. An IR firm will support the company in building up a robust outreach program in the following ways.

Helping to field incoming inquiries from investors

Both institutional and retail investors are likely to request more information on the company's strategy, reported results and other corporate developments. An IR firm can help to handle both the volume and the complexity of these requests, prioritizing them to direct the most important ones straight to the investor contact in the management team and fielding simpler requests on its own.

Marketing the company proactively after the IPO

It is integral to any strong IR program that the company's management visits analysts and investors face to face. Although the analysts covering a company will invite members of management to investor conferences and non-deal roadshows, investors respond positively to marketing trips conducted under a NASDAQ issuer's own auspices, without the attached institutional sales obligations inherent in a broker-sponsored roadshow. Further, one-on-one and group marketing helps to raise visibility and build relationships with new sell-side analysts. Much like IPO roadshows, these marketing trips are usually exciting, but exhausting. An IR firm will assist in planning by creating target lists, pitching meetings and setting up itineraries to meet with existing and potential new analysts and investors, arranging the trip to leverage management's time as efficiently as possible.

Using social media as an investor marketing tool

Best practices for the use of social media in IR are still emerging. Research analysts and institutional investors do not currently rely upon social media conduits for serious business communications, and these conduits have not been proven to be effective disclosure tools. However, legal considerations do not preclude the use of social media as a corporate communications vehicle that can supplement traditional IR marketing on a selective basis. This is obviously true for consumer goods companies that are likely communicating with their target customers through these conduits as a matter of course, but also applies to issuers in other sectors. One example of a social media tactic is producing and posting to online venues, including the IR website, videos featuring presentations by the CEO and CFO.

Managing the IR calendar

As a rule, a NASDAQ issuer should interact with Wall Street roughly once every six weeks in some form to maintain strong visibility with the investment community, enhance Wall Street's perception of the vitality of the story and keep the investment case moving forward. An IR firm can manage this process by maintaining a calendar of the following events:

- quarterly results releases and conference calls;
- non-financial news releases (eg, new business wins or corporate events);
- investor conferences;
- marketing roadshows;
- trade show appearances; and
- media stories.

Conclusion

The practice of excellent IR blends financial statement and valuation analysis and disclosure regulation compliance with the arts of communication and strategic planning. The pre-IPO phase is the right time for the company's management team to make sure that it is ready to take on the significant added responsibilities and time demands that it faces once the company goes public. An IR firm can be the company's ally in preparing and supporting these efforts.

6

Directors' and officers' liability and insurance for public companies

by Carol AN Zacharias, ACE North America

Securities law provides a framework of liability for directors and officers of public companies. Resulting litigation comes at a significant cost; and government enforcement actions are also a risk, both in the United States and abroad. Against this backdrop, directors' and officers' liability (D&O) policies provide critical protection for executives of public companies.

This chapter summarizes key areas of liability of concern to public company directors and officers, current trends in litigation and enforcement and directors' and officers' liability (D&O) policies that provide a balanced portfolio of protection for the public company and its management.

Regulation

Public companies and their boards labor under disclosure requirements imposed by federal and state securities laws to ensure that investors have material information about a company and can make informed investing decisions. The Securities Act of 1933 requires that companies selling securities to the public disclose information that a reasonable investor would consider material, or important, in making their investment decision. The act also prohibits the use of fraudulent schemes, misrepresentations or omissions in the selling process, so investors are not misled as they evaluate the stock. Several key sections impose liabilities for violations, as do state securities laws and common law.

Section 11

Section 11 of the Securities Act permits a stock purchaser in a public offering to bring an action if the securities registration statement contains an "untrue statement of a material fact or omit[ted] to state a material fact required…to make the statement therein not misleading". The shareholder may sue in the event of a material misstatement or omission in the public offering.

Section 12

Section 12(a)(2) of the act permits a stock purchaser in a public offering to file an action if there are any material misstatements or omissions in the issuer's offering prospectus or oral communications.

Section 15

Section 15 of the act permits purchasers to seek Section 11 and Section 12 recoveries against individuals who qualify as control persons of the issuer, by virtue of the level of their stock ownership or under agency principals.

Section 10b

The Securities Exchange Act of 1934 was enacted to regulate securities trading in the aftermarket, following public offerings by a company under the Securities Act. The Exchange Act includes the gravamen for securities litigation: Section 10b. This section, along with Rule 10b-5 promulgated thereunder, permits purchasers of securities in the secondary market to sue sellers if any "device, scheme, or artifice to defraud" was used in the sale of securities, and imposes liability for any material misstatement or omission of any material information that a reasonable person would consider important in making the decision to buy or sell the security.

State securities laws

Similar to federal securities laws, states have securities laws that impose their own requirements. The laws have anti-fraud provisions, and may provide for a private action by securities buyers or sellers in the event of a material misrepresentation or omission in the selling documents or process.

Common law

Private actions may by filed based upon common law fraud and breach of fiduciary duty, in the event of a material misrepresentation or omission in the selling documents or process.

Private actions

Aggrieved purchasers in public offerings may file individual, derivative or class actions. Derivative actions are cases filed by an individual on behalf of the issuer company, seeking redress on behalf of the company. Class actions are suits by a group of similarly situated investors. The number of derivative actions increased 39% from 2009 to 2010 (J Molka, "2010 A Record Year for Securities Litigation", *Advisen*, January 2010). The number of securities class actions has also increased in recent years: 174 cases were filed in 2010. This is a 12% increase from 2009 and is consistent with the average of 176 securities class actions filed each year since the enactment of the Sarbanes-Oxley Act of 2002 ("2010 Securities Litigation Study" (PWC), *PricewaterhouseCoopers LLP*, at p 5; 107 PL 204)

Directors and officers are sued individually in most securities class actions. The chief executive officer (CEO) is named in 86% of the cases, the chairman in 66%, the president in 71% and other directors are named in 58% of the cases (PWC at p 18).

The size of a company is not determinative of the likelihood of securities class actions. Only 14% of securities class actions filed in 2010 were filed against Fortune 500 companies (PWC at p 19).

Historically, allegations included accounting irregularities, improper earnings guidance, insider trading and illegal "Ponzi" schemes. Today these allegations are being replaced with a growing number of cases seeking recovery for product and operational defects, and breaches of fiduciary duty (J Milev, R Patton and S Starykh, "Trends 2010 Year-End Update" (NERA), NERA Economic Consulting, December 14 2010, at p 12). Breach of fiduciary duty allegations have more than doubled, partially due to a 20% increase in mergers and acquisitions in 2010, which gives rise to complaints of unfair pricing and transactional improprieties (NERA at p 12; "Securities Class Action Filings - 2010 Year in Review" *Cornerstone 2010 Year in Review*, Cornerstone Research, January 20, 2011, at p 33). In 2010, 40 cases contained merger and acquisition related allegations in contrast with only seven cases in 2009 (Cornerstone 2010 Year in Review at pp 2, 33).

Plaintiffs file securities class actions with alacrity, putting both companies and executives immediately on the defensive. In 2010, actions were brought only a month after the event ending the class period, even faster than an average of 1.5 months in the time period between January 2007 and June 2009 (NERA at p 11). Cornerstone found that cases took an average of 25 days to file in the first half of 2010 but only 10 days in the second half of the year, also suggesting remarkable speed to file *Cornerstone 2010 Year in Review* at p 10).

Historically, a sudden decrease in securities value may spawn an immediate securities class action filing. However, more recently, filings are also being triggered by significant current events such as product recalls, oil spills and the commencement of major investigations or cases by the federal government. Plaintiffs may allege that the issuer made false or misleading statements about products, government approvals, safety practices, inspections, licenses or design defects, any of which led to subsequent problems impacting financial performance (PWC at pp 30, 44).

The duration of a securities class action is often determinative of its expense and distraction. Studies have shown that cases filed in 2000 took an average of 2.5 years to be resolved. Cases that are dismissed are of shorter average duration at 1.8 years, and cases that are settled are of longer average duration of 3.5 years (NERA at p 13). The average case life for cases settling in 2010 is longer, at 4.1 years. (E Ryan and L Simmons, "Securities Class Action Settlements – 2010 Review and Analysis" *Cornerstone 2010 Settlement Review*, Cornerstone Research, March 10 2011, at p 3).

The cost of securities cases is significant by any measure. In 2010, the average settlement was $30.1 million, and the median settlement was $10.1 million. Exceptional cases impact the average settlement amount, with six cases settling between $124.8 million and $624 million (PWC at pp 22, 24).

Factors driving settlement valuations are:

- generally accepted accounting principle allegations;
- restatements;
- auditors or underwriters acting as co-defendants; and
- concurrent derivative actions or Securities and Exchange Commission (SEC) actions (Cornerstone 2010 Settlement Review at pp 7, 9, 10, 11).

In addition, actions led by public pension funds are particularly active and costly, settling for two to three times the average settlement amount of cases without a public pension fund as lead plaintiff. In 2010, 67% of settlements were cases led by institutional investors, the highest percentage since the passage of the Private Securities Litigation Reform Act in 1995 (Cornerstone 2010 Settlement Review at p 8).

The impact of the recent credit-crisis cases is developing and may drive severity in the months ahead. Approximately 230 securities class action filings between 2007 and 2009 are related to the credit crisis. Of these, at the time of writing, 8.26% have settled, 28.7% have been dismissed, and the remaining 63.04% are pending. These cases may be particularly expensive as they move toward settlement, since investor losses are purportedly high. Median investor losses in cases filed in 2007, 2008 and 2009 that are unrelated to the crisis are $330 million, $414 million and $530 million, respectively. In contrast, median investor losses jump to $1.07 billion, $3.47 billion and $610 million, respectively, in cases related to the credit crisis (NERA at pp 14, 27).

Unsurprisingly, 2010 median settlement values were $31.3 million for credit-crisis cases in contrast to only $10 million for cases unrelated to the credit crisis. Average settlement values for 2010 were $103.1 million for credit-crisis cases in comparison with $31.6 million for cases unrelated to the credit crisis (Cornerstone 2010 Settlement Review at p 12).

Governmental enforcement

The D&O landscape is now far broader than private securities actions. As noted above, those cases have increased in both volume and severity, but are now supplemented and, in some cases, overshadowed by multiple enforcement proceedings brought both in the United States and around the world. Escalation of enforcement by a myriad of regulatory authorities presents exposure to directors and officers today that is at once local and global, civil and criminal, comprehensive and intricate.

SEC enforcement

The SEC has sought to improve its enforcement efforts in recent years by:

- placing more experienced investigators in the field;
- creating five specialized units to focus on particular violations; and
- increasing the coordination between its units and other agencies ("FY 2010 Performance and Accountability Report" (SEC FY 2010), Securities and Exchange Commission, pp 42, 151).

Supporting these enforcement efforts was the January 2010 passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Dodd-Frank provides the SEC with a variety of new powers, giving it broader authority than ever before.

The SEC can now file cases against any person that has recklessly aided and abetted a securities violation, in contrast to the previously higher standard of knowingly aiding and abetting. Moreover, if individual executives committed acts that necessitated a financial restatement by the company, the SEC can seek recoupment of executive compensation not only against the CEO and chief financial officer, but also against any current or former company executive who committed the act. In addition, the SEC may provide greater financial rewards than ever before to whistleblowers – that is, persons who provide original information that results in a successful SEC prosecution (PWC at p 34). This new financial incentive is expected to increase the number of tips and SEC actions.

In 2010 alone, SEC initiatives resulted in 681 enforcement cases, 952 investigations, and five settlements of more than $100 million (PWC at p 35, SEC FY 2010). The SEC also joined in private securities actions, participating in 22 cases filed in 2010, consistent with participation in approximately 13% of cases filed each year (PWC at p 32).

In addition, the SEC identifies potential cases for prosecution by other regulators. In 2010, 492 matters investigated by the SEC were referred to self-regulatory organizations and a variety of state, federal and foreign authorities, for concurrent or separate enforcement (SEC FY 2010 at p 51). In 2010, 139 investigations were referred to criminal authorities for possible criminal prosecution (SEC FY 2010 at p 52).

The number of securities regulators has increased with global expansion of enforcement efforts. In 2010, the SEC received 457 requests for enforcement assistance from foreign regulators, and sent abroad 605 of its own requests for assistance (SEC FY 2010 at p 53). The cooperation is formalized, based upon the Multilateral Memorandum of Understanding between international securities regulators and negotiated through the International Organization of Securities Commissioners (SEC FY 2010 at p 53).

Foreign securities violation enforcement is omnipresent for global companies. For example, the number of actions brought by Canada's Securities Enforcement Agency more than doubled from 2007, to 215 in 2008 (R Panko, "Overseas Challenges", Best's Review, AM Best Company, Inc, October 2010).

The thousands of tips, referrals and complaints received each year have increased to the point that the SEC recently created the Office of Market Intelligence to handle them all (SEC FY 2010 at p. 151). In 2010, the SEC conducted 303 investigations based on tips (SEC FY 2010 at pp. 42, 48). As noted, the number of securities investigations may increase due to the whistleblower provisions of Dodd-Frank, which has made tips more financially lucrative than ever before, potentially driving up tips and thereby the number of investigations (Pub L 111-203, HR 4173).

Federal Deposit and Insurance Corporation enforcement

The Federal Deposit and Insurance Corporation (FDIC), as receiver, commenced investigations into more than 300 bank failures arising out of the credit crisis. The agency suggests that most investigations take 18 months and include a review of the potential professional liability of the institution's directors and officers. Ultimately, the FDIC may issue demand letters to the executives, alleging negligence.

Directors and officers were sued in 24% of bank failures between 1985 and 1992, and the FDIC and the Resolution Trust Corporation collected $6.2 billion from all professional liability claims from 1986 through 2009. The commitment to pursue these cases is strong, with the agencies expending $1.5 billion in investigations and claims. As of March 2011, the FDIC had authorized potential suits against 158 individuals based upon directors' and officers' liability, for purported damages of

$3.57 billion. By March 2011, only six civil actions had been brought against 44 of these individuals, but more cases are anticipated given the target of 158 individuals (see www.fdic.gov/bank/individual/failed/pls/index.html).

In addition to civil actions by the FDIC, the Department of Justice (DOJ) may pursue criminal actions, as it did in one 2010 case. The DOJ has indicated that, as of late 2010, it was conducting as many as 50 investigations into the activities of former directors, officers and employees of failed banks, which suggests that more cases will be filed (Eaglesham, "US Sets 50 Bank Probes", *The Wall Street Journal*, November 17 2010).

The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act makes it unlawful for companies and persons to make payments to foreign government officials to obtain or retain business (15 USC §§78dd-1, *et seq*). The SEC and the DOJ have brought a rising number of enforcement actions, increasing these cases by 85% in 2010 alone ("2010 Year-End FCPA Update", Gibson Dunn & Crutcher LLP, January 2011, at p 2). In 2010, the DOJ and the SEC brought 48 and 26 actions, respectively – nearly double the actions in 2009. Both were record-setting years in volume of enforcement action filings (Gibson at p 3).

Individuals are very much at risk. Only six individuals were charged in 2002, increasing to 42 in 2009 and 17 in 2010. Cases are being brought to fruition. In 2010, 13 individuals were sentenced and two pleaded guilty. Fines are usually between $25,000 and $40,000, although one case resulted in $1.3 million in fines, disgorgement and interest in addition to criminal sentencing. More is to come, with 40 individuals awaiting trials (Shearman & Sterling, "Recent Trends and Patterns in FCPA Enforcement" (Shearman), *FCPA Digest*, January 2011, p iv).

Enforcement techniques are increasingly sophisticated, moving away from uncoordinated case-by-case filings toward judicious use of one case to educate the authorities on how to pursue similar cases, or full industry sweeps (Shearman at pp viii, ix). Moreover, enforcement is global, based on analogous anti-bribery laws in other countries, such as the UK Bribery Act of 2010. Foreign laws may be more stringent or may vary from the Foreign Corrupt Practices Act, which makes global compliance complicated albeit imperative. For example, the UK Bribery Act not only makes it illegal to bribe foreign public officials, but also makes it illegal for a commercial organization to fail to prevent bribery by another person in an effort to gain an advantage for the commercial organization (UK Bribery Act of 2010, chap 23).

The Office of Foreign Asset Control

The US Treasury Department's Office of Foreign Asset Control (OFAC) enforces economic and trade sanctions imposed by the United States against designated foreign countries, regimes and individuals. OFAC enforces restrictions on transactions with these parties and may freeze assets that are within the jurisdiction of the United States. Compliance is mandated through various programs, ranging from a list of persons with whom transactions are restricted, to barring trading with entire countries or targeting certain activities, such as terrorism and narcotics.

OFAC regulations impose liability not only upon companies but also upon directors and officers who knowingly participate in an OFAC violation. As a result, corporate executives may become targets if they knowingly participate and cause an OFAC violation, and may be subject to criminal sanctions and fines (31 CFR 545.701(a)(2)).

Climate change

Regulation S-K of the securities laws sets forth disclosure requirements for periodic reports and public offerings (17 CFR Sec 229 (2007)). Climate change raises disclosure liability risks.

Item 101 mandates company disclosure of the "material effects" that compliance with environmental regulations "may have upon the capital expenditures, earnings and competitive position of the registrant" (17 CFR Sec 229.101(c)(1)(xii)). As such, disclosure may be required where any climate change regulations may have a material effect on the company or its financials.

Item 303 mandates company disclosure of "any known trends or uncertainties that have had or that the [company] reasonably expects will have a material favorable or unfavorable impact on net sales or revenue or income from continuing operations" (17 CFR Sec 229.303(a)(3)(ii)). Information is deemed material under the federal securities laws if a reasonable investor would consider it important in making a decision to invest (*TSC Industries v Northway, Inc*, 426 US 438, 449 (1976)). Disclosure may be necessary if changes in climate patterns or climate change-related laws or regulations rise to the level of "known trends or uncertainties" that may have a material financial impact on the company.

Protection for directors and officers: D&O insurance

D&O insurance maximizes the protection of directors and officers against private securities litigation as well as the myriad government enforcement proceedings. There are various types of policies, designed to provide flexibility suited to the needs and desires of the companies and their executives.

D&O insurance policies

D&O policies generally cover defense costs, settlements and judgments that company directors and officers become legally obligated to pay on account of a claim first made against them during the policy period because of acts, errors or omissions committed by them in the discharge of their duties to the company, including service as an outside director to other companies. However, actual D&O policy terms and conditions vary from insurer to insurer, and even from insured to insured. Each policy may be different in certain ways, as there is no industry standard form. In fact, the language evolves over time in response to legal and other developments. At the same time, as discussed above, claims can be very significant, complex and lengthy. As a result, insurer selection and discussions are critical, and generalizations are difficult. The following is an overview of some of the more common terms of D&O insurance policies.

Acts and omissions

Directors and officers are typically covered for misstatements, misleading statements, acts, omissions, neglect or breaches of duty in their capacity as directors and officers. This may be extended to include acts or omissions relating to employment practices and outside directorships. In addition, most D&O policies also cover the company for securities claims against the company itself.

Claims

A variety of forms of claims are covered under most D&O policies. Claims may include mere written demands for relief, or take the more common form of civil, criminal, arbitration, administrative or regulatory proceedings. Claims may also include formal civil, criminal, administrative or regulatory investigations.

Loss

Most D&O policies will pay for defense costs, settlements and judgments. Defense costs typically include reasonable and necessary costs, charges, fees and expenses incurred by insureds in defending the covered claims.

Coverage grants

A traditional D&O policy provides coverage through three different coverage clauses:

- first, for loss of the director or officer who is not indemnified by the company, known as 'Side A coverage";
- second, for loss of the director or officer who is indemnified by the company, known as "Side B coverage"; and
- third, for loss of the company on account of a securities liability claim against the company itself, known as "Side C coverage".

Claim notice

D&O policies generally cover only claims first made and reported during the policy period. The forms are not occurrence policies that permit notice in the years to come. As a result, it is very important to review the notice provisions in the policy and ensure that timely notice is provided.

Potential claim notice

D&O policies may permit the company and its directors and officers to provide notice not only of actual claims, but also of potential claims. The policies may permit notice of facts and circumstances which the insureds believe may give rise to future claims. The value of giving this type of notice is that any subsequent claim will be deemed to have been reported when the earlier circumstance notice was given. This enables risk managers and their companies to decide whether they want to trigger earlier policy terms, or wait to provide notice under a later policy.

Side A insurance policies

A traditional D&O insurance policy with Side A, B and C coverage may not provide enough protection for directors and officers in certain circumstances. In those events, a policy dedicated to directors and officers and exclusively providing non-indemnifiable loss coverage, known as a Side A policy, provides critical additional coverage. Some of the circumstances are discussed below.

Depletion of traditional D&O policy limits

The limits of liability under a traditional D&O policy may be deteriorated or exhausted by the company using the limits to resolve the more frequent claims under Side B, indemnifiable loss, or Side C, entity securities claims. If that happens, directors and officers may have reduced or no limits left to protect them against claims. Side A policy limits can never be depleted for indemnified claims or the company's own securities claims, hence, they are preserved and dedicated to the directors and officers.

Bankruptcy

A bankruptcy court may freeze any asset in which the bankrupt estate has an interest. The company may have an interest in a traditional D&O policy. The entity is insured under Side B coverage to the extent that it indemnifies directors and officers. It is also insured for its own securities liability under Side C coverage.

As a result, some bankruptcy courts have found that both the policy and the proceeds are assets of the bankruptcy estate, and so are frozen and inaccessible to the company and its executives. Other bankruptcy courts have disagreed, finding that the policy is an asset of the bankruptcy estate, but the proceeds are meant to protect the directors and officers and, since they are not in bankruptcy, the proceeds are available to them.

Given this uncertainty and the importance of maximizing protection of executives when their company becomes illiquid, it is critical to consider purchasing a Side A-only policy. Since the entity is not a beneficiary of the Side A policy, it is more likely that the proceeds will not become frozen as part of the bankrupt estate, and will be available to protect the directors and officers.

Financial impairment

Short of bankruptcy, the company may become financially impaired and unable to fund indemnification of the directors and officers. Non-indemnifiable risks increase and a separate limit of Side A coverage can protect the assets of the individual executives.

Derivative settlements and judgments

Often individual, class and derivative actions are filed simultaneously against a company and its directors and officers, seeking recovery for some alleged transgression. As discussed above, the cases are very costly and make take years to resolve. If the individual and class actions are settled first, or if defense costs mount up, the limits under any Side A, B or C policy may be significantly depleted by the time of the settlement or trial of the derivative claim.

Companies ordinarily indemnify a director or officer for settlements or judgments. However, that may not be possible in a derivative claim.

A shareholder derivative action is a case brought and maintained by a shareholder of a corporation on its behalf, to enforce a legal claim which the company has failed to seek to enforce. The shareholder files the claim on behalf of the company. Since the company is essentially the plaintiff, most states are of the view that it is circular to permit the company to indemnify the directors or officers for the settlement or judgment in the derivative action, subject to some exceptions. The theory is that the company is filing the action so it would be circular and unfair to shareholders if the company indemnified the executive for payments the executive makes to the company on account of a settlement or judgment.

Change in control

A new board may replace an old board. The new board may decide not to indemnify the former directors and officers, exposing them to liability accrued when they were executives of the company. An additional separate tower of coverage for non-indemnifiable loss may be critical to protecting the assets of the former directors and officers when they confront obstacles to getting corporate indemnification.

Differences in terms and conditions

The terms and conditions of Side A policies are typically much broader than those in the A, B or C D&O policies, since the nature of the non-indemnifiable loss coverage is more of an excess coverage. There may be a broader grant of coverage, fewer exclusions, a broader number of persons qualifying as insured executives and other more favorable provisions. Given the breadth of coverage and the need for additional non-indemnifiable loss coverage in the circumstances discussed above, Side A coverage is always a consideration for a public company's insurance portfolio.

Multinational programs

If a US-based insured company has subsidiaries in another country, those subsidiaries may be subject to local insurance laws when purchasing coverage. Some countries require the purchase of local coverage, while others do not. The local countries also may impose requirements on premium payment and allocation, premium taxation, policy language and issuance, and claims handling and payment. The US-based parent company must consider whether and to what extent coverage must be purchased locally, how and whether the local policy coverage can be coordinated with the policy purchased in the United States for the parent company and any other subsidiaries that are permitted to be insured thereunder.

Other policies

As companies grow in size, global presence and valuation, liability exposures increase concomitantly. Insurance protection is available to maximize protection for the executives, fiduciaries and managers, as well as the organization, depending on the type of policy:

- excess insurance;
- employment practices liability insurance;
- Employee Retirement Income Security Act of 1974 plan fiduciary liability insurance;
- crime and fidelity insurance; and
- digitech and privacy insurance.

Companies and their risk managers should consider whether and to what extent they need to develop their insurance portfolio given their business and plans for the future.

Any opinions or positions are the author's own and not necessarily those of any ACE company.

7

The role of the financial printer

Peggy Cohen and Jeff Levy, RR Donnelley

RR Donnelley discusses the financial printing needs associated with a NASDAQ listing by US issuers in connection with a public offering in the United States.

In addition to attorneys, investment bankers and accountants, financial printers play an essential role in helping to bring initial public offerings (IPOs) and NASDAQ American depositary receipt listings to fruition. Specifically, a financial printer helps to create, manage, produce and distribute various documents for a wide range of capital markets and investor communications-related activities. In addition, the financial printer will continue to be a valuable partner by providing documentation and service support for the company's future compliance requirements and debt and equity capital-raising activities.

How does a financial printer differ from a commercial printer?

Financial printing is a highly specialized activity and extends beyond the simple transfer of information to a page. The services offered by a financial printer are designed to meet the unique needs of the time-critical and rapidly changing financial community.

In addition to providing regulatory expertise, financial printers have extensive customer service capabilities and offer fully integrated and global resources that operate around the clock. These assets are highly flexible and allow financial printers to accommodate the special needs of the deal and the market quickly.

Several factors differentiate financial printers from commercial printers. Unlike commercial printers, financial printers excel at managing last-minute print capacity. In addition to complex deal management, they provide finance-specific document composition services and a suite of electronic tools to streamline the document creation and filing process. Their infrastructure is built to ensure the security and confidentiality of the documents at every phase of the production cycle. Their on-site composition and customer service teams provide a level of support and follow-through guaranteed to get the job done. Office space and conference facilities are also designed to maximize productivity without minimizing the client's comfort. Collectively, these resources work together seamlessly to ensure the accurate and timely delivery of the financial print project.

In general, financial printers create documents that come directly from the discussions and the due diligence information occurring between the company, investment bankers, legal teams and accountants. The documents are composed in real time and in the correct format required by the US Securities and Exchange Commission (SEC).

Worldwide scope is another important strength of the largest and most well-respected financial printers. Finance has no borders and the need for global scope is even more important with today's far-reaching transactions.

Knowledge of the SEC's technology requirements also allows the financial printer to support the company's needs in this area. For example, the SEC requires that some elements of the deal be filed electronically using Electronic Data Gathering, Analysis and Retrieval (EDGAR). Specifically, this applies to much of the documentation related to IPO and American depositary receipt filings, along with subsequent annual and periodic reporting. Unlike commercial printers, financial printers are EDGAR experts and do not need to hire subcontractors to perform this critical task. The same holds true for eXtensible Business Reporting Language (XBRL), the recently mandated means of transmitting financial data on forms 10-Q, 10-K and Securities Act registration statements (excluding IPO S-1s).

Many leading financial printers offer extensive translation services to facilitate their clients' global project needs. They also accommodate comprehensive foreign-language typesetting to enable the creation of language-specific preliminary prospectuses. This service is essential if the company plans to list on two exchanges.

Bringing a deal to market requires a heightened level of security and confidentiality. Financial printers, familiar with the requirements in this area, have incorporated security measures into their multiple processes – including technical infrastructure, facilities and personnel. Various levels of third-party certification (under Statement on Auditing Standards 70) can provide the company with enhanced peace of mind that the financial printer is continuously and properly protecting the project.

Bringing a deal to market is a time-compressed activity that is often stressful. Financial printers are familiar with the demands of bringing a deal to fruition. As a result, their facilities are designed to accommodate the company's needs during this sensitive period. For example, the company's representatives will often spend extended periods of time at the financial printer making amendments to the registration statement and revising, proofing and fine-tuning the preliminary prospectus. In key financial centers across the world, top financial printers provide technology-driven, staffed conference facilities that are available 24 hours a day, 365 days a year.

As illustrated by numerous examples,

financial printers have a focused expertise that commercial printers simply do not have. Given the importance of transaction documents, companies need the expertise, added value, speed and comfort of a financial printer to complete their IPOs and related subsequent disclosure requirements.

Preparation of critical documents

The SEC requires a company to provide four main classes of documents in order to complete its US filing. It also stipulates which documents are to be provided in print or electronic form. The four groups of filing documents are:

- the registration statement pages (facing sheets and signature pages);
- exhibit files to the registration statement to provide additional background information;
- the preliminary prospectus, which describes the company's story and outlines its value as an investment opportunity; and
- the final prospectus, which outlines final price information.

Only the preliminary and final prospectuses are provided in printed form; all others are filed with the SEC in electronic form.

Over a period of rigorous due diligence and information verification, the company writes the registration statement and preliminary prospectus. The SEC must review these documents and the exhibits will usually undergo several rounds of revision. During this busy time, the financial printer works with the company to organize its content into the format required by the SEC and other regulatory institutions.

The financial printer is fully responsible for processing all requested changes to the registration statement until the final draft. In addition, its systems are designed to reflect changes instantaneously. Working in sync with their other electronic tools, financial printers facilitate the secure and timely delivery of documents to the company wherever it is based.

The tangible strengths of a financial printer are evident here as they work to print the final preliminary prospectus and deliver it to the underwriting syndicate. For documents that need to be delivered electronically to the SEC, financial printers make them EDGAR suitable and submit them to the SEC on the company's behalf.

Electronic versions of documents that may need to be posted on a company's investor relations website are also provided by the financial printer. Financial printers with assets located in key financial districts can also accommodate the company's requests to deliver advanced printed and electronic copies to select audiences.

At the conclusion of the roadshow, the deal is priced. At this point, the company will return to its financial printer to prepare the final prospectus. During this time, the company and its team set a final offer price before its SEC 42B submission. Once the submission is confirmed, the financial printer will receive approval to print the final prospectus and deliver it to the company's investors.

Financial printers are experts at providing the tools and resources necessary to complete finance projects. They handle all the deal's logistics, allowing the company to focus on generating the content required for the final deliverable. Financial printers are highly skilled at simplifying projects and cultivating a good relationship with them will make this challenging time far more manageable for the company.

Timeline for working with a financial printer

The company chooses a financial printer for its deal. This decision may be made with input from the company's investment bank and securities lawyers. They can often provide valuable insight based on their past deal experience and involvement with particular financial printers.

The timeline for working with a financial printer depends on how the company chooses to integrate with their electronic solutions. Specifically, many financial printers offer virtual datarooms that work to reduce substantially the cost and time associated with more traditional and paper-based forms of due diligence.

The financial printer should be a part of the work group that is assembled two to three months before the planned initial filing date. If the company elects to use a virtual dataroom for the due diligence process, the relationship with the financial printer begins earlier. The work team typically includes the company's key representatives, lawyers, underwriters, accountants and advisors. Being involved from the start of the project allows the financial printer to become familiar with all aspects of the deal.

The financial printer assists the company's lawyers with the submission of a number of confidential filings related to the company's registration statement to the SEC examiner. Within one month of the team's first meeting, the company must send a draft of the registration statement to the financial printer. This is the first step of SEC documentation. Over a period of several months, the SEC will provide comments and several rounds of edits may be required before the SEC examiner finally indicates that the document is acceptable and ready to be filed publicly with the SEC.

During this period, the company will spend extended time at the financial printer filing amendments to the registration statement and revising, proofing and fine-tuning the preliminary prospectus.

Following the investor roadshow with the preliminary prospectus, the company goes back to the financial printer to complete the final prospectus and any electronic filing required by the SEC. The financial printer will then proceed to the final phase of the project – printing and distributing the final prospectus to interested parties locally and globally.

Future relationship with the financial printer

The financial printer continues to play an essential role in many of the company's future activities. Most companies use the same financial printer for their annual compliance and future transaction needs. This reduces the time required for data collection for future deals and ensures that former project knowledge is properly applied. Therefore, the choice of financial printer is important.

The company works with the financial printer when it:

- files required disclosure documents during the annual compliance process – such as the Annual Report (10-K) and the 10-Q for disclosing quarterly reports. Form 8-K is filed to disclose significant news and a company may file as few as three Form 8-Ks a year or more than 100, depending on the how much material news the company has generated;
- files additional disclosure documents to report significant changes in stock ownership on Schedules 13D and 13G;
- reports the purchase/sale of stock by company insiders (eg, officer or director) on Forms 3, 4 and 5;
- creates, produces and distributes the company's annual report to shareholders, often produced in four-colour process;
- prepares all materials related to the secondary offering of equity or debt, mergers, acquisitions, tender offers and real estate investment trusts; asset-backed securities that can be used throughout the life of the company are also covered; and
- wishes to optimise internal and external communications by using the financial printer's leading-edge technology solutions, including virtual datarooms and content management systems.

Key criteria for selecting a financial printer

In order to support the project properly, in both the short and long term, a financial printer must illustrate expertise in several key areas, including:

- industry reputation;
- product knowledge;
- equipment;
- technology;
- customer service; and
- overall project management.

A financial printer that illustrates strength in these critical areas will ensure that the project, regardless of size or geographical scope, is produced on time, on budget and to the highest standard.

Ability to adjust to a rapidly changing environment

The capital markets community is highly dynamic due to market fluctuations, regulatory changes and new technological innovations. A financial printer must have an infrastructure that can easily adapt to change without sacrificing customer service and deliverables. Fully integrated financial printers can invest in resources more quickly and effectively to ensure that their people, technology and equipment can meet market needs promptly.

A partnership, not just procurement

Bringing a capital markets deal to fruition is a complex and often stressful process. After a company has gone public, future mandatory compliance-based filings are also necessary. With financial printers, printing is only one tangible element of the overall service. Equally important are the financial printer's knowledge of the industry, understanding of how the SEC works and proven deal management skills. These elements will allow the financial printer the long-term ability to anticipate the company's needs and to supply it with winning solutions.

Global strength and local execution

The world of finance has no defined borders. These days, a deal may need to reach constituents in multiple continents, time zones and languages. Only a financial printer with an internationally broad distribution network, powerful equipment accessible 24 hours a day and reliable customer service can support deals of international complexity.

A hard-working locally based team is ultimately responsible for the execution of a global deal. For this reason it is important to choose a financial printer with strong local accommodations, including technology-oriented conferencing centers with on-site composition teams and printing capabilities. Local support matched with a global delivery platform guarantees that the deal – regardless of size or scope – is executed on time.

Deal management supersedes document management

Bringing a deal to market involves numerous moving parts. These parts include a multi-person work team, hundreds of documents, countless rounds of text revisions and an awareness of SEC filing deadlines. A financial printer is familiar with the 'art of the deal' and has designed robust workflows to ensure that it can smoothly manage the project. Reputable financial printers have dedicated deal managers assigned to coordinate all the details of the project, from start to finish. They are experts on form requirements for particular filing types and the necessary timelines needed to execute the deal. Their familiarity with their own resources, matched with the company's unique deal requirements, allows them to develop a workable project plan that will meet the company's overall objectives.

Single-source services

A financial printer that can offer the company single-point sourcing has multiple benefits. These services include:

- comprehensive composition;
- XBRL;
- virtual datarooms;
- translation;
- press capacity;
- mail and fulfillment services; and
- global distribution.

The benefits of using a single provider include:

- greater cost and time efficiencies;
- greater production control;
- increased opportunities to reuse content for future deals; and
- enhanced confidentiality.

Service reliability

One major factor in the deal's success is delivering it to the target audience on time. A financial printer's ability to provide an accurate and timely turnaround for the project is critical in this regard. The company should ensure that it asks prospective financial print partners for data on their delivery speed. This is a hallmark measure of a financial printer's core offering.

An accommodating work environment

To take a company public, the company's team will spend an extraordinary amount of time preparing content and managing text revisions. Deals are presented to the market based on a set schedule in order to maximize returns. To expedite the creation process, the work team will likely perform these services on-site at the financial printer's conference facilities. The financial printer's accommodations should include state-of-the-art conference room facilities with ample space for a large work team. Technological tools including high-speed internet connections, conference-ready phones, audio/video capabilities, photocopying and projectors are standard offerings. Reference materials, concierge services, in-house dining and relaxation areas should also be available.

Embracing technology

The financial printer should use technology tools to streamline the delivery of the project. Best practices in manufacturing concepts, analytical techniques, process management and standardized procedures can significantly increase production capacity, service consistency and delivery times. The financial printer may also be able to provide a suite of user-intuitive e-based tools to facilitate various elements of financial communications and filings. Asking the financial printer about its latest market innovations and technology budget will allow the company to determine whether it is a technology innovator in the industry.

EDGAR

The financial printer should have extensive expertise in hypertext mark-up language filings via EDGAR, as this is preferable to the older American Standard Code for Information Interchange language. In 2002 it became the mandated means of all international filings. Hypertext mark-up language provides increased readability to the company's documents. These include font highlights, hyperlinks and graphics. It can also be easily and quickly uploaded to the investor relations website. The SEC has strict filing hours. For the initial set-up, the company should begin work with the financial printer in plenty of time to ensure a smooth transition to this technology.

Large financial printers also offer additional e-solutions including self-filing tools for frequent filings (Forms 3, 4 and 5 for share ownership). The company should also ensure that the financial printer is well versed in new technology platforms with the SEC. For example, the SEC is now accepting XBRL. Also known as interactive data, XBRL is a standards-based method with which users can prepare, publish, exchange and analyze financial statements and the information they contain. The company's ability to streamline its processes depends on its financial printer's ability to support and implement new technologies. Before choosing a financial printer, the company should ensure that it can meet this need by asking for a list of clients that it has supported in this area.

Virtual datarooms

A financial printer should be able to offer the company virtual dataroom technology services to support the IPO process. A virtual dataroom provides the company with a highly secure environment in which to share confidential information among a geographically dispersed work team. It can help it to attract investors by giving them an easy platform on which to conduct due diligence and analysis. It can also assist the company's advisors and bankers with the electronic dissemination of information during the early stages of the deal. In addition to their vital security aspects, virtual datarooms also:

- establish a single place of record for sensitive documents;
- eliminate email overloads; and
- remove delays associated with travel and expedited mail.

Overall, the strengths of virtual datarooms extend beyond the IPO stage. Their capabilities are also applicable for merger and acquisition projects.

XBRL

XBRL is a new format for furnishing financial statements that are filed under forms 10-K and 10-Q, along with their Multi-Jurisdictional Disclosure System or Foreign Private Issuer equivalents, as well as registration statements filed under the Securities Act. For a complete listing of filing requirements, please see Rule 400 of Regulation S-T. Although an initial public offering under Form S-1 is exempt from XBRL requirements, non-IPO S-1 filings are mandated to furnish an XBRL version of the financial statements. XBRL is a national reporting standard, created under US-GAAP, by which issuers conform reporting items under their financial statements with standard US-GAAP "tags", as managed and maintained by the Financial Accounting Standards Board under the Financial Accounting Foundation. These tags consist of familiar labels, such as Selling, General and Administrative Expenses, but more importantly contain a standardized US-GAAP definition; issuers must decide whether said definitions are accurate for application to their reporting item. The XBRL requirements affect all financial statements (income statement, balance sheet, cash flow and statement of shareholders' equity/debt), notes to the financial statements and any schedules. All issuers, starting for reporting period ended June 15 2011 forward, must begin furnishing their Exchange Act reports with XBRL (blocked footnotes for non-LAF filers) and with the reporting period ended June 15 2012, all issuers must begin furnishing their financial statements with XBRL and they must contain detailed footnote tagging.

Although XBRL is currently mandated only for the forms listed above, at the time of publication, there is a concept rule release issued by the SEC relating to XBRL tagging for Compensation Disclosure and Analysis and Executive Compensation tables as filed under form DEF-14A and proxy voting results on Form NP-X. Upon going public, issuers must be vigilant in keeping current with XBRL and should engage a financial printer that has significant experience and resources to address this time-consuming and extensive requirement.

Distribution to shareholders and investors

The financial printer should have hands-on accountability for all distribution. To facilitate the company's needs in relation to shareholder and investor communications, a financial printer must have multiple venues, both domestically and internationally. In addition to standard fulfillment and tracking capabilities, it should also be knowledgeable of a region's unique mailing and shipping requirements. In today's environment, the financial printer should also offer a means of electronic document delivery. Its ability to offer a well-rounded suite of services, married with a global delivery platform, will ensure that the company's materials arrive in the right hands at the right time.

Conclusion

Financial printers are experts at providing integrated communication solutions for finance-related activity. In addition to a strong delivery platform upon which to execute the deal, the financial printer should provide industry expertise, dedicated customer service, innovative technology solutions and global printing capacity. Along with a commitment to excellence and customer dedication, these features will ensure that the company's project and needs are met efficiently.

Contributor profiles

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Ms Zacharias has served as chairman of the American Bar Association (ABA) Business Law Section's Business Insurance Committee and vice chairman of the Professional, Officers' and Directors' Liability Law Committee of the Tort and Insurance Practice Section. She has also served as co-chair of the insurance sub-committee of the ABA Litigation Section's Committee on Corporate Counsel.

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Ms Zacharias has been published in a securities law textbook and a variety of periodicals, including the *Journal of Commerce*, *National Underwriter*, *Global Reinsurance*, *Bank Director*, *Professional Agent*, *Journal of Accountancy*, *John Liner Review*, *Professional Agent*, *Insights*, *BNA's Tax Management & Compensation Planning Journal* and *Liability Corporate Analyst*. She is quoted in various publications, such as Business Insurance and the *Wall Street Journal*. She is a frequent speaker and taught professional liability at New York's College of Insurance, now part of St John's University.

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Carolyn Capaccio, a chartered financial analyst, joined LHA in 2004 after collaborating with the firm in a consulting capacity for more than a year. With combined Wall Street and senior experience in the practice of IR, Ms Capaccio advises clients in a variety of industries on financial community relations, communication of strategic business objectives, disclosure and crisis communications. Most recently, she led her own IR consultancy, providing high-level advice to public and private companies, and contributing to special-project teams. Prior to this, she was an equity research analyst at Robertson Stephens, a boutique investment bank and brokerage, where she used a return on invested capital and discounted cash flow focus to analyze catalog, retail and e-commerce channels in the hard goods, home improvement, specialty retail, consumer electronics and office retail sectors. Ms Capaccio also served as vice president and group director at Morgen-Walke Associates, then one of the world's largest IR firms, managing a group of IR professionals serving small to medium-cap public and initial public offering-track companies in the retail, consumer products, leisure, textile, manufacturing and distribution, e-commerce and B2B sectors. Ms Capaccio began her career at Prudential-Bache Securities as an equity coordinator on the firm's equity research desk, liaising between sell-side analysts and financial advisors.

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Mr Gould's specific technical knowledge focuses on accounting for carve-outs, purchase accounting, pro forma financial statements, stock compensation, principles of revenue recognition, segmental reporting, the SEC registration process and private equity exit strategies. In addition, he frequently takes on the role of an IPO advisor to help his clients both with their initial registration process and with the process of preparing to operate as a public company.

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Don Rupprecht is a senior leader of PwC's finance effectiveness practice. He specializes in transforming finance, reporting and back-office functions, and has broad experience of information systems and operations. Mr Rupprecht has also helped clients improve specific processes such as budgeting, reporting, consolidation, month-end close, transaction processing and intercompany accounting. He brings an insightful business perspective and international acumen to projects, having spent three years in the London office assisting multinational clients with post-merger business transformation.

Mr Rupprecht has helped clients take control of their businesses on day one, integrating companies to capture value and correcting poorly integrated acquisitions. He has negotiated and implemented transition service agreements and quickly implemented back-office infrastructures to allow carved-out businesses to operate separately. Complementing his operational background and deal experience, Mr Rupprecht has excellent leadership, facilitation and program management skills.

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Erin Cahill is a director in PwC's transaction services capital markets team in San Francisco. Ms Cahill specializes in advising clients on the process of preparing, executing and accounting for various forms of capital markets transactions, including spin-offs and carve-outs, IPOs, M&As and other domestic and cross-border capital markets transactions. Ms Cahill has over eight years' experience serving clients in the US markets, as well as clients throughout Europe and the Caribbean, with a focus on SEC reporting requirements for both domestic and foreign private issuers and technical accounting advice under US GAAP and IFRS.

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Mr Gorrell has been in public accounting for more than 10 years, including six years in the audit practice. He is a certified public accountant in Texas and Oklahoma and a graduate of the University of Oklahoma School of Business.

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For the past 20 years Jeff Levy has worked with RR Donnelley in numerous positions within the capital markets group. He played an instrumental role in creating RR Donnelley's go-to-market strategy for Latin America and now currently directs all targeted sales efforts in Mexico. In the United States, he has spent most of his career focusing on the New York Metropolitan area, with emphasis on providing financial print and virtual dataroom services to many top international law firms and companies in the life sciences industry. Mr Levy has a BS in marketing from the University of Maryland.

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