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US IPO Guide

LATHAM & WATKINS LLP

2026 EDITION

This is our initial public offering guide. It will help you decide whether an IPO is the right move for your company and, if so, help you make sure your IPO goes off as quickly and as smoothly as possible, without any unpleasant surprises.

Prior to this offering, there will have been no public market for your common stock, but we will help you understand what will be required of you as a public company and how to make the transition to life in the limelight.

Undertaking an IPO involves risks. See "Summary" beginning on page 1 to read about common pitfalls and how good advance planning and legal advice can help you avoid them.

	Per Share	Total
Price to the public	$	$
Underwriting discounts and commissions[(1)]	$	$
Proceeds, before expenses, to us	$	$

(1) The underwriters are crucial players in conducting a successful offering. You and your counsel will be spending lots of quality time with them, their counsel, and your auditors.

Closing of your offering should occur approximately 120-180 days after you say "go."

Neither the Securities and Exchange Commission nor any other regulatory body has approved or disapproved of this guide, or passed upon the accuracy or adequacy of this guide. We hope this guide will make the IPO process less mysterious and the goal of going public more attainable.

Athos & Co. **Porthos Securities LLC** **Aramis Inc.**

The information in this guide represents only a fraction of our accumulated expertise in capital markets transactions and does not constitute legal advice. Never hesitate to check with us for up-to-the-minute guidance.

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SUMMARY

This Summary does not contain all of the information that you will need to successfully complete your IPO. You really should read this entire guide as well as the other Latham & Watkins publications referred to in this guide if you want to get the full picture. Actually, you should just hire Latham & Watkins to act as your IPO counsel and then you will not need to read any of this stuff. However, if you want an advance copy of the playbook and are not yet ready to choose your counsel, you can read this Summary and get a pretty good sense of what to expect in the IPO process.

Recent Developments

In May 2026, the Securities and Exchange Commission (SEC) proposed rules[1] that, if adopted, would permit US public companies to report semiannually rather than quarterly.

Each year, companies would choose whether to report semiannually on new Form 10-S or quarterly on Form 10-Q. IPO issuers (and other initial listings) would elect semiannual reporting by checking a box on the cover of their registration statement (e.g., Form S-1/S-11/S-4 or Form 10). The election would be binding until the next fiscal year and thereafter would be made annually on the company's Form 10-K.

Form 10-S requirements would track the Form 10-Q. Form 10-S would follow the Form 10-Q requirements as applied to the first half of the year, rather than a single quarter. Semiannual reporting companies would make required CEO and CFO certifications on a semiannual basis only.

Requirements for earnings releases would remain unchanged. The SEC is not proposing substantive changes to Item 2.02 of Form 8-K, or to earnings guidance practices. However, semiannual reporting companies will now have the ability to provide voluntary quarterly earnings releases without making any Form 10-Q filings.

The requirements of the current quarterly reporting framework and earnings releases are discussed in the chapter "Beginning Life as a Public Company" on page 53. Final rules could become effective as early as 2027 or, more likely, in 2028.

Our Mission

We are among a select group of leading IPO law firms in the United States – having been a market leader in every year since 2010. Since 2021, we have advised on more than 400 IPOs globally, helping companies raise more than $324 billion. Our mission in this guide is to arm you with a thorough overview of the IPO process, including practical tips gleaned from our unparalleled experience in the trenches. This guide is different from any other guide you might come across, because we do more than just recite the rules – we share the secret sauce. We believe that our leadership position in the IPO market positions us to give you the practical advice you need to navigate the IPO process successfully.

The Market Opportunity

There are lots of good reasons to consider an IPO. Public companies and their shareholders can:

- monetize an equity interest in the company at the rich price-to-earnings multiples that are typically available only in the public markets;

- cash in a portion of the owner's or founder's equity without giving up control completely;
- access public equity markets for future capital raising;
- more easily attract and reward key employees and directors by providing them with an opportunity to share in the upside of the enterprise through stock-based compensation; and
- acquire other companies by issuing public equity either directly to the sellers or to the public to raise the funds for a cash purchase.

The first of these considerations is usually paramount. The owners of a private company can always sell out to a purchaser looking to acquire all of the company's equity, but the public markets typically offer a higher earnings multiple and, hence, a higher enterprise value than any private purchaser is willing to pay. In our view, this is the single best reason to go public, although it can take years for the pre-IPO stockholders to sell out in full. Where the public market valuation does not exceed the valuation available in a private sale of the enterprise, most owners of private companies who are looking to exit will opt for a private sale. The private sale lets you get out in full in one fell swoop, which is nearly impossible in the public markets.

Of course, an IPO is not the right answer for every private company. A private sale to an industry player or a private equity shop may provide a quicker way to monetize your investment. One possibility is to consider both alternatives simultaneously through a dual-track process (simultaneously pursuing a sale and an IPO). It is not unheard of for a private company to venture most of the way down the IPO road and decide to sell privately at the last minute.

After all, there are some distinctly unpleasant things about being public. In fact, it's pretty sweet to be a private company. Here are some of the privileges that private companies enjoy:

- they do not need to share their financial results with competitors, customers, or suppliers;
- they do not need to disclose what they pay their top executives;
- they do not need to pay an outside accounting firm to audit their internal controls over financial reporting;
- they can approve major corporate events without the need for a public solicitation of shareholder votes;
- they enjoy a flexible corporate governance environment, with no requirements for independent directors; and
- they can make significant corporate acquisitions even if the target company does not have audited historical financial statements available.

Public companies enjoy none of these privileges. Moreover, public companies are subject to market expectations for regular growth and must live in a world governed by a thicket of regulation. It's not for everyone.

The Preliminary Checklist

Even before the organizational meeting that kicks off the IPO process, you will want to start grappling with a number of key issues. These include the following:

- *Will the market regard you as an attractive IPO candidate?* Some of the key business attributes of a company that is ready for an IPO typically include:
  - a leading market position with a compelling investment thesis;
  - an attractive financial model;
  - appropriate and foreseeable revenue growth and profitability;

- an established quarterly forecast process and reliable financial reporting controls;
- a proven management team; and
- a robust corporate governance framework.

- *Which bank will be "lead left" and who will be your other underwriters?* You probably already have a relationship with potential underwriters, and you may be thinking of adding others to the syndicate. The lead left bank — the underwriter whose name is listed to the left of the other banks on the prospectus cover — acts as the quarterback for the IPO. The other underwriters listed in the first tier on the prospectus cover page will also play an active role in the process.
- *Will you qualify as an Emerging Growth Company, or EGC?* If so, you will benefit from the accommodations provided by Title I of the JOBS Act, which will make the entire IPO process easier. Most IPO issuers with less than $1.235 billion of revenue in their most recently ended fiscal year will qualify as an EGC and be entitled to cost-saving regulatory accommodations, which we discuss in more detail below.
- *Is the right audit team in place and are the auditors ready to go?* Public company auditors need to be registered with the Public Company Accounting Oversight Board, or PCAOB, and the audits need to be conducted in accordance with PCAOB standards. Public company auditors must also meet the SEC's and the PCAOB's rigorous independence standards. Private companies with smaller auditors sometimes find their existing auditors are not experienced in these matters or are not enthusiastic about the prospect of their audit being part of a public registration statement. Some private companies decide to switch to a larger accounting firm in order to gain from the experience the larger firm has amassed. Also, an auditor that is considered independent for a private company may not meet the independence test for public companies. Obviously, these decisions have timing and cost implications.
- *Do you have the right law firm in your corner?* A strong, experienced legal team can significantly reduce the burden of the IPO drill on management. This is important because the management team will still be obligated to run the business during the time-consuming IPO process. Also, life as a public company will involve new challenges that an experienced legal team can help you navigate. As with your auditors, you will want to make sure your law firm is the right fit.
- *Are the financials ready for prime time?* The SEC's financial statement requirements impose reporting obligations on top of what is already required by US GAAP for private companies. Topics such as financial statements for recent significant acquisitions, financial statements for certain significant subsidiaries, segment treatment, and the like can be time-consuming to address.
- *Is quarterly data available?* Some underwriters will want to see selected quarterly data for the most recent eight quarters in the S-1 (that's the name of the registration statement form you will file with the SEC for your IPO). This is not an SEC requirement for the S-1 disclosure, but note that it will be required once you are public. Either way, you will want to anticipate the need for quarterly data before the rules or the banks require it so that you can have it prepared and scrubbed by your accountants well before you need it.
- *Are you ready for life as a public company?* Will changes need to be made to ownership structures, shareholder agreements, employment arrangements, and the like? Will it be necessary to hire a treasurer, a general counsel, an investor relations officer, or other individuals with public company experience? Are you ready to start turning out annual and quarterly financial statements on the timeline required of public companies? Will revisions be needed to bring executive compensation arrangements in line with public company practices and those of key public competitors? Do you have appropriate internal controls in place?
- *Do you have a communications plan in place?* The SEC's rules impose strict limitations on communications around a planned IPO. These rules can cause significant friction, especially for companies that are used to

being transparent and have active PR programs. On the other hand, violations of the SEC's communications restrictions — often called "gun jumping" — can cause an offering to be delayed for weeks or even months. You will need to ensure you have a plan in place to prevent unauthorized public statements during the public offering process.

- *Will there be a concurrent private capital raise?* Is there a possibility that you will pursue an unregistered private placement concurrently with the IPO? If so, care must be taken to avoid taking steps that could potentially threaten the private placement or inadvertently cause offerees in the private offering to be excluded from participation in the IPO.
- *Can material contracts be filed publicly?* The SEC requires material contracts to be publicly filed as exhibits. The definition of material contracts sweeps in many related-party agreements but excludes most ordinary-course agreements. You will, however, need to file ordinary-course contracts on which your business is "substantially dependent." You may be able to redact limited, commercially sensitive portions of filed contracts, but the need to publicly file the balance of those agreements can raise difficult business issues. Do you have any material contracts that contain commercially sensitive information, or that are subject to confidentiality agreements that would be violated if they were filed publicly? Are any third-party notices or consents required before the contracts can be filed?
- *Are there "cheap stock" issues?* Have you granted stock options within the 12 months prior to filing an IPO registration statement? Was there a contemporaneous equity valuation performed at or near the time of grant? If there is a significant difference between the exercise price of those options and the expected IPO price, the grant may trigger compensation expense that could reduce net income and/or prompt the SEC to ask for a detailed explanation of the rapid change in the issuer's valuation.
- *Will there be a directed share program, or DSP?* In a DSP, the issuer requests the underwriters to reserve a certain number of IPO shares for the company's customers, vendors, suppliers, and other friends and family. The size of the DSP needs to be set (it typically will not exceed 5% of the offering, although market practice varies). Communications with potential DSP participants must be designed to fit within the communications restrictions on pre-IPO publicity known as the "gun jumping" rules.
- *Will there be any industry data?* If so, you may need an expert's consent if you include or summarize an industry expert's report, valuation, or opinion in your S-1. This is separate from the consent you will need from your auditors for the inclusion of their audit report.

This list is just the tip of the iceberg. We have included a more comprehensive checklist in Annex A.

The IPO Timeline

Our initial focus in this guide is on the IPO process — how to get public. It's important to understand the "how to" aspects of going public so that you know what to expect over the next few months and can stay one step ahead of the issues. We will walk you through the critical steps on the road to glory assuming the following timeline for a typical IPO:

Day 1	Day 60	Day 100	Day 130	Day 160	Day 165	Day 176	Day 177	Day 180
Org Meeting	First Confidential Submission to SEC	Second Confidential Submission to SEC	First Public Filing With SEC	Second Public Filing With SEC	Commence Road Show	SEC Declares S-1 Effective/ Pricing Occurs	Trading Begins	Close IPO

However, we will not limit our discussion to process. Most of the work to be done in preparing for an IPO is actually preparation for *being public* after the IPO closes. You will need to revamp your corporate governance architecture, disclose everything material about your business, decide whether to regularly provide your analysts with guidance about future operating results, scrub your accounting controls and procedures, set up mechanisms for timely current reporting, and otherwise prepare for life in the public market fishbowl. The IPO road show is just the beginning of your formal interaction with the buy-side investors who will be your future owners (and there are earlier, less formal, events to discuss too). Once you are public, you will be under the constant scrutiny of research analysts and buy-side investors. You will be expected to know what to do and not do, and what to say and not say.

There is simply no substitute for good preparation. First impressions are important, and you want (need) to know what is coming so you are ready when it arrives.

The First Month. Some of the most important decisions you will make during this process will be made right at the outset, even before the organizational meeting. These include selection of your:

- lead investment bank;
- law firm(s); and
- auditors.

The quality of the team you assemble will have a major impact on the rest of the process and, perhaps, the success of your IPO. Take the time to get this part right. You will want to build a team of bankers, lawyers, and auditors who have experience with IPOs and, ideally, with your industry. IPO issuers may even interview law firms to propose as counsel for their underwriters. If the issuer develops a relationship with a prominent IPO law firm that will be acceptable to the investment banking community in the role of underwriters' counsel, this can help streamline the process from the issuer's perspective. The underwriters' counsel is an important partner in the IPO process (and in subsequent offerings, and bank and bond financings down the road), and it is important to the issuer to make sure that the underwriters choose a firm that will bring the right expertise and attitude to the party. Experienced bankers, lawyers, and auditors will be more efficient with your time and get you to market when conditions are optimal. They are informed about, and will focus on, what matters to investors. They will know what about your company or the IPO is likely to draw the attention of the SEC or other regulators and will help anticipate and pre-empt those comments.

The organizational meeting is the official kickoff of the IPO process. It is attended by all of the professionals we mentioned above and most of the company's executive officers. However, you will not want to use the org meeting to start getting organized — you should begin that process well before the org meeting. Ideally, a month or so before the org meeting, you will have hired counsel, identified the three or four most useful IPO filings by comparable companies (the "comps"), and started working with your counsel to flesh out a rough draft of the registration statement so that you are ahead of the curve by the time the org meeting arrives. It is never too soon to start discussing the content of the road show with your underwriters since the information in the road show should also be consistent with the registration statement. If you start ahead of the curve, you can stay in control of the process from beginning to end. If you start behind, you will be on your heels for the duration.

The org meeting also marks the beginning of the legal, business, and accounting due diligence process. The underwriters will engage in a thorough due diligence exercise designed to provide a reasonable basis to believe that the prospectus included in the registration statement (as well as the other offering materials such as the road show presentation) are free of material misstatements and omissions. Underwriters take due diligence very seriously, for both liability and reputational reasons. The due diligence process starts with a detailed management presentation about the business (usually at the org meeting) and continues through all of the drafting sessions and right up to the closing.

As part of their diligence exercise, the underwriters will ask you to prepare a binder of evidence to support the accuracy of certain factual assertions in the registration statement (such as market share, size of market opportunity, and recent industry awards). Compiling these materials can be a time-consuming process and will slow you down if left until the end.

The Second Month. Most of the second month will be spent working to finalize the disclosure in your registration statement and helping the underwriters with their due diligence drill. IPOs are registered with the SEC on an appropriate registration form (usually Form S-1 for US domestic companies). The registration statement includes a prospectus containing prescribed categories of financial and non-financial disclosure, as well as additional information not included in the prospectus such as copies of key corporate documents and material contracts that are filed as exhibits. Here is a brief summary of the contents of your registration statement:

- *The Box.* Form S-1 requires a summary of the information that is contained in the prospectus. This information is presented at the beginning of the prospectus on pages that are marked with a box border (like this page), which is why the summary section is referred to as the summary box, or the "box." In IPO drafting sessions, the working group will spend considerable time drafting the box since it is at the beginning of the prospectus and sets out the issuer's story and value proposition in a few easy-to-read pages. Typically, the summary box will include the following headings: Company, Industry, Competitive Strengths, Business Strategies, Risk Factors, Offering Summary, and Summary Financial Data.

- *MD&A.* The IPO prospectus must contain a "management's discussion and analysis" section which discusses the issuer's financial results and condition. The purpose of the MD&A is to provide investors with the information necessary to interpret the issuer's operating results and financial condition through the eyes of management. It is the place where management explains the issuer's financial statements to investors. A well-written MD&A will identify the key drivers of the issuer's results of operations and focus on trends and uncertainties in the marketplace. It will explain the issuer's business as management sees it, separately discussing each operating segment's performance as well as the business as a whole. It will also identify and discuss the key performance indicators, or KPIs, that management uses to evaluate the performance and financial health of the business. In addition, MD&A sections often incorporate a comprehensive analysis of the issuer's future prospects, typically presented under a subheading such as "Outlook." Drafting the MD&A requires close collaboration among the issuer's financial team, its accountants, and legal counsel and can be a time-consuming process.

- *Business.* The Business section of the prospectus contains a detailed description of the issuer's business. It will include the text about the business from the summary box (including competitive strengths and business strategies) as well as a raft of more granular information about the issuer's principal products and services, the location of its primary facilities, the number of its employees, and the like. If the issuer's business is regulated, there will be a summary of key regulation. If the issuer is involved in material litigation or is subject to other material contingent liabilities, those will be described. The Business section is intended to be the full story about the issuer's operations.

- *Risk Factors.* The Risk Factor section gives you a chance to warn investors about risks and challenges that may result in bad news in the future. It is the place to manage investor expectations. We think of these cautionary disclosures as insurance. The buy side is rarely put off by risk factor disclosure (they are usually aware of the risks), but the risk factors often provide important legal protection should risks come to roost after the closing. Don't fret. It is typical for the risk factors to go on for several pages and to sound quite negative. The SEC does not allow you to include mitigating language in the risk factor disclosures.

At the end of the second month, you should be ready to send your document to the SEC. You can do this in the form of a nonpublic submission of a draft registration statement or a public filing.[2] Nonpublic review offers a number of advantages: If you decide not to proceed with the IPO past this stage, competitively sensitive information, such as financial information or key supplier or customer contracts, will not have been made public.

However, you may not commence a road show until at least 15 days after publicly filing the initial nonpublic submission and all subsequent nonpublic submitted amendments.[3]

Nonpublic submissions must be substantially complete when submitted to the SEC for review, just like a publicly filed registration statement. However, a confidentially submitted draft registration statement need not include the consent of auditors or other experts and does not need to be signed because a confidential submission does not constitute a "filing" under the Securities Act.[4] An issuer does not need to name any underwriters in its first confidential submission, but the SEC Staff typically will not continue reviewing a draft registration statement unless underwriters are named with the second submission.

The Third Month. After you make your first SEC confidential submission or public filing, you will have 30 days to get other things done while you are waiting for your first round of SEC comments. Some of the major tasks that will be on your plate during this period are:

- *Testing the Waters.* Issuers may meet with certain institutional investors and solicit preliminary indications of interest in the coming IPO at any time prior to the launch of the formal road show (including before the first SEC submission). Usually, the testing the waters, or TTW, meetings do not occur prior to the first SEC submission because the issuer wants to be sure it has its story straight before meeting with potential investors, given the importance of first impressions. For that reason, you may decide to receive and respond to the first round of SEC comments before scheduling TTW meetings. The SEC Staff routinely asks to see copies of the TTW materials used in these meetings, and the TTW materials should tell the same story as the registration statement. TTW meetings are optional and not part of the program in every deal — work with your bankers to see if the time and energy it takes to participate in a TTW program are worth the trouble.

- *Choose a Stock Exchange.* You will need to satisfy certain quantitative listing requirements and corporate governance standards to be eligible for either NYSE or Nasdaq listing, and listed companies are required to meet certain requirements relating to ongoing shareholder communication and disclosure. Working with your counsel, you will want to explore the differences between these two exchanges and decide where to list your stock for post-IPO trading. The exchanges will allow you to confidentially reserve one or more potential ticker symbols months before going public.

- *Management's Model/Analyst Day.* The research analysts at your syndicate banks will want frequent chances to meet and speak with you to discuss your company, its businesses, and its strategy, and to review management's projections for the next several years (typically quarter-by-quarter for the next two years and then year-by-year for another year or so thereafter). A group meeting with the syndicate analysts typically will occur around the third month of the process, usually referred to as "analyst day." Unlike the investment bankers who have been helping you prepare your registration statement, the research analysts do not work for you. They are independent and the research they prepare must reflect their personal views, without influence or pressure from investment banking, issuer management, or other external forces. Your meetings with research analysts are very important because these analysts are going to help educate the market about your company once the transaction has launched. You will want to be well prepared for analyst day and any follow-up meetings with analysts after this first meeting. Management should look to deliver a clear and concise articulation of the company's story on analyst day and be ready to answer detailed questions about the management model. While the investment bankers can help you prepare for the analyst meetings, regulatory restrictions limit the information that they can share, and the interactions they can have, with research analysts. The bottom line is that you want to provide the syndicate analysts with the information they need to formulate a well-informed perspective on your business.

- *The Director Slate.* This is a good time to finalize the composition of the board of directors, particularly the identity of the independent directors. You will need a certain number of independent directors at the time you go public. You may also want to focus on the composition of your various board committees. Finding qualified directors to serve on your board can take some time, so start the search process early.

- *Corporate Governance Decisions.* You will need an independent Audit Committee and will want to review a range of options on other committees and other corporate governance matters. Topics include insider trading policies, director independence requirements and terms, whistleblower policy, related-party transaction policy, Regulation FD policy, incentive-based compensation clawback policy, and identification of executive officers for Section 16 and other reporting purposes.

- *Finalize Employee Benefit Programs.* One of the good things about being public is the ability to award stock options and restricted stock to key employees and directors. The architecture of employee benefit plans can be complex, and it makes sense to budget time to design benefit plans that are properly suited to your company. The board may want to retain a compensation consultant to help guide it through the benefit design process.

- *The Underwriting Agreement.* The underwriting agreement has a brief moment in the limelight between the end of the road show when it is signed and the IPO closing three business days later. This document is probably unlike any other agreement you have seen in any other transaction, and at first glance may strike you as somewhat one-sided. But don't let that put you off — most of the pages of the underwriting agreement exist to assist the underwriters in carrying out their due diligence drill (you can think of the reps and warranties as a series of questions designed to uncover potential disclosure issues). As a result, there are only a few real business points in the whole agreement, and negotiating it should not be a particularly adversarial or time-consuming process.

- *The Lock Up.* The issuer's existing shareholders, directors, officers, and option holders will be asked to agree not to sell any of their shares during the 180-day period following the offering (with a few exceptions). There is room to negotiate exceptions to the lock up — for estate planning and charitable giving, for example — and these exceptions will need to be finalized before the start of the road show. The underwriters will require that the signed lock-up agreements be delivered prior to the launch of the road show, and many request that they be delivered prior to the initial filing of the registration statement.

The Fourth Month. Once you have received your first round of SEC comments, you will begin to get a glimpse of the goal line. Responding to those comments will be your main focus when they come in the door (usually on a Friday afternoon, in our experience) because you will want to show the SEC Staff that you are prepared to move quickly in order to send the signal that you are hoping they will do the same.

Here are a few other projects that will be taking your time during the fourth month:

- *Preparing the Road Show Slides.* Ideally, you have been thinking about the content of the road show since you started drafting the registration statement because the content of the road show must be consistent with, and should largely be drawn from, the contents of the registration statement. However, distilling your story into a 30-minute pitch can be challenging. The road show slides will get plenty of attention, as they should, since the road show is at the center of the marketing process. You may have already started this process when you prepared for the TTW meetings.

- *Finalizing Valuation.* Obviously, this is where the action is. All of your SEC submissions and filings to date will not have included any information about the price at which you hope to sell your stock. You will not fill in the targeted price range until the day you start your road show, but you will be discussing valuation with your bankers right up until that moment. Once a valuation is determined, you and the bankers may consider a stock split to try to get the proposed price within a desirable range. They will be watching the trading prices of the comps (if there are any publicly traded comps) and discussing the appropriate new issue discount with each other and with you.

- *Finishing Everything Else.* You will not have much free time once the road show starts so you will want to make sure you have all of the loose ends tied down before you hit the road. Anything on the to-do list for the third month that didn't actually get done in the third month will need to be completed before you can start the road show.

The Road Show, Pricing, and Closing. Road shows are both fun and grueling. You should anticipate asking your CEO and CFO to devote four business days to a full slate of virtual road show presentations to investors in the United States and across the globe, and a few group lunches with investors.

The road show begins with a "teach-in" to the sales forces of each of the lead underwriters and continues through a series of group meetings (typically lunches) with buy-side institutional investors and one-on-one virtual meetings with the largest institutional investors. Retail investors see a video recording of an early road show meeting, which is made available on the internet to anyone interested. On the road show, the underwriters are building an order book of indications of interest from investors, which helps them gauge the level of demand for your stock.

The bookbuilding process will result in a pricing recommendation (how many shares can be sold and at what price) by the underwriters to the pricing committee of your board. Once the deal has priced, you will sign the underwriting agreement, and the underwriters will commit to buy all of the shares being offered at a discount to the "price to public" in the offering. The underwriters will then immediately resell the shares at the price to public appearing on the front page of the prospectus to the investors who have been allocated shares (referred to as confirming orders). The difference between the discounted price the underwriters pay for your stock and the public offering price – the "gross spread" – is the underwriters' payment for their services. Your stock will open for trading the next morning.

One business day later, the offering will close and you will receive the net proceeds from your IPO. Finally, you will be able to go back to running the business and working hard to meet the growth expectations you signaled the market to expect.

A Note About Research Analysts. The research analyst at each of your lead investment banks will create his or her own financial model based in part on what he or she learns on analyst day and in subsequent one-on-one diligence sessions with you. The analysts will have myriad questions about the company, its business, its strategy, and the management model, and each analyst will produce his or her own proprietary model, which can be expected to differ in some ways from the management model. You will not share projections with potential IPO investors during the road show (except in some MLP and REIT deals), but the analysts may verbally discuss their proprietary models with potential IPO investors once the offering has launched. The analysts' models may include growth rates and margin assumptions specific to your business as well as other metrics based on your industry. It is important to ensure that the analysts are not basing their projections of future growth or profitability on outdated, inaccurate, or incomplete information, as the information that you provide will be the basis for many of the assumptions that they make and share with buy-side clients during this investor education process.

Corporate Information

Our principal executive offices do not exist. We have a one-firm approach with no headquarters. Instead, we have over 2,600 attorneys practicing in 60 international practice groups and industry teams spread out over offices in 14 countries. We have over 450 attorneys in our capital markets practice group. We started our firm the same year that Congress created the SEC (in 1934) and have been a leading IPO firm since 2010. Given how long we have been at this, we believe we have seen it all and doubt you have a problem we have not tackled before.

Our website address is www.lw.com. Information contained on, or that can be accessed through, our website is enthusiastically incorporated by reference into this IPO Guide, and all of it is yours for the taking. We look forward to working with you on your IPO.

ENDNOTES

[1] See Proposed Rule *Semiannual Reporting*, Release No. 11414 (May 5, 2026), https://www.sec.gov/files/rules/proposed/2026/33-11414.pdf.

[2] Issuers that are EGCs and registering with the SEC for the first time may submit draft registration statements for *confidential* review, which are protected from disclosure under the Freedom of Information Act (FOIA). JOBS Act, Section 106, adding Securities Act Sections 6(e)(1) and (2).

Issuers that are not EGCs and registering with the SEC for the first time may submit draft registration statements for *nonpublic* review. *See* SEC Staff of the Division of Corporation Finance, *Enhanced Accommodations for Issuers Submitting Draft Registration Statements* (Mar. 3, 2025) [2025 Procedures]. These accommodations apply to drafts of initial registration statements under the Securities Act (IPOs) and Exchange Act Sections 12(b) and 12(g), including initial registrations under Forms 10, 20-F, and 40-F. Nonpublic submissions are not automatically exempt from FOIA, and issuers are advised to request confidential treatment under SEC Rule 83. 2025 Procedures, at n.1. Making a Rule 83 request does not guarantee that the information will be protected from public disclosure; the issuer simply puts the SEC on notice that it wants the information kept confidential. The SEC will resolve whether to honor a confidentiality request only when disclosure of the information is requested under FOIA. *See Confidential Treatment Procedures Under the Freedom of Information Act*, 17 C.F.R. 200.83.

Regardless of how long it has been a reporting company, an issuer (including an EGC) may submit for *nonpublic* review the first draft only of registration statements for subsequent Securities Act offerings and Exchange Act. See 2025 Procedures. These accommodations apply to a subsequent registration statement for any offering or registration of securities under Exchange Act Sections 12(b) and 12(g). It includes shelf offerings on Form S-3/F-3, as well as registration statements on Form S-4/F-4 for business combinations and exchange offers.

[3] An issuer (including an EGC) that is registering with the SEC for the first time must publicly file its registration statement and all previous confidential submissions at least 15 days before commencing its road show or, absent a road show, 15 days prior to effectiveness. Fixing America's Surface Transportation (FAST) Act Section 71001, amending Securities Act Section 6(e)(1).; *see also* Jumpstart Our Business Startups Act Frequently Asked Questions – Confidential Submission Process for Emerging Growth Companies (updated Dec. 21, 2015) [*JOBS Act FAQs*], Questions 8 and 9 and 2025 Procedures.

An issuer (including an EGC) submitting the first draft of a subsequent Securities Act offering or Exchange Act registration statement for nonpublic review must publicly file its registration statement and previous nonpublic submission at least two business days prior to effectiveness. 2025 Procedures; Voluntary Submission of Draft Registration Statements – FAQs, Question 5.

[4] *See* SEC Division of Corporation Finance, *JOBS Act FAQs: Confidential Submission Process for Emerging Growth Companies* (Apr. 10, 2012), Question 7. In addition, a confidential submission does not constitute a filing for purposes of Sarbanes-Oxley. Issuers may also omit the financial information discussed under the heading "What Financial Statements Must Be Included to Begin SEC Review" in the *IPO Financial Statements* chapter.

THE IPO BUSINESS

Some Basics

There are a few primary federal statutes that we will be talking a lot about in this guide. Here is a brief summary to get things started.

Securities Act of 1933 and Securities Exchange Act of 1934

The two Depression-era federal statutes at the center of our discussion are the US Securities Act of 1933 and the US Securities Exchange Act of 1934. The Securities Act generally governs the initial offer and sale of securities in the United States. The Exchange Act generally regulates the post-issuance trading of securities, the activities of public companies, including reporting obligations and M&A transactions, and the activities of other market participants (such as underwriters).

The US Securities and Exchange Commission, the regulatory body in charge of the Securities Act and the Exchange Act, has issued a comprehensive body of rules and regulations under those Acts that have the force of law. The SEC and its Staff have also provided interpretive guidance on a wide range of questions under the securities laws.

JOBS Act

In April 2012, the Jumpstart Our Business Startups Act became law. The JOBS Act made significant changes to the IPO process and other aspects of the US securities laws. Above all, it created a new category of issuer, called an emerging growth company, or EGC. EGCs benefit from a transition period, or on-ramp, from private to public company. During this period — which can last for up to five years — EGCs are exempt from certain costly requirements of being a public company. EGCs may choose all, some, or none of the on-ramp accommodations offered by Title I of the JOBS Act.[1]

EGC Status

You can take advantage of the JOBS Act accommodations only if you are an EGC. In order to qualify as an EGC, a company must have annual revenue for its most recently completed fiscal year of less than $1.235 billion.[2] After the initial determination of EGC status, a company will remain an EGC until the earliest of:

- the last day of any fiscal year in which the company earns $1.235 billion or more in revenue;
- the date when the company qualifies as a “large accelerated filer,” with at least $700 million in public equity float;[3]
- the last day of the fiscal year ending after the fifth anniversary of the IPO pricing date; or
- the date of issuance, in any three-year period, of more than $1.0 billion in non-convertible debt securities.

EGC status will ordinarily terminate on the last day of a fiscal year. However, the issuance in any three-year period of more than $1.0 billion in non-convertible debt securities would cause an issuer to lose its EGC status immediately. Note however, that EGC status will be extended during the registration process even if the registrant’s revenues exceed $1.235 billion or the registrant issues in excess of $1.0 billion of debt securities during the registration process. Any confidential submission or public filing by an EGC will lock in EGC status through the earlier of (i) the IPO date or (ii) one year after the issuer would have otherwise lost EGC status.[4]

Subject to certain limitations, a company that was previously public may be eligible for EGC status.[5]

PRACTICE POINT

An EGC that loses status during the registration process will get the benefit of all disclosure-related aspects of being an EGC (e.g., two years of financials rather than three). But the SEC Staff has taken the position that the lock-in does not extend to the relaxed rules on research[6]

Elements of the IPO On-Ramp

As long as an issuer continues to qualify as an EGC, it benefits from a temporary transition period, or on-ramp, during which its regulatory requirements phase in gradually. This phased approach eases the cost of public company compliance by allowing the EGC additional time to comply with some of the more costly requirements that apply broadly to the largest public companies. As discussed above, the on-ramp period for any particular EGC will depend upon its revenue, public float, and issuance of debt securities but will not last beyond the last day of the fiscal year-ending after the fifth anniversary of its IPO pricing date.

The on-ramp exemptions for EGCs include:

- *Section 404(b) of Sarbanes Oxley*. EGCs are exempt from the auditor attestation requirements of Section 404(b) relating to internal controls over financial reporting for as long as they qualify as EGCs.[7]
- *Executive compensation disclosure*. EGCs may use streamlined executive compensation disclosure and are exempt from the shareholder advisory votes on executive compensation required by the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).
- *Extended phase-in for new US GAAP*. EGCs are not required to comply with new or revised financial accounting standards under US GAAP until those standards also apply to private companies.[8]
- *Certain PCAOB rules.* EGCs are exempt from any PCAOB rules that, if adopted, would mandate audit firm rotation and an expanded narrative, called auditor discussion and analysis, that would appear as part of any financial statement audit.[9] The PCAOB has adopted a new auditor reporting standard that will alter the standard form of audit report used in SEC filings. EGCs are exempt from this new standard.[10]

EGCs and the IPO Process

Testing the Waters

EGCs and their authorized persons (including underwriters), before or after confidentially submitting or publicly filing a registration statement, are allowed to meet with large heavyweight investors, called qualified institutional investors or QIBs, and other institutional accredited investors, or IAIs, to gauge their interest in a contemplated offering.[11] These testing-the-waters, or TTW, meetings are discussed in more detail below.

Scaled Financial Disclosures

At the time of its IPO, an EGC can provide two, rather than three, years of audited financial statements.[12] After its IPO, an EGC must phase into full compliance by adding one additional year of financial statements in each future year until it presents the traditional three years of audited financial statements.[13] An EGC's MD&A may address only the years for which it provides audited financial statements and any subsequent interim period.[14] In our experience, some EGCs choose not to take advantage of the scaled financial disclosure accommodation because they prefer to show their performance trajectory over a longer period.

Research

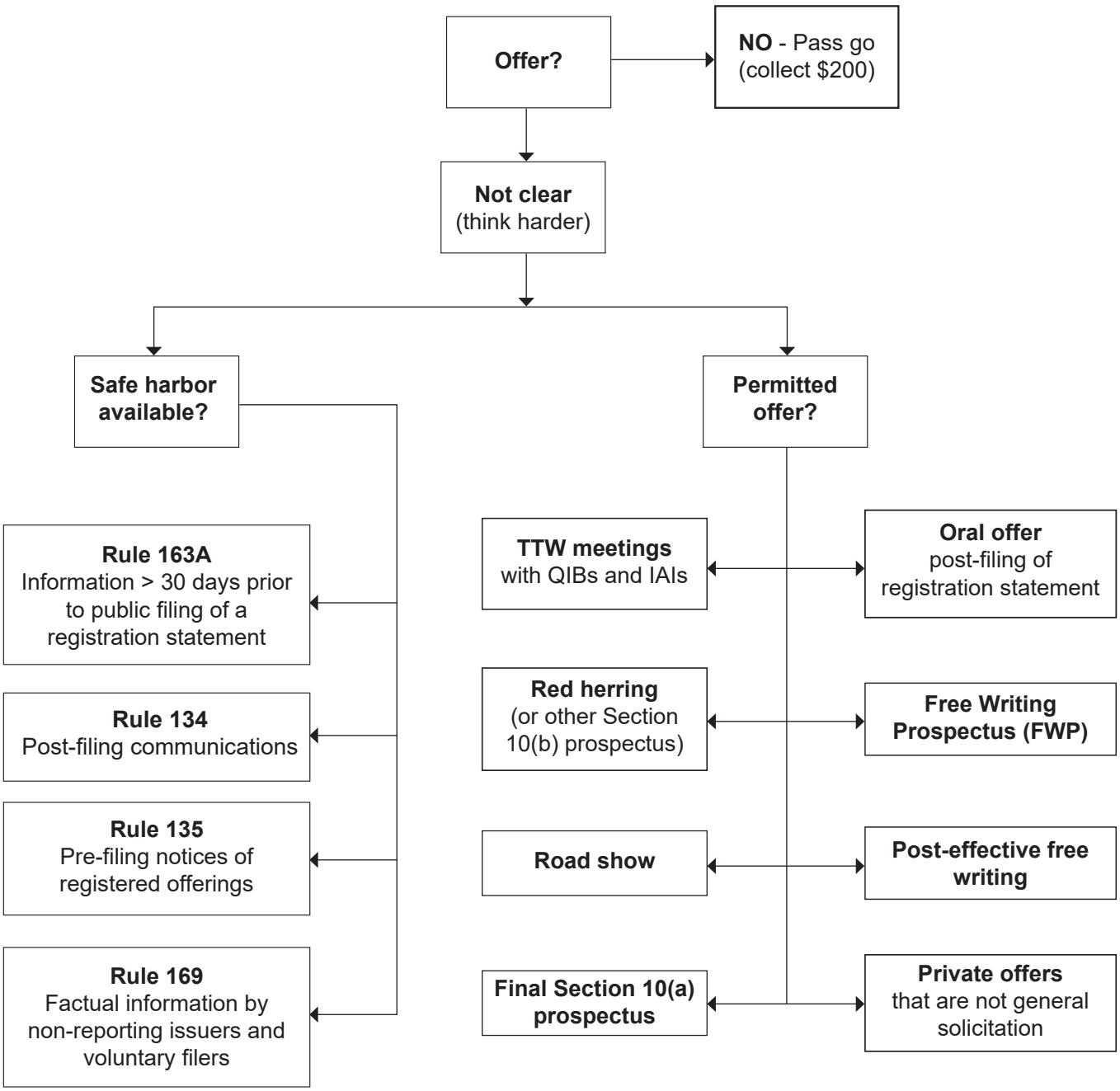
The JOBS Act and subsequent FINRA rulemaking have effectively eliminated the quiet periods for pre-IPO and post-IPO research on EGCs and thus, in theory, would allow participating broker-dealers to publish research reports on an EGC before or immediately after the IPO pricing date. FINRA also subsequently amended its

rules to reduce the research blackout period for non-EGC IPOs to 10 days following pricing, although other considerations under federal securities laws with respect to the distribution of research around the time of an offering continue to apply. Accordingly, for both EGC and non-EGC IPOs, a 25-day research quiet period is still typically imposed on members of the underwriting syndicate. This syndicate-imposed research quiet period typically begins at the time an underwriter becomes a member of the syndicate and lasts until the 25th calendar day following the IPO effective date. This approach reflects the view of many industry participants that investors should be looking to the information provided in the prospectus during the prospectus delivery (or availability) period set forth in Securities Act Rule 174(d). It also provides the covering analysts with some time to prepare their first public research reports.

Gun Jumping – Restrictions on Communications During the IPO Process

How It All Works Together – The Gun-Jumping Flowchart

The following flowchart gives an overview of how to think about publicity-related questions as your IPO proceeds:



What Is Gun Jumping?

Gun jumping refers generally to violations of the communications restrictions under the Securities Act. Section 5 of the Securities Act divides the registration process into three distinct time periods:

- *Pre-filing or "quiet" period*. The pre-filing or quiet period begins when a company decides to make a public offering (usually by retaining an investment bank or banks to undertake the offering) and ends when the registration statement relating to the offering is first filed publicly with the SEC. During this period, Section 5(c) of the Securities Act prohibits any person from engaging in activity that could be construed as making an "offer" of the company's securities. Accordingly, other than TTW activities permitted by Section 5(d) of and Rule 163B under the Securities Act (discussed below), or absent an exemption from registration — such as the private placement exemption of Section 4(a)(2) or an exception from the definition of offer — nothing that would be considered to be an offer of securities is permitted during the pre-filing period.
- *Period between filing and effectiveness (also often called the "waiting period")*. The waiting period extends from the time that the registration statement is *filed publicly* with the SEC until the time that it is declared effective by the SEC. During this period, offers of the security are permitted by Section 5 if they are made properly (sales are not allowed until the effectiveness of the registration statement). Under Section 5(b)(1), no prospectus other than a prospectus meeting the requirements of Section 10 of the Securities Act may be used to make written offers. Because the term "prospectus" picks up nearly all forms of written offers (and many forms of oral communication, including TV broadcasts, blast voicemail messages, and the like), only certain types of oral offers and a carefully limited group of written offers may be made during the waiting period. A properly designed road show is one form of oral offer that satisfies the intricate requirements of Section 5. Issuers may also engage in TTW communications with QIBs and other IAIs during the waiting period.
- *Post-effective period.* After effectiveness of the registration statement (which occurs on the pricing date), underwriters and other distribution participants may confirm sales of the securities by means of a final prospectus meeting the requirements of Section 10(a) of the Securities Act. In addition, underwriters will have an obligation to deliver a final prospectus during a period of time following effectiveness, even in connection with secondary market resales. Accordingly, until the later of (1) completion of the "distribution" of the securities (that is, when the securities have been sold to investors) or (2) expiration of the relevant prospectus-delivery period (25 days in the case of IPOs that will be listed on a national securities exchange), limitations on publicity by the issuer will remain in place.

Restrictions on Communications During the Quiet Period

During the quiet period, an IPO issuer may not make offers or sales of the securities being registered, although issuers may participate in TTW meetings. The SEC has construed the term "offer" very broadly to include communications that do not refer to the proposed offering but which may nevertheless stimulate investor or dealer interest in the issuer or its securities. General statements about the issuer's rosy future prospects may well be considered to be offers. An IPO issuer should generally not release publicly any forecasts, projections, or predictions relating to revenue, income, or earnings per share or concerning expected valuations, and should put in place procedures for review of public statements and press releases as soon as the IPO process first gets underway.

> PRACTICE POINT
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> Prior to filing your registration statement, you should review your website to make sure the content is factually consistent with the statements in your registration statement and will not be considered to be an illegal offer of securities. Issuer websites are routinely reviewed by the SEC Staff during the registration process and could be construed to be an ongoing offer of securities. In addition, the Staff is looking to assess whether the issuer is presenting information about itself that is consistent, regardless of the media used.

Although an IPO issuer may continue to advertise its products and services and issue press releases regarding factual business and financial developments in accordance with past practice,[15] the breadth of the SEC's definition of the term offer, coupled with the potentially significant problems flowing from gun jumping, make it advisable to tone down all public statements (or at least run them by counsel) during and immediately preceding the IPO process. Meetings with or publications targeted at members of the investment community are particularly problematic during the quiet period.

As we discuss in more detail below, issuers and their authorized persons (including underwriters) may engage in oral or written communications with QIBs and other IAIs in TTW sessions that occur during (or before) the quiet period. In addition, the SEC has provided certain safe harbors from the prohibition on pre-filing offers that apply to all issuers (even non-EGCs). Under these safe harbors, an IPO issuer may:

- take advantage of the Rule 163A safe harbor for communications that do not refer to the IPO made more than 30 days prior to the filing of the registration statement;
- release a limited notice regarding the planned IPO under Securities Act Rule 135; and
- release certain factual information under Rule 169.

We discuss these safe harbors below.

The 30-Day Bright Line Safe Harbor – Securities Act Rule 163A

Rule 163A provides IPO issuers with a non-exclusive safe harbor from Section 5(c)'s prohibition on pre-filing offers for certain communications made more than 30 days before the public filing of a registration statement that might otherwise have been considered to be an offer under Section 2(a)(3). For an EGC that confidentially submits a draft registration statement for nonpublic review by the SEC, the date of the first public filing of the registration statement, not the date of the confidential submission, determines the availability of the Rule 163A safe harbor. Rule 163A is not available to prospective underwriters.

The requirements for Rule 163A include that:

- the communication cannot refer to the securities offering;
- the communication must be made by or on behalf of an issuer — in other words, the issuer will need to authorize or approve each Rule 163A communication (communications by an underwriter will not come within the safe harbor); and
- the issuer must take "reasonable steps within its control" to prevent further distribution of the communicated information during the 30-day period before filing the registration statement (although the SEC has suggested that the issuer may maintain copies of previously published information on its website, if the information is appropriately dated, identified as historical material and not referred to as part of the offering activities).[16]

Pre-Filing Public Announcements of a Planned Offering – Securities Act Rule 135

Rule 135 provides that an IPO issuer will not be deemed to make an offer of securities under Section 5(c) as a result of a public announcement of a planned registered offering that includes only the bare-bones information permitted by the Rule. A Rule 135 notice can be released at any time, including before a registration statement is filed.

Under Rule 135, the announcement must contain a legend, and no more than the limited information enumerated in the Rule, which includes:

- the name of the issuer;
- the title, amount, and basic terms of the securities offered;
- the anticipated timing of the offering; and

- a brief statement of the manner and purpose of the offering, without naming the prospective underwriters for the offering.

Factual Business Communications by Non-Reporting Issuers and Voluntary Filers – Securities Act Rule 169

Rule 169 provides a non-exclusive safe harbor from both Section 5(c)'s restriction on pre-filing offers and Section 2(a)(10)'s definition of a prospectus for companies that are not yet public. Under Rule 169, non-reporting issuers are permitted to continue to release factual business information, *but not forward-looking information*. Rule 169 is available only for communications intended for customers, suppliers, and other non-investors. The SEC has nonetheless made clear that the safe harbor will continue to be available if the information released happens to be received by a person who is both a customer and an investor.[17]

Restrictions on Communications During the Waiting Period

During the waiting period, which extends from the time that the registration statement is filed publicly with the SEC until the time that it is declared effective by the SEC, oral offers may be made but only certain types of written offers are permitted. The distinction between oral and written is not intuitive, and many forms of verbal communication, as well as TV broadcasts, blast voicemail messages, and the like, are considered written for these purposes. Issuers may continue testing the waters with QIBs and other IAIs during the waiting period through both written and oral communications.

During the waiting period, an issuer may continue to engage in activity that falls within one of the safe harbors discussed above. In addition, it may:

- publish a limited notice of its upcoming IPO pursuant to the Securities Act Rule 134 safe harbor;
- circulate a preliminary prospectus (often referred to as a "red herring") that meets the requirements of Section 10 of the Securities Act, including a price range for the offering;
- conduct a road show and solicit "buy" orders; and
- under certain circumstances, use a free writing prospectus, or FWP.

Limited Post-Filing Communications – Securities Act Rule 134

Rule 134 provides that certain limited written communications related to a securities offering as to which a registration statement has been filed will be exempt from the restrictions applicable to written offers (because they will not be considered to be a prospectus). Rule 134 is only available once a preliminary prospectus that meets the requirements of Section 10 has been filed. IPO issuers may rely on Rule 134 before filing a price range prospectus, although the Rule does require a price range prospectus for certain specific statements, as discussed below.[18]

The information permitted by Rule 134 includes:

- certain basic factual information about the legal identity and business location of the issuer, including contact details for the issuer;
- the title and amounts of securities being offered;
- a brief description of the general type of business of the issuer, limited to information such as the general types of products it sells;
- the price of the security or the method for determining price (in the case of an IPO, this information cannot be provided until a price range prospectus has been filed);
- in the case of a fixed-income security, the final maturity, interest rate, or yield (in the case of an IPO, this information cannot be provided until a price range prospectus has been filed);

- anticipated use of proceeds, if then disclosed in the prospectus on file;
- the name, address, phone number, and email address of the sender of the communication, and whether or not it is participating in the offering;
- the names of all underwriters participating in the offering and their additional roles in the underwriting syndicate;
- the anticipated schedule for the offering and a description of marketing events;
- a description of the procedures by which the underwriters will conduct the offering and information about procedures for opening accounts and submitting indications of interest, including in connection with directed share programs;
- in the case of rights offerings, the class of securities the holders of which will be entitled to subscribe, the subscription ratio, and certain additional information;
- certain additional information, including the names of selling security holders, the exchanges on which the securities will be listed, and the ticker symbols; and
- a required legend.

It is customary to have a Rule 134 press release on the first day of the road show announcing the launch of the offering.

> PRACTICE POINT
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> Naturally, you will want to inform employees once your IPO registration statement has been filed, perhaps by an email blast, a town hall meeting, or an intranet posting. Remember that all communications with employees should be designed with the restrictions of Rule 134 in mind. If the communication mentions a DSP, it should be limited to factual information regarding procedures and not attempt to solicit interest in the DSP.

Testing the Waters

Issuers and their authorized persons (including underwriters), before or after confidentially submitting or publicly filing a registration statement, are allowed to meet with large heavyweight investors, called qualified institutional buyers or QIBs, and other institutional accredited investors, or IAIs, to gauge their interest in a contemplated offering.[19] These TTW meetings can include oral and written communications. The decision whether to test the waters and the timing of these meetings depends on the specific circumstances of each IPO. In our experience, the majority of TTW meetings take place after confidential submission and before public filing, but we have also seen deals where TTW meetings occur prior to any submission or during the 15-day period prior to the launch of the road show.[20]

PRACTICE POINT

Testing the Waters

The deal team should consider how much detail to include in TTW materials, based on when testing the waters occurs and bearing in mind that the antifraud provisions of the federal securities laws apply to the content of these communications. As with traditional road show materials, TTW materials should also be consistent with the information contained in the registration statement. Market participants typically do not leave written TTW materials behind, although it is common to hand out flip books at these meetings and take them back when the meeting ends. The SEC Staff routinely asks to see all materials used in TTW meetings by issuing the following comment:

> *Please supplementally provide us with copies of all written communications, as defined in Rule 405 under the Securities Act, that you, or anyone authorized to do so on your behalf, present to potential investors in reliance on Section 5(d) of the Securities Act or Securities Act Rule 163B, whether or not they retain copies of the communications.*

These materials are not sent to the SEC Staff through EDGAR but instead are provided in hard copies. The SEC provides a procedure for requesting that these materials be returned to the issuer.

Preliminary Prospectus (Red Herring)

A "red herring" or "red" is the colloquial term for a certain type of preliminary prospectus permitted by Section 10(b) of the Securities Act. A red herring can be used to make written offers and solicit customer orders but cannot be used to satisfy the prospectus delivery obligations that apply when orders are confirmed and securities are sold. This is because a red herring is a Section 10(b) prospectus but not a Section 10(a) prospectus.

Securities Act Rule 430 provides that, in order to be a Section 10(b) prospectus, a red herring must include substantially all of the information required in a final prospectus, other than the final offering price and matters that depend on the offering price, such as offering proceeds and underwriting discounts.

In addition, Regulation S-K Item 501(b)(3) requires a preliminary prospectus used in an IPO to contain a "bona fide estimate" of the price range. The SEC Staff generally takes the position that a bona fide price range means a range no larger than $2 (for ranges below $10) or 20% of the high end of the range (for maximum prices above $10). If a filed prospectus does not yet include a bona fide price range or otherwise does not comply with Rule 430, it is known in the trade as a "pink herring" — i.e., a filed preliminary prospectus that is not quite a red because it does not yet meet the requirements of Section 10(b) and cannot be used to solicit customer orders.

PRACTICE POINT

Regulation S-K Item 501(b)(10) specifies the required "subject to completion" legend that must appear on the front cover of any preliminary prospectus. This legend is traditionally printed in red ink, and gave rise to the name "red herring."

Road Shows

Road shows are the duck-billed platypus of the securities world — the evolutionary missing link with traits of both oral and written offers. Securities Act Rule 433(h)(4) provides a formal definition of "road show" as an offer (other than a statutory prospectus) that "contains a presentation regarding an offering by one or more members of an issuer's management … and includes discussion of one or more of the issuer, such management and the securities being offered."

You can see why a traditional road show (an intensive series of in-person meetings with key members of the buy-side community over a multi-day period in multiple cities and, sometimes, in multiple countries) would be an oral offer. But what about the slide deck that is traditionally handed out and reviewed at road show meetings? And what if the road show is recorded and broadcast over the internet?

The explanatory note to Rule 433(d)(8) states:

> A communication that is provided or transmitted simultaneously with a road show and is provided or transmitted in a manner designed to make the communication available only as part of the road show and not separately is deemed to be part of the road show. Therefore, if the road show is not a written communication, such a simultaneous communication (even if it would otherwise be a graphic communication or other written communication) is also deemed not to be written.

As a result, road show slides and video clips are not considered to be written offers as long as copies are not left behind. Even handouts are not written offers so long as they are collected at the end of the presentation. If they are left behind, however, they become an FWP, and are subject to a variety of detailed requirements spelled out in Securities Act Rules 164 and 433, which we discuss further below.

It has become customary to prepare a video recording of the road show meeting for the benefit of retail investors. The video version will not need to be filed as an FWP so long as it is available on the internet to all comers and covers the same ground as the live road show.

> PRACTICE POINT
>
> It is customary to pass out copies of the slide deck at road show meetings, but all of these flip books are retrieved at the end of the meeting so the slides do not have to be treated as an FWP.

Free Writing Prospectuses (FWPs)

Overview

Under Securities Act Rule 405, an FWP is any written communication that constitutes an offer to sell or a solicitation of an offer to buy the securities that are the subject of a registered offering that is used *after* a registration statement has been filed. A confidential submission does not trigger the Rule's definition of an FWP, nor do TTW communications. A supplement to a statutory prospectus can be an FWP, as can press releases, emails, blast voicemails, and even press interviews.

The use of FWPs is governed by Securities Act Rules 164 and 433. Rule 164 provides that, once a registration statement has been filed, an issuer or an underwriter may use an FWP if, among other things, the issuer is an eligible issuer, the offering is an eligible offering, and the additional conditions of Rule 433 are met.[21] We discuss the key points of using FWPs below.

Why Are FWPs Permitted? – Securities Act Rule 164(a)

Recall that, under Section 5(b)(1), no prospectus, other than a prospectus meeting the requirements of Section 10, may be used to make offers. Rule 164(a) provides that an FWP meeting the requirements of Rule 433 will be a Section 10(b) prospectus — that is, a prospectus that may be used to make offers after a registration statement has been filed. However, an FWP may not be used as a *final* prospectus to satisfy the prospectus delivery requirements associated with the delivery of securities after pricing.

Use of FWPs – Securities Act Rule 433(b)

For an IPO issuer:

- The prospectus must contain a bona fide price range in order to qualify as a Section 10(b) prospectus that can be used to solicit customer orders during the road show. An IPO issuer cannot use an FWP until it has filed a price range prospectus. The requirement to have a price range prospectus does not apply, however, in the case of a media FWP that was not published in exchange for payment and was filed with a required legend within four business days of becoming aware of its appearance in the press (more on this below).
- A Section 10 prospectus must accompany or precede the FWP, unless either:
  - a statutory prospectus has already been provided and there is no material change from the most recent prospectus on file with the SEC; or
  - the FWP is a media FWP that was not published in exchange for payment and was timely filed with a legend.

Note that an electronic FWP emailed with the proper hyperlink will obviate the need for physical delivery of a prospectus.

What Can Be in an FWP? – Securities Act Rule 433(c)

An FWP may include information "the substance of which is not included in the registration statement," but this information must not conflict with either:

- information contained in the registration statement; or
- information in any of the issuer's Exchange Act reports that are incorporated by reference into the registration statement.

FWPs must also contain a prescribed legend, and may not include disclaimers of responsibility or liability that are impermissible in a statutory prospectus.[22] These include: disclaimers regarding accuracy, completeness or reliance by investors; statements requiring investors to read the registration statement; language indicating that the FWP is not an offer; and, for filed FWPs, statements that the information is confidential.[23]

> PRACTICE POINT
>
> An FWP is often used when changes are made to an IPO that is already on the road. Typically, these changes are implemented in an amended registration statement filed with the SEC and a concurrent distribution of an FWP to prospective purchasers in the IPO. The FWP in this circumstance is typically a short summary of the changes included in the amended registration statement with the (important) changed pages attached. Circulating the FWP to prospective purchasers is a less cumbersome way to inform the market of deal changes than circulating an entire new preliminary prospectus.

Media FWPs – Securities Act Rule 433(f)

Rule 433(f) provides that any written offer that includes information provided, authorized, or approved by the issuer or any other offering participant that is prepared and disseminated by an unaffiliated media third party will be deemed to be an issuer FWP. Nevertheless, the requirements for prospectus delivery, legending, and filing on the date of first use that would otherwise apply to FWPs will not apply if:

- no payment is made or consideration given for the publication by the issuer or other offering participants; and
- the issuer or other offering participant files the media FWP with the required legend within four business days after the issuer or other offering participant becomes aware of publication or dissemination (but note that the FWP need not be filed if the substance of the written communication has previously been filed).

Any filing of a media FWP in these circumstances may include information that the issuer or offering participant believes is needed to correct information included in the media FWP. In addition, in lieu of filing the media communication as actually published, the issuer or offering participant may file a copy of the materials provided to the media, including transcripts of interviews.

> PRACTICE POINT
>
> A media FWP is how the SEC rules deal with an article containing unfortunate quotes from an issuer or other offering participant that appears at an inopportune point in the offering process. If the article could be construed to be an "offer," then treating it as a media FWP is a good compromise solution — the offer will not violate Section 5, but the issuer will be required to accept Section 12 liability for the article's contents. It is usually advisable for issuers to refrain from giving media interviews immediately prior to or during the IPO process.

When Must FWPs Be Filed? – Securities Act Rule 433(d)

The general rule is that an FWP must be filed with the SEC on the day the FWP is first used. If you miss the SEC's EDGAR filing cutoff for that day (5:30 p.m. Eastern Standard Time), you should still file the FWP as soon as you can.[24]

Issuers must generally file any issuer FWP, which is defined broadly to include an FWP prepared by or on behalf of the issuer or an FWP used or referred to by the issuer, as well as a description of the final terms of the securities in a pricing term sheet (whether contained in an issuer or an underwriter FWP). By contrast, an underwriter only needs to file an FWP that it distributes in a manner reasonably designed to lead to its "broad unrestricted dissemination." The SEC has explained that an FWP prepared by an underwriter that is only made available on a website restricted to the underwriter's customers or a subset of its customers will not require filing with the SEC, nor will an email sent by an underwriter to its customers, regardless of the number of customers involved.[25]

There are certain exceptions to the requirement to file an FWP. These include:

- an FWP does not need to be filed if it does not contain substantive "changes from or additions to" a previously filed FWP;
- an issuer does not need to file issuer information contained in an underwriter FWP if that information is already included in a previously filed statutory prospectus or FWP relating to the offering; and
- an FWP that is a preliminary term sheet does not need to be filed (recall that an FWP that is a final pricing term sheet must be filed by the issuer within two days of the later of establishing the terms or the date of first use).

Certain Failures to File and Failures to Include the Required Legend – Securities Act Rule 164

Failure to comply with the conditions of Rule 433 will potentially result in a violation of Section 5(b)(1) of the Securities Act. This has serious consequences, including a potential right of rescission under Section 12(a)(1).

Rule 164 provides some welcome relief from this harsh result in the case of certain "immaterial or unintentional" deviations from the requirements of Rule 433. In particular:

- a failure to file or a delay in filing an FWP will not be a violation so long as a good faith and reasonable effort was made to comply with the filing requirement and the FWP is filed as soon as practicable after the discovery of the failure to file;
- a failure to include the required legend will not be a violation, so long as: (1) a good faith and reasonable effort was made to comply with the legending requirement; (2) the FWP is amended to include the required legend as soon as practicable after the discovery of the omitted or incorrect legend; and (3) if the FWP was

transmitted without the required legend, it is subsequently retransmitted with the legend by substantially the same means as, and directed to substantially the same purchasers to whom, the original FWP was sent; and

- a failure to comply with the record retention requirements of Rule 433 will not be a violation so long as a good faith and reasonable effort is made to comply with these record retention requirements.

Restrictions on Communications After Effectiveness of the Registration Statement; Prospectus Delivery

Some communications restrictions continue after the IPO. Underwriters (and other dealers) will have an obligation to deliver (or make available in accordance with the "access equals delivery" protocol) a final prospectus during a period of time following effectiveness, even in connection with secondary market resales. That period is 25 calendar days in the case of an IPO that will be listed on a US exchange.[26] For a number of reasons, including that the prospectus being made available needs to continue to be accurate[27] until the expiration of the 25-day prospectus delivery period, certain limitations on other communications by the issuer during this period will remain in place. Once the 25-day prospectus delivery period has expired, Securities Act-related limitations on communications in connection with the offering can generally be eliminated.

> PRACTICE POINT
>
> Your CEO or CFO may want to give interviews on television or to the financial press once your stock opens for trading. If the offer to spar with Jim Cramer is irresistible:
>
> - stick to a script that has been vetted by the legal team for consistency with the prospectus and stripped of speculation and hyperbole;
> - focus on talking about how hard everyone has worked, what a milestone this is in the company's development, the company's mission, and its products and services;
> - avoid any discussions about growth or suggestions that the stock is a good investment;
> - avoid talking about financial metrics of any sort; and
> - above all, stay away from information that is not in the prospectus.
>
> Remember that the prospectus is required to be provided to investors for 25 days following pricing, and your CEO and CFO will want to avoid saying anything that might require the prospectus to be amended or supplemented during that period.

Concurrent Private Offerings

Given that the IPO process can take many months, an IPO issuer may want, or need, to pursue a private offering that is not registered with the SEC on the same schedule as the IPO. Concurrent public and private offerings are permitted, but need to be properly structured and conducted. There are two main areas of concern: making sure that activities in the public offering do not cause the private offering to run afoul of Section 4(a)(2)'s restrictions on general solicitation; and preserving the potential for offerees in the private placement to participate in the public offering.

There are two ways to avoid tripping over the ban on general solicitation in private offerings. First, if the private offering purchasers are all QIBs, then it will not matter that the registration statement has been filed. In the *Black Box* and *Squadron Ellenoff* no-action letters, the SEC Staff laid out a limited policy exception to allow concurrent private offerings to QIBs and two or three additional large IAIs even though there was an ongoing public offering.[28] We call this the "who" exception. Alternatively, it is possible to structure a good private placement to investors who are not QIBs if they were attracted to the private offering by a means other than the registration statement, for example as a result of a substantive pre-existing relationship with the issuer.[29] We call this the "how" exception.

The other issue that comes up in the context of concurrent public and private offerings is that potential private investors may expect information that is not typically part of the IPO disclosure package, particularly projections. Once a private investor has received projections from the issuer or placement agent in connection with the private offering, you will have to think carefully whether it will be wise to include that investor in the public offering. In most cases of concurrent public and private offerings, it can prove difficult to keep both the public and private options open as to the same institutional investor, unless that investor has received only the information included in the IPO disclosure. Otherwise, you and your banks will at some point need to decide which investors are exclusively private side and which are exclusively public side.

> PRACTICE POINT
>
> Concurrent public and private offerings are permissible, but you will want to be very thoughtful about who participates in which offering process, how they are solicited, and what disclosure they are provided.

ENDNOTES

[1] For a detailed discussion of the on-ramp accommodations introduced by Title I of the JOBS Act, see our Client Alerts *JOBS Act Establishes IPO On-Ramp* (Mar. 27, 2012) and *The JOBS Act After Two Weeks: The 50 Most Frequently Asked Questions* (Apr. 23, 2012). For a comprehensive analysis of trends in the IPO market that emerged during the first two years of the JOBS Act, *see* our report *The JOBS Act, Two Years Later: an Updated Look at the IPO Landscape* (Apr. 5, 2014).

[2] *See* JOBS Act Sections 101(a) and (b) (adding new Securities Act Section 2(a)(19) and Exchange Act Section 3(a)(80)).

[3] *See* Regulation S-K Items 308 (a) and (b). Under Exchange Act Rule 12b-2, a "large accelerated filer" is an issuer that, as of the end of its fiscal year:

- has an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates (market capitalization) of $700 million or more (measured as of the last business day of the issuer's most recently completed second fiscal quarter);
- has been subject to SEC reporting under the Exchange Act for a period of at least 12 calendar months;
- has filed at least one annual report under the Exchange Act with the SEC; and
- is not eligible to use the requirements for a "smaller reporting company" under the revenue test (i.e., had annual revenues of less than $100 million in the most recent fiscal year for which financial statements are available), and annually thereafter remains unqualified unless public float and revenue fall below designated thresholds.

See Section (2) under the definition of "smaller reporting company" for the revenue test. In addition, an issuer has previously failed to qualify or fallen out of smaller reporting company status must also test annually whether it remains unqualified under the public float and revenue thresholds set out in Section 3(iii)(B) of the "smaller reporting company" definition in Rule 12b-2. Exchange Act Rules CFI 130.05 provides additional guidance on when a non-accelerated filer that loses smaller reporting company eligibility and would otherwise become a large accelerated or accelerated filer would be able to remain a non-accelerated filer and defer its transition for a fiscal year.

Under Exchange Act Rule 12b-2, an "accelerated filer" is an issuer meeting the same conditions, except that it has a market capitalization of $75 million or more but less than $700 million (measured as of the last business day of its most recently completed second fiscal quarter). *See Final Rule: Accelerated Filer and Large Accelerated Filer Definitions*, Release No. 34-88365 (Mar. 12, 2020). *See also Final Rule: Smaller Reporting Company Definition*, Release No. 33-10513 (July 10, 2018).

[4] FASTAct, revising Securities Act Section 6(e)(1).

[5] Restrictions include that the company was not taken private for the purpose of conducting an IPO as an EGC and did not have registration of a class of its securities revoked under Exchange Act Section 12(j). *See* SEC Division of Corporation Finance, *Jumpstart Our Business Startups Act Frequently Asked Questions: Generally Applicable Questions on Title I of the JOBS Act* (Sept. 28, 2014) (SEC Title I FAQs), Question 54.

[6] See SEC Title I FAQs, Question 3.

[7] *See* JOBS Act Section 103 (revising Sarbanes-Oxley Section 404(b)).

[8] *See* JOBS Act Section 102(b)(1) (adding new Securities Act Section 7(a)(2)(B)). *See also* SEC Title I FAQs, Question 13. An EGC wishing to opt out of the extended phase-in for new or revised financial accounting standards under US GAAP must disclose this election in the first registration statement that is submitted to the SEC, regardless of whether it is a confidential submission or a public filing.

[9] *See* JOBS Act Section 104 (revising Sarbanes-Oxley Section 103(a)(3)).

[10] AS 3101: The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion and Related Amendment to PCAOB Standards, Note to .05(b).

[11] *See* JOBS Act Section 105(c) (adding new Securities Act Section 5(d)).

[12] *See* JOBS Act Section 102(b)(1) (adding new Securities Act Section 7(a)(2)).

[13] *See* JOBS Act Section 102(b)(2) (modifying Exchange Act Section 13(a)).

[14] *See* JOBS Act Section 102(c) (modifying Regulation S-K, Item 303(a)).

[15] *See Guidelines for the Release of Information by Issuers Whose Securities are in Registration*, Release No. 33-5180 (Aug. 16, 1971).

[16] *Securities Offering Reform*, Release No. 33-8591 (July 19, 2005), at 76-77 (*Securities Offering Reform Release*).

[17] *Id*., at n.147.

[18] *See id.,* at n.185.

[19] *See* JOBS Act Section 105(c) (adding new Securities Act Section 5(d) for EGCs only) and Securities Act Rule 163B (expanding the ability to engage in TTW to all issuers, including EGCs). EGCs might prefer to conduct TTW under Rule 163B, which — unlike Section 5(d) — allows the issuer and its representatives to rely on a reasonable belief that an investor is a QIB or IAI without having to verify that status.

[20] The application of Exchange Act Rule 15c2-8(e) to TTW activities was clarified by the SEC in FAQs issued by the Division of Trading and Markets on August 22, 2013. *See* SEC Division of Trading and Markets, *Jumpstart Our Business Startups Act Frequently Asked Questions About Research Analysts and Underwriters* (Research FAQs). As discussed in the response to Question 1 of the Research FAQs, it should be possible for TTW activities to take place in a manner consistent with the requirements of Rule 15c2-8(e) (which generally has been interpreted to require the availability of a price range prospectus prior to soliciting orders for the registered securities). In particular, the answer to Question 1 states that an underwriter should generally be able to seek non-binding indications of interest from prospective

investors (including as to the number of shares they may seek to purchase at various price ranges) so long as the underwriters are not soliciting actual orders and the investors are not otherwise asked to commit to purchase any particular securities.

[21] Ineligible issuers include blank check companies and shell companies, while ineligible offerings include business combinations. *See* Rules 164(e), (f), and (g).

[22] *Securities Offering Reform Release*, at 111-112.

[23] *Id.*

[24] *See* CFI, Securities Act Rules, Question 232.02.

[25] *Securities Offering Reform Release*, at n.267.

[26] Securities Act Rule 174(d).

[27] *See SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1095-1096 (2d Cir. 1972).

[28] *See* Division of Corporation Finance no-action letters to *Black Box Incorporated* (June 26, 1990) and *Squadron Ellenoff, Pleasant & Lehrer* (Feb. 28, 1992). The SEC stated in 2007 guidance that the *Black Box* and *Squadron Ellenoff* no-action letters remain valid. *See Revisions of Limited Offering Exemptions in Regulation D*, Release No. 33-8828 (Aug. 3, 2007) (*2007 Regulation D Release*), at n.126.

[29] *See* Securities Act Rule 152(a)(1)(ii); *See also Final Rule: Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, Release No. 33-10884 (Nov. 2, 2020), at 30 "New Rule 152(a)(1)(ii) codifies and expands the Commission's 2007 guidance that the existence of a pre-existing substantive relationship between the issuer, or its agent, and a prospective investor may be one means by which an investor may become interested in, or become aware of, a private placement conducted while a registration statement for a public offering is on file with the Commission that may be consistent with Section 4(a)(2)." *See 2007 Regulation D Release*, at 55-56; *see also* CFI 139.25 (discussing the SEC's 2007 guidance).

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IPO FINANCIAL STATEMENTS

What Financial Statements Must Be Included?

The following tables summarize the scope of the basic financial statement requirements for IPOs.

The Basic Requirements for IPOs

Annual Audited Financial Statements[1]	• Balance sheets: – audited balance sheets as of the end of the two most recent fiscal years.[2] if the issuer has been in existence less than one year, an audited balance sheet as of a date within 135 days of the date of filing the registration statement will suffice.[3] • Statements of comprehensive income, cash flow, and changes in stockholders' equity: – audited statements of comprehensive income, cash flows, and changes in stockholders' equity covering:[4] ○ **EGCs** — each of the two most recent fiscal years, although EGCs can choose to provide three years of audited financial statements; ○ **Non-EGCs** — each of the three most recent fiscal years, or for the life of the issuer (and its predecessors), if shorter. • Under certain circumstances, audited financial statements may cover nine, 10, or 11 months rather than a full fiscal year for one of the required years.[5] • Audited financial statements for an issuer must be accompanied by an audit report issued by independent accountants that are registered with the PCAOB under auditing standards promulgated by the PCAOB.[6]
Interim Unaudited Financial Statements	• Balance sheet: – an interim unaudited balance sheet as of the end of the most recent three-, six-, or nine-month period following the most recent audited balance sheet.[7] • Statements of comprehensive income, cash flows, and changes in stockholders' equity: – interim unaudited statements of comprehensive income, cash flows, and changes in stockholders' equity for any stub period covered by an interim balance sheet, together with statements of comprehensive income, cash flows, and changes in stockholders' equity for the corresponding three-, six-, or nine-month stub period of the prior year.[8]

Acquired Business Financial Information and Pro forma Financial Information – Regulation S-X Rule 3-05 and Regulation S-X Article 11[9]	• Depending on the size of the acquisition and its significance to the issuer (which is measured in various ways — not all of them intuitive), audited financial statements for the most recent one or two fiscal years of the acquired business must be included, plus appropriate unaudited interim financial statements. These requirements are found in Regulation S-X Rule 3-05. • Under Regulation S-X Article 11, when acquired business financial statements are included in a registration statement, pro forma financial information must also be included, covering the most recently completed fiscal year and the interim period in the current fiscal year.

What Financial Statements Must Be Included to Begin SEC Review?

Normally, a registration statement must include – as of the date of filing – the required financial statements listed in the tables above. However, under accommodations afforded by statute and SEC Staff policy, qualifying issuers may submit draft Securities Act and Exchange Act registration statements for nonpublic review. During this review process, financial statements may become "stale" (i.e., are too old and must be updated). Consequently, these accommodations also permit the omission of the financial data discussed below.

EGCs that are registering with the SEC for the first time may submit draft registration statements for confidential review.[10] The EGC may omit from its confidential submissions annual and interim financial data that it reasonably believes will not be required *at the time of the offering*.[11] It may also omit from its confidential submissions the financial statements of an acquired business required by S-X Rules 3-05 or 3-14 on the same basis.[12]

Although EGCs using the confidential filing procedures may omit from their subsequent public filings any financial statements that would not be required at the time of the offering, they frequently adhere to the requirements below applicable to non-EGCs, who look to the date of the public filing when testing which financial statements may be omitted.

Non-EGCs that are registering with the SEC for the first time may submit draft registration statements for nonpublic review.[13] The issuer may omit from its nonpublic submissions the annual and interim financial data it reasonably believes will not be required *at the time it files publicly*.[14] A non-EGC may also omit the financial statements of an acquired business required by S-X Rules 3-05 or 3-14 that it reasonably believes will not be required *at the time it files publicly*.[15]

Additional Financial Information That Is Typically Included

In addition to the formal requirements of Regulations S-K and S-X, it is customary to include additional operational and other metrics in the prospectus to help investors understand the issuer's business.

> PRACTICE POINT
>
> Determining what additional operating and other metrics to include in your prospectus will be a team effort. The bankers can help you understand what the market would like to see, and your management can help the bankers understand the key performance indicators that they think are important. Also, it's always good to look at the comps to see what metrics competitors are disclosing.

Summary Financial Data

A page of summary financial data is always included in the summary box at the front of the prospectus. This key marketing page often supplements the financial data with additional operational and other metrics. These

additional metrics will vary with the type of issuer and its industry and are selected based on the criteria that management and the investment community monitor to evaluate performance or liquidity. Typical examples include comparable store sales data for a retailer, capital expenditures for a manufacturer, and subscriber numbers for a cable television company.

Recent Financial Results

If a significant amount of time has passed since the most recent financial statements included in the prospectus, it may be appropriate to include a summary of the quarter in progress (or recently ended) in the summary box, even before full financial statements for that quarter are required. Examples of "recent results" disclosures are most common after a quarter is completed but before financial statements for that quarter have become available. The issuer and the underwriters will want to tell investors about any positive improvement in operating trends, while if the recent results are negative, on the other hand, recent results disclosure may be advisable to avoid any negative surprises for investors when the full quarterly numbers become available.

Recent Developments

To the extent material, the likely consequences of material recent developments may also be disclosed in the summary box or the MD&A section of the disclosure. For example, it is customary to discuss a material recent or pending and probable acquisition, whether or not audited financial statements of the acquired or to-be-acquired business are required to be presented. This practice will often result in a "Recent Developments" paragraph in the summary and a discussion of the impact of the pending or recently completed transaction on margins, debt levels, etc., in a section of the MD&A labeled "Overview," "Impact of the Acquisition" or a similar title. The textual disclosure may also include a discussion of any special charges or anticipated synergies expected to result from the acquisition or other pending event.

Non-GAAP Financial Measures

Many IPO issuers choose to disclose measures of financial performance or liquidity that, while derived from GAAP figures presented in a company's financial statements, are not themselves calculated in accordance with GAAP. Adjusted EBITDA is perhaps the best-known (and most widely used) non-GAAP financial measure. All non-GAAP financial measures included in an IPO registration statement must comply with Item 10(e) of Regulation S-K. Among other things, this means that the non-GAAP financial measure must be reconciled to the most directly comparable GAAP financial measure so that investors get a clear picture of how the GAAP measure was adjusted.

Selected IPO Financial Statement Issues

Cheap Stock

IPO candidates seeking to grant equity awards to their employees during the 12-month window preceding the filing of an IPO registration statement should proceed with caution.[16]

When a company makes pre-IPO equity awards at valuations substantially lower than the IPO price, questions arise under accounting and tax rules that apply to equity awards. Under these rules, the value of an equity award on the grant date is considered compensation expense on the company's statement of comprehensive income for purposes of US GAAP and may constitute taxable income to the employee for US income tax purposes. This collection of issues is known as the "cheap stock" problem.

In the review of a company's IPO registration statement, the SEC Staff will focus on the valuation methodology employed by the company in connection with its equity award process, the compensation expense associated with those awards, and the related disclosure.

The best way to avoid trouble with cheap stock issues is to avoid equity awards entirely during the 12-month period before the filing of your IPO. That is not a realistic possibility for many pre-IPO companies, though, and the second-best solution is to plan ahead:

- Obtain contemporaneous independent valuations that follow the valuation guidance in the AICPA's VPES Practice Aid[17] with respect to all equity awards made during at least the 12-month period before you begin the SEC registration process.
- Keep the valuation firm updated on your progress with the SEC during the registration process.
- Be ready to provide the SEC Staff with a detailed analysis regarding the process and substance behind your valuation determinations. If you obtained contemporaneous independent valuations on each of the targeted grant dates, you will be well armed to discuss the key drivers in these earlier valuation determinations.
- In some cases, it will be advisable to prepare for the SEC Staff's review of your equity award valuations by drafting a detailed narrative to share supplementally with the Staff, upon their request, in which you describe the process and substance underlying the valuation of your equity awards.
- As you get closer to completing your IPO, consider granting options with a strike price equal to the IPO public offer price and subject to the IPO closing successfully.

Segment Reporting

In addition to all the consolidated financial information required to be included in a registration statement a company (including a company that has a single reportable segment) is required to provide segment disclosures by reportable segment in annual and interim financial statements. Regulation S-K Item 303 requires certain financial reporting and narrative disclosure in the MD&A for each relevant reportable segment or other subdivision of the business if the discussion would be necessary to understanding the business.[18]

FASB Accounting Standards Codification 280, "Segment Reporting" (ASC 280), provides detailed guidance for when a component of an enterprise constitutes an operating segment, and how discrete financial information of a reportable segment must be reported. Because the guidance of ASC 280 is complex and its application very fact-specific, it is important to begin an early dialogue with the independent auditors when there may be segment reporting issues. The identification and reporting of financial information for operating segments may be critical in the IPO process, as the time to prepare such information, the effect on narrative disclosure, and the impact on enterprise valuation may all be significant.

Generally, a component of an enterprise is an operating segment if it has three characteristics:

- it engages in business activities from which it may earn revenues and incur expenses (including revenues and expenses relating to transactions with other components of the same enterprise);
- its operating results are regularly reviewed by the enterprise's chief operating decision maker (CODM)[19] to make decisions about resources to be allocated to the segment and assess its performance; and
- discrete financial information is available for the component.

Segment reporting is a frequent topic of SEC comments. A company's operating and reportable segments may or may not be the same, depending on whether multiple operating segments are aggregated into fewer reportable segments, but the Staff generally presumes that companies should report operating segments separately unless more detailed information is not useful to investors. In the comment process, you can expect the Staff to review other disclosures about your business for consistency with your segment disclosures. For example, the Staff will look at your business section and MD&A disclosure, as well as information on your website, to see how you describe different geographic or product-based components of your business. The Staff may also ask to see copies of the internal segment reporting package your "chief operating decision maker(s)" receive to understand how they identify and aggregate your operating segments and to review that information for consistency with the way you report your segments in the registration statement. Significant operating segments generally cannot be aggregated for disclosure purposes unless they share similar economic characteristics, and the Staff tends to have an exacting standard of economic similarity for purposes of segment reporting. Given the complexities of

most businesses and the highly fact-specific nature of the issues, segment accounting comments can involve challenging issues that will require thoughtful and robust analysis.

Internal Control Over Financial Reporting

Section 404(a) of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) requires public companies to provide investors in their Exchange Act reports with an assessment by management of the effectiveness of the issuer's internal control over financial reporting, and Section 404(b) requires the issuer's independent auditors to provide an attestation report on management's assessment. Compliance with Section 404 can be a major undertaking for a newly public company.

Fortunately, all IPO issuers are permitted to omit both the Section 404(a) management's assessment and the Section 404(b) auditor's attestation report in their first annual reports on Form 10-K filed with the SEC.[20] In addition, an EGC is not required to provide the Section 404(b) auditor's attestation report for as long as it qualifies as an EGC.[21]

The underwriters will nonetheless focus on internal controls in the IPO registration statement and their due diligence process so as to avoid any surprises when the issuer ultimately becomes subject to full compliance with Section 404. Issuers typically disclose in their IPO prospectus any material weaknesses they had as of the most recent audit, even if they have been remediated since the audit date.

ENDNOTES

[1] The requirements of Regulation S-X Rule 3-01 are imported into Form S-1. *See* Form S-1, Item 11(e) (noting financial statements must be included to meet the requirements of Regulation S-X generally).

[2] *See* Regulation S-X Rule 3-01(a). If the filing is made on or before February 14 (i.e., within 45 days after the end of the prior fiscal year), and audited financial statements for the most recent year are not available, the balance sheet may be as of the end of the two preceding fiscal years. *See* Regulation S-X Rule 3-01(b). In this case, the filing must include an additional balance sheet as of an interim date at least as current as the end of the issuer's third fiscal quarter of its most recently completed fiscal year. *Id.* Interim balance sheets need not be audited. *See* Regulation S-X Rule 3-01(f).

[3] *See* Regulation S-X Rule 3-01(a). Financial information of a registrant's predecessor is required for all periods prior to the registrant's existence, with no lapse in audited periods or omission of other information required about the registrant. *Financial Reporting Manual*, Section 1170. The term "predecessor" is defined broadly. *See* Securities Act Rule 405.

[4] *See* JOBS Act Section 102(b)(1) (adding new Securities Act Section 7(a)(2)); Regulation S-X Rule 3-02(a) (statements of comprehensive income and cash flow); Regulation S-X Rule 3-04 (changes in stockholders' equity).

[5] *See* Regulation S-X Rule 3-06. Under this rule, the SEC will accept financial statements for periods of not less than nine, 21 and 33 consecutive months as substantial compliance with the requirement to provide financial statements for one, two, and three years, respectively. In particular, whenever audited financial statements are required for a period of one, two, or three years, a single audited period of nine to 12 months may count as a year if:

- the issuer has changed its fiscal year during the period;
- the issuer has made a significant business acquisition for which financial statements are required under Regulation S-X Rule 3-05 and the financial statements covering the interim period pertain to the business being acquired; or
- the SEC grants permission to do so under Regulation S-X Rule 3-13, provided that financial statements are filed that cover the full fiscal year or years for all other years in the time period.

See id.

See also SEC Division of Corporation Finance Financial Reporting Manual [Financial Reporting Manual], Note to Section 1140.8. This relief can be difficult to obtain, and an issuer should be prepared to argue that the omitted information is not necessary for investor protection. *See* S-X Rule 3-13 and *Financial Reporting Manual*, Note to Topic 2. The SEC Staff has signaled that it will "consider an issuer's specific facts and circumstances in connection with any request made under Rule 3-13" relating to financial information omitted from a draft registration statement. SEC Staff of the Division of Corporation Finance, *Enhanced Accommodations for Issuers Submitting Draft Registration Statements* (Mar. 3, 2025) [2025 Procedures].

[6] *See Financial Reporting Manual*, Section 4110.5 (accounting firm must be PCAOB registered and auditor's report must refer to PCAOB standards); Section 4110.1 (citing PCAOB Rule 2100, which requires each firm to register with the PCAOB that prepares or issues any audit report with respect to any issuer, or plays a substantial role in the preparation or furnishing of an audit report with respect to any issuer).

[7] *See* Regulation S-X Rules 3-01(c), 3-01(e) and 3-01(f). If the filing is made on or before February 14 (i.e., within 45 days after the end of the prior fiscal year) and audited financial statements for the most recent year are not available, then an interim unaudited balance sheet must be included as of the previous September 30 (i.e., as of the end of the most recently completed third quarter). *See* Regulation S-X Rule 3-01(b).

[8] *See* Regulation S-X Rules 3-02(b) and 3-04. Note that the statement of stockholders' equity and noncontrolling interests may be provided in the notes to the financial statements. *See Financial Reporting Manual*, Section 1120.

[9] *See* Form S-1 Item 11(e) (financial statements must be included meeting the requirements of Regulation S-X generally).

[10] JOBS Act, Section 106(a), adding Securities Act Section 6(e)(1). These submissions are automatically exempt from FOIA. Foreign private issuers may elect to submit draft registration statements under any of the accommodations available described in this section for which they qualify or may use the procedures established for foreign private issuers. See SEC Staff of the Division of Corporation Finance, *Non-Public Submissions from Foreign Private Issuers* (last updated Aug. 8, 2013).

[11] FAST Act Section 71003, adding new JOBS Act Sections 102(c)(1) and (2); FAST Act Corporation Finance Interpretations (CFIs), Question 1 (Aug. 17, 2017) [FAST Act CFIs]. *See also* Securities Act Forms CFIs, Question 101.04 (Aug. 17, 2017).

[12] FAST Act CFIs, Question 2. In addition, the SEC Staff has signaled that it will consider requests to omit financial information under S-X Rule 3-13, based on an issuer's specific circumstances.

[13] 2025 Procedures. These accommodations apply to drafts of initial registration statements under the Securities Act (IPOs) and Exchange Act Sections 12(b) and 12(g), including initial registrations under Forms 10, 20-F, and 40-F. These accommodations also permit an issuer to submit for nonpublic review the first draft of a registration for subsequent Securities Act offerings and registrations under Exchange Act under Section 12(b) or (g) and to omit financial information on the same basis. Because these submissions are not automatically exempt from FOIA, issuers are advised to request confidential treatment under SEC Rule 83. 2025 Procedures, at n.1.

[14] 2025 Procedures. *See also* Voluntary Submission of Draft Registration Statements – FAQs, Question 7; Securities Act Forms CFIs, Question 101.05 (Aug. 17, 2017). An issuer using these procedures must publicly file its registration statement and all previous nonpublic submissions at least 15 days before commencing any road show or, absent a road show, 15 days prior to effectiveness, and for a subsequent offering two business days prior to effectiveness. 2025 Procedures.

[15] FAST Act CFIs, Question 2; *see also* 2025 Procedures, at n.8 ("This relief is intended to be similar to the relief provided by Section 71003 of the [FAST] Act."). In addition, the SEC Staff has signaled that it will consider requests to omit financial information under S-X Rule 3-13, based on an issuer's specific circumstances.

[16] We discuss the issue of cheap stock in more detail in our client alert *Cheap Stock: An IPO Survival Guide* (Aug. 12, 2010).

[17] A 2004 publication by the American Institute of CPAs, *Valuation of Privately-Held-Company Equity Securities (VPES) Issued as Compensation*. Note that the VPES Practice Aid is being updated by a Task Force of the AICPA primarily to reflect guidance in Statement of Financial Accounting Standards No. 157, Fair Value Measurements, issued in 2006 and codified in ASC 820.

[18] *See* Regulation S-K Item 303(a).

[19] ASC 280 uses the term "chief operating decision maker" to identify a function rather than a specific person; the "chief operating decision maker" could be the CEO, CFO, or a group of senior managers, depending upon the circumstances. For a detailed discussion of segment reporting and ASC 280, see our companion guide Financial Statement Requirements in US Securities Offerings: What You Need to Know.

[20] *See* Regulation S-K Items 308 (a) and (b). Under Exchange Act Rule 12b-2, a "large accelerated filer" is an issuer that, as of the end of its fiscal year:

- has an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates (market capitalization) of $700 million or more (measured as of the last business day of the issuer's most recently completed second fiscal quarter);
- has been subject to SEC reporting under the Exchange Act for a period of at least 12 calendar months;
- has filed at least one annual report under the Exchange Act with the SEC; and
- is not eligible to use the requirements for a "smaller reporting company" under the revenue test (i.e., had annual revenues of less than $100 million in the most recent fiscal year for which financial statements are available), and annually thereafter remains unqualified unless public float and revenue fall below designated thresholds.

See Section (2) under the definition of "smaller reporting company" for the revenue test. In addition, an issuer has previously failed to qualify or fallen out of smaller reporting company status must also test annually whether it remains unqualified under the public float and revenue thresholds set out in Section 3(iii)(B) of the "smaller reporting company" definition in Rule 12b-2. Exchange Act Rules CFI 130.05 provides additional guidance on when a non-accelerated filer that loses smaller reporting company eligibility and would otherwise become a large accelerated or accelerated filer would be able to remain a non-accelerated filer and defer its transition for a fiscal year.

Under Exchange Act Rule 12b-2, an "accelerated filer" is an issuer meeting the same conditions, except that it has a market capitalization of $75 million or more but less than $700 million (measured as of the last business day of its most recently completed second fiscal quarter). *See Final Rule: Accelerated Filer and Large Accelerated Filer Definitions*, Release No. 34-88365 (Mar. 12, 2020). *See also Final Rule: Smaller Reporting Company Definition*, Release No. 33-10513 (July 10, 2018).

[21] JOBS Act Section 103 (revising Sarbanes-Oxley Section 404(b)); JOBS Act Section 101(a) and (b) (adding new Securities Act Section 2(a)(19) and Exchange Act Section 3(a)(80)).

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UPSIZING AND DOWNSIZING AN IPO

The preliminary prospectus circulated to potential IPO investors will show the number of shares expected to be sold and a bona fide estimate of the price range per share, as required by Regulation S-K Item 501(b)(3). The SEC Staff generally takes the position that a bona fide price range means a range no larger than $2 (for ranges below $10) or 20% of the high end of the range (for maximum prices above $10).

Until an IPO registration statement has been declared effective by the SEC, it is possible to file a pre-effective amendment with a new price range and/or a new number of shares to be sold. However, using a pre-effective amendment to upsize or downsize a deal after the price range prospectus has been distributed to investors, *i.e.*, during the road show, can have unwelcome timing implications (for example, the need to update dilution tables, obtain a new auditor's consent and updated signature pages, and clear any comments from the SEC Staff on the new disclosure). Even in the absence of new comments, the SEC Staff may require a few days to review the new disclosure. In addition, the new filing containing the amended price range could send a signal to the market about the trajectory of the offering and pricing that may be premature.

A key question, hence, is how far can the deal be upsized or downsized at pricing and after effectiveness *without* having to go back to the SEC for permission?

> PRACTICE POINT
>
> **Pre-effective Amendment**
>
> There are situations in which you may conclude that filing a pre-effective amendment is unavoidable. One example would be where you are certain before effectiveness that your deal is going to be dramatically downsized or upsized. Note that Regulation S-K Item 501(b)(3) requires that you include a **bona fide** estimate of the price range. In the ordinary course, you would seek to go effective at some point prior to the close of the stock market — 2:00 p.m. Eastern Standard Time is often chosen. Because the market has not yet closed, you would typically not be in a position to know with certainty that you will be pricing outside the range set forth in the prospectus at that time, which allows you to avoid changing the range on the cover of the red herring at the time you refile.

Rule 430A

Securities Act Rule 430A permits a registration statement to be declared effective without containing final pricing information. Instead, it allows you to insert information retroactively into a registration statement and have it be treated as if it were there as of its effective date. Rule 430A provides that pricing-related information (which includes the price per share and the number of shares offered) that is contained in a prospectus filed pursuant to Rule 424(b) after effectiveness of the registration statement will be deemed to have been part of the registration statement as of the effective date.[1]

Here is a summary of how Rule 430A works:

If you are…	Then you should use…	And you can…	But you would need to…
Upsizing your deal	Instruction to Rule 430A(a)	Increase the price per share and/or number of shares, so long as the aggregate size of the revised deal does not exceed 120% of the amount shown in the fee table in the registration statement at the time of effectiveness	File an immediately effective registration statement under Rule 462(b) to register any increase in shares or deal size not already provided for Consider whether additional disclosure about the revised deal (a new use of proceeds, for example) needs to be delivered to purchasers (orally or by means of an FWP) prior to confirmation of sale
Downsizing your deal	SEC Staff Corporation Finance Interpretation (CFI) 627.01	Decrease the price per share and/or decrease the number of shares sold, so long as the size of the revised deal is not less than the lower end of the deal size reflected in the price range prospectus, minus 20% of the maximum deal size reflected in the price range prospectus	Consider whether additional disclosure about the revised deal (liquidity issues, for example) needs to be delivered to purchasers (orally or by means of an FWP) prior to confirmation of sale

Instruction to Rule 430A(a)

Rule 430A's most important contribution to pricing outside the range is found in the instruction to paragraph (a), which provides that, where the 20% safe harbor threshold is not exceeded, changes in price and deal size can be poured backwards in time into the registration statement using a Rule 424(b) filing of the final prospectus after the effectiveness of the registration statement, and this pricing information will be deemed to have been part of the registration statement at the time it became effective. This is a very useful device indeed. It allows you to change the size of your deal by 20% in either direction without having to go back to the SEC.

CFI 227.03

CFI 227.03 establishes two important points:

- for purposes of Rule 430A, retroactive changes in price and/or deal size within the 20% threshold can be made after the fact by way of a Rule 424(b) prospectus, even if the effects of those changes are material; and
- even deal size changes outside the 20% threshold can be made using a Rule 424(b) prospectus if the size changes do not materially change the disclosure.

Rule 430A effectively lets you make pricing-related changes to your registration statement without SEC review (i.e., without filing a post-effective amendment), even if those changes are material. This special privilege is limited to pricing information as contemplated by Rule 430A, but it is a very special privilege nevertheless. The second point is equally important — changes in excess of 20% may not be material.

PRACTICE POINT

When Is a Greater Than 20% Change Not Material?

Consider a $1 billion offering that is half primary and half secondary shares. If the secondary shares are reduced to $250 million, but the primary shares stay at $500 million, the offering has been reduced by 25% but the reduction may well not be material. There will still be a very substantial public "float" after the offering and the proceeds to the issuer (and hence the use of proceeds), the pro forma number of shares outstanding, and the pro forma earnings per share will not change at all. This sort of fact pattern is right in the center of CFI 227.03's fairway.

CFI 627.01

What does Rule 430A have to say about the deal size actually reflected in the prospectus circulated to investors, as opposed to the maximum deal size reflected in the "Calculation of Filing Fee" table filed as an exhibit to the registration statement? What if (as is often the case) these two amounts are not aligned?

This is where CFI 627.01 comes into play. CFI 627.01 permits you to calculate the 20% amount for purposes of downsizing your deal in a very favorable way. It allows you to derive your 20% amount by multiplying the upper end of the range in the price range prospectus by 20%.[2]

You can then add that amount to the upper end of the range in the price range prospectus if you are upsizing, or subtract that amount from the bottom of the range if you are downsizing, to figure out what share count and price per share will be within the safe harbor. Since 20% of the upper end of the price range is by definition greater than 20% of the lower end of the price range, CFI 627.01 effectively broadens the scope of the Rule 430A safe harbor for troubled deals.

The approach in CFI 627.01 represents an alternative to the approach in the instruction to paragraph (a) of Rule 430A, and the SEC Staff takes the position that you cannot "mix and match" between the CFI and the instruction to paragraph (a). As a result, if you are following CFI 627.01, you may not take 20% of the amount reflected in the fee table and subtract that from the lower end of the price range, even though that might yield a lower floor on your transaction than 20% of the upper end of the range (since the fee table often registers a larger transaction than the upper end of the range). Either you calculate using the fee table or you calculate using the range in the price range prospectus, but you can't have it both ways. **In practice, this means that you will want to use CFI 627.01 when downsizing and the instruction to paragraph (a) of Rule 430A when upsizing.**

Those who qualify for the special treatment offered by Rule 430A and the related rules will find it much more attractive to make the necessary changes to the terms of the deal after effectiveness, in almost all cases. Therefore, the key question for the deal team will be whether the proposed changes to the number of shares to be sold and the price per share qualify for Rule 430A's special magic.

Section 11 and Section 12

Section 11(a) of the Securities Act imposes liability if any part of a registration statement, at the time it became effective, "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." Section 11 liability only covers misstatements or omissions *in the registration statement at effectiveness*. We think of the registration statement at the magic moment of effectiveness as the "Section 11 file." This is a helpful way to remember that Section 11 is a highly technical provision, in the sense that it looks only at (a) what is or is deemed to be in the registration statement (b) at the time it became effective.[3]

By contrast, Section 12(a)(2) of the Securities Act is not limited to the registration statement and is not linked to the moment of effectiveness. It imposes liability on any person who offers or sells a security in a registered

offering by means of a prospectus, or any oral communication, which contains "an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading." Section 12(a)(2) is less technical and more holistic than Section 11. Section 12(a)(2) takes into account all oral statements, FWPs, and statements in the price range prospectus rather than focusing exclusively on the registration statement.

Because Rule 430A relates only to the registration statement at the time of effectiveness, it only serves to update disclosure for purposes of Section 11 of the Securities Act. Section 12, on the other hand, looks to the sum of *what investors have been told at or before the time the underwriters confirm orders*. Section 12's focus, therefore, is the price range prospectus sent to investors and any additional information that may have been conveyed to investors (orally or in writing) on or before the time of pricing. We think of this collection of information as the "Section 12 file."

In order to deal with all of the issues that arise in the context of changing the size and price of an IPO after the registration statement has been declared effective, you will need to keep in mind both your "Section 11 file" and your "Section 12 file."

The Section 12 File

Securities Act Rule 159; FWPs; Exchange Act Rule 15c2-8(b)

Rule 159 makes clear that, for purposes of Section 12, information conveyed to a securities purchaser after the time of sale does not count for purposes of determining whether the Section 12 file was complete at the moment that liability attaches. In other words, Section 12 liability is a function of what you actually gave or told the purchaser prior to confirming the order — anything delivered after the Rule 159 "moment of truth" does not count.

This means that those material pricing changes that can be retroactively poured into the Section 11 file after the fact under Rule 430A must actually be conveyed to purchasers in real time prior to confirming orders in order for the Section 12 file to be up to snuff. There are a number of ways to transmit the required information — the rules are agnostic as to the actual method of conveyance — but the key point is that the conveyance must be made, and it must be made prior to confirming orders.

Market practice is that simple information that can be effectively reduced to sound bites is conveyed orally. It is customary in deals pricing within the range, for example, to convey the final pricing information orally.

Oral conveyance is also used in many upsizing and downsizing scenarios. The easiest example of this would be a 20% decrease in deal size in an all-secondary offering by a selling stockholder. All the investor needs to know in that case is how many shares are being sold and at what price — there are no collateral disclosure implications to the change in deal size in that example.[4] The disclosure in the price range prospectus will not otherwise change at all.

More complicated deal changes may require that an FWP summarizing the changes be circulated to accounts in writing as permitted by Rule 433. The decision whether to convey the new information orally or in writing will, in part, depend on whether the price range prospectus circulated to investors contained "sensitivity analysis" explaining how the company's plans would change if the actual proceeds turned out to be more or less than the amount assumed in the price range prospectus. The more sensitivity analysis is included in the price range prospectus, the more likely it will be possible to convey the missing information orally at the time of pricing. This is a key point to keep in mind in the early drafting sessions.

PRACTICE POINT

Sensitivity Analysis

There is no hard-and-fast rule about how much sensitivity analysis will suffice and what topics need to be covered. The only certainty is that more is better when you are trying to make significant deal changes at the end of the road show. Here are some of the places where we have found sensitivity disclosure to be particularly useful:

- use of proceeds, particularly where stated uses would need to be changed or new uses added. It's always best to disclose multiple uses of proceeds in the order of their priority so that it's clear which uses will be skipped or skinnied if the deal is downsized;
- pro forma earnings per share, balance sheet, and capitalization;
- the size of the "float" after the offering;
- the company's liquidity position (or burn rate) after the offering;
- the level of beneficial ownership by members of senior management or other significant stockholders; and
- dilution.

The goal is to have disclosure that allows investors to see how changes in share price or deal size ripple through critical elements of the disclosure. Ideally, the price range prospectus will present all deal-size related disclosures in an "if/then" waterfall format ("We will apply the net proceeds from this offering first to repay all borrowings under our credit facility and then, to the extent of any proceeds remaining, to general corporate purposes," for example).

Finally, where the changes are so fundamental that the original price range prospectus must be completely rewritten, the question may arise whether to recirculate a completely new price range prospectus. In practice, the FWP concept introduced by Rule 433 in the 2005 securities offering reforms has all but eliminated the need for full recirculation of a completely new price range prospectus.

One issue that has sometimes arisen in this context, especially in the old days before FWPs became a trusty part of the pricing toolkit, is compliance with Exchange Act Rule 15c2-8(b). Rule 15c2-8(b) requires that brokers and dealers participating in an IPO deliver a preliminary prospectus "to any person who is expected to receive a confirmation of sale at least 48 hours prior to the sending of such confirmation."

In present-day IPO practice, Rule 15c2-8(b) will rarely, if ever, create a speedbump in the offering process. This is thanks largely to the availability of FWPs, which have proven to be a reliable and effective means of updating investors to new information in the disclosure package. The Rule 15c2-8(b) requirement "is satisfied by delivering a preliminary prospectus that is current at the time of its delivery," which typically occurs with the commencement of the road show process and therefore does not require further delivery of later updates to the preliminary prospectus.[5]

An FWP summarizing late-breaking disclosure raises an issue of timing. Deal teams often conclude that investors need only a few hours (or even minutes) to digest the new disclosure. The SEC Staff has, to date, refrained from offering any guidance on the question "How long is long enough?" as it relates to delivery of new information for purposes of Rule 159 and Section 12. We believe most information can be digested upon receipt, and only very complicated changes would need more time to be absorbed. Somewhat complicated changes may need more than a few minutes to be digested but considerably less than a full business day.

PRACTICE POINT

FWPs Have Largely Supplanted Recirculation

An FWP that summarizes new changes in disclosure, and attaches or highlights key changed pages, is almost always sufficient in lieu of a full recirculation of the preliminary prospectus. This practice has essentially supplanted the more cumbersome historical practice of recirculating a new price range prospectus where late-breaking changes were deemed material to the disclosure.

Filing Fee Issues – Securities Act Rules 457 and 462(b)

Rule 457

Although Rule 457 deals with the seemingly mundane issue of the calculation of the registration fee, the choice you make under Rule 457 will have a significant impact on your options if your deal is upsized or downsized at the end of the road show after you have gone effective under Rule 430A.

Remember that you initially filed your registration statement with a fee table, calculated either:

- under Rule 457(o) on the basis of the *amount of proceeds* the issuer wanted to raise; or
- under Rule 457(a) on the basis of the *number of shares* to be sold and a *bona fide* estimate of the sale price per share.

Chances are, you initially opted to calculate the registration fee for purposes of the fee table under Rule 457(o). You could have used Rule 457(a) instead, but since doing so would let the market know the likely per share price (i.e., maximum deal size divided by the number of shares registered), most deal teams opt to use Rule 457(o) for the initial filing.[6]

When the time comes to file your price range prospectus, however, you have a choice: either keep using Rule 457(o) or refile your fee table under Rule 457(a).

If you choose to refile under Rule 457(a), you will not have to pay more filing fees if your offering price per share later increases — that's baked right into the text of the rule. You will, however, be required to pay additional filing fees if you later increase the number of shares to be offered, even if the total offering size (number of shares sold times sale price) does not go above the original estimate used to calculate the original filing fee. The added shares will need to be registered on an immediately effective registration statement under Rule 462(b). We discuss below how that is done.

If you stick with Rule 457(o), you will not have to pay additional filing fees if your per share price goes down and you increase the number of shares offered so as to maintain the original aggregate offering price.[7] You will, however, be required to pay additional filing fees if you keep the same number of shares and increase the per share price (thereby increasing the aggregate deal size).

PRACTICE POINT

Rule 457(a) Versus Rule 457(o)

Which route is preferable? Refiling under Rule 457(a) allows you to increase the price per share (but not the number of shares) without filing an additional registration statement. By contrast, staying with Rule 457(o) allows you to increase the number of shares and decrease the price per share so as to maintain overall deal size without filing an additional registration statement. So, it all boils down to whether you think you will be increasing price only (and potentially increasing the number of shares as well) or will be playing with both price and number of shares in order to keep the same total aggregate deal size. Many deal teams elect to switch to Rule 457(a) at the time of printing the price range prospectus because increasing the price per share at pricing is a more likely outcome than increasing the number of shares and decreasing the price.

Rule 462(b)

How do you go about adding additional shares (if you are using Rule 457(a)) or increasing the deal size (if you are using Rule 457(o))? Before effectiveness, you can refile with a new fee table. After effectiveness, you need to file an immediately effective registration statement under Rule 462(b).[8]

Rule 462(b) is available if:

- you file the new registration statement prior to the time confirmations are sent; and
- the increase in price and share count together represent an increase of no more than 20% of the previous maximum aggregate offering price, as set forth in the fee table at effectiveness.

There is a curious wrinkle to how the 20% amount is calculated for purposes of Rule 462(b), again depending on whether you refiled your fee table under Rule 457(a) or stayed with Rule 457(o). If you are using Rule 457(a), you multiply the number of additional shares by the new offering price and then look to see whether the increase in deal size associated with the added shares is more or less than 20% of the deal size in the fee table at effectiveness, even though that fee table was calculated at the old price per share.[9] To take an example, imagine that your fee table at effectiveness reflected 11.5 million shares and a price range of $8-$10 per share, for a maximum aggregate deal size of $115 million. At pricing, the number of shares is increased by 1.5 million and the price is increased to $12 per share. The number of additional shares times the price equals $18 million. Since this is less than 20% of $115 million (i.e., less than $23 million), you can use Rule 462(b) to register the new shares. The increase in price per share above the top of the previous range, as well as the fact that the entire deal is actually being upsized by more than 20% (since $115 million plus 20% equals $138 million, and 13 million shares times $12 per share equals $156 million) are disregarded if you are using Rule 457(a).

The calculation is done differently if you stayed with Rule 457(o). In that case, you multiply all of the shares being offered (including the additional shares) by the new price per share and then look to see if you have increased total deal size by more than 20%.[10] This makes sense, since Rule 457(o) looks to total deal size. To use our example above, 20% of the original maximum deal size equals $23 million. Because 13 million shares are being offered at a new price per share of $12, total deal size would be $156 million, which is more than the original deal size plus 20% ($115 million plus $23 million equals $138 million). As a result of the use of Rule 457(o), you could not use Rule 462(b) to register the full amount of the additional deal size.

ENDNOTES

[1] Rule 430A defines pricing information as: "information with respect to the public offering price, underwriting syndicate (including any material relationships between the registrant and underwriters not named therein), underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date."

[2] We're assuming that the prospectus at effectiveness is the same price range prospectus circulated to investors — in other words, that you have not refiled with a different range.

[3] The time of "effectiveness" is a key moment in the IPO. Among other things, securities cannot be sold until the registration statement is declared effective. Rule 430A allows an IPO to price as many as 15 business days after effectiveness, but it is most common to price on the day of effectiveness (which is also the time the underwriters will begin confirming orders). The actual closing of the transaction happens some number of days later.

[4] Note, however, that one consequence might be a material change to the ownership structure (for example, if the change resulted in a control group's retention (or loss) of control over the company).

[5] *Final Rule: Prospectus Delivery; Securities Transactions Settlement*, Release No. 33-7168 (May 11, 1995), at n.79 (explaining that the Rule 15c2-8(b) requirement to deliver a preliminary prospectus to any person expected to receive a confirmation of sale at least 48 hours prior to sending such confirmation "is satisfied by delivering a *preliminary prospectus* that is current *at the time of its delivery*" (emphasis added)). Moreover, two full business days is generally understood to satisfy the 48-hour requirement. In other words, if prospective investors received a preliminary prospectus at 9:00 a.m. on Monday morning, it would be appropriate to price on Tuesday after the market closes.

[6] There is a technical reason why it is generally preferable to choose Rule 457(o) at the outset. The SEC Staff informally takes the position that if you raise your price range in a preliminary prospectus contained in a pre-effective amendment from the range used to calculate the filing fee and you originally elected to proceed under Rule 457(a), then the 20% safe harbor contemplated by the instruction to paragraph (a) of Rule 430A is calculated on the basis of the original maximum aggregate offering price and not the offering price range contained in the price range prospectus distributed to investors. This qualification can be eliminated if you "voluntarily" pay an additional filing fee when you increase your offering range, but doing so defeats the primary benefit of Rule 457(a) (i.e., you do not need to go back to the SEC if you increase your estimated price per share). This SEC Staff position can be a trap for the unwary issuer who elected to use Rule 457(a) originally to calculate the filing fee and later seeks to upsize. There is no such hidden problem for users of Rule 457(o), as they are required to pay additional filing fees at the time they upsize their deal, and they know it.

[7] *See* CFI 640.05.

[8] You will also need to remember to include a new Exhibit 5.1 opinion on the legality of the additional securities being registered. This can be done by means of an immediately effective post-effective amendment under Rule 462(d). Note, by the way, that Rule 462(b) works for an increase in transaction size in a Rule 457(o) deal, even though the text of Rule 462(b) speaks only of "registering additional securities." *See* CFI 640.04.

[9] *See* CFI 640.03.

[10] *See* CFI 640.04.

SPECIFIC ISSUERS AND INDUSTRIES

Foreign Private Issuers

A foreign private issuer, or FPI, is an entity (other than a foreign government) incorporated or organized under the laws of a jurisdiction outside of the US unless:[1]

- more than 50% of its outstanding voting securities are directly or indirectly owned of record by US residents; and
- any of the following applies:
  - the majority of its executive officers or directors are US citizens or residents;
  - more than 50% of its assets are located in the United States; or
  - its business is administered principally in the United States.

> PRACTICE POINT
> An issuer that has more than 50% US ownership can still be a foreign private issuer. In order to fail to qualify as a foreign private issuer, a company needs to be both majority owned by US residents and meet any one of the three additional tests noted above.

An FPI may conduct an IPO in the United States, whether or not it is listed in its home country or another jurisdiction. FPIs enjoy a number of key benefits not available to domestic US issuers. These include:[2]

- FPIs may file financial statements in US GAAP, the English-language version of IFRS as issued by the International Accounting Standards Board, or local GAAP;
- FPIs are not required to file quarterly reports on Form 10-Q or current reports on Form 8-K;
- the financial information of FPIs goes stale more slowly;
- FPIs are exempt from the US proxy rules;
- FPIs are exempt from Regulation FD;
- annual reports of FPIs on Form 20-F are not due until 120 days after fiscal year end;
- FPIs can follow home-country governance practices as long as the differences between those and US practices are disclosed to investors; and
- FPIs enjoy exemptions from certain aspects of Sarbanes-Oxley.

Master Limited Partnerships

What Is an MLP?

A master limited partnership, or MLP, is an entity that meets three criteria:

- It is a state law entity that can be treated as a pass-through entity for federal income tax purposes. MLPs are most commonly formed as Delaware limited partnerships, but they also can be limited liability companies.
- It is publicly traded. That is, owners of MLP units have the ability to buy and sell interests in the MLP.
- It is listed on one of the major stock exchanges, such as the NYSE or Nasdaq.

PRACTICE POINT

For an MLP to be treated as a pass-through entity for federal income tax purposes, at least 90% of its gross income for each taxable year must be income that is considered "qualifying income" under the Internal Revenue Code of 1986, as amended. If an MLP fails to satisfy this test, the MLP will be taxed as a corporation for federal income tax purposes, thereby eliminating any advantage from operating as an MLP rather than a corporation. "Qualifying income" includes, among other things, income and gains derived from the exploration, development, mining or production, processing, refining, transportation (including pipelines transporting gas, oil, or products thereof), or the marketing of any mineral or natural resource, as well as certain passive-type income, including interest, dividends, and real property rents.

Cash Distributions and Equity Structure

An MLP is typically required by its partnership agreement to distribute all of its "available cash" to its unitholders on a quarterly basis; importantly, this distribution requirement is not driven by tax or securities laws. "Available cash" for these purposes is commonly defined as all cash on hand at the end of a quarter, plus working capital borrowings made after the end of the quarter, less (a) reserves established by the general partner to provide for the proper operation of the business or to comply with law and (b) reserves necessary to fund distributions for any of the next four quarters. This definition gives the MLP wide discretion in determining the amount of available cash. Most MLPs, nonetheless, offer public investors additional support for the cash distribution by issuing to the sponsor a class of equity interests called "subordinated units" that are subordinated to the public's right to receive cash distributions. In other words, public investors will get their cash distributions first before the sponsor receives cash distributions on its subordinated units. To compensate the sponsor for receiving subordinated units, the MLP typically also issues to the sponsor incentive distribution rights, or IDRs, as a form of carried interest. The IDRs allow the sponsor to receive an increasing share of cash distributions as certain distribution benchmarks for the limited partners are achieved. The IDRs provide a meaningful incentive for the sponsor to run the MLP's business in a manner that increases cash distributions to the limited partners, so that the sponsor can enjoy an increasing share of those distributions.

Securities Law Considerations

The SEC has implemented a number of unique disclosure requirements for MLPs. In the prospectus relating to its IPO, the typical MLP will state its intention to distribute a specified minimum level of cash distributions to its unitholders each quarter. This amount is referred to as the minimum quarterly distribution, or MQD. Because the MLP expresses its intention to make specified levels of cash distributions, the SEC requires MLPs to provide a forecast of the amount of cash they will have available for distribution over the 12-month period following the IPO and explain in some detail the basis for that forecast. An MLP also must present its available cash on a pro forma basis for each of the most recently completed fiscal-year and four-quarter period and, if this amount of available cash would have been insufficient to pay the target MQD, the MLP must prominently disclose (including on the prospectus cover) the fact that there would have been a shortfall in distributions relative to the MQD during the pro forma period.

Governance Considerations

Because it is typically structured as a state law limited partnership, an MLP is controlled by its general partner, so the "public company" board of directors sits at the general partner (or higher) level in the organizational structure. MLPs are exempt from many of the requirements of the stock exchanges, including the requirement to have an annual meeting of unitholders and the requirement that a majority of the board of directors be independent.

As is permitted under Delaware law, most MLPs provide in their partnership agreements that all common-law fiduciary duties of the general partner, the board of directors, and the officers are eliminated and are replaced

with the requirement that the board or officers act in good faith. The MLP partnership agreement typically defines good faith to mean a subjective belief that the action being taken is in the best interests of the partnership. In the event that a proposed transaction presents a conflict between the MLP and its sponsor, the partnership agreement provides that the conflict may be resolved through, among other means, approval of the unitholders or approval of a conflicts committee consisting solely of independent directors.

REITs

A real estate investment trust, or REIT, is a company that owns or finances income-producing real estate. REITs can be corporations, limited liability companies, or business trusts (some states have statutes creating real estate investment trust entities). Although REITs routinely have institutional investor owners, REITs were created to facilitate investments by individuals collectively in institutional-quality real estate assets without the individuals having to directly acquire and manage the real estate assets. REITs typically pay out all of their earnings to their shareholders in the form of dividends and benefit from being able to deduct those dividends from their federal corporate income taxes, although the REIT's shareholders do pay tax on the dividends received.

REITs can be categorized in a number of different ways. Equity REITs own the properties and charge rent to tenants; mortgage REITs loan money to borrowers against the collateral of real estate; hybrid REITs do both. Most REITs are public companies whose stocks trade on exchanges, typically the NYSE. A number of REITs, known as non-traded REITs or NTRs, conduct registered public offerings but do not list the shares for trading. There are also many different forms of private REITs. Internally managed REITs have traditional board-supervised management teams dedicated to the company's business. Externally managed REITs also have a board of directors but contract with the REIT's sponsor for day-to-day management. Listed equity REITs are almost always internally managed, while mortgage REITs and NTRs are routinely externally managed.

REITs invest in many types of real estate ranging from the traditional (such as office, industrial, hotel, health care, self-storage, multi-family, and retail properties) to the more recent, and sometimes esoteric (such as single family homes, data and document storage, farmlands, vineyards, timber lands, cell towers, and power transmission lines). Even prison properties have been held by REITs (the government is the tenant).

To be and remain a REIT, the company is obliged to meet a number of asset, income, and shareholder holdings tests. For example, a REIT must:

- invest at least 75% of its total assets in real estate;
- obtain at least 75% of its gross income from rents on real estate, interest on mortgages, or the sale of real estate assets;
- pay at least 90% of its taxable income out as dividends (although REITs normally pay out all taxable income to avoid tax on the amounts between 90% and 100%);
- be an entity taxable as a corporation;
- have at least 100 shareholders; and
- have no more than 50% of its shares held by five or fewer persons.

> PRACTICE POINT
>
> From a securities law standpoint, REITs are subject to virtually all of the same rules as other public companies, although there is a special form, Form S-11, and additional disclosure requirements for REIT IPOs (mainly contained in Industry Guide 5).

The complex contractual relationships between a YieldCo and its sponsor(s) are the subject of significant additional disclosures as these contracts are all related party transactions and subject to the heightened disclosure rules in Regulation S-K applicable to related party dealings. The ongoing corporate governance mechanisms needed to manage the conflicts that will arise between the YieldCo and its sponsor(s) going forward also call for significant additional disclosures.

Life Sciences

Crossover Investors

There has also been an emerging and growing trend in the life science industry where traditional public equity investors, including established mutual fund investors, cross over and invest in middle- to late-stage private life science deals in private placement transactions in advance of an IPO. Several factors have been the catalyst for this trend. First, the clinical development process for life science companies is capital intensive, and it is assumed that companies in this industry will eventually need to access the capital markets in order to continue to fund clinical development prior to receiving regulatory approval and becoming commercial companies. These private placement transactions provide necessary capital and flexibility to allow private companies to access the capital markets during favorable windows rather than as required to fund particular programs. In addition, for "hot companies," public investors are not always able to get a meaningful allocation in an IPO, in light of the time commitment necessary to understand a potentially complex scientific story. By investing in advance of an IPO, these crossover investors may be able to invest at a discount to the IPO price, thus enabling them to cost-average their investment while building an equity position so they are not entirely dependent on IPO allocations or after-market purchases to build their desired equity position in the public company. Further, these investors provide the company with an independent validation of the company's potential upon which the underwriters and other potential public investors may rely.

> PRACTICE POINT
>
> Often, with crossover investors, you will want to negotiate the lock-up agreement as early as possible, ideally as part of their initial investment. As traditionally public investors, they take a much more restrictive view of what they are willing to agree to in an underwriter lock-up and negotiating these up front will help ensure a smoother IPO process. Sensitive provisions include how to treat shares purchased in the IPO or whether they are promised most-favored nation treatment. In addition, these crossover investors may have a different level of sensitivity with respect to confidential information that they receive. Consideration should be given to what information will be shared with them in connection with their early investments versus what information is intended to be provided in the public offering setting.

Testing the Waters

TTW is especially popular in the life sciences industry where issuers tend to be pre-revenue companies with shorter operating histories. There is also a need to communicate highly scientific information to potential investors in this space, and TTW meetings can be used for that purpose.

PRACTICE POINT

Combining TTW and Confidential Submission

Where valuation is uncertain and the timing of the IPO depends on regulatory approval, such as biotech companies awaiting FDA approval of a new drug candidate, the ability of an EGC to submit confidentially and test the waters with prospective investors can provide additional flexibility. EGCs and their underwriters may gain useful feedback from prospective investors while maintaining confidentiality as they await both clearance from the FDA and market conditions that are favorable to the offering.

ENDNOTES

[1] Securities Act Rule 405; Exchange Act Rule 3b-4.

[2] For a comprehensive discussion of legal and practical issues facing FPIs when accessing the US capital markets, see our book, *The Latham FPI Guide: Accessing the US Capital Markets from Outside the United States*.

THE FINRA REVIEW PROCESS

FINRA's Corporate Financing Rule and Related Requirements

IPOs conducted, in whole or in part, in the United States in which a FINRA member firm participates as an underwriter, dealer, distributor, or in a similar capacity (the "Participating Member"[1]), are subject to FINRA Rule 5110 (also commonly referred to as the Corporate Financing Rule).[2] The purpose of Rule 5110 is to ensure that FINRA members do not participate in a public offering of securities in which the underwriting or other terms and arrangements relating to the distribution of securities are "unfair or unreasonable." In determining whether the compensation to be received by the Participating Members for the offering is "unfair or unreasonable," FINRA will look not only at the "spread" or underwriting discount to be received by the underwriters, but also at any other fees and arrangements or securities of the issuer that could be deemed to be "Underwriting Compensation"[3] received by (or payable to) the Participating Member within the period beginning 180 days prior to the date of the initial SEC confidential submission or public filing for a registered offering through the 60th day following the effectiveness date of the offering (this period is known as the "Review Period").

In the case of an IPO in the United States, as well as in respect of certain other public offerings, Rule 5110 requires that the underwriters for the offering file certain information with FINRA for review. With respect to documents FINRA allows registration statement or other documents that have been filed with the SEC to be filed with FINRA, solely by providing the relevant EDGAR identification or "accession" number, and provides that amendments to previously filed offering documents need to be filed only if they include changes that impact the underwriting terms and arrangements. The filing of industry-standard master forms of agreement is not required unless such forms are specifically requested by FINRA. Public offering filings will also need to include a representation as to whether any officer or director of the issuer, or any beneficial owner of 10% or more of any class of the issuer's equity and "equity-linked securities,"[4] is an associated person or an affiliate of a Participating Member. The FINRA filing must be made no later than three business days after the SEC filing or confidential submission, as applicable. In addition, IPOs and other offerings that are not otherwise exempt from FINRA's filing requirements must receive FINRA's approval (in the form of a "no objections letter") before any securities may be sold to investors.[5] This is the case even if the SEC has indicated it has no further comments and is ready to declare the registration statement effective.[6] As a result, it is of critical importance to incorporate FINRA's filing and other requirements into the anticipated timeline for the IPO.

If a participating FINRA member has a "conflict of interest" in connection with the offering (which may be the case, for example, if the member is an affiliate of the issuer or the member or its affiliates will be receiving 5% or more of the net proceeds from the offering to reduce or retire an outstanding credit facility or to redeem outstanding bonds or for any other purpose), FINRA Rule 5121[7] will also apply and may, in certain circumstances, require the participation in the offering of a "qualified independent underwriter," or QIU. Again, early identification of the potential application of this rule and the possible need to appoint a QIU will be key to ensuring that the offering is not unnecessarily delayed.

To assist in the determination of whether, and which, FINRA rules and requirements will be applicable to a particular offering, underwriters' counsel (typically in coordination with issuer's counsel) will send to the issuer, its officers, directors, and the beneficial holders of 10% or more of the issuer's equity and equity-linked securities a detailed questionnaire designed to elicit the required information. The issuer will also be asked to identify, and similar questionnaires will be sent to, the beneficial holders of any unregistered equity securities of the issuer that were acquired during the Review Period. In particular, the questionnaires are designed to identify (i) any Underwriting Compensation received or to be received by any of the Participating Members in connection with the public offering during the Review Period; and (ii) any association or affiliation of the issuer or any officer, director, 10% beneficial holder, or beneficial holder of recently acquired unregistered equity securities with any Participating Member in the offering. The information gathered in this process will be used to satisfy the requirements of Rules 5110 and 5121 and to make the associated FINRA filings, but the questionnaires themselves are not submitted to FINRA.

Although FINRA will accord confidential treatment to all documents and other information submitted to it for review under the Corporate Financing Rule,[8] note that certain information regarding items of underwriting compensation and other material relationships between the Participating Members and the issuer will, nonetheless, require disclosure in the prospectus pursuant to the provisions of the FINRA rules, as well as Regulation S-K.

ENDNOTES

[1] The term “Participating Member” means any FINRA member that is participating in a public offering, any affiliate or associated person of the member and their immediate family members, but does not include the issuer itself. The terms “participate,” “participation” or “participating” for this purpose means involvement in the preparation of the offering document or other documents, involvement in the distribution of the offering, furnishing of customer or broker lists for solicitation, or providing advisory or consulting services to the issuer related to the offering. A broker dealer solely providing advisory or consulting services to the issuer as an independent financial adviser are excluded from the definition of “participating member.”

[2] Rule 5110 was substantially amended in September 2020. Issuers categorized as “direct participation programs” (those issuers whose primary equity securities have flow-through tax consequences, such as limited partnerships or royalty trusts, as well as non-listed real estate investment trusts) must meet the requirements of Rule 2310 as well as the filing requirements of Rule 5110.

[3] “Underwriting Compensation” is defined as any payment, right, interest, or benefit received or to be received by a participating member from any source for underwriting, allocation, distribution, advisory and other investment banking services in connection with a public offering. In addition, underwriting compensation shall include finder’s fees, underwriter’s counsel fees, and securities. Amended Rule 5110 also includes expansive Supplementary Materials, which provide additional context and guidance as to what the term underwriting compensation is intended to encompass.

[4] The term “equity-linked securities” means any security that are convertible or exchangeable into an equity security.

[5] Rule 5110 provides exemptions from the FINRA filing requirements for certain public offerings. Such exemptions are not available for companies during the IPO process. However, the participating FINRA members must, nonetheless, comply with the underwriting compensation limitations and other requirements of Rule 5110.

[6] Typically, the SEC will not declare the registration statement effective until it has received an indication from FINRA that FINRA has no objection to the underwriting terms for the offering.

[7] Direct participation programs and real estate investment trusts are not “entities” for the purposes of Rule 5121. Therefore, the underwriters cannot have a “conflict of interest” in connection with an offering by such an issuer.

[8] *See* FINRA Rule 5110(a)(4)(D).

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BEGINNING LIFE AS A PUBLIC COMPANY

Overview

As you prepare to begin life as a public company, you will need to ensure that you have appropriate policies and processes to comply with your reporting and compliance obligations.

- *Insider trading*. Long before your first day as a public company, you should inform all of your personnel, and formally train more senior employees, about insider trading laws. Public companies ordinarily have a written policy that governs the ability of employees, directors, contractors, and other related persons to trade in the company's securities. The terms of these policies vary depending on factors such as the size of the company and the likely flow of financial and other sensitive information within the enterprise.

- *Regulation FD*. As soon as your stock begins trading publicly, you will become subject to Regulation Fair Disclosure. Regulation FD requires broad dissemination, via public disclosure in a press release, Form 8-K filing, pre-announced webcast, or other acceptable means, of any material nonpublic information selectively disclosed to a stockholder, investment analyst, or other types of securities professionals. The public disclosure must occur either simultaneously with an intentional selective disclosure or promptly after an inadvertent selective disclosure. Your senior management and others must understand Regulation FD and know that a violation of Regulation FD can result in significant personal liability.

- *Quarterly close process*. Virtually all companies that prepare to go public have thought about the importance of a timely and well-organized quarterly close process. Many pre-IPO companies spend a year or more going through a mock reporting process to test their readiness for the real thing. That's always a good practice, but it's also only part of the drill.

- *Disclosure controls and procedures*. The SEC requires public companies to have a reporting system that provides reasonable assurance that all required information is timely reported. This is known as disclosure controls and procedures, or DC&P. Each time you file a periodic report, you must include the conclusion of your CEO and CFO regarding the effectiveness of your DC&P.

- *Internal control over financial reporting*. Public companies must have a system of financial controls that provide reasonable assurance that the financial statements are accurate in all material respects. Each periodic report must disclose material changes in internal control over financial reporting, or ICFR, and every annual report must include management's conclusion on the effectiveness of ICFR. After an initial phase-in period, most public companies (i.e., those with a public float of more than $75 million) must also obtain an audit opinion attesting to the effectiveness of their ICFR. For EGCs, the phase-in period lasts until they lose EGC status (up to the first year-end after the fifth anniversary of their IPO). For other companies, the ICFR audit is required with their second annual report.

- *CEO and CFO certifications*. The CEO and CFO must file personal certifications with each periodic report attesting to the accuracy of the report as a whole and other matters, including their DC&P conclusion, and that they have designed DC&P to ensure accurate and timely reporting. The certifications also cover the design and evaluation of effectiveness of ICFR. Your CEO and CFO will want to establish a process to enable them to make their personal certifications. Often, companies use sub-certifications by direct reports and lower-level personnel for this purpose.

- *Disclosure committee*. Many public companies use a disclosure committee to help design, maintain, and implement their DC&P.

- *Periodic reporting*. An obvious consequence of going public is the need to file quarterly reports on Form 10-Q and annual reports on Form 10-K. Public companies nearly always file their periodic reports on or before the deadline, and timely reporting is important to show that you have your act together. Moreover, a late filing affects your eligibility to use a more streamlined SEC registration process known as short-form registration on Form S-3.

- *Current reporting*. About two dozen types of events that the SEC considers "presumptively and unquestionably material" will trigger a requirement to file within four business days a current report on Form 8-K to provide investors with information about the recent event. That said, about 15 of the triggering events are more significant than the others because a late report will affect Form S-3 eligibility. For those Form 8-K filings, a late filing is like a late periodic report. Other late filings, however, do not affect short-form eligibility. You should pay close attention to the distinction in designing your reporting systems.
- *Giving guidance*. Chances are, your company will be among the nearly nine out of 10 companies that give some form of financial guidance. If so, you will need to sort out a number of issues that arise in that context, including the occasions that may warrant updating your guidance and how to do so.
- *Section 16 reporting*. This involves real-time reporting of sometimes highly complex issues. As a result, you will need coordination, communication, and advance planning to do it right. Section 16 reporting persons (discussed below) must file deceptively simple two-page reports that disclose, initially, their securities ownership and, on an ongoing basis, each change in ownership. Most of these reports are due within two business days, and securities ownership depends on a complex set of rules and SEC guidance that define the "beneficial ownership" that these reports cover.
- *Schedule 13D and Schedule 13G reporting*. Persons, or members of a group, must file Section 13 reports after acquiring beneficial ownership of more than 5% of a class of equity securities of an SEC-reporting company. Public companies should know how these reports work to understand filings by significant stockholders and groups and, on occasion, to manage their own reporting obligations if they have significant holdings in another company.

Exchange Act Reporting

After your IPO, you will be required to begin SEC reporting under the Exchange Act with the SEC. This includes filing current reports on Form 8-K, quarterly reports on Form 10-Q, annual reports on Form 10-K, and proxy statements on Schedule 14A.

When Are Exchange Act Reports Due?

During the first fiscal year that an IPO company is public:

- *Current reports on Form 8-K* must generally be filed within four business days of the event that triggers the 8-K.
- *Quarterly reports on Form 10-Q* must be filed with the SEC within 45 days after the end of each of the first three fiscal quarters. Reports on Form 10-Q are not required for the fourth quarter of a fiscal year since the fourth quarter results are covered by the financial statements included in the Form 10-K.
- *Annual reports on Form 10-K* must be filed within 90 days after the end of the first fiscal year.
- *Proxy statements on Schedule 14A* must generally be filed within 120 days after the end of the fiscal year.[1]

After an IPO company has been a reporting issuer for a full year, the 10-Q and 10-K deadlines can accelerate depending on the size of the company's public float.

Current Reports on Form 8-K

Current reports on Form 8-K are generally required to be filed with the SEC within four business days after the occurrence of a reportable event.[2] Reports furnished to satisfy Regulation FD obligations, however, must be filed simultaneously with the Regulation FD disclosure (for intentional disclosures) or promptly (for non-intentional disclosures). "Promptly," for these purposes, means as soon as reasonably practicable but in no event after the later of 24 hours or the commencement of the next day's trading on the NYSE.[3]

We summarize the required Form 8-K disclosure items in Annex D.

Quarterly Reports on Form 10-Q

Under Exchange Act Rule 13a-13(a):

- Quarterly reporting starts with the first fiscal quarter following the most recent fiscal year for which full financial statements were included in the registration statement, or, if the registration statement included interim financial statements subsequent to the most recent fiscal year-end, for the first fiscal quarter subsequent to the quarter reported on in the registration statement.
- The first quarterly report is due within the later of:
  - 45 days following the effective date of the registration statement; or
  - the due date for the report that would otherwise have applied had the company been public.

For example, if a calendar year-end company's S-1 goes effective on October 15 on the basis of June 30 interim numbers, the first 10-Q would cover the third quarter, ending September 30. That filing would normally be due by November 14 (i.e., 45 days after September 30). But, under Rule 13a-13(a), you can postpone the first filing to November 29 (i.e., 45 days after October 15).

We summarize the requirements of Form 10-Q in Annex D.

Annual Reports on Form 10-K

An IPO company's first annual report on Form 10-K must be filed with the SEC within 90 days after the end of its fiscal year. If the 90th day falls on a holiday or a non-business day, then the report should be filed the next business day.

We summarize the requirements of Form 10-K in Annex D.

Proxy Statements

All public companies must provide stockholders with a proxy statement in connection with their annual meeting. Proxy statements must comply with Sections 14 and 14A of the Exchange Act and the SEC rules governing the solicitation of stockholders' proxies. Generally, a company's proxy statement is due within 120 days after the end of its fiscal year.[4] MLPs are subject to the requirements of the Exchange Act, but this typically will not include an annual proxy statement, as there is no need to conduct an annual meeting to elect directors because the directors are appointed by the sponsor.

We summarize the requirements of Schedule 14A in Annex D.

Pending Material M&A Transactions

Material merger negotiations or major corporate acquisitions can pose particularly difficult Exchange Act reporting questions. There is no *general* duty under the securities laws to disclose merger or other similar transaction negotiations until there is a material definitive agreement.[5] However, if a public company is selling or buying securities, this may give rise to an obligation to disclose a pending material transaction even if not completed, for example under Exchange Act Rule 10b-5. In addition, Regulation S-X Rule 3-05 may require financial statement disclosures about material acquisitions that are probable.

Absent some other duty to disclose, once public, an IPO issuer that is holding merger negotiations need not disclose the existence of those negotiations, or it may choose to respond to press inquiries by stating "no comment."

PSLRA Safe Harbor[6]

The Private Securities Litigation Reform Act of 1995 (PSLRA) provides a safe harbor for SEC reporting issuers for certain types of written or oral forward-looking statements,[7] including:[8]

- projections of revenues, income, losses, earnings, and other financial items;
- statements of the plans and objectives of management for future operations; and
- statements of future economic performance.

The PSLRA does not, however, protect forward-looking statements made in connection with IPOs or those statements that are included in financial statements prepared in accordance with GAAP.[9]

In order to take advantage of the PSLRA safe harbor, among other things, the forward-looking statement must be identified as such, and it must be accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.[10] As a practical matter, issuers try to bring themselves within the safe harbor with respect to written forward-looking statements by inserting cautionary language, noting that the relevant document contains forward-looking statements and by keeping current, in a widely available public document such as a periodic SEC filing, the key market variables and risk factors affecting the issuer's business. This is the reason many earnings announcements and other press releases routinely include long disclaimers. As for forward-looking oral statements, a spokesperson will often make a formal statement to the following (rather stilted) effect:

> The statements I am about to make include statements about our plans and future prospects for the company and our industry that are forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. Our actual performance may differ materially from performance suggested by those statements. I encourage you to review the 'Cautionary Statement' section of our annual report on Form 10-K filed with the SEC for additional information concerning factors that could cause those differences.

We suggest that this statement be made at the beginning of each conference call with investors or analysts. Some issuers have the statement made by the moderator of the call, rather than by an officer.

Regulation FD

All public companies must comply with Regulation FD. Regulation FD broadly requires that when a public company, or any person acting on its behalf, discloses "material nonpublic information" regarding the company or its securities to certain enumerated persons, the company must concurrently make public disclosure of the same information.

Disclosure to Securities Market Professionals or Securityholders

Regulation FD's disclosure requirement applies if material nonpublic information is provided to certain people, including:

- securities analysts;
- investment advisers;
- institutional money managers;
- hedge funds;
- private equity funds; and
- holders of the company's securities, if it would be "reasonably foreseeable" that the holders will trade on the basis of the information.

Certain communications to these persons are exempt from this disclosure requirement, including disclosures to persons who owe a duty of trust or confidence to the company, such as the company's lawyers, bankers and accountants, disclosures to persons who expressly agree to maintain the disclosed information in confidence, and disclosures made in connection with most securities offerings.

Material Nonpublic Information

What constitutes material nonpublic information is not defined in Regulation FD and is not amenable to a precise answer. In general, an IPO issuer should assume that information is material if a reasonable investor would consider the information to be important in deciding whether to buy, sell, or hold securities of the company. You should also bear in mind that regulators and plaintiffs will assess materiality using the 20/20 vision of hindsight.

Timing of Disclosure

The timing of the required public disclosure depends on whether the selective disclosure was intentional or unintentional.

- *Intentional.* For intentional selective disclosure, the company must make public disclosure simultaneously with the selective disclosure. In this context, a selective disclosure is intentional when the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is disclosing is both material and nonpublic.
- *Unintentional.* For unintentional selective disclosure, the company must make public disclosure as soon as reasonably practicable (but no later than the later of 24 hours or the commencement of the next day's trading on the NYSE) after a senior executive of the company learns that there has been a non-intentional disclosure of material nonpublic information.

Form of Disclosure

Public disclosure can be made by filing a Form 8-K with the SEC, furnishing a Form 8-K to the SEC, or by disseminating the information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution to the public. The company should consider disclosing the information in a press release, providing notice through a press release and/or website posting of a conference call or webcast regarding the information, and then holding the conference call in an open manner, permitting investors to listen in either by dialing in to a toll-free number or by logging on to a webcast.

It is unclear what constitutes sufficient dissemination of information to satisfy public disclosure by means other than filing or furnishing a report on Form 8-K. Although the SEC has issued guidance regarding the factors relevant to determining if posting information to a company's website makes it "public" for purposes of Regulation FD, a company's website generally is not yet viewed as a primary means for Regulation FD-compliant public disclosure.

Non-GAAP Financial Measures

Many issuers choose to disclose measures of financial performance or liquidity that, while derived from GAAP figures presented in a company's financial statements, are not themselves calculated in accordance with GAAP. EBITDA is perhaps the best-known (and most widely used) non-GAAP financial measure.

The SEC's rules (adopted in response to Section 401(b) of Sarbanes-Oxley) limit the use of non-GAAP financial measures in various ways. First, Regulation G applies to any public disclosure of non-GAAP financial measures.[11] Second, Item 10(e) of S-K layers on additional requirements for disclosures in Securities Act and Exchange Act filings (and earnings releases furnished to the SEC under Item 2.02 of Form 8-K).[12]

Regulation G

A non-GAAP financial measure under Regulation G is defined broadly as a numerical measure of financial performance that excludes (or includes) amounts that are otherwise included in (or excluded from) the comparable measure calculated and presented in the financial statements under GAAP.[13]

The term "non-GAAP financial measure" carves out certain items including:

- operating measures and ratios or statistical measures calculated using financial measures determined in accordance with (1) GAAP (e.g., GAAP sales per square foot and operating margin calculated by dividing GAAP revenues into GAAP operating income) or (2) measures that are not themselves non-GAAP financial measures;[14] or
- financial measures required to be disclosed by GAAP, SEC rules or an applicable system of regulation of a government, governmental authority, or a self-regulatory organization (e.g., segment measures required by ASC 280).[15]

Under Regulation G, if a public company discloses a non-GAAP financial measure, it must:[16]

- present the most directly comparable financial measure calculated in accordance with GAAP; and
- quantitatively reconcile the differences between the non-GAAP financial measure and the most directly comparable GAAP financial measure.[17]

In addition, Regulation G contains an antifraud prohibition — that is, an issuer may not make any non-GAAP financial measure public if the measure contains a material misstatement or omission.[18]

Regulation S-K Item 10(e)

For purposes of Item 10(e), the term "non-GAAP financial measures" has the same meaning as under Regulation G.[19] Under Item 10(e), if a public company includes a non-GAAP financial measure in an SEC filing (or an earnings release furnished under Form 8-K Item 2.02) it must also include:[20]

- a presentation, with equal or greater prominence, of the most directly comparable GAAP financial measure;
- a quantitative reconciliation of the differences between the non-GAAP financial measure and the most directly comparable GAAP financial measure;[21]
- a statement why management believes the non-GAAP financial measure provides useful information for investors; and
- to the extent material, a statement of the additional purposes for which management uses the non-GAAP financial measure.[22]

Furthermore, Item 10(e) prohibits in SEC filings (but not in an earnings release furnished under Form 8-K Item 2.02), among other things:[23]

- non-GAAP measures of *liquidity* that exclude items requiring cash settlement, other than EBIT and EBITDA;
- non-GAAP measures of *performance* that eliminate or smooth items characterized as non-recurring, unusual, or infrequent when it is reasonably likely that a similar charge or gain will recur within two years, or there was a similar charge or gain within the prior two years;
- the presentation of non-GAAP financial measures on the face of the financial statements, in the accompanying notes, or on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X; and

- using a name for non-GAAP financial measures that is the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.

The SEC Staff monitors the use of non-GAAP financial measures and has issued several interpretations of SEC rules. The guidance covers various areas, such as ensuring equal or greater prominence for GAAP measures, appropriate presentation of per-share measures, handling of forward-looking non-GAAP financial measures without reconciliation, exclusion of recurring items, consistency in the inclusion or exclusion of gains or charges in non-GAAP financial measures over time, tailored recognition and measurement methods for specific financial statement line items (e.g., revenue), accurate labeling and clear descriptions of non-GAAP measures, and the recognition that disclosure alone may not be sufficient to address misleading non-GAAP measures.[24]

Earnings Guidance

Every IPO company must decide whether, and to what extent, to give the market guidance about future operating results. Questions from the buy side will begin at the IPO road show and will likely continue on every quarterly earnings call, and at investor meetings and conferences between earnings calls. The decision whether to give guidance, and how much guidance to give, is an intensely individual one. There is no one-size-fits-all approach in this area. The only universal truths are (1) an IPO company should have a policy on guidance, and (2) the policy should be the subject of careful thought.[25]

A Review of the Basics

Public companies are not required by stock exchange rules or the SEC's rules to provide investors with projections of future operating results.[26] However, investors and analysts can be demanding, and many public companies elect to provide the market with guidance about their expectations for the future. The decision to give guidance can spring from a desire to share good news with investors in order to help the market get to a higher valuation for the company's stock, or it can spring from a desire to correct analysts' overly optimistic earnings expectations. Whatever the motivation, the legal landscape should be carefully understood before management takes the plunge. It is possible to give guidance in a deliberate and careful way without incurring undue liability. It is also possible to make critical mistakes that can have significant economic consequences under the federal securities laws and in the financial markets.

How Far to Go

The most basic decision is whether to give guidance on a quarter-by-quarter basis or on a year-by-year basis. The next question is how far forward to project results. There is no one-size-fits-all answer here. Some businesses are stable and predictable. For them, predicting earnings on a quarter-by-quarter basis may be an option. Many energy companies, for example, have pre-sold the majority of their output multiple years into the future. A company with a predictable earnings stream is in a very different position than a company with unpredictable operating results.

Businesses with lumpy revenue streams or that experience seasonality or weather issues may not feel they can make quarterly projections prudently. A September 2012 survey performed by the National Investor Relations Institute (NIRI) found that guidance-giving companies most often communicate annual estimates only. The most common frequency for communicating those estimates is on a quarterly basis.[27] Even the most stable businesses typically elect not to provide earnings guidance beyond the year in progress, although some businesses will provide long-term estimates or goals for longer periods.

What to Say

Directly related to the decision of how far forward to look when guiding investors is the decision of what to say about the periods in question. Guidance takes many forms, not just earnings per share for the year. Some companies will guide investor expectations by giving a range of anticipated earnings per share or simply by

saying that they are “comfortable with the Wall Street analysts’ consensus” regarding earnings per share for the year. However, explicitly blessing a specific analyst’s estimate can be viewed under the case law as “adopting” it, which has the same liability considerations as issuing guidance directly. This casual approach to guidance usually does not offer an opportunity to include appropriate cautionary disclosure and should generally be avoided.

Many companies prefer to provide the market with forecasts of an Adjusted Net Income or Adjusted EBITDA metric that excludes the impact of expected (or unexpected) non-recurring, non-cash and/or unusual items. Adjusted measures of operating performance are easier to predict accurately since they are unaffected by many of the statement of comprehensive income items that impact earnings per share. Of course, public release of these non-GAAP financial measures will need to comply with Regulation G.[28]

Other companies stop their numerical guidance at the revenue line, projecting only a targeted revenue growth in percentage terms. Revenue-only guidance may be supplemented with a comment about profit margins — “We expect to see an improvement in profit margins as we do not expect anticipated revenue increases to be accompanied by a corresponding increase in our fixed costs” — or not. Still another form of guidance involves non-financial measures — “We expect to open 25 new company-owned stores this year” or “We currently expect to complete construction of our new manufacturing facility in the fourth quarter of 2026.”[29] There is no limit to the forms that guidance can take. What is appropriate for one company in one industry may be totally inappropriate for another company, even one in the same industry.

Guidance Guidelines

Scope

Each IPO company’s decision of what to say and how far to go needs to be made in light of the nature of its industry and the circumstances of its business. Careful thought should be given to the trade-off that going further down the statement of comprehensive income presents. More precise information will please analysts in the short run, but it can create sharper liability issues in the long run. Much more agility is needed to predict earnings per share successfully than to predict revenue, Adjusted Net Income, Adjusted EBITDA, or another “normalized” measure of performance that is less likely to be affected by surprises on the business front or in the accounting literature. We recommend that companies only give guidance on a metric that they feel comfortable they can accurately predict.

Cautionary Statements

All good guidance should be accompanied by dynamic, carefully tailored, cautionary statements. These disclaimers should temper the predictions of a rosy future with a balanced discussion of what could go wrong. Risk factor disclosure should also be appropriately updated with each publication. Do not just use the same old boilerplate from prior years. It is also helpful if some of the material assumptions on which the guidance is based are disclosed and if the company’s risk factors tie to the achievement of those assumptions. A 10% increase in earnings that is premised on cutting redundant overhead costs is not the same as a 10% increase that is premised on a substantial increase in market share. The point of cautionary language is to explain what goes into the sausage so investors can make their own informed decisions about the likelihood of the projected outcome actually being realized. Good cautionary disclosure can be an effective insurance policy against future liability if the guidance turns out to be incorrect.

The Delivery

It is best if guidance and the related cautionary disclosures are given in a controlled environment. The most popular forums are the year-end or quarter-end earnings release and the related quarterly earnings calls. The press release and the script for an earnings call are usually the subject of a greater degree of oversight than any casual encounter, and earnings calls are always Regulation FD-driven events since the public is invited to listen in and a recording is typically available on the company’s website for a period of time after the call. Many companies prefer to give guidance orally on their earnings calls and do not produce a written version of their statements for the

related earnings press release. For a CFO who is comfortable sticking tightly to a prepared script, this is a perfectly acceptable choice. For others, putting it down in writing in the earnings release may be a wise precaution.

The earnings release or call should include carefully tailored disclaimer language, and the actual guidance statements should be carefully vetted and scripted. Oral forward-looking statements should be accompanied by an oral statement that cautionary disclosures are contained in a readily available written document. Similarly, statements regarding non-GAAP financial measures should identify where the required reconciliations can be found.

Anticipating Questions

There are at least three good reasons to anticipate the questions about guidance that analysts are likely to ask on an earnings call. First, there are some questions the company will want to answer. If the answer has not been scripted, it may not come out with all of the nuance that is appropriate. Second, there are some questions the company will not want to answer. It helps to have worked out in advance which questions the company is prepared to answer and which questions merit only a “no comment” response. Finally, Regulation FD frowns on answering follow-up questions in private calls or meetings where the public does not have access, so what is said on the earnings call will set the boundaries of what can be discussed in private meetings between earnings calls. Answering questions that were asked on the earnings call, or providing additional detail on topics that have been covered at an appropriate level of materiality on the earnings call, will generally be acceptable in follow-up, one-on-one investor meetings. Venturing into territories that were not covered on the earnings call in subsequent private meetings can raise selective disclosure issues under Regulation FD.

Updating or Confirming Prior Guidance

When management begins to doubt whether the company’s actual results will be in line with prior guidance, the decision whether to make a public statement to that effect depends entirely on context — all facts and circumstances must be considered. As always, the analysis should start with a review of what was said in the first place. Did the company say that it would confirm annual guidance every quarter? Did the company say that it would not? Is it obvious from the facts that the prior guidance is no longer reliable (due to an important acquisition, disposition, or industry development)?

If a company expects to exceed its prior guidance by a modest amount, it is probably safe to keep that information confidential and pleasantly surprise the investment community. On the other hand, if a company is reasonably sure that it will miss the mark by a material amount, intervening events or market pressures may force an out-of-sequence guidance update. Context is everything. For a company repurchasing its own shares or one involved in a going-private transaction, the fact that current guidance is materially low may be problematic. In the context of a securities offering, the opposite is true — materially high guidance is the concern. Managing expectations to maintain credibility, provide transparency, and avoid unpleasant surprises is always the goal.

PRACTICE POINT

Ten Rules for Giving Good Guidance

1. Designate a limited number of company personnel to communicate with analysts and investors about future plans and prospects.
2. Adopt an appropriate guidance policy early and follow it.
3. Do not rely on boilerplate. Explain the assumptions underlying each forward-looking statement and disclose the risks that may cause anticipated results not to be realized — the cautionary statements should be tailored to fit the guidance.
4. Have prepared remarks reviewed by counsel and stick to the script.
5. Remember Regulation FD: Disclose guidance and other material information only in an FD-compliant manner.
6. Do not be afraid to say "no comment" in response to questions or deflect uncomfortable questions by restating the company's guidance policy.
7. Do not comment on or redistribute analysts' reports, and only review advance copies of analysts' reports (or selected excerpts) for factual errors.
8. Remember Regulation G: Include appropriate disclosure for non-GAAP financial measures where required.
9. Continually evaluate whether changed circumstances argue in favor of an update of prior disclosures.
10. Be particularly sensitive to Rules 1 through 9 in the context of an intervening event between quarterly earnings releases and calls, such as an offering of securities, share repurchase program, or acquisition, or when insiders are buying or selling company securities.

The Sarbanes-Oxley Act of 2002

The US Congress enacted Sarbanes-Oxley in response to several high-profile, accounting-related scandals at US companies. Sarbanes-Oxley instituted a number of significant changes for public companies in the United States that were designed to enhance the reliability of financial information published by public companies and promote investor confidence in US markets.

Sarbanes-Oxley applies to IPO companies once they have filed their IPO registration statement.[30] We highlight below some key aspects of Sarbanes-Oxley.

Internal Control Over Financial Reporting – Section 404

Section 404 of Sarbanes-Oxley contains two related requirements. Section 404(a) requires an assessment by management of effectiveness of the issuer's ICFR, while Section 404(b) requires an attestation report of the issuer's independent auditors on management's assessment. Compliance with Section 404 can be a major undertaking for a newly public company. The SEC has adopted rules to allow an IPO company to wait until its second annual report to provide management's Section 404(a) assessment and its auditor's Section 404(b) attestation.[31]

Issuers that are "large accelerated filers" or "accelerated filers" must comply with both Sections 404(a) and 404(b), starting with the second annual report on Form 10-K following the IPO.[32] By contrast, issuers that are neither large accelerated filers nor accelerated filers, and those that are EGCs, are required only to provide management's assessment of ICFR under Section 404(a).[33]

Management may not determine that an issuer's ICFR is effective if it identifies one or more material weaknesses in the issuer's ICFR.[34] The SEC has adopted a definition of the term material weakness in Exchange Act Rule 12b-2 and Rule 102 of Regulation S-X. A "material weakness" is a deficiency, or a combination of deficiencies, in ICFR, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis.

Disclosure Controls and Procedures

In addition to ICFR, an issuer must maintain and evaluate the effectiveness of its "disclosure controls and procedures."[35] There is, however, no required auditor's attestation with respect to disclosure controls and procedures.

Disclosure controls and procedures mean controls and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the Exchange Act is: (i) timely recorded, processed, summarized, and reported; and (ii) accumulated and communicated to the issuer's management to allow for timely decisions about disclosure.[36] There is substantial overlap between the concepts of disclosure controls and procedures and ICFR, although there are some elements of each term that are not subsumed within the other. In particular, "disclosure controls and procedures will include those components of internal control over financial reporting that provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles."[37] By contrast, disclosure controls and procedures would not necessarily include accurate recording of transactions and disposition or safeguarding of assets, which would remain components of internal control.[38] The existence of a material weakness in ICFR may not prevent management from concluding that an issuer's disclosure controls and procedures are effective, but, in practice, this can be a challenging determination.

Certification Requirements – Sections 302 and 906

Sarbanes-Oxley contains two overlapping certifications that must be provided by an issuer's CEO and CFO (or persons performing similar functions): the Section 302 certification and the Section 906 certification. Section 302 amends the Exchange Act, whereas Section 906 amends the US federal criminal code. Under the rules adopted by the SEC, both certifications must be included with an IPO issuer's annual report on Form 10-K and its quarterly reports on Form 10-Q.[39] Neither certification is required, however, for current reports on Form 8-K.[40]

Listed Company Audit Committees – Rule 10A-3

Exchange Act Rule 10A-3 (which implements Section 301 of Sarbanes-Oxley) requires that each audit committee member has to be a member of the board of directors and meet certain independence requirements. To be "independent," an audit committee member is barred from accepting any compensatory fees from the issuer or any subsidiary, other than in his or her capacity as a member of the board, and may not be an "affiliated person" of the issuer. The definition of affiliated person includes a person who, directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with the specified person. There is, however, a safe harbor for certain non-executive officers and other persons who are 10% or less shareholders of the issuer.

Rule 10A-3 also requires that:

- the audit committee must be "directly responsible" for the appointment, compensation, oversight, and retention of the external auditors, who must report directly to the audit committee;
- the audit committee must establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal controls, or auditing matters, and the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters;
- the audit committee must have the authority to engage independent counsel and other advisers as it deems necessary to carry out its duties; and

- the issuer must provide the audit committee with appropriate funding for payment of external auditors, advisers employed by the audit committee, and ordinary administrative expenses of the audit committee.

Under the NYSE and Nasdaq rules, IPO issuers are entitled to certain exemptions during a transitional period following their public offering:[41]

- *For the first 90 days* from the date of listing (under Nasdaq rules) or the date of effectiveness of the IPO registration statement (under NYSE rules), all but one of the members of the audit committee may be exempt from the independence requirements.
- *For the first year* after the date of listing (under Nasdaq rules) or the date of effectiveness of the IPO registration statement (under the NYSE rules), a minority of the members of the audit committee are exempt from the independence requirement (so, for example, only two out of three members need to be independent for days 91 through 365).

These transitional rules effectively apply in the same manner to EGCs, controlled companies, and all other IPO issuers.

An IPO issuer will have to disclose in any proxy or information statement filed with the SEC and in its annual report that it has relied on one of these exemptions, and the company's assessment of whether, and if so, how, such reliance on an exemption would materially adversely affect the ability of the audit committee to act independently.

Audit Committee Financial Expert

Sarbanes-Oxley requires that at least one member of a public company's audit committee have accounting or financial management expertise that would qualify that person as an audit committee financial expert.[42] The SEC defines an audit committee financial expert as someone who has: (i) education and experience as a public accountant, auditor, principal financial officer, principal accounting officer, or controller, or experience in one or more positions that involve performance of similar functions; (ii) experience actively supervising persons in the positions above; (iii) experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing, or evaluation of financial statements; or (iv) other relevant experience, and who has:[43]

- an understanding of GAAP and financial statements;
- the ability to assess the general application of such principles 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 company's financial statements, or experience actively supervising one or more persons engaged in such activities;
- an understanding of internal controls and procedures for financial reporting; and
- an understanding of audit committee functions.

A public company must disclose in its Form 10-K the name of at least one audit committee financial expert on the company's audit committee and, if there is not an audit committee financial expert on the audit committee, an explanation of why there is not an audit committee financial expert.

Loans to Executives – Section 402

Under Section 402 of Sarbanes-Oxley (which added Section 13(k) to the Exchange Act), it is illegal for an issuer to "extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof)" of that issuer. Section 402 covers both direct extensions and indirect extensions of credit, including through subsidiaries.

Section 402 contains certain exemptions, including:

- any loan existing on July 30, 2002, unless its terms are materially modified or the loan is renewed;
- consumer credit and extensions of credit under a charge card; and
- certain bank loans.

The broad sweep of Section 402, coupled with the absence of SEC guidance, has raised a number of thorny questions for issuers. In response, Latham & Watkins (together with 24 other law firms) issued a paper concluding that the following should generally be regarded as permissible under Section 402:[44]

- cash advances to reimburse travel and similar expenses while performing executive duties;
- personal usage of a company credit card and company car, and relocation expenses required to be reimbursed;
- "stay" and "retention" bonuses subject to repayment if an employee terminates employment before a designated date;
- indemnification advances for litigation;
- tax indemnity payments to overseas-based executive officers;
- loans by a parent or shareholder that is a foreign private issuer, but not subject to Sarbanes-Oxley, to the executive officer of a wholly owned subsidiary that is subject to Sarbanes-Oxley, if the subsidiary has not "arranged" the loan and the loan is made by reason of service to the parent, not the subsidiary; and
- most "cashless" option exercises.

Forfeiture of Bonuses – Section 304

Section 304 of Sarbanes-Oxley provides that if an issuer is required to "prepare an accounting restatement due to the material non-compliance of the issuer as a result of misconduct" with any financial reporting requirements under the securities laws, the CEO and CFO must reimburse the issuer for:

- all bonuses or other incentive-based or equity-based compensation received from the issuer during the 12-month period following the first public issuance or filing with the SEC (whichever is first) of the financial document embodying the financial reporting requirement; and
- any profits received from the sale of the issuer's securities during that 12-month period.

Incentive-Based Compensation Clawbacks

Listing standards adopted by Nasdaq and the NYSE require listed issuers (including FPIs) to adopt and implement incentive-based compensation clawback policies and to make applicable disclosures in their SEC filings.[45]

The clawback policy must be in writing and provide that a listed issuer that is required to prepare an accounting restatement must recover from any current or former executive officer incentive-based compensation erroneously paid based on the misstated financial measure during the three most recently completed fiscal years prior to the restatement.[46] Recovery must be made "reasonably promptly" and without regard to misconduct by any executive officer from whom recovery is sought.[47]

The exchanges were directed to impose these requirements by – and the listing standards track the language of – Exchange Act Rule 10D-1, adopted in 2022 by the SEC to implement the original requirement under Dodd-Frank.[48] Exchange Act Rule 10D-1 broadens the statutory mandate in two respects:

- First, the rule requires compensation recovery not only upon so-called "Big R" restatements, which correct errors that are material to previously issued financial statements, but also upon "little r" restatements, which correct only immaterial prior-period errors that (despite their immateriality to previously issued financial statements) would result in a material misstatement of an as-yet unreported current period if the historical errors were left uncorrected in the current period or if the error correction were made in the current period.[49] As a result, compensation will be subject to clawback after correction of exclusively immaterial errors even though the statutory prerequisite for a clawback event is "an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws."
- Second, the listing standards requires compensation recovery for a broader group of persons than "executive officers" as generally defined under the Exchange Act. Instead, the rule introduces a new definition of "executive officer" that tracks the Section 16 "officer" definition, which includes the principal accounting officer (or, if there is no such accounting officer, the controller) even if that person is not an executive officer for Exchange Act purposes and not publicly reported as an executive officer.[50] As a result, the compensation of some persons who are not executive officers for Exchange Act purposes will be subject to clawback even though the statute refers to "any current or former executive officer."

The listing standards require a listed issuer to make all required disclosures,[51] including filing its clawback policy as an exhibit to its Form 10-K[52] and disclosing how it has applied the policy, including, as relevant:

- the date the issuer was required to prepare an accounting restatement;
- the aggregate dollar amount of erroneously awarded compensation; and
- the aggregate amount that remains outstanding and any outstanding amounts due from any current or former named executive officer for 180 days or more.[53]

NYSE and Nasdaq Corporate Governance and Board Composition Requirements

Nasdaq and NYSE impose corporate governance and board composition requirements as part of their respective listing standards. Foreign private issuers and controlled companies are exempt from some of these standards. (A "controlled company" is one in which more than 50% of the voting power for the election of directors is held by an individual, a group, or another company.)

We summarize these in detail in Annexes B and C, and highlight the NYSE and Nasdaq board composition requirements below:

Nasdaq/NYSE Requirement	Foreign Private Issuers	Controlled Companies	All Others (e.g., EGCs, non-EGCs)
Majority of independent directors	May follow home-country practice	Not required	Yes, within 12 months of listing
Nominating/corporate governance committee	Same	Same	Yes†
Compensation committee	Same	Same	Yes†
Audit committee			
• Must meet requirements of Rule 10A-3‡	Yes	Yes	Yes
• Must have at least three members	May follow home-country practice	Yes	Yes

† The requirements for these committees are:

- one independent director on each committee at the time of listing (under Nasdaq rules) or by the earlier of the date the IPO closes, or five business days from the listing date (under NYSE rules);
- a majority of independent directors within 90 days thereafter (under both Nasdaq and NYSE rules); and
- fully independent committees within one year (under both Nasdaq and NYSE rules).

‡ The following transition periods apply to all IPO companies:

- *for the first 90 days* after an IPO all but one of the members of the audit committee are exempt from Rules 10A-3's independence requirement; and
- *for the first year* after an IPO a minority of the members of the audit committee are exempt from Rule 10A-3's independence requirements (since most audit committees have three members, this means that only two need to be independent for the days 91 through 365 following the IPO).

Schedule 13D and 13G Reporting

Schedule 13D

Under Section 13(d)(1) of the Exchange Act, any person who acquires, directly or indirectly, beneficial ownership[54] of more than 5% of a voting class of equity securities registered under Section 12 of the Exchange Act must file with the SEC a statement on Schedule 13D (eligible investors may instead file a short-form Schedule 13G within the applicable deadlines discussed below). The ownership thresholds and amendments that trigger a Schedule 13D filing and the associated deadlines are set out in the table below.

Schedule 13G

Rule 13d-1 under the Exchange Act allows certain stockholders who would otherwise be obligated to file a Schedule 13D to file a short-form Schedule 13G if they meet eligibility criteria. Eligible categories of investors comprise certain qualified institutional investors (QIIs) (pursuant to Rule 13d-1(b)); investors that own less than 20% with neither the effect nor purpose of changing or influencing control of the company (Passive Investors) (pursuant to Rule 13d-1(c)); and stockholders who acquired shares prior to the registration of shares under Section 12, such as pre-IPO investors (Exempt Investors) (pursuant to Rule 13d-1(d)). The ownership thresholds and amendments that trigger a Schedule 13G filing for each investor category and the associated deadlines are set out in the following table.

	Schedule 13D	Schedule 13G
Initial Filing Deadline	Within five business days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G.	**QIIs & Exempt Investors:** 45 days after calendar quarter-end in which beneficial ownership exceeds 5%. **QIIs:** Five business days after month-end in which beneficial ownership exceeds 10%. **Passive Investors:** Within five business days after acquiring beneficial ownership of more than 5%.

	Schedule 13D	Schedule 13G
Amendment Triggering Event	Material change in the facts set forth in the previous Schedule 13D.	**All Schedule 13G Filers:** Material change in the information previously reported on Schedule 13G. **QIIs & Passive Investors:** Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership.
Amendment Filing Deadline	Within two business days after the triggering event.	**All Schedule 13G Filers:** 45 days after calendar quarter-end in which a material change occurred. **QIIs:** Five business days after month-end in which beneficial ownership exceeds 10% or a 5% increase or decrease in beneficial ownership. **Passive Investors:** Two business days after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership.

Once a reporting person files an amendment reflecting ownership of 5% or less of the company's securities, no additional filings are required.

Section 16 of the Exchange Act

An IPO company's 10% stockholders, directors, and certain designated officers (collectively "Section 16 reporting persons") are subject to the reporting requirements of Section 16(a) of the Exchange Act, to civil liability for short-term profits under Section 16(b) of the Exchange Act and to criminal liability for "short sales" under Section 16(c) of the Exchange Act.

Directors and officers of Foreign Private Issuers must also file Section 16(a) disclosure reports, though 10% stockholders are excluded. Sections 16(b) (short-swing profit liability) and 16(c) (short sale liability) do not apply. FPI insiders may be exempt from Section 16(a) reporting if the FPI is in a "qualifying jurisdiction"[55] and the insider makes timely filings under a "qualifying regulation."[56]

Who Is a Section 16 Reporting Person?

Section 16 reporting persons include the following:

- *Directors*: All members of the IPO company's board of directors.
- *Officers*: Each person who is designated as an Executive Officer of the company (as defined in Rule 3b-7) and, if there is no principal accounting officer, the controller.
- *Principal Stockholders*: Any person who is, directly or indirectly, the beneficial owner of more than 10% of the company's securities. To determine whether a person beneficially owns more than 10% of an IPO company's securities and is, thus, subject to Section 16, the SEC applies the same definition of beneficial ownership as that specified in Rule 13d-3. Consequently, a person who controls the voting or disposition of more than 10% of the company's securities will be considered a reporting person subject to the provisions of Section 16.[57]

Section 16(a) Reports

Under Section 16(a) of the Exchange Act, each Section 16 reporting person of an IPO company is required to file with the SEC an "Initial Statement of Beneficial Ownership of Securities" on Form 3, listing all of the company's equity securities that he or she beneficially owns. The report is due by 10:00 p.m. Eastern Standard Time on the day that the IPO company's Exchange Act registration statement becomes effective. In addition, each person who becomes an officer, director or beneficial owner of more than 10% of the company's securities after the IPO is required to file a statement on Form 3 within 10 calendar days of that event.

What Is Beneficial Ownership?

The definition of beneficial ownership for purposes of Section 16(a) reporting (which differs from the Rule 13d-3 concept of beneficial ownership used to determine whether a person constitutes a 10% holder) focuses on whether the director, officer, or principal stockholder has any "pecuniary interest" in the stock. Pecuniary interest is defined as "the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in" the stock. SEC rules provide the following guidelines in determining whether a person has a pecuniary interest in the stock.

- *Family holdings*: There is a rebuttable presumption that a reporting person has a pecuniary interest in stock held by members of his or her immediate family if they share the same household. A reporting person who is a trustee of a family trust may have a pecuniary interest in the trust holdings of immediate family members *whether or not* they share the same household.
- *Partnership holdings*: General partners of both general and limited partnerships are considered the beneficial owners of the portfolio securities held by the partnership in proportion to the greater of (i) their share of the partnership capital account or (ii) their share of the partnership's profits.
- *Derivative securities*: A person's right to acquire equity securities through the exercise or conversion of options and other derivative securities, whether or not currently exercisable, creates a pecuniary interest in the underlying security, which interest must be reported. (The requirement to report derivative securities, whether or not exercisable, differs from the Rule 13d-3 analysis, which excludes from the "beneficial ownership" definition those derivative securities not exercisable within 60 days.)
- *Trust interests*: A person's interest as trustee, beneficiary, or settlor in the shares of stock held by a trust may be regarded as beneficial ownership of those shares pursuant to certain rules governing trust holdings and transactions.

The above examples of "pecuniary interests" are not exclusive. The rules governing the determination of beneficial ownership for Section 16(a) reporting purposes (and for purposes of determining Section 16(b) liability) are complex, and we suggest you seek the assistance of counsel in making any such determination in cases not involving direct ownership.

Form 4 Filings

Following the initial filing on Form 3, changes in the beneficial ownership of the company's securities, with certain limited exceptions, must be reported on Form 4 within two business days of the date on which the change occurs. Specific SEC rules apply to determine what constitutes a change in beneficial ownership, and counsel should be consulted if there is a question as to whether a given transaction should be reported. It should be noted, however, that Form 4 must be filed even if, as a result of offsetting transactions, there has been no net change in holdings.

In deciding the day on which a purchase or sale on the open market occurs for purposes of filing Form 4, the date of the broker's or dealer's confirmation would ordinarily be determinative, except as set forth in the next paragraph below. Special rules governing the filing of Form 4 reports may apply in certain situations. For example, if any officer or director purchases or sells any of the company's securities within six months after his or her termination as an officer or director of the company, he or she must report the transaction on Form 4 if he or she made any purchase or sale within the preceding six months and prior to termination.

In two situations, the date of execution in calculating the two-business-day deadline for filing a Form 4 will not be determined by the actual date of the transaction, but rather by the date that the reporting person is notified, so long as the notification is not more than three business days after such purchase or sale of the company's securities. This allowance for "extra time" applies in the following instances:

- For a transaction that complies with the affirmative defense set forth in Exchange Act Rule 10b5-1(c), which exempts a sale or purchase of the company's equity securities pursuant to a contract, instruction, or written plan from being considered made on the basis of material nonpublic information. In this instance, the reporting person does not select the date of the transaction, and, therefore, the date of execution will be deemed the date that the person who makes the trade notifies the reporting person of the transaction, so long as the notification date is not later than the third business day following the actual trade date;[58] and
- For discretionary transactions pursuant to an employee benefit plan where the reporting person does not select the date of execution. In this instance, the date of execution would be the date on which the reporting person is notified by the plan administrator, so long as the date of notification is not later than the third business day following the actual trade date.

Form 5 Filings

In addition to the Form 3 and Form 4 reporting requirements, every reporting person is required to file a Form 5 within 45 days after the end of the company's fiscal year, unless he or she has previously reported all changes in beneficial ownership, including those transactions exempt from Section 16(b) liability, on Form 4. Form 5 reconciles the reporting person's Section 16 reports by requiring disclosure of the reporting person's total beneficial ownership of the company's securities at year-end and, with certain exceptions, all transactions affecting the reporting person's beneficial ownership not disclosed on Form 4. Form 5 must also identify any required reports that the reporting person failed to file during the previous year.

Filing Issues

All reports on Forms 3, 4, and 5 are required to be filed electronically with the SEC by 10:00 p.m. ET on the appropriate date as set forth above. Such reports must be posted on the company's website no later than the first business day after the date of filing such report.

An IPO company should ensure that it has procedures in place to assist its reporting persons to timely file their required reports. The SEC mandates public disclosure by the company in its annual proxy statement and its Form 10-K of any Section 16 reporting persons who have filed late reports or failed to make the requisite filings and to identify the number of transactions not timely reported. This mandated disclosure system is designed, through the threat of public embarrassment and the risk of adverse SEC enforcement action, to cause reporting of persons to be timely in their filings and to encourage issuers, such as the company, to monitor compliance by its reporting persons.

Some Additional Issues

Rule 144 Resales

After a company's IPO, certain public sales of the company's shares will be subject to restrictions. Pursuant to Securities Act Rule 144, persons who acquired their securities prior to the IPO and persons who are deemed "affiliates" of the company must comply with the following provisions in order to sell freely their shares to the public without registration. Affiliates must comply with Rule 144 even if their securities were purchased after the public offering in the open market.

Affiliates

An affiliate of an issuer is defined by Rule 144 as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer." Thus, a determination of whether a person is an affiliate for purposes of Rule 144 depends principally on the meaning of the term "control." The SEC has defined "control" to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of the company whether through the ownership of voting securities, by contract, or otherwise." Applying this definition, the courts and the SEC have consistently held that the existence of control of a company is a question of fact to be determined by the specific circumstances in each case.

Affiliates of an issuer may periodically sell a small amount of securities under Rule 144, subject to certain volume and manner restrictions (and any applicable lock-up agreement with the underwriters). Specifically, (a) the amount of securities sold in any three-month period (including certain sales required to be aggregated as described below) may not exceed the greater of: (i) 1% of the outstanding securities of the class or (ii) the average weekly reported volume of trading in the shares of securities during the four calendar weeks preceding the filing of a Form 144 notice; and (b) the shares must be sold in a broker's transaction, directly to a market maker or through a riskless principal transaction.[59] In addition, adequate current public information about the company must be available, and the following holding periods apply:

- *Six months*: If the company is a reporting issuer,[60] affiliates (including anyone who was an affiliate within 90 days prior to the proposed sale) must satisfy a holding period of six months from the date of purchase before they can resell their securities.
- *One year*: If the company is not a reporting issuer, affiliates who acquired their securities in a nonpublic transaction must satisfy a holding period of one year from the date of acquisition before they can resell their securities.

If an affiliate acts in concert with other persons in selling securities of the company during a three-month period, the sales of all of these persons will be combined to determine the quantity which may be sold. Securities sold (i) pursuant to an effective registration statement or (ii) pursuant to an exemption under Section 4 of the Securities Act and not involving a public offering, need not be included in determining applicable volume limitations.

Non-Affiliates

Subject to any lock-up agreements with the underwriters, non-affiliates[61] who acquired their shares in the IPO or in the market after the IPO may generally resell their securities in the open market immediately without restriction as to volume, manner of sale, or holding periods.

Non-affiliates who acquired their securities prior to the IPO are generally not subject to the volume limitations and manner of sale requirements discussed above; however, certain holding periods and other requirements do apply. If the company is a reporting issuer, any non-affiliate who acquired his or her securities prior to the IPO is restricted from reselling such securities into the open market for six months from the date of the acquisition of the securities. Between six months and one year from the acquisition of the securities, the current public information requirement applies. If the company is not a reporting issuer, any non-affiliate who acquired his or her securities prior to the IPO is restricted from reselling such securities into the public market for one year from the date of the acquisition of the securities. After one year, non-affiliates may make unlimited public resales without complying with any Rule 144 requirements.

Conflict Minerals

Section 1502 of Dodd-Frank added Section 13(p) to the Exchange Act, and broadly mandates SEC reporting companies to make disclosures and undertake due diligence if they are involved in manufacturing products containing "conflict minerals." In 2012, the SEC adopted new Exchange Act Rule 13p-1 and Form SD to implement Section 1502.

Rule 13p-1 is deceptively simple — it provides that all SEC registrants "having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that registrant to be manufactured" must file Form SD, which, depending on the circumstances, can entail short-form reporting or long-form audited disclosure. Rule 13p-1 applies to all SEC reporting companies.

An IPO company's initial Form SD is not due until May 31 after the end of the company's **first calendar** year that begins no sooner than eight months after the effective date of its IPO registration statement.[62] In other words:

- if an IPO company with a calendar year fiscal year end goes public on March 15 of 2026, its first Form SD would be in respect of the fiscal year ending December 31, 2027 and would be due by May 31, 2028; and
- if the same company goes public on May 15, 2026, its first Form SD would be in respect of the fiscal year ending December 31, 2028 and would be due by May 31, 2029.

Resource Extraction

In December 2020, the SEC adopted new Exchange Act Rule 13q-1 and added Section 2 to Form SD to implement Section 1504 of Dodd-Frank (which added Section 13(q) to the Exchange Act).[63] The rules require resource extraction issuers to annually file a Form SD with an exhibit providing detailed tabular data regarding payments made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the US federal government for the purpose of the commercial development of oil, natural gas, or minerals.

Section 2 Form SD filing deadlines are calculated from the issuer's **fiscal year end** (unlike Section 1 Form SD filings, which key off the calendar year end).[64] The filing is due no later than 270 days following the end of the issuer's most recently completed fiscal year. An IPO company's initial Form SD is not due until it has completed a fiscal year following the IPO and would cover payments made during that fiscal year.[65]

ENDNOTES

[1] Many companies choose to incorporate by reference into Part III of their 10-K certain information that is contained in the definitive proxy statement. If initially omitted from the 10-K filing, this Part III information must be provided − either in the definitive proxy statement or on a Form 10-K/A — no later than 120 days after the end of the company's fiscal year. *See* Form 10-K, General Instruction G(3).

[2] For a summary of the events that require a company to file an 8-K, see our *Desktop Reference of 8-K Filing Events*.

[3] *See* Form 8-K, General Instruction B.1 (reports filed or furnished to satisfy Regulation FD obligations must be filed or furnished within the deadlines imposed by Rule 100(a) of Regulation FD); Regulation FD Rule 100(a) (disclosures must be made simultaneously, in the case of intentional disclosure, and promptly, in the case of non-intentional disclosure); Regulation FD Rule 101(d) (defining promptly).

[4] Many companies choose to incorporate by reference into Part III of their 10-K certain information that is contained in the definitive proxy statement. If initially omitted from the 10-K filing, this Part III information must be provided − either in the definitive proxy statement or on a Form 10-K/A — no later than 120 days after the end of the company's fiscal year. *See* Form 10-K, General Instruction G(3).

[5] *See Basic v. Levinson*, 485 U.S. 224, 239, at n.17; *Levie v. Sears Roebuck & Co.*, 676 F.Supp.2d 680, 686 (N.D. Ill. 2009); *Vladimir v. Bioenvision Inc.*, 606 F. Supp.2d 473, 485 (S.D.N.Y. 2009), *affd* Case No. 09-3487-CV (2nd Cir. Apr. 7, 2010).

[6] *See generally Federal Securities Litigation*, at 2-1 to 2-31 (discussing the PSLRA).

[7] Securities Act Section 27A(c)(1).

[8] Securities Act Section 27A(i)(1).

[9] Securities Act Section 27A(b)(2).

[10] Securities Act Section 27A(c)(1)(A)(i).

[11] *See* Regulation G, Rule 100(a).

[12] *See* Form 8-K, Item 2.02, Instruction 2 (requirements of Regulation S-K Item 10(e)(1)(i) apply to Item 2.02 disclosures).

[13] *See* Regulation G, Rule 101(a)(1).

[14] *See id*. at Rule 101(a)(2).

[15] *See id*. at Rule 101(a)(3).

[16] *See id*. Rule 100(a).

[17] *See id*. at Rule 100(a)(2). In the case of forward-looking non-GAAP measures, a quantitative reconciliation need only be provided to the extent available without unreasonable efforts. *Id*.

[18] *See id*. at Rule 100(b).

[19] *See* Regulation S-K, Items 10(e)(2), 10(e)(4), and 10(e)(5).

[20] *See id.* at Item 10(e)(1)(i).

[21] *See id.* at Item 10(e)(1)(i)(B).

[22] *See id.* at Item 10(e)(1)(i).

[23] *See id.* at Item 10(e)(1)(ii).

[24] *See generally* Non-GAAP Financial Measures CFIs (last updated Dec. 22, 2022).

[25] *See* Latham & Watkins Client Alert, *Giving Good Guidance* (Oct. 18, 2012).

[26] *Cf. Commission Statement about Management's Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 33-8056 (Jan. 22, 2002), at n.8 ("Disclosure is mandatory where there is a known trend or uncertainty that is reasonably likely to have a material effect on the registrant's financial condition or results of operations."). In our experience, MD&A does not typically include earnings guidance, although more and more public companies include some kind of forward-looking statements in their MD&A under a caption entitled "Outlook" or something similar.

[27] National Investor Relations Institute, *Guidance Practices and Preferences, 2012 Survey Report* (Sept. 5, 2012) (NIRI Guidance Survey Report) (survey results received from approximately 360 NIRI corporate members).

[28] Regulation G requires SEC-reporting companies that publicly disclose non-GAAP financial measures to provide an accompanying presentation of the most directly comparable GAAP financial measure and a reconciliation of the disclosed non-GAAP financial measure to the most directly comparable GAAP financial measure. *See* Regulation G Rule 100(a). The GAAP reconciliation is only required for forward-looking financial measures "to the extent available without unreasonable efforts." *Id*., Rule 100(a)(2). For further information on Regulation G and the use of non-GAAP financial measures, *see* our Client Alert *Adjusted EBITDA Is Out of the Shadows as Staff Updates Non-GAAP Interpretations* (Feb. 22, 2010).

[29] Nearly half of guidance-giving companies provide non-financial guidance, such as statements about market conditions or industry information. However, the number of companies providing non-financial guidance has been decreasing over the past several years. *See* NIRI Guidance Survey Report.

[30] *See* Sarbanes-Oxley Section 2(a)(7).

[31] *See* Instructions to Regulation S-K Item 308.

[32] Under Exchange Act Rule 12b-2, a "large accelerated filer" is an issuer that, as of the end of its fiscal year:

- has an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates (market capitalization) of $700 million or more (measured as of the last business day of the issuer's most recently completed second fiscal quarter);
- has been subject to SEC reporting under the Exchange Act for a period of at least 12 calendar months;
- has filed at least one annual report under the Exchange Act with the SEC; and
- is not eligible to use the requirements for a "smaller reporting company" under the revenue test (i.e., had annual revenues of less than $100 million in the most recent fiscal year for which financial statements are available), and annually thereafter remains unqualified unless public float and revenue fall below designated thresholds.

See Section (2) under the definition of "smaller reporting company" for the revenue test. In addition, an issuer has previously failed to qualify or fallen out of smaller reporting company status must also test annually whether it remains unqualified under the public float and revenue thresholds set out in Section 3(iii)(B) of the "smaller reporting company" definition in Rule 12b-2. Exchange Act Rules CFI 130.05 provides additional guidance on when a non-accelerated filer that loses smaller reporting company eligibility and would otherwise become a large accelerated or accelerated filer would be able to remain a non-accelerated filer and defer its transition for a fiscal year.

In addition, under Exchange Act Rule 12b-2, an "accelerated filer" is an issuer meeting the same conditions, except that it has a market capitalization of $75 million or more but less than $700 million (measured as of the last business day of its most recently completed second fiscal quarter). *See Final Rule: Accelerated Filer and Large Accelerated Filer Definitions*, Release No. 34-88365 (Mar. 12, 2020). *See also Final Rule: Smaller Reporting Company Definition*, Release No. 33-10513 (July 10, 2018).

[33] *See Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers*, Release No. 33-9142 (Sept. 21, 2010). This rule implemented Section 989G of Dodd-Frank, which added Section 404(c) to Sarbanes-Oxley. Under Section 404(c), the requirements of Section 404(b) do not apply to any audit report prepared for an issuer that is neither an accelerated filer nor a large accelerated filer. *See also* Section 103 of the JOBS Act, which modified Section 404(b) to exempt EGCs from the auditor attestation requirement.

[34] *See* Office of the Chief Accountant, Division of Corporation Finance, *Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports,* Question 5 (Oct. 6, 2004).

[35] *See* Exchange Act Rules 13a-15, 15d-15.

[36] *See* Exchange Act Rules 13a-15(e), 15d-15(e).

[37] *See Management's Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, Release No. 33-8238, II.D (June 5, 2003).

[38] *See id*.

[39] *See* Exchange Act Rules 13a-14, 15d-14.

[40] *See Certification Adopting Release*, at n.50 (Section 302); *see Additional Form 8-K Disclosure Adopting Release*, at n.142 (Section 906).

[41] *See NYSE Listed Company Manual*, Section 303A.00; *Nasdaq Stock Market Rules,* IM-5615-4(b)(1).

[42] *See* Sarbanes-Oxley Section 407(a).

[43] Regulation S-K Item 407(d)(5).

[44] *See Sarbanes-Oxley Act: Interpretive Issues under Section 402 — Prohibition of Certain Insider Loans* (Oct. 15, 2002).

[45] Nasdaq Rule 5608; NYSE Listed Company Manual § 303A.14.

[46] Nasdaq Rule 5608(b)(1); NYSE Listed Company Manual § 303A.14(c)(1).

[47] *Id. See also Final Rule: Listing Standards for Recovery of Erroneously Awarded Compensation*, Release No. 33-11126 (Oct. 26, 2022) [Recovery of Erroneously Awarded Compensation Release], at 5 ("recovery policy mandated by Section 10D 'does not require adjudication of misconduct in connection with the problematic accounting that required restatement.'" (quoting Report of the Senate Committee on Banking, Housing, and Urban Affairs, S.3217, Report No. 111.176, at 135-6 (Apr. 30, 2010))).

[48] Dodd-Frank Section 954 (adding Exchange Act Section 10D *Recovery of Erroneously Awarded Compensation Policy)*. *See also* Recovery of Erroneously Awarded Compensation Release.

[49] Exchange Act Rule 10D-1(b)(1); Nasdaq Rule 5608(b)(1); NYSE Listed Company Manual § 303A.14(c)(1).

[50] Nasdaq Rule 5608(d); NYSE Listed Company Manual § 303A.14(e).

[51] Nasdaq Rule 5608(b)(2); NYSE Listed Company Manual § 303A.14(c)(2).

[52] Regulation S-K Item 601(b).

[53] Regulation S-K Item 402(w).

[54] Pursuant to Rule 13d-3 under the Exchange Act, a stockholder is deemed to be the beneficial owner of a company's securities if the stockholder, directly or indirectly, has or shares the power to vote or the power to dispose of those securities. Schedule 13D requires disclosure of the identity, address, occupation, citizenship, and nature of the beneficial ownership of the stockholder making the report and of all persons on whose behalf the purchases have been made. Schedule 13D also requires disclosure of the source and amount of funds used in making the purchases and the purpose of the purchases.

[55] "Qualifying jurisdictions" comprise Canada, Chile, the European Economic Area, the Republic of Korea, Switzerland, and the United Kingdom. *Order Granting Directors and Officers of Certain Foreign Private Issuers an Exemption from the Filing Requirements of Section 16(a) of the Exchange Act*, Release No. 34-104931 (Mar. 5, 2026), at 2.

[56] *Id.*, at 2-5. A Section 16(a) filer may be subject to the qualifying regulation of a different qualifying jurisdiction of incorporation, but each prong must be independently satisfied. For instance, directors and officers of an FPI that is incorporated in Canada with securities registered in Germany and subject to Article 19 of EU MAR that otherwise satisfy the conditions of this order would be exempt from Section 16(a) reporting obligations, but if either the qualifying jurisdiction or regulation were India, the exemption would not be available. *See Id*., at 2 and n.7.

[57] Rule 16a-1(a)(1) lists several exceptions to this 10% beneficial ownership rule, which in certain circumstances exempt entities such as banks, brokers, dealers, investment companies, and employee benefit plans, to the extent such entities hold shares in fiduciary accounts, from Section 16 liability.

[58] *See* Exchange Act Rule 16a-3(g)(3). Note that this accommodation does not reply to a disposition by gift, which must be reported on Form 4 within two business days of execution of the gift. Exchange Act Rule 16a-3(g)(1).

[59] A "riskless principal transaction" is defined as a principal transaction where, after having received from a customer an order to buy, a broker or dealer purchases the security as principal in the market to satisfy the order to buy or, having received from a customer an order to sell, sells the security as principal to the market to satisfy the order to sell.

[60] A reporting issuer is an issuer that has been subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act for at least 90 days prior to the sale of the security.

[61] A non-affiliate is a person who is not an affiliate of the company at the time of sale of securities and has not been an affiliate of the company at any time during the three months preceding such sale.

[62] *See* Form SD, General Instruction B; Division of Corporation Finance *Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions: Conflict Minerals*, Question 11.

[63] *See Final Rule: Disclosure of Payments by Resource Extraction Issuers*, Release No. 34-90679 (Dec. 16, 2020).

[64] Form SD, General Instruction B.2

[65] Form SD, Section 2, Item 2.01(b)(3).

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LIABILITY UNDER THE US FEDERAL SECURITIES LAWS

A public company is exposed to liability under the federal securities laws in a variety of ways as a result of offering or listing its securities in the United States. This liability can be civil or, in certain circumstances, criminal. Although litigation by private plaintiffs is more common, the SEC frequently initiates civil enforcement actions against issuers and persons associated with them. In cases involving serious securities fraud, the US Department of Justice (DOJ) sometimes brings criminal proceedings, often in parallel with an SEC civil action.

We summarize below the key areas of federal securities law liability.

Registration – Section 5 of the Securities Act

Section 5 of the Securities Act effectively requires every offer and sale of securities to be either registered with the SEC or made pursuant to an available exemption from registration. The terms "offer" and "sale" in the Securities Act are broadly construed. For example, an offer includes any attempt to dispose of a security for value.[1] As a result, publicity in the United States about an impending offering, website disclosure of the offering, or even an email communication to "friends and family" announcing an offering can constitute an unregistered offer in violation of Section 5.

Violations of Section 5 can give rise to liability in SEC enforcement actions and also in actions brought by investors under Section 12(a)(1) of the Securities Act, as discussed below. They can also lead to the delay (or even abandonment) of a securities offering if the SEC imposes a cooling-off period. As a result of these onerous remedies, it is critical to control publicity and comply carefully with the requirements for any applicable exemptions from Section 5 registration.

Under Section 12(a)(1), an investor who buys securities issued in transactions violating Section 5 can rescind the sale and recover his or her purchase price (plus interest, less any amount received on the securities). If the investor no longer owns the securities, he or she can recover damages equal to the difference between the purchase and the sale price of the securities (again, plus interest, less any amount received on the securities).[2]

Section 12(a)(1) imposes strict liability, and an investor is not required to demonstrate any causal link between his or her damages and the violation of Section 5.[3] However, in order to be liable, a defendant must be a seller — that is, a person who successfully solicits the purchase, motivated at least in part by financial interest — and the plaintiff must actually have bought the securities from that defendant.[4]

Antifraud

As a general matter, there is no duty under the US federal securities laws to disclose material information unless an applicable rule or regulation specifically requires disclosure.[5] An issuer's duty to disclose may arise in situations such as:

- purchasing or selling securities;
- filing a registration statement;
- filing an annual report on Form 10-K or a quarterly report on Form 10-Q;
- submitting information on Form 8-K;
- issuing a press release; and
- NYSE or Nasdaq requirements.

Once an issuer chooses to disclose information to investors or the public, it must do so completely and accurately.[6] If a statement is believed by the issuer to be true when made, but the issuer subsequently learns that it was not true, the issuer generally has a duty to correct that statement.[7] If, on the other hand, a statement by an issuer was reasonable when made, but it becomes misleading in light of subsequent events, the issuer might or might not have a "duty to update" the statement, depending on a number of factors.[8] This is one reason why projections of future results require careful thought.

What Is Material?

The various antifraud provisions of the Securities Act and the Exchange Act impose liability for material misstatements or omissions in the offer or sale, or in connection with the purchase or sale, of securities. The fundamental test for "materiality" is whether there is a substantial likelihood that a reasonable investor would consider the misstatement or omission important in deciding whether or not to purchase or sell a security.[9] As the US Supreme Court has explained, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[10]

The determination of materiality is a mixed question of law and fact,[11] and there is no bright-line quantitative test for materiality.[12] In adopting Regulation FD, for example, the SEC indicated that the following subjects should be carefully reviewed to determine whether they are material:[13]

- earnings information;
- mergers, acquisitions, tender offers, joint ventures, or changes in assets;
- new products or discoveries, or developments regarding customers or suppliers (for example, the acquisition or loss of a contract);
- changes in control or in management;
- change in auditors or auditor notification that the issuer may no longer rely on an auditor's audit report;
- events regarding the issuer's securities — for example, 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; and
- bankruptcies or receiverships.

In addition, in *Staff Accounting Bulletin No. 99*, the SEC Staff pointed to several qualitative factors that may need to be considered in assessing materiality and that could render a quantitatively minor misstatement material, including whether the misstatement:

- arises from an item capable of precise measurement or from an estimate and, if so, the degree of imprecision inherent in the estimate;
- masks a change in earnings or other trends;
- hides a failure to meet analysts' consensus expectations;
- changes a loss into income or vice versa;
- concerns a segment or other portion of the issuer's business that has been identified as playing a significant role in the issuer's operations or profitability;
- affects the issuer's compliance with regulatory requirements;
- affects the issuer's compliance with loan covenants or other contractual requirements;

- has the effect of increasing management's compensation — for example, by satisfying requirements for the award of bonuses or other forms of incentive compensation; or
- involves concealment of an unlawful transaction.

Fraud in Connection With the Purchase or Sale of Securities – Rule 10b-5

Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 provide a broad (and heavily litigated) basis for both civil and criminal liability in securities transactions. Such claims can be brought by parties to the transaction as well as by the SEC, the DOJ, and investors who were effecting transactions in the subject securities during the period of improper disclosure. Rule 10b-5 prohibits, in connection with the purchase or sale of securities:

- employing "any device, scheme, or artifice to defraud;"
- making "any untrue statement of material fact" or omitting "to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;" or
- engaging in any "act, practice, or course of business which operates or would operate as a fraud or deceit."

Elements of a Claim Under Rule 10b-5

The elements of a claim under Rule 10b-5 by a private plaintiff[14] are:

- a misrepresentation or omission of a material fact when the omission renders any statements made misleading;[15]
- made with *scienter* — that is, an intent to deceive, manipulate, or defraud,[16] meaning intentionally or recklessly (beyond mere negligence);[17]
- in connection with the purchase or sale of a security;
- upon which the plaintiff relied; and
- which caused the injury.[18]

In government enforcement actions under Rule 10b-5, only the first three elements apply.

The requirement that the alleged fraud must have been "in connection with" the purchase or sale of securities is flexibly construed to effectuate the remedial purposes of the Exchange Act, particularly when the SEC is the plaintiff.[19] A private plaintiff, by contrast, must show that he or she actually purchased or sold stock,[20] but Rule 10b-5 does not require privity between the defendant and the plaintiff,[21] and accordingly a plaintiff need not show that he or she actually bought securities from the person who made the misleading statements.

Scope of Rule 10b-5

Rule 10b-5 is not limited to public offerings of securities, and applies to unregistered transactions and secondary market trading. In addition, Rule 10b-5 covers oral and written statements, whether or not relating to a registration statement or prospectus.[22] These would potentially include statements made:

- in an offering memorandum for a Rule 144A offering or other private placement;
- during a press conference or an interview, or in a press release;
- in an annual report on Form 10-K or quarterly report on Form 10-Q; and
- in a document submitted on Form 8-K.

In addition, while an issuer is generally not liable for the statements of others, there may be exceptions. For example, the issuer could be liable for misstatements in an analyst's report if a corporate insider participates sufficiently in the preparation of the report or circulates the report to prospective investors.[23]

Insider Trading

Insider trading is also prosecuted under Rule 10b-5, civilly by the SEC and criminally by the DOJ. As interpreted by the SEC and the US federal courts, Rule 10b-5 prohibits a person from buying or selling securities on the basis of material nonpublic information, or providing such information to another person who trades, in violation of a fiduciary duty or similar duty of trust and confidence.[24] Rule 10b-5 imposes an obligation to either disclose material nonpublic information or abstain from trading on:

- corporate insiders, such as directors, officers, and controlling shareholders, who owe a fiduciary duty to the issuer's shareholders;[25]
- temporary insiders, such as lawyers, accountants or investment bankers;[26] and
- outsiders who "misappropriate" material nonpublic information for trading purposes in breach of a duty owed to the source of the information.[27]

> PRACTICE POINT
>
> Bear in mind that a person can be liable under Rule 10b-5 even if he or she did not actually trade on the material nonpublic information, but instead passed it directly or indirectly to a third party — a practice known as "tipping" — to get some "personal benefit."[28] The personal benefit could be pecuniary gain (such as a kickback or a "reputational benefit that will translate into future earnings") or even the benefit one gets from making "a gift of confidential information to a trading relative or friend."[29] In addition to the tipper, the "tippee" (the person to whom the information is disclosed) may also be liable under Rule 10b-5 if he or she trades on the basis of the tipped information and had reason to know the information came from a person who violated a duty of trust and confidence.[30]

Damages Under Rule 10b-5

In private actions, violations of Rule 10b-5 can lead to rescission or damages.[31] Damages comprise a purchaser's out-of-pocket loss, which cannot exceed the difference between the purchase or sale price the plaintiff paid or received and the mean trading price of the security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.[32] Punitive damages are, however, not available in private actions under Rule 10b-5.[33]

In civil or administrative actions, the SEC can obtain money penalties, disgorgement, and injunctions, or cease-and-desist orders. In criminal prosecutions, the DOJ can obtain penalties that include imprisonment, fines, and disgorgement.

Registered Offerings – Section 11 of the Securities Act

Section 11(a) of the Securities Act imposes liability if any part of a registration statement, at the time it became effective, "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." Section 11 liability only covers statements made in a registration statement. It does not reach other documents that are not considered part of a registration statement (such as road show materials, FWPs, or research reports).[34] In addition, Section 11 does not extend to unregistered transactions, since these do not involve a "registration statement."[35]

A Section 11 claim can be brought by a purchaser (and not by the government) against:

- each person who signed the registration statement, including the issuer and members of management;[36]
- each member of the issuer's board of directors, or similar governing body, regardless of whether he or she signed the registration statement;[37]

- any expert named as responsible for a portion of the registration statement, such as an issuer's auditors; and
- each underwriter participating in the offering.

Issuers are strictly liable under Section 11. Potential defendants other than the issuer[38] have the following statutory defenses to Section 11 liability, by virtue of Section 11(b)(3):

- *Due diligence defense:* in the case of a non-expert with respect to the non-expertized portions of the registration statement, or in the case of an expert with respect to the expertized portions (for example, the financial statements that include the auditors' opinion), a defendant must show that he or she had, after reasonable investigation, reasonable grounds to believe — and did believe — that the included information was true and that no material facts were omitted;[39] and
- *Reliance defense:* in the case of a non-expert with respect to expertized portions of the registration statement, a defendant must show he or she had no reasonable ground to believe, and did not believe, that the registration statement contained a material misstatement or omission.[40]

Damages for violation of Section 11 are generally limited to:[41]

- the difference between the price paid for a security and its value at the time a plaintiff brings a lawsuit;
- if the security has already been sold at the time a lawsuit is brought, the amount paid for the security, less the price at which the security was sold in the market; or
- if the security was sold after the lawsuit was brought but before judgment, the lesser of (1) the amount the plaintiff paid for the security, less the price at which the security was sold in the market, or (2) the amount the plaintiff paid for the security, less the value of the security as of the time the suit was brought. Punitive damages are not available under Section 11.[42]

Registered Offerings – Section 12(a)(2) of the Securities Act

Section 12(a)(2) of the Securities Act imposes liability on any person who offers or sells a security by means of a prospectus, or any oral communication, which contains "an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading."

Section 12(a)(2) overlaps with Section 11, but covers oral statements, FWPs, and statements in a prospectus, rather than the registration statement alone (of which the prospectus is a part). Actions under Sections 11 and 12(a)(2) are brought by purchasers in private litigation. As for enforcement by the US government, civil and criminal actions involving material misstatement or omissions in sales of securities may be brought, respectively, by the SEC and the DOJ under Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5.

The Supreme Court has construed the term "prospectus" in Section 12(a)(2) to mean a prospectus in connection with a public offering under the Securities Act. As a result, it ruled that Section 12(a)(2) does not apply to unregistered offerings or secondary market trading.[43]

Section 12(a)(2) provides a statutory due diligence defense if the seller can show he or she "did not know, and in the exercise of reasonable care could not have known," of the material misstatements or omissions.

Under Section 12(a)(2), a person who buys securities on the basis of a prospectus that contains a material misstatement or omission — such as a person who buys securities issued in violation of Section 5 of the Securities Act — can rescind the sale and recover his or her purchase price (plus interest, less any amount received on the securities). If the investor no longer owns the securities, he or she can recover damages equal to the difference between the purchase and the sale price of the securities (again, plus interest, less any amount received on the securities).

Timing of the Investment Decision Under Section 12(a)(2) – Rule 159

Rule 159 provides that, for purposes of determining whether a prospectus or oral statement included a material misstatement or omission at the time of the contract of sale under Section 12(a)(2), "any information conveyed to the purchaser only after such time of sale" will not be taken into account.

The key implication of Rule 159 is that Section 12(a)(2) liability is determined by reference to the total package of information conveyed to the purchaser at or before the time of sale. Accordingly, a preliminary prospectus, an FWP or an oral communication at a road show may give rise to liability under Section 12(a)(2) (in suits by private plaintiffs), even if later corrected or supplemented in a final prospectus that is filed or delivered after pricing.

Controlling Person Liability

Liability under the US federal securities laws potentially extends beyond issuers, underwriters, and other direct participants in securities offerings to the persons who control those participants. In particular, Section 15 of the Securities Act and Section 20 of the Exchange Act provide that controlling persons may be jointly and severally liable with the persons they control. As a result, an issuer's significant shareholders, its board of directors, and members of its management may be liable along with the issuer for violations of Section 11, Section 12, or Rule 10b-5.

The term "control" generally means the possession, directly or indirectly, 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.[44] This is not a bright-line test, and instead depends on the facts and circumstances of any particular case. A defendant generally will be found to have controlled an issuer if he or she actually participated in (that is, exercised control over) the operations of the issuer and possessed the power to control the specific transaction or activity from which the issuer's primary liability derives.[45] Some courts have held that the defendant must be a "culpable participant" in the issuer's wrongful conduct in order to trigger liability.[46]

The controlling person has a defense to liability under Section 15 if he or she "had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist," and a defense under Section 20 if he or she "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." This analysis is obviously quite fact-specific[47] and may depend on such factors as whether the defendant is an independent director.

> PRACTICE POINT
>
> Potential controlling persons such as controlling shareholders and members of an issuer's board of directors should familiarize themselves generally with the disclosure used in connection with an offering and should pay particular attention to any high-level statements about an issuer's strategy, business, or financial performance. They should also review carefully any statements about themselves (for example, disclosure about a controlling shareholder).

Enforcement

Background

The SEC prosecutes civil violations of the US federal securities laws.[48] It has wide-ranging powers to investigate any conduct that could constitute a violation of those laws.[49] SEC investigations are conducted by the Division of Enforcement, which reports to the five members appointed by the President of the United States who constitute the Commission itself. If, after investigating, the Division of Enforcement believes it has found a violation, it typically recommends to the Commission that enforcement action be taken. The Commission then decides by majority vote whether to take action or not and what action to take. Charges may be brought administratively

within the SEC, or in a US federal district court. In either venue, the preponderance-of-the-evidence standard of proof applies, meaning that the finder of fact needs only to find that it is more likely than not that the Division of Enforcement has proved the elements of the offense. The proof need not be "clear and convincing" or "beyond a reasonable doubt" (the latter being the standard of proof in criminal cases).[50] An adverse decision in an SEC administrative or civil trial can be appealed to a US federal appellate court, and some appeals are eventually heard by the US Supreme Court.

While the SEC has civil enforcement authority only, Section 24 of the Securities Act and Section 32(a) of the Exchange Act make it a federal crime for any person to willfully violate any provision of those acts or a rule promulgated under the acts. "Willfully" is not defined uniformly by all US federal courts, but in most courts it means that the defendant knew his conduct was wrongful but did not necessarily know it was unlawful (whereas in the SEC civil context "willfully" simply means that the actor was conscious of taking the action and not sleepwalking or the like). Consequently, the SEC works closely with criminal law enforcement agencies throughout the US to develop and bring criminal cases when the misconduct warrants more severe action and can be proved beyond a reasonable doubt.

Criminal penalties under the federal securities laws can be severe. Under Securities Act Section 24, conviction for each violation can result in a fine of up to $10,000 and/or imprisonment for up to five years. Under Exchange Act Section 32, for individuals, conviction can result in a fine of up to $5 million and/or imprisonment for up to 20 years per violation; however, no one can be imprisoned for violating an Exchange Act rule or regulation if he or she proves that he or she had no knowledge of the rule or regulation. Fines against entities can reach $25 million per violation.

Civil Liability for Short-Term Transactions Under Exchange Act Section 16

Recovery of Profits Under Section 16(b)

For the purpose of preventing the unfair use of information which may have been obtained by a Section 16 reporting person, any profits realized by a Section 16 reporting person from any "purchase" and "sale" of securities (or sale followed by a purchase) within any period of less than six months may be recovered by the company. Liability is absolute even if the purchase or sale took place after full disclosure and without the use of any inside information. When "opposite" transactions (i.e., a purchase and a sale) occur within a six-month period, the good faith of the Section 16 reporting person is no defense to liability. The Section 16 reporting person would be liable even if compelled to sell for personal reasons. The operation of Section 16(b) is quite complex, and if there is any question at all concerning possible Section 16 liability, counsel should be consulted prior to any purchase or sale of the company's securities or derivative securities by a Section 16 reporting person.

The liability of a reporting person under Section 16(b) is only to the company itself. The company, however, cannot waive its right to recover the short-swing profits, and any stockholder of the company can bring suit in the name of the company to recover short-swing profits on behalf of the company. Note that Section 16 violations do not go unnoticed by lawyers whose entire practices are based on filing these types of suits (since they are entitled to have the company pay their fees if they are the first to identify a Section 16 violation by the company). Remember that reports of changes in ownership filed pursuant to Section 16(a) are readily available to the public, and that liabilities under Section 16(b) may require disclosure in the company's Form 10-K or its proxy statement for its annual meeting of stockholders.

No suit under Section 16(b) may be brought more than two years after the date the profit was realized. If the reporting person fails to file a report of the transaction under Section 16(a) as required, however, the two-year limitation period does not begin to run until after the transactions giving rise to the profit have been disclosed.

Purchase and Sale

A purchase and a sale will be matched even though different blocks of stock are purchased and sold. Where, for example, securities held for two years are sold one month after or before acquisition of other shares of the same

class, there has been a purchase and sale of securities of the company within a six-month period. Moreover, acquisitions and dispositions of derivative securities, including stock options, warrants, and convertible securities, unless exempt from Section 16(b) liability, may be matched with purchases and sales of the underlying security or of other derivative securities. However, under Exchange Act Rule 16b-6, the exercise or conversion of a derivative security, and the acquisition of the underlying security upon such exercise or conversion, is exempt from Section 16(b) liability provided such derivative security was not "out of the money" at the time of exercise.

A sale (or purchase) by a Section 16 reporting person may be matched with a purchase (or sale) by such reporting person's spouse or other members of his/her immediate family or other individuals sharing the same household unless the reporting person can rebut the presumption that he or she is the beneficial owner of the securities held by such other persons.

Calculation of Profits

The profits recoverable by the company often bear no relationship to the actual overall profit, if any, realized by the reporting person. As noted above, it is not necessary for recovery that the purchase and the sale be of the same block of stock. Nor is it necessary that the purchase precede the sale. In determining the profits recoverable by the company, all purchases made within any period of less than six months are listed in one column. All sales made during such period are listed in another column. Then the securities purchased at the lowest price are matched against an equal number of securities sold at the highest price during such period, and the profit is computed. After that, securities purchased at the next lowest price are matched against securities sold at the next highest price and the profit computed. The process is repeated until all securities in the purchase column which may be matched against securities sold for higher prices in the sales column have been matched off. The total profit on each "match" so computed is recoverable by the company. For example, if a reporting person buys 100 shares at $50 on January l, sells 100 shares at $40 on February 1, buys 100 shares at $30 on March 1, and sells 100 shares at $20 on April 1, the reporting person actually lost $2,000. For purposes of Section 16(b), however, the sale at $40 may be matched against the purchase at $30 and "profits" of $1,000 may be recovered from the reporting person by the company, with no offset for the $3,000 "loss" on the other match.

The amount of recoverable profits may include dividends declared and received by the reporting person as a result of short-swing transactions. The profits recoverable upon matchable transactions involving options or other derivative securities are calculable pursuant to certain formulas set forth in the Section 16(b) rules.

Criminal Liability for "Short Sales" Under Section 16(c)

In contrast to Section 16(b), which creates civil liability for recovery of profits, Section 16(c) is an absolute prohibition on certain sales. It prohibits a Section 16 reporting person from making short sales of the company's securities (i.e., any sale made by him of securities which he does not own at the time of the sale) or sales of securities against the box (i.e., any sale of securities not delivered within 20 days after the sale). Willful violations by any person of any provision of the Exchange Act, including Section 16, or any rules or regulations thereunder can result in criminal prosecution with maximum penalties of a $5 million fine or 20 years imprisonment, or both.

ENDNOTES

1. Securities Act Section 2(a)(3).
2. David M. Brodsky & Daniel J. Kramer, *Federal Securities Litigation*, at 4-16 to 4-17 (1st ed. 1997) (*Federal Securities Litigation*).
3. *Id*., at 4-2 to 4-3.
4. *Id*., at 5-20 (citing *Pinter v. Dahl*, 486 U.S. 622, 641-54 (1988)).
5. *Federal Securities Litigation,* at 6-4.
6. *Id*., at 6-4 to 6-5.
7. *See,* e.g., *Stansky v. Cummins Engine Co., Inc.*, 51 F.3d 1329 (7th Cir. 1995) (distinguishing duty to correct from duty to update).
8. *See,* e.g., *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. 1997).
9. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *see also* Securities Act Rule 405 ("material" information is "matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered"). *TSC* involved the interpretation of Section 14(a) of the Exchange Act and Rule 14a-9. The Supreme Court has, however, explicitly extended TSC's definition of materiality to Rule 10b-5, *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988), and the lower US federal courts have generally used the *TSC* standard in all contexts involving the antifraud provisions of the US federal securities laws. *See* Louis Loss, Joel Seligman & Troy Paredes, *Securities Regulation*, Chapter 6.C.5 (Registration and Post Registration Provisions of the 1934 Act; Proxies, False or Misleading Statements (Rule 14a-9)), (5th ed. 2014) (*Loss, Seligman & Paredes*).
10. *TSC Indus., Inc.*, 426 U.S. 438, 449.
11. *Id*., at 450.
12. *See* Staff Accounting Bulletin 99.
13. *Selective Disclosure and Insider Trading*, Release No. 33-7881, at n.47 (Aug. 15, 2000) (*Regulation FD Release*).
14. Many securities suits are brought as class actions, which are subject to the Private Securities Litigation Reform Act of 1995 (PSLRA). Congress passed the PSLRA in 1995 to address the filing of frivolous or unwarranted securities lawsuits. Among other things, the PSLRA imposes heightened pleading requirements in order to withstand a motion to dismiss, each of which applies to the elements of a fraud claim, as discussed below.
15. *See Macquarie Infrastructure Corp. v. Moab Partners L.P.*, 601 U.S. 257 (2024) (holding that a pure omission, absent a showing that the omission rendered any affirmative statements materially misleading, is not actionable under Rule 10b-5(b)). Under the PSLRA, the complaint must identify each specific statement or omission alleged to be false or misleading and explain why it is misleading. 15 U.S.C. § 78u-4(b)(1).
16. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). The PSLRA requires the plaintiff to state particular facts giving rise to a strong inference that the defendant made the allegedly false or misleading statement or omissions with the requisite state of mind, i.e., the intent to manipulate, deceive or defraud. 15 U.S.C. § 78u-4(b)(2).
17. *Federal Securities Litigation*, at 6-13 to 6-14. Recklessness is typically defined by courts as conduct demonstrating an extreme departure from the standard of ordinary care.
18. Under the PSLRA, the plaintiff has the burden to prove that the false, misleading, or omitted information was the cause of the actual loss the plaintiff suffered. 15 U.S.C. § 78u-4(b)(4).
19. *Cf.,* e.g., *SEC v. Zandford*, 535 U.S. 813, 822 (2002).
20. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 754-55 (1975).
21. *Loss, Seligman & Paredes*, Chapter 9.B.7 (Fraud; Issuers and Insiders; Scope of Rule 10b-5), at n.678.
22. *See id*. (explaining that "[t]he Rule may be violated by feeding misinformation into the marketplace, or even withholding information too long," regardless of whether the defendants themselves bought or sold securities) (citation omitted).
23. *Federal Securities Litigation*, at 6-30 to 6-31. The SEC has stated that an issuer may be "fully liable" if it disseminates and adopts false third-party reports "even if it had no role whatsoever in the preparation of the report." *Use of Electronic Media Release,* at n.54 (citing *In the Matter of Presstek, Inc.*, Release 34-39472 (Dec. 22, 1997)).
24. *Federal Securities Litigation*, at 6-32.
25. *Federal Securities Litigation*, at 6-32 to 6-33.
26. *Id*., at 6-34; *see also Regulation FD Release,* at n.28 (referring to a temporary insider as "a person who owes a duty of trust or confidence to the issuer," such as an attorney, investment banker, or accountant).
27. *Id*., at 6-34 to 6-35 (citing *United States v. O'Hagan*, 521 U.S. 642 (1997)). The SEC has added two rules to clarify issues that have arisen in insider trading cases. First, Rule 10b5-1 provides that trading "on the basis of" material nonpublic information includes all trading while in possession of that information, except certain trades previously contracted for in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b5-1. Second, Rule 10b5-2 fleshes out the meaning of a "duty of trust or confidence" for purposes of the misappropriation theory.
28. *SEC v. Dirks*, 463 U.S. 646 (1983).

29. *Id.; see also SEC v. Yun*, 327 F.3d 1263 (11th Cir. 2003) (applying the *Dirks* personal benefit rule to misappropriation case).

30. *Federal Securities Litigation*, at 6-34.

31. *Id*., at 6-42.

32. Exchange Act Section 21D(e)(1); *see also* Exchange Act Sections 21(d)(3) (providing for money penalties in SEC civil actions) and 32(a) (providing for criminal penalties for willful violations of the Exchange Act); *Federal Securities Litigation*, at 6-43 to 6-45 (discussing damages under Exchange Act Section 10(b)).

33. *Federal Securities Litigation*, at 6-42; *see also* Exchange Act Section 28(a) (limiting recovery for damages in actions under the Exchange Act to *actual damages*).

34. *Federal Securities Litigation*, at 3-1.

35. *See Loss, Seligman & Paredes*, Chapter 11.C.2.d (Civil Liability; SEC Statutes; Securities Act of 1933; Section 11: Misstatements or Omissions in Registration Statement).

36. *Id*., at 3-11 (citing Securities Act Section 6(a)).

37. *Id*., at 3-12.

38. *Id*., at 3-14.

39. Securities Act Sections 11(b)(3)(A) and (B).

40. Securities Act Section 11(b)(3)(C).

41. Securities Act Section 11(e). Note that, under Section 11(e), an underwriter is not liable for Section 11 damages "in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public" unless that underwriter "shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting."

42. *Federal Securities Litigation*, at 3-19 to 3-20.

43. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 564, 584 (1995).

44. Securities Act Rule 405; *see also* Exchange Act Rule 12b-2.

45. *Federal Securities Litigation*, at 11-5.

46. *Id*., at 11-5 to 11-7.

47. *See generally id*., at 11-7 to 11-10 (discussing the defense).

48. For a comprehensive discussion of SEC Enforcement practice, *see,* e.g., *The Securities Enforcement Manual: Tactics and Strategies* (Richard M. Phillips, ed. 1997); William R. McLucas, J. Lynn Taylor & Susan A. Mathews, *A Practitioner's Guide to the SEC's Investigative and Enforcement Process*, 70 Temp. L. Rev. 53 (1997).

49. *See SEC v. Murphy*, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,688 (C.D. Cal. 1983).

50. *Steadman v. SEC*, 450 U.S. 91 (1981).

LEGAL MATTERS

A cast of outstanding lawyers too numerous to name have passed upon the contents of this IPO Guide on behalf of Latham & Watkins LLP. Go Team!

WHERE YOU CAN FIND MORE INFORMATION

We maintain extensive thought leadership resources on our website at www.lw.com and our capital markets online reference library at www.wowlw.com. We list below some materials that you may find useful for your IPO and as you begin life as a public company.

- *The Latham FPI Guide: Accessing the US Capital Markets from Outside the United States* (2025)
- *Guide to Financial Statement Requirements in US Securities Offerings by US Issuers* (2026)
- *Guide to Financial Statement Requirements in US Securities Offerings by Non-US Issuers* (2026)
- *SEC Staleness Calculator for US Issuers*
- *Desktop Staleness Calendar for 2026 Offerings* (2026)
- *Desktop Reference of 8-K Filing Events* (2026)
- *Amended Rule 10b5-1 and New Insider Trading Disclosure: Frequently Asked Questions* (2023)
- *Guide to Acquired Business Financial Statements* (2021)
- *The Last Days of Disco Ops* (2014)
- *The Good, the Bad and the Offer: Law, Lore and FAQs* (2014)
- *What's the Deal with Regulation M?* (2013)
- *"You Talkin' to Me?" FAQs About the SEC's New General Solicitation, Regulation D and "Bad Actor" Rules* (2013)
- *Giving Good Guidance: What Every Public Company Should Know* (2012)
- *The JOBS Act, Part Deux: Frequently Asked Questions About Title II of the JOBS Act* (2012)
- *The JOBS Act After Two Weeks: The 50 Most Frequently Asked Questions* (2012)
- *The JOBS Act Establishes IPO On-Ramp* (2012)
- *Recent Developments In Recent Developments — Using "Flash" Numbers in Securities Offerings* (2011)
- *Cheap Stock: An IPO Survival Guide* (2010)
- *Adjusted EBITDA is Out of the Shadows as Staff Updates Non-GAAP Interpretations* (2010)

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REPORT OF NON-INDEPENDENT EDITORS

The Readers of the Latham & Watkins US IPO Guide:

We have edited the accompanying US IPO Guide as of June 15, 2026. The US IPO Guide reflects the accumulated wisdom of the lawyers at Latham & Watkins LLP. Our responsibility is to express an opinion on the US IPO Guide based on our role as non-independent editors.

We conducted our edits in accordance with our standards for top-quality thought leadership. Those standards require lively, plain-English explanations to demystify complicated concepts. They strive for the highest possible level of technical accuracy with the least amount of mind-numbing gobbledygook. We believe that our edits provide a reasonable basis for our opinion.

In our opinion, the US IPO Guide referred to above presents fairly, in all material respects, what you need to know to plan and execute a successful IPO.

/s/ Anderson, Cohen, Dudek & Trotter, LLC

Washington, D.C.

June 15, 2026

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ANNEX A: SAMPLE IPO CHECKLIST

Initial Public Offering

Annex A: Draft Time and Responsibility Checklist for Legal Issues

Task No.	Description	Responsible Party	Notes/Status	Completed
Pre-Filing Items:				
	Planning / Structuring Items			
1.	Issuer and L&W to begin preparation of registration statement	Issuer / Issuer's Counsel — Latham & Watkins (of course)	*It's better to have a draft of the registration statement well underway before the organizational meeting*	☐
2.	Commence preparation of required financial statements	Issuer / Accountants / L&W	*Preparation of required audits and SAS 100 reviews are often the longest lead-time item, particularly if new or revised audits are required (as is the case where there is a new auditor or a recent material acquisition)*	☐
3.	Select underwriters and underwriters' counsel	Issuer		☐
4.	Determine whether issuer is an EGC under the JOBS Act	Issuer / L&W		☐
5.	Schedule organizational meeting with working group — attendees typically include senior management, underwriters, lawyers and accountants	Issuer / Underwriters	*Organizational meeting typically includes comprehensive management presentations*	☐
6.	Discuss "gun jumping" considerations (prohibited "offers" of securities prior to filing a registration statement and during the registration process; 30-day bright-line test pre-initial S-1 filing regarding publicity)	Issuer / L&W	*The JOBS Act has made gun jumping less of an issue, but it has not gone away*	☐
7.	Determine structure of IPO: primary offering or primary/secondary offering	Issuer / Underwriters	*It is possible to add selling stockholders in an amendment to the S-1 if determination cannot be made by time of initial filing* *L&W can help determine whether any existing stockholders have the right to participate in (or get notice of) an IPO pursuant to registration rights agreement*	☐

Task No.	Description	Responsible Party	Notes/Status	Completed
8.	Determine whether company or selling stockholders will provide shares for over-allotment option	Issuer / Selling Stockholders	*Known as the "Green Shoe," the over-allotment option may be exercised at any time by underwriters within 30 days of IPO; amount is always fixed at 15% of the base offering*	☐
9.	Consider pre-filing TTW meetings with institutional investors	Issuer / L&W / Underwriters	*Information presented in TTW meetings must be consistent with registration statement and will be required to be given to the SEC on a nonpublic basis*	☐
10.	ONLY IF issuer is an EGC, discuss which EGC accommodations, if any, issuer would like to take advantage of	Issuer / L&W / Underwriters	*Most EGCs take advantage of several of the following JOBS Act accommodations:* • *scaled financial disclosure;* • *relief from SOX 404(b);* • *reduced executive compensation disclosure; or* • *delayed requirement to comply with new/revised GAAP (or irrevocable opt-out)*	
11.	Consider whether a stock split will be necessary	Issuer / Underwriters	*Stock splits are typically determined prior to printing red herring and commencing the road show; financial statements may need to be revised to give retroactive effect to the stock split and auditor's report will likely be legended to reflect the stock split and re-dated*	☐
12.	Consider whether offering will include a directed share program for "friends and family"	Issuer / L&W	*This determination does not need to be made by initial filing*	☐
13.	Consider whether it is desirable to implement a dual class stock structure	Issuer / L&W	*Under exchange rules, dual class stock structures may only be implemented pre-IPO; typical structure is that Class A shares are held by public stockholders and have one vote per share and Class B shares are held by existing stockholders and have multiple votes (10) per share*	☐

Task No.	Description	Responsible Party	Notes/Status	Completed
14.	Negotiate lock-up agreements (typically 180 days for IPOs); distribute lock-up agreements to directors, officers, stockholders and option holders	L&W / Underwriters' Counsel	*Underwriters will typically request that all lock-up agreements are signed and delivered prior to commencing the road show and sometimes prior to initial filing of the registration statement*	☐
15.	Review and negotiate underwriting agreement and, if selling stockholders are selling shares, power of attorney and custody agreement	L&W / Underwriters' Counsel	*While the underwriting agreement is negotiated pre-road show, it is typically executed on the day of pricing of the IPO*	☐
16.	Consider whether any stockholder consents are required under stockholders' agreement or other agreements	L&W	*Stockholder agreements typically (but not always) fall away at the closing of the IPO, although registration rights for controlling stockholders usually continue post-IPO*	☐
17.	Reserve stock symbol — generally three to four characters	Issuer / L&W	*Stock symbols can be reserved on a confidential basis well in advance of initial filing of S-1 (note that reserving a symbol on one exchange also reserves it on the other)*	☐
18.	Select stock exchange and confirm the company will meet the applicable listing standards (e.g., NYSE/Nasdaq Global Select Market); conduct preliminary conversations with NYSE/Nasdaq listing representatives; prepare necessary listing applications	Issuer / L&W	*Exchange does not need to be selected prior to initial filing. It is often a good idea to engage both major exchanges in a dialogue about options*	☐
19.	Select financial printer	Issuer		☐
20.	Select transfer agent and registrar	Issuer	*Transfer agent can be selected post initial filing of S-1*	☐
21.	Select bank note company	Issuer	*Many transfer agents also have the ability to print stock certificates*	☐
	Due Diligence and Related Disclosure Matters			
22.	Assemble electronic data room for providing due diligence materials to underwriters and counsel; underwriters' counsel to deliver due diligence request letter	Issuer / L&W		☐

Task No.	Description	Responsible Party	Notes/Status	Completed
23.	Distribute Directors and Officers (D&O), NYSE/Nasdaq and FINRA Questionnaires to all officers, directors and 5% securityholders (10% for FINRA Questionnaires); provide completed questionnaires to underwriters' counsel	Issuer / L&W	*Underwriters' counsel will prepare FINRA Questionnaire*	☐
24.	Review material contracts (i.e., registration rights agreements, stockholders agreements, loan agreements, if any) for potential restrictions that may require notice, consent and/or waivers prior to filing registration statement	Issuer / L&W	*An IPO does not always trigger a change of control, but it is a good idea to take a hard look at any requirements in debt agreements for the existing stockholders group to maintain control*	☐
25.	Evaluate potential disclosure problems (i.e., material litigation; material contingent liabilities; insider transactions)	Issuer / L&W		☐
26.	Review contracts to determine material contracts that will need to be filed as exhibits to the registration statement and the terms of which will need to be disclosed in the registration statement; determine whether notice needs to be given to 3rd parties and/or consents obtained to disclose terms in the registration statement; make preliminary assessment of competitive harm and materiality issues	Issuer / L&W	*Item 601(b)(10)(iv) of Regulation S-K allows an issuer to redact provisions or terms of material contracts if the issuer customarily and actually treats that information as private or confidential and that omitted information is not material* *The SEC may request supplemental information to substantiate the redactions* *See S-K Item 601(b)(10)(iv)*	☐
27.	Analyze related-party transactions during the current year and the last three fiscal years that will need to be disclosed under "Certain Relationships and Related Party Transactions" in the registration statement	Issuer / L&W		☐
28.	Determine whether any "conflicts of interests" disclosure is required in the registration statement pursuant to applicable FINRA rules	Underwriters' Counsel	*This issue arises if, for example, one of the underwriters or its affiliates will be receiving 5% or more of the net proceeds of the offering in connection with the repayment of a credit facility or other indebtedness*	☐
29.	Prepare back-up binder of all factual statements included in the registration statement	Issuer / L&W		☐

Task No.	Description	Responsible Party	Notes/Status	Completed
30.	Conduct legal and accounting due diligence meetings/calls	Issuer / Underwriters' Counsel		☐
31.	Background checks of directors and executive officers conducted by underwriters	Underwriters' Counsel		☐
	Auditor Items			
32.	Confirm schedule for preparation of audited financials (three years of audited financial statements will be required to be included in registration statement) ONLY IF issuer is an EGC, issuer may go public with two, rather than three years, of audited financial statements	Accountants		☐
33.	Determine whether quarterly financial data for prior two fiscal years will be called for in the MD&A	Underwriters	*This is not required by the SEC rules but is often required for marketing purposes*	☐
34.	Confirm auditor independence	Accountants	*SEC rules require an auditor to be independent under both S-X Rule 2-01(b) and (c) for the most recent audited year* *The SEC Staff may also apply S-X 2-01(b) to some activities performed during prior audited years included in the registration statement*	
35.	Assess SOX 404 compliance — review internal control over financial reporting and disclosure controls and procedures (if issuer is an EGC, issuer is exempt from auditor attestation requirements of SOX 404(b) for so long as issuer is an EGC; non-EGC issuers have until the 2nd annual report to comply with SOX 404(b))	Issuer / Accountants / L&W	*Identify and remediate any material weaknesses and/ or significant deficiencies pre-initial filing of S-1*	☐
36.	Meet with accountants to discuss required financial statements and any necessary changes in accounting procedures due to the company becoming a public company	Accountants		☐
37.	Determine whether any of the company's operations must be reported as separate segments	Accountants / L&W		☐
38.	Discuss use of non-GAAP financial measures	Issuer / Accountants / Underwriters' Counsel		☐

Task No.	Description	Responsible Party	Notes/Status	Completed
39.	"Cheap stock" analysis	Accountants	*Cheap stock comments by the Staff cannot be resolved until a price range is provided to the Staff*	☐
40.	Determine "significant subsidiaries" under Rule 1-02 of Regulation S-X	Issuer	*Frequently used in connection with reps and warranties in underwriting agreement*	☐
41.	Underwriters' counsel and auditors discuss comfort letter	Underwriters' Counsel / Accountants	*If quarterly financial data for previous fiscal years will be included in the MD&A, be sure to discuss comfort on that data*	☐
42.	Obtain draft of accountant's consent	L&W / Accountants	*It is not necessary to submit a signed consent in a confidential submission, but verbal approval from accountants to file is always advisable*	☐
	General Corporate Matters			
43.	Consider whether a name change of the issuer is desired	Issuer	*Be thoughtful about intellectual property issues in the event of a name change*	☐
44.	Consider whether it is desirable to restructure the capitalization of the company; consider whether a leveraged re-cap is desirable	Issuer / Underwriters		☐
45.	Consider whether there is a need to revise or enter into: • employment agreements • employee benefit matters (i.e., stock option plans, employee stock purchase plans) • renegotiation of any covenants in loan agreements that restrict or limit the use of proceeds in a public offering, as applicable	Issuer / L&W	*It is customary for the board to revisit management compensation arrangements concurrently with the IPO, usually with the advice of a compensation consultant*	☐
46.	Revise organizational/constitutional documents as necessary for public companies: • certificate of incorporation • bylaws • registration rights agreements • stockholders agreement • other	Issuer / Accountants / L&W	*Board resolutions typically provide that public company governance documents become effective in connection with consummation of the IPO* *Stockholders agreements typically terminate in connection with an IPO*	☐

Task No.	Description	Responsible Party	Notes/Status	Completed
47.	Conduct NYSE / Nasdaq / SOX director "independence" analysis; board of directors to make independence determination; determine whether additional directors need to be appointed to the board of directors to meet independence requirements	Issuer / Board of Directors / L&W	*Consider whether board of directors is going to avail itself of the "controlled company" exemption; phase-in rules for the independence requirements do apply in connection with an IPO*	☐
48.	Review composition of board committees, consider: • heightened independence requirements for audit and compensation committee members • "outside director" and "non-employee director" requirements for compensation committee members • staggered terms • mandatory retirement age • separation of Chairman / CEO roles	Board of Directors / L&W	*Directors who are not planning to remain on the board post-IPO should resign prior to the filing of the registration statement to avoid liability for the registration statement*	☐
49.	Designate board committees; prepare NYSE/Nasdaq compliant: • audit committee charter • nominating and corporate governance committee charter • compensation committee charter	Board of Directors / L&W	*Determine whether any audit committee members qualify as "audit committee financial experts"*	☐
50.	Prepare corporate governance policies • code of business conduct and ethics • corporate governance guidelines • insider trading policy • Regulation FD policy • related-party transaction policy • compensation clawback policy • communications with stockholders • disclosure controls and procedures • whistleblower policy	Board of Directors / L&W	*Board resolutions typically provide that public company governance policies become effective in connection with the consummation of the IPO*	☐
51.	Consider formation of a disclosure committee • disclosure committee charter	Issuer / L&W		☐
52.	Confirm appropriate levels of D&O insurance	Issuer		☐

Task No.	Description	Responsible Party	Notes/Status	Completed
53.	Consider entering into stand-alone indemnification agreements with directors and executive officers	Issuer / L&W	*This is advisable under the law of most states. The form of indemnification agreement needs to be filed as an exhibit to the registration statement*	☐
	Preparation of S-1 Registration Statement			
54.	Prepare registration statement (must meet the requirements of Form S-1 or F-1 for foreign private issuers) • Prospectus Summary • Summary Financial Data • Risk Factors • Forward-Looking Statements • Use of Proceeds • Dividend Policy • Capitalization • Dilution • Management's Discussion and Analysis of Financial Condition and Results of Operations • Industry Overview • Business – Products – Sales and Marketing – Research and Development – Competition – Intellectual Property – Manufacturing – Regulatory, if applicable – Employees – Facilities – Legal Proceedings • Management • Board of Directors/Board Committees • Compensation Discussion and Analysis – not required for EGCs • Compensation of Directors • Executive Compensation • Benefit Plans • Employment Agreements/Change of Control Agreements • Certain Relationships and Related Party Transactions	Issuer / Underwriters / Counsel		☐

Task No.	Description	Responsible Party	Notes/Status	Completed
	• Principal Stockholders (and Selling Stockholders, if applicable) • Description of Indebtedness, if applicable • Description of Capital Stock • Shares Eligible for Future Sale • Material US Federal Income Tax Consequences to Non-US Holders of the Common Stock • Underwriting • Legal Matters/Experts • Financial Statements • Part II – Expenses of Issuance and Distribution – Indemnification of Directors and Officers – Recent Sales of Unregistered Securities (past three years) – Exhibits • Signature Pages/Power of Attorney			
55.	Prepare cover art graphics for prospectus (coordinate with financial printer regarding proper format; lead time required)	Issuer / Underwriters	*SEC will review graphics*	☐
56.	Perform S-1 form check of registration statement to confirm registration statement meets all applicable requirements	L&W		☐
57.	Edgarize / typeset registration statement	L&W / Printer		☐
58.	Edgarize exhibits	L&W	*Frequently a long lead-time item; ideally have Word versions of documents to Edgarize*	☐
59.	Prepare confidential treatment request (if applicable)	L&W		☐
60.	Review and revise company website as appropriate (gun-jumping concerns, information inconsistent with the disclosures in the registration statement)	Issuer / L&W	*The SEC will typically review a company's website and other public announcements regarding the company*	☐
	Board Items			
61.	Prepare pre-filing board resolutions authorizing initial filing of registration statement, listing application with exchange, establishment of pricing committee and other IPO-related matters	Board of Directors / L&W		☐

Task No.	Description	Responsible Party	Notes/Status	Completed
62.	Distribute registration statement for board to review	Issuer / Board of Directors		☐
63.	Hold board meeting to approve pre-filing IPO resolutions	Board of Directors		☐
	Miscellaneous Items			
64.	Distribute signature pages to the registration statement and power of attorney to directors and appropriate officers; obtain executed signature pages	L&W		☐
65.	Obtain CIK and CCC EDGAR filing codes on behalf of the company and the directors, Section 16 officers and 10% securityholders (confirm none of these individuals/entities already possess CIK/CCC codes)	L&W		☐
66.	Have financial printer make a "test" filing and confirm CIK and CCC codes are accepted	L&W		☐
67.	Prepare Rule 134 press release to be issued at time of filing of registration statement	Issuer / L&W	*Issuers are extremely limited in what they can include in the press release regarding the IPO*	☐
Initial Filing of Registration Statement:				
68.	Confirm receipt of executed signature pages to registration statement from all directors and officers	Issuer / L&W		☐
69.	Confirm receipt of executed signature pages to lock-up agreements and provide to underwriters' counsel	Issuer / L&W	*Underwriters will typically request that all lock-up agreements are signed and delivered prior to commencing the road show and sometimes prior to initial filing of the registration statement*	☐
70.	Confirm receipt of executed auditor's consent	Issuer / Accountants	*It is not necessary to submit a signed consent in a confidential submission, but verbal approval from accountants to file is always advisable*	☐
71.	Consider submitting draft registration statement confidentially via EDGAR for nonpublic SEC review Note: issuer must publicly file initial submission plus all amendments at least 15 days before conducting traditional road show	Issuer / L&W		☐

Task No.	Description	Responsible Party	Notes/Status	Completed
72.	If issuer is not submitting confidentially, calculate SEC filing fee; coordinate wire transfer of fee to the SEC; have financial printer confirm filing fee has been accepted prior to filing Filing fee is due at the time of the first public filing	Issuer / L&W	*No SEC filing fee is required for a confidential submission*	☐
73.	Calculate FINRA filing fee; coordinate payment of fee to FINRA	Underwriters' Counsel	*Payment of FINRA filing fee is due within one business day following the initial filing with FINRA* *Underwriters' counsel will calculate the fee and provide wire instructions, but the issuer will submit the payment to FINRA* *Note that FINRA requires the filing fee to be paid based on a "preliminary estimate" of the offering size even if the registration statement has been confidentially submitted to the SEC*	☐
74.	Conduct bring-down due diligence call with CFO and general counsel prior to (day of) initial filing of registration statement	Issuer / Underwriters / Counsel		☐
75.	If underwriters request, conduct "Testing the Waters" meetings with QIBs and/or IAIs	Issuer / Underwriters		☐
76.	Confirm acceptance of the company's CIK and CCC EDGAR filing codes	L&W		☐
77.	Publicly file or confidentially submit registration statement with SEC (EDGAR filing deadline of 5:30 p.m. (Eastern Standard Time))	L&W	*Unless S-1 is confidentially submitted, S-1 will be publicly available as soon as it is filed with SEC through EDGAR. SEC comment letters are made public approximately 20 business days after registration statement is declared effective*	☐
78.	Make initial filing through FINRA Public Offering System	Underwriters' Counsel	*FINRA filings must be made within three business days of any filing with or confidential submission to the SEC*	☐

Task No.	Description	Responsible Party	Notes/Status	Completed
79.	Submit registration statement to NYSE/Nasdaq for review	Underwriters' Counsel	*If submitting to NYSE, schedule company for review by Clearance Committee*	☐
80.	Accountants to deliver draft comfort letter to underwriters	Accountants		☐
81.	Confirm quantities of registration statement to be distributed to various parties of the working group; coordinate distribution with financial printer	L&W		☐
Post-filing of Initial Registration Statement:				
82.	Within a week of filing the registration statement, contact SEC and determine who the SEC examiner will be for the offering and when the company can expect to receive comments on the filing (typically 30 days following initial filing / submission date)	L&W		☐
83.	Receive and respond to SEC comments; file / submit necessary amendments to registration statement (SEC typically takes approximately two weeks to review each amendment to the registration statement)	Issuer / Underwriters / Counsel	*Accountants' consent will be required to be filed with each amendment filing* *Attorney-in-fact will sign on behalf of all directors*	☐
84.	Receive and respond to SEC comments on confidential treatment request, if applicable (SEC typically takes at least 30 days to respond to initial CTR application)	Issuer / L&W		☐
85.	Prepare and deliver listing application, requisite copies of the registration statement and any other required documents to NYSE/Nasdaq	L&W		☐
86.	Prepare road show presentation; management, investment bankers and lawyers to review pre-recorded road show; company must make the electronic road show available without restriction to any person (i.e., post the road show on its website, or on a commercial website approved for such purposes, and grant unrestricted access or file road show with SEC)	Underwriters / Issuer	*Information provided in road show must be consistent with information provided in red herring* *Underwriters frequently use netroadshow.com*	☐

Task No.	Description	Responsible Party	Notes/Status	Completed
87.	Finalize negotiation of underwriting agreement, power of attorney, and custody agreement	L&W / Underwriters' Counsel	*Underwriters will want power of attorney and custody agreement to be executed and shares placed in custody prior to commencement of road show; transfer agent typically acts as custodian*	☐
88.	Obtain executed copies of any outstanding lock-up agreements	Issuer / L&W		☐
89.	Finalize listing application with NYSE/Nasdaq; deliver appropriate documentation	Issuer / L&W		☐
90.	Finalize any necessary "corporate housekeeping" and corporate governance documents (e.g., post-IPO certificate of incorporation and bylaws; adoption of committee charters/governance policies)	L&W / Issuer		☐
91.	Prepare and have board authorize resolutions adopting: • public company certificate of incorporation • public company bylaws • committee composition • committee charters • Section 16 officers and "executive officers" lists • governance policies • stock split	L&W / Board of Directors		☐
92.	Prepare any necessary stockholder consents	L&W		☐
93.	Advise banknote company of offering schedule; obtain specimen stock certificate; determine lead time for printing of stock certificates	L&W	*Specimen stock certificate must be filed as an exhibit to the registration statement*	☐
94.	Prepare certificate of appointment of transfer agent and other necessary documents (typically transfer agent needs executed certificate of appointment prior to effective date of registration statement)	L&W		☐
95.	Obtain CUSIP number from CUSIP Service Bureau (www.cusip.com)	L&W		☐

Task No.	Description	Responsible Party	Notes/Status	Completed
96.	Prepare Form 8-A for Exchange Act registration	L&W	*The 8-A registration statement registers the company's common stock under the Exchange Act and is effective immediately upon the Securities Act registration statement being declared effective by the SEC*	☐
97.	Determine any changes to the proposed Maximum Aggregate Offering Price to be included in the fee table of the registration statement (consider converting to Rule 457(a) fee table)	Issuer / Underwriters / L&W		☐
98.	Determine price range of offering and submit supplemental price range letter to SEC if there are potential cheap stock issues	Issuer / Underwriters		☐
99.	If issuer is submitting confidentially, publicly file all confidential submissions at least 15 days prior to the road show	L&W		☐
100.	Update FINRA filing to reflect initial public filing and pay additional FINRA filing fees, as applicable	Underwriters' Counsel	*Additional FINRA filing fees will be required based on total aggregate dollar amount of securities registered (including over-allotment option)*	☐
101.	Effectuate stock split, if applicable	Issuer / Accountants / L&W		☐
102.	Confirm no further SEC comments on S-1 and confidential treatment request	L&W		☐
103.	Prepare and deliver preliminary blue sky memo	Underwriters' Counsel		☐
104.	File and print preliminary prospectus (referred to as the red herring)	L&W / Printer	*Additional FINRA filing fees may be required based on total aggregate dollar amount of securities registered (including over-allotment option)*	☐
105.	Prepare road show slides (confirm no material departures from the registration statement disclosure)	Underwriters / Issuer / Counsel		☐
106.	Road show commences	Underwriters / Issuer	*Road show typically lasts two weeks; CEO and CFO typically participate; first day of road show will be presentations to underwriters' sales force teams*	☐

Task No.	Description	Responsible Party	Notes/Status	Completed
107.	Launch press release under Rule 134	L&W / Issuer		☐
108.	Post pre-recorded road show on website	Underwriters / Issuer	*Netroadshow.com*	☐
Between Commencement of Road Show and Effectiveness of Registration Statement:				
109.	Prepare pricing committee resolutions	L&W		☐
110.	Prepare Form 3s and Form 4s for directors, Section 16 officers, and 10% securityholders (obtain any remaining CIK/CCC codes)	L&W		☐
111.	FINRA matters: • Underwriters to obtain "no objections" clearance from FINRA regarding reasonableness of underwriting terms and arrangements • FINRA notifies SEC of "no objections" determination	Underwriters' Counsel	*SEC will not declare registration statement effective without FINRA clearance* *Provide underwriters' counsel with name and contact information for SEC examiner*	☐
112.	Confirm that underwriters' counsel has resolved any outstanding blue sky issues and completed blue sky registration and qualification	L&W / Underwriters' Counsel	*Will only apply if securities will not be listed on a national securities exchange*	☐
113.	Analyze need to distribute and file any FWPs (updating disclosure from preliminary prospectus)	L&W		☐
114.	Prepare and deliver to SEC company's request for acceleration of the registration statement (48 hours prior to desired effectiveness time)	L&W		☐
115.	Underwriters to deliver to SEC letter joining the company's acceleration request	Underwriters		☐
Effective Date of Registration Statement:				
116.	SEC declares registration statement effective	SEC		☐
117.	Conduct pricing call with pricing committee	Underwriters / Pricing Committee		☐
118.	Pricing committee resolutions adopted	Board of Directors		☐
119.	Finalize and execute underwriting agreement	Issuer / Underwriters		☐
120.	Price offering and issue press release announcing pricing	L&W / Issuer		☐
121.	Accountants deliver comfort letter	Accountants		☐
122.	File Form 3s with SEC (directors, Section 16 officers, and 10% securityholders)	L&W		☐

Task No.	Description	Responsible Party	Notes/Status	Completed
123.	File Form 8-A registration statement for Exchange Act registration (effective immediately upon filing)	L&W		☐
124.	Post corporate governance guidelines, committee charters and code of business conduct and ethics on company's website as required by SEC and NYSE/Nasdaq requirements	Issuer	*If NYSE, file NYSE 303A Corporate Governance Certification no later than the night before the initial trading date*	☐
125.	Provide required link on company's website to Section 16 filings and future periodic Exchange Act reports	Issuer		☐
126.	Conduct bring-down due diligence call	Underwriters / Issuer / Counsel		☐
127.	Prepare final prospectus	L&W	*Referred to as 424(b) prospectus*	☐
Day Following Effectiveness of Registration Statement:				
128.	File 424(b) prospectus with the SEC	L&W		☐
129.	File effectiveness notice, 424(b) prospectus, and final underwriting agreement with FINRA within three business days of SEC filing	Underwriters' Counsel	*Additional FINRA filing fees may be required based on total aggregate dollar amount of securities registered (including over-allotment option)*	☐
130.	Prepare and deliver final blue sky memo	Underwriters' Counsel		☐
131.	Trading commences on Nasdaq/NYSE	N/A		☐
132.	Finalize closing documents • officers' certificate • secretary's certificate • legal opinions • other	L&W / Underwriters' Counsel		☐
133.	Prepare summary "funds flow memo" for closing			☐
Closing:				
134.	Conduct bring-down due diligence call	Underwriters / Issuer / Counsel		☐
135.	Confirm no stop orders have been issued on registration statement	L&W / Counsel		☐
136.	Confirm receipt of executed copies of all closing documents	L&W / Underwriters' Counsel		☐

Task No.	Description	Responsible Party	Notes/Status	Completed
137.	File public company certificate of incorporation with applicable secretary of state	L&W		☐
138.	Underwriters to wire funds to company (and selling stockholders, if applicable)	Underwriters		☐
139.	File Form 4s, if applicable	L&W		☐
140.	Deliver final copies of prospectus to applicable parties (i.e., FINRA, NYSE/ Nasdaq, CUSIP bureau, transfer agent)	L&W / Underwriters' Counsel	*If NYSE, deliver final NYSE Listing Application within 30 days of initial listing date*	☐
141.	Issue press release regarding closing of offering	Issuer / L&W		☐
142.	File S-8 registration statement covering stock option plans (effective immediately upon filing)	L&W		☐

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ANNEX B: NYSE QUANTITATIVE LISTING CRITERIA AND CORPORATE GOVERNANCE STANDARDS

The NYSE's requirements for initial listing and listing maintenance are set out below. Foreign private issuers may satisfy either the general NYSE listing standards applicable to domestic US issuers or the NYSE's Alternate Listing Standards for foreign private issuers. They apply only to foreign private issuers with a broad, liquid market for their securities in their country of origin.[1]

Quantitative Initial Listing Standards[2]

Under the NYSE initial listing standards, an issuer typically must meet the following minimum distribution and market value criteria[3] and must also meet one of the two financial standards described below.[4]

Minimum Distribution Requirements

An IPO issuer must have 400 holders of 100 shares or more[5] and 1.1 million publicly held shares.[6]

Market Value of Publicly Held Shares

The aggregate market value of publicly held shares must be at least $40 million for IPO issuers.[7] In addition, a company must have an IPO price per share of at least $4 at the time of initial listing.

Financial Standards

A company seeking to list must meet the requirements of either the Earnings Test or the Global Market Capitalization Test:

- *Earnings Test:* An issuer's pre-tax earnings (from continuing operations and after minority interest, amortization, and equity in the earnings or losses of investees, subject to certain adjustments) must total:
  - at least $10 million in the aggregate for the last three fiscal years including a minimum of $2 million in each of the two most recent fiscal years and positive amounts in all three years;
  - at least $12 million in the aggregate for the last three fiscal years together with a minimum of $5 million in the most recent fiscal year and $2 million in the next most recent fiscal year;[8] or
  - if the issuer is an EGC[9] and it avails itself of the Securities Act and Exchange Act provisions permitting EGCs to report only two years of financial statements, it may meet the final prong of this test if it has at least $10 million in aggregate pre-tax earnings for the last two years with at least $2 million in both years.
- *Global Market Capitalization Test:* An issuer must have at least $200 million in global market capitalization.[10]

Alternate Listing Standards for Foreign Private Issuers Only

The NYSE provides Alternate Listing Standards for foreign private issuers that do not list under the standards listed for domestic issuers listed above. These alternative minimum distribution, market value criteria, and financial standards are described below.[11]

FPI Minimum Distribution Requirements

A foreign private issuer must have:

- 5,000 worldwide holders of 100 shares or more; and
- 2.5 million shares held publicly worldwide.[12]

FPI Market Value of Publicly Held Shares

The aggregate worldwide market value of publicly held shares of the foreign private issuer must be at least $100 million. In addition, an issuer must have a closing price or, if listing in connection with an IPO, an IPO price per share of at least $4 at the time of listing.

Financial Standards

A foreign private issuer seeking to list must satisfy the requirements of either the Earnings Test or the Valuation/Revenue Tests:

- *Earnings Test:*
  - The pre-tax earnings (from continuing operations and after minority interest, amortization, and equity in the earnings or losses of investees, subject to certain adjustments) of the foreign private issuer must be at least $100 million in the aggregate for the last three fiscal years, including a minimum of $25 million in each of the most recent two fiscal years;[13] or
  - If the issuer is an EGC and it avails itself of the Securities Act and Exchange Act provisions permitting EGCs to report only two years of financial statements, it may meet the final prong of this test if it has at least $100 million in aggregate pre-tax earnings for the last two years with at least $25 million in each year.
- *Valuation/Revenue Tests:*

  Valuation/Revenue with Cash Flow Test:[14]
  - At least $500 million in global market capitalization, at least $100 million in revenues during the most recent 12-month period, and $100 million in the aggregate cash flows for the last three fiscal years, including $25 million in each of the two most recent fiscal years (subject to certain adjustments); or
  - If the issuer is an EGC and it avails itself of the Securities Act and Exchange Act provisions permitting EGCs to report only two years of financial statements, it may meet the final prong of this test if it has at least $100 million aggregate cash flows in the last two fiscal years with at least $25 million in each year.

  Pure Valuation/Revenue Test:[15]
  - At least $750 million in global market capitalization and $75 million in revenues during the most recent fiscal year.

Quantitative Maintenance Requirements

To maintain its listing on the NYSE, a domestic US issuer or foreign private issuer must meet certain quantitative maintenance standards, which are summarized below.

Minimum Distribution Requirements

The NYSE may promptly initiate suspension and delisting procedures against an issuer if:

- the total number of stockholders is less than 400; or
- the total number of stockholders is less than 1,200 and the average monthly trading volume for the most recent 12 months is less than 100,000 shares; or
- the number of publicly held shares is less than 600,000.[16]

Minimum Financial Standards

The NYSE will consider an issuer to be below compliance (and so eligible for suspension and delisting) if an issuer's average global market capitalization over a consecutive 30 trading-day period is less than $50 million and, at the same time, total stockholders' equity is less than $50 million.[17] An issuer that falls below an average global market capitalization of $15 million over a consecutive 30 trading-day period will be subject to prompt suspension and delisting procedures.[18]

When determining an issuer's ability to meet the market capitalization test in any of the financial standard tests above, include the total number of outstanding shares of common stock (excluding treasury shares, if any) along with any shares of common stock issuable upon conversion of any other outstanding equity security. All such shares should be included in the calculation of market value so long as the security is the "substantial equivalent" of the issuer's common stock. All securities included in the calculation must be either publicly traded (or quoted) or convertible into a publicly traded (or quoted) security.

Price Criteria

An issuer will be considered to be below compliance standards and accordingly may be subject to suspension and delisting if the average closing price of its listed security is less than $1.00 over a consecutive 30 trading-day period. The NYSE will grant the issuer six months to cure the deficiency as long as the issuer (1) files a press release disclosing the deficiency within four days following notification; and (2) notifies the NYSE that it intends to return its share price and average share price to more than $1.00 within 10 business days following NYSE notification. A foreign private issuer has 30 days following notification to issue a press release disclosing that it has fallen below the continued listing standards. In the event that an issuer does not comply with the press release requirement, the NYSE will issue a press release noting the issuer's failure to meet the continued listing requirements. If, on the final trading day of any calendar month during the six-month cure period, the issuer's shares have a closing price of at least $1.00 and an average closing price of $1.00 over the prior 30 trading days, then the issuer will be deemed to be in compliance. However, if the six-month cure period expires without the securities meeting these requirements, then the NYSE will initiate the suspension and delisting of the securities.[19]

Other Maintenance Requirements

An issuer may also be subject to suspension and delisting on a number of additional grounds, including:

- a substantial reduction in operating assets and/or scope of operations;
- the failure of an issuer to make timely, adequate, and accurate disclosures of information to its shareholders and the investing public; and
- the failure to observe good accounting practices in reporting of earnings and financial position.[20]

NYSE Corporate Governance Requirements

In addition to the quantitative and maintenance listing standards detailed above, an issuer must meet certain corporate governance standards for an initial listing, with two key exceptions:

- *Foreign Private Issuers*. Foreign private issuers are permitted to follow home-country practice in lieu of the NYSE's corporate governance standards, other than the NYSE's requirements that it must: (1) have an audit committee that meets the requirements of Exchange Act Rule 10A-3; (2) provide prompt notification from its CEO of non-compliance with the applicable provisions of the NYSE's corporate governance rules; and (3) comply with the requirements regarding erroneously awarded compensation.[21] Whether a listed foreign private issuer follows the NYSE corporate governance standards or its home-country practice, it must disclose any ways in which its corporate governance practices differ from those followed by domestic US issuers under NYSE listing standards.[22]

- *Controlled Companies*. A "controlled company" is an issuer in which more than 50% of the voting power for the election of directors is held by an individual, a group, or another company. Master Limited Partnerships ("MLPs") often qualify as controlled companies. A "controlled company" is not required to comply with the NYSE's requirements to have a majority of independent directors, a nominating/corporate governance committee, or a compensation committee.[23]

Majority of Independent Directors

A majority of the issuer's board of directors must consist of independent directors.[24] A director will qualify as independent only if the board affirmatively determines that the director does not have any material relationships with the company (either directly or as a partner, shareholder, or officer of an organization that has a relationship with the company).[25] In making its determination, the board of directors must consider a candidate's commercial, industrial, banking, consulting, legal, accounting, charitable, and familial relationships, among others. The NYSE notes that a director's stock ownership, even if significant, should not in and of itself negate a determination of independence.[26]

A director would not be independent if:

- currently or during the previous three years, either the director was an employee of the company or an immediate family member of the director was an executive officer of the company;[27]
- during any 12-month period within the last three years, the director (or any of the director's immediate family members) has received more than $120,000 in direct compensation from the company (other than in the form of director and committee fees, pension, or other forms of deferred compensation for prior service, provided such compensation is not contingent in any way on continued service);[28]
- (A) the director is a current partner or employee of a firm that is the company's internal or external auditor; (B) the director has an immediate family member who is a current partner of such a firm; (C) the director has an immediate family member who is a current employee of such a firm and personally works on the company's audit; or (D) the director or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the company's audit within that time;[29]
- the director or an immediate family member is, or has been within the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee;[30] or
- the director is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of $1 million, or 2% of such other company's consolidated gross revenues.[31]

An "immediate family member" is defined broadly to include a person's spouse, parents, children, and siblings, as well as mothers- and fathers-in-law, sons- and daughters-in-law, brothers- and sisters-in-law, and anyone who shares that person's home (other than a domestic employee). "Listed company" or "company" for the purpose of determining independence includes any parent or subsidiary in a consolidated group with the company.[32]

Furthermore, with respect to service on the compensation committee, the board of directors must affirmatively conclude that the director is able to be independent from management after consideration of all relevant factors, including, but not limited to:[33]

- the director's compensation, including any consulting, advisory, or other compensatory fees paid by the listed company; and
- any affiliation between such director and the listed company, any of its subsidiaries, or any affiliates of its subsidiaries.

Executive Session

The listed company must hold regularly scheduled meetings of non-management directors without management present. Furthermore, a listed company that chooses to include all non-management directors at such meetings should also hold an executive session solely for independent directors at least once a year.[34]

Recovery of Erroneously Awarded Compensation ("Claw Back" Rules)

The listed company must adopt a written policy that provides for the reasonably prompt recovery of erroneously awarded incentive-based compensation received by executive officers and comply with such policy if the listed company is required to prepare an accounting restatement due to a material noncompliance by the listed company with any financial reporting requirement under the securities laws. This includes any such restatement required to correct any material errors in previously issued financial statements or errors that would result in a material misstatement if such errors were corrected in the current period or left uncorrected in the current period.[35]

Each listed company must also file disclosures with respect to such erroneously awarded compensation recovery policy as required by the federal securities laws and any applicable SEC rule.[36]

Nominating/Corporate Governance Committee

The listed company must have a fully independent nominating/corporate governance committee,[37] which is governed by a written charter that:

- addresses the committee's purpose and responsibilities, which must include identifying and selecting or recommending director nominees, developing and recommending corporate governance principles, and overseeing the evaluation of the board and management;[38] and
- provides for an annual performance evaluation of the committee.[39]

The nominating/corporate governance committee charter should also address how the committee:

- qualifies its members;
- appoints and removes its members;
- is structured and operates (including the authority to delegate to subcommittees); and
- reports to the board.[40]

Finally, the committee charter should also specify that the committee has the sole authority over the retention and termination of any company engaged to identify director candidates, including the terms and fees relating to such search.

Compensation Committee

Companies must have a fully independent compensation committee,[41] which is governed by a written charter that:

- addresses its purpose and responsibilities, including, at a minimum, direct responsibility for:
  - setting corporate goals and objectives relevant to CEO compensation, evaluating CEO performance, and determining and approving CEO compensation levels in light of such evaluation;[42]
  - recommending compensation, incentive-compensation plans, and equity-based plans for non-CEO executives that are subject to board approval to the board;[43] and
  - producing a report on executive compensation as required by the SEC to be included in the company's annual proxy statement or annual report filed with the SEC;[44]

- provides for an annual performance evaluation of the compensation committee;[45] and
- sets forth the following rights and responsibilities with respect to the use of compensation consultants, legal counsel, or other advisers by the compensation committee:[46]
  - the ability, in its sole discretion, to retain or obtain the advice of a compensation consultant, independent legal counsel, or other adviser upon consideration of all of the factors relevant to that person's independence from management, including the following:
    - any other services to be provided to the issuer by the employer of the compensation consultant, legal counsel, or other adviser;
    - any fees to be received from the issuer by the employer of the compensation consultant, legal counsel, or other adviser taken as a percentage of the total revenue of such employer;
    - the policies and procedures of the employer of the compensation consultant, legal counsel, or other adviser that are designed to prevent conflicts of interest;
    - any business or personal relationships between any member of the compensation committee and the proposed compensation consultant, legal counsel, or other adviser;
    - whether such compensation consultant, legal counsel, or other adviser owns any stock of the listed company;
    - any business or personal relationship of the compensation consultant, legal counsel, other adviser, or the person employing the adviser with an executive officer of the listed company;[47] and
    - responsibility for the appointment, compensation and oversight of the work of any such compensation consultant, independent legal counsel, or other adviser.[48] The listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to such compensation consultant, independent legal counsel, or other adviser.[49]

The compensation committee charter should also address committee member qualifications, committee member appointment and removal, committee structure and operations (including authority to delegate to subcommittees), and committee reporting to the board.[50]

Audit Committee

Composition

Companies must have an audit committee composed of at least three members that meet all of the NYSE independence requirements as well as the independence and other requirements of Exchange Act Rule 10A-3 (implementing Section 301 of Sarbanes-Oxley).[51]

The audit committee members must be "financially literate," and at least one member must have accounting or financial management expertise, as determined by the company's board based on its business judgment. For any audit committee member that serves on the audit committees of more than three public companies at the same time, the board must determine that such service would not impact such member's ability to serve effectively on its audit committee, and it must disclose its determination on or through the company's website or in the company's annual proxy statement or, if the company does not file an annual proxy statement, in its annual report filed with the SEC.[52]

Charter

The audit committee must have a written charter that addresses:

- the committee's purpose, which at a minimum must be to:

  - assist the board with oversight of: (1) the integrity of the company's financial statements; (2) the company's compliance with legal and regulatory requirements; (3) the independent auditor's qualifications and independence; and (4) the performance of the company's internal audit function and independent auditors;[53] and
  - prepare an audit committee statement as required by the SEC to be included in the company's annual proxy statement or annual report filed with the SEC;[54]
- an annual performance evaluation of the audit committee;[55] and
- the duties and responsibilities of the audit committee, which at a minimum must include those set out in Exchange Act Rule 10A-3(b)(2), (3), (4) and (5) (concerning responsibilities relating to: (1) registered public accounting firms; (2) complaints relating to accounting, internal accounting controls or auditing matters; (3) authority to engage advisers; and (4) funding as determined by the audit committee),[56] as well as to:
  - at least annually, obtain and review a report by the independent auditor describing: (1) the firm's internal quality-control procedures; (2) any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by government or professional bodies, within the preceding five years respecting one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and (3) all relationships between the independent auditor and the company (to assess the auditor's independence);[57]
  - meet to review and discuss the company's annual audited financial statements;[58] quarterly unaudited financial statements with management and the independent auditor, including the company's MD&A disclosures;[59] earnings press releases;[60] financial information and earnings guidance provided to analysts and rating agencies;[61] and policies with respect to risk assessment and risk management;[62]
  - meet separately, periodically, with management, with internal auditors and with independent auditors;[63]
  - review with the independent auditors any audit problems or difficulties and management's response;[64]
  - set clear hiring policies for employees or former employees of the independent auditors;[65] and
  - report regularly to the board.[66]

Internal Audit

Companies must have an internal audit function that evaluates the company's risk management processes and internal control systems and reports its findings to management and the audit committee. This function may be provided by a third party other than the company's independent auditor.[67]

Shareholder Meetings

Each fiscal year, a listed company must hold an annual meeting of its shareholders.[68]

Shareholder Approval of Certain Transactions

Shareholder approval is required for each of the following material transactions, with certain exceptions:

- the implementation of equity-compensation plans and material revisions thereto[69] (any sale of stock to an employee, director, or services provider is also subject to the equity compensation rules in Section 303A.08[70]);
- prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions to a related party (that is, directors, officers, or substantial security holders of the issuer) if such transaction is a cash sale for a price that is less than the Minimum Price,[71] and the number of shares of common stock to be issued, or if the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either 1% of the number of shares of common stock or 1% of the voting power outstanding before the issuance.[72]

- prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, where such securities are issued as consideration in a transaction or series of transactions in which a Related Party has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into common stock, could result in an issuance that exceeds either 5% of the number of shares of common stock or 5% of the voting power outstanding before the issuance.[73]
- an issuance of more than 20% of the outstanding common stock of the issuer (measured either by amount of shares or voting power);[74] and
- an issuance that will result in a change of control of the issuer.[75]

Related Party Transactions

A company's audit committee or another independent body of the board of directors, is required to conduct a reasonable prior review and oversight of all related party transactions for potential conflicts of interest and will need to prohibit such a transaction if it determines it to be inconsistent with the interests of the company and its shareholders.[76]

Corporate Governance Guidelines

Companies must adopt and disclose corporate governance guidelines that must address:

- director qualification standards;
- director responsibilities;
- director access to management and, as necessary and appropriate, independent advisers;
- director compensation;
- director orientation and continuing education;
- management succession; and
- annual performance evaluation of the board.

The company must make its corporate governance guidelines available on its website, and it must state in its annual proxy statement or, if the company does not file an annual proxy statement, in its annual report filed with the SEC, that the guidelines are available on its website and provide the website address.[77]

Code of Business Conduct and Ethics

Companies must adopt and disclose a code of business conduct and ethics for directors, officers, and employees.

This code should address, among other things:

- conflicts of interest;
- corporate opportunities;
- confidentiality;
- fair dealing;
- protection and use of company assets;

- compliance with laws, rules, and regulations (including insider trading laws); and
- encouraging the reporting of illegal or unethical behavior.

The code must contain compliance standards and procedures to facilitate its effective operation and must require that only the board or a board committee may waive any provision of the code for executive officers or directors, and that any such waiver be disclosed to shareholders within four business days.

The company must make the code available on its website, and it must state in its annual proxy statement or, if the company does not file an annual proxy statement, in its annual report filed with the SEC, that this information is available on its website and provide the website address.[78]

NYSE Communication and Notification Requirements

The NYSE requires that any listed company promptly notify the public of any information that it might reasonably expect to materially affect the market for its securities. A listed company should also act promptly to dispel unfounded rumors that produce unusual market activity or price variations.[79]

If the company will announce a material event or make a statement regarding a rumor between 7:00 a.m. and 4:00 p.m. Eastern Standard Time, it must notify the NYSE by telephone at least 10 minutes before it releases the announcement. The company must also provide the text of any written announcement to the NYSE at least 10 minutes prior to releasing the announcement. This will allow the NYSE to determine if a trading halt should be imposed.[80]

Corporate Governance Requirements for Foreign Private Issuers

As noted above, foreign private issuers are permitted to follow home-country practice in lieu of the NYSE's corporate governance standards, other than the NYSE's requirements that it must: (1) have an audit committee that meets the requirements of Exchange Act Rule 10A-3; and (2) provide prompt notification from its CEO of non-compliance with the applicable provisions of the NYSE's corporate governance rules. As described earlier, a foreign private issuer must also provide an annual written affirmation as well as an interim written affirmation to the NYSE.[81]

Whether a listed foreign private issuer follows the NYSE corporate governance standards or its home-country practice, it must disclose any ways in which its corporate governance practices differ from those followed by domestic US issuers under NYSE listing standards.[82] A detailed and cumbersome analysis is not required; a brief, general summary of differences is enough. A foreign private issuer that is required to file an annual report on Form 20-F with the SEC must include the statement of significant differences in that annual report. All other foreign private issuers may either (i) include the statement of significant differences in an annual report filed with the SEC or (ii) make the statement of significant differences available on or through the listed company's website. If the statement of significant differences is made available on or through the listed company's website, the listed company must disclose that fact in its annual report filed with the SEC and provide the website address.[83]

[1] *See generally* NYSE Listed Company Manual, § 103.00 (*NYSE Manual*).

[2] Both affiliated companies and companies listing following emergence from bankruptcy have different listing standards.

[3] When considering a listing application from a company organized under the laws of Canada, Mexico or the US (North America), the NYSE will include all North American holders and trading volume in applying the minimum stockholder and trading volume requirements. When listing a company from outside North America, the Exchange may, in its discretion, include holders and trading volume in the company's home country or primary trading market outside the United States in applying the applicable listing standards, provided that such market is a regulated stock exchange. In exercising this discretion, the Exchange will consider all relevant factors including: (i) whether the information is derived from a reliable source, preferably either a government- regulated securities market or a transfer agent that is subject to governmental regulation; (ii) whether there exist efficient mechanisms for the transfer of securities between the company's non-US trading market and the United States; and (iii) the number of shareholders and the extent of trading in the company's securities in the United States prior to the listing. For securities that trade in the format of American Depositary Receipts ("ADR's"), volume in the ordinary shares will be adjusted to be on an ADR-equivalent basis. *See* NYSE Manual §102.01.

[4] *See NYSE Manual* § 102.01. In addition, in certain circumstances, the NYSE will take into account certain other qualitative factors, including: the company must be a going concern or the successor to a going concern, the degree of national interest in the company, the character of the markets for its products, its relative stability and position in its industry, and whether it is engaged in an expanding industry with prospects for maintaining its position. Higher minimum standards might apply if there is a lack of public interest in the securities of a company as evidenced, for example, by low trading volume on another exchange, lack of dealer interest in the over-the-counter market, unusual geographic concentration of holders of shares, slow growth in the number of shareholders, and a low rate of transfers. *See NYSE Manual* § 102.01C. A company formed by a reverse merger is subject to additional initial listing requirements. *See NYSE Manual* § 1-02.01F. In order to qualify for initial listing a reverse merger company must also: (i) have been trading for at least one year on the US over-the-counter market, on another national securities exchange or on a regulated foreign exchange, and, in the case of a domestic issuer, have filed a Form 8-K containing all required information under Item 2.01(f) including audited financial statements or, in the case of a foreign private issuer, have filed all such information on Form 20-F; (ii) have maintained a minimum closing price of $4 per share for at least 30 of the most recent 60 trading days preceding the filing of the initial listing application; and (iii) have filed all periodic financial reports required by the SEC or other regulatory authority during the year preceding the initial listing, including one annual report containing audited financial statements for a full fiscal year after the filing of the initial Form 8-K or 20-F, as applicable. In addition, in order to qualify for listing, the reverse merger company must (i) have timely filed all periodic financial reports required by the SEC or other regulatory authority during the year preceding the listing date, including one annual report containing audited financial statements for a full fiscal year; and (ii) have maintained a minimum closing price of $4 per share for at least 30 of the most recent 60 trading days prior to the listing date. However, a reverse merger company will not be required to meet the above additional conditions if it lists in connection with a firm-commitment underwritten public offering with gross proceeds of at least $40 million.

[5] *See NYSE Manual* § 102.01A. If the issuer has less than 100 shares, the requirement relating to the number of publicly held shares will be reduced proportionately.

[6] *See id*. If the unit of trading is less than 100 shares, the requirement relating to the number of publicly held shares will be reduced proportionately. Shares held by directors, officers, or their immediate families and other concentrated holdings of 10% or more are excluded in calculating the number of publicly held shares.

[7] *See NYSE Manual* § 102.01B. For IPOs, the NYSE will rely on a written commitment from the underwriter regarding the anticipated value of the offering. Under certain limited circumstances, the NYSE may allow an issuer to list without conducting a public offering (a "direct listing"). For a selling shareholder direct listing, the exchange will determine whether the company has met the $100 million market value requirement based on the lesser of (i) the value calculable based on the valuation and (ii) the value calculable based on the most recent trading price in a private placement market. In the absence of recent trading in a private placement market, the NYSE will determine that the company has met the market value of publicly-held shares requirement if the company provides a valuation showing a market value of publicly-held shares of at least $250 million. For a primary direct listing, the NYSE will determine that the company has met the market value of publicly-held shares requirement if the company will sell at least $100 million in market value of shares in the opening auction on the first day of trading on NYSE. For this purpose, market value will be calculated using a price per share equal to the lowest price of the price range in the registration statement minus an amount equal to 20% of the highest price of such price range.

[8] *See NYSE Manual* § 102.01C(I).

[9] As defined in Section 2(a)(19) of the Securities Act and Section 3(a)(80) of the Exchange Act.

[10] *See NYSE Manual* § 102.01C(II).

[11] In addition, a foreign private issuer listing its equity securities in the form of ADRs must sponsor its ADRs and enter into an agreement with a US depository bank to provide such services as cash and stock dividend payments, transfer of ownership and distribution of company financial statements and notices, such as shareholder meeting material. *See generally NYSE Manual* § 103.04.

[12] *See NYSE Manual* § 103.01A. Shares held by directors, officers, or their immediate families, and other concentrated holdings of 10% or more are excluded in calculating the number of publicly held shares. If an issuer either has a significant concentration of stock, or if changing market forces have adversely impacted the public market value of an issuer which otherwise would qualify for listing on the NYSE such that its public market value is no more than 10% below $100 million, the NYSE will generally consider $100 million in stockholders' equity as an alternate measure of size and therefore, as an alternative basis to list the issuer.

[13] *See NYSE Manual* § 103.01B(I).

[14] *See NYSE Manual* § 103.01B(II)(a). For IPOs, the company's underwriters must provide a written representation that demonstrates the company's ability to meet the global market capitalization requirement based upon the completion of the offering.

[15] *See NYSE Manual* § 103.01B(II)(b). For IPOs, the company's underwriters must provide a written representation that demonstrates the company's ability to meet the global market capitalization requirement based upon the completion of the offering. For all other companies, market capitalization valuation will be determined over a six-month average.

[16] *See NYSE Manual* § 802.01A. If the unit of trading is less than 100 shares, the requirement relating to the number of shares publicly held will be reduced proportionately. Shares held by directors, officers, or their immediate families, and other concentrated holdings of 10% or more are excluded in calculating the number of publicly held shares.

[17] *See NYSE Manual* § 802.01B(I).

[18] *See generally* NYSE Manual § 802.01B.

[19] *See NYSE Manual* § 802.01C. For any curative actions requiring the approval of the issuer's shareholders, the issuer must include such approval requirement in its notification to the NYSE, seek and obtain such approval by the next annual meeting, and then effect such action without delay. Note that the NYSE may exercise discretion with respect to the minimum price criteria after evaluating the financial status of the issuer if the security that has fallen below compliance is other than the issuer's primary trading common stock (for example, a tracking stock or a preferred class).

[20] *See generally NYSE Manual* § 802.01D for additional enumerated criteria.

[21] *See NYSE Manual* §§ 303A.00, 303A.06, 303A.12; 303A.14.

[22] *See NYSE Manual* § 303A.11.

[23] *See NYSE Manual* §§ 303A.00, 303A.01, 303A.04, 303A.05.

[24] *See NYSE Manual* § 303A.01. Issuers listing in connection with an IPO have one year following the initial listing date to meet the majority independent board of directors requirement and may phase in independent committees as follows: at least one independent director per committee at the time of listing, a majority of independent directors within 90 days following listing, and fully independent committees, as required, within one year. *See NYSE Manual* § 303A.00.

[25] *See NYSE Manual* § 303A.02.

[26] *See* Commentary to *NYSE Manual* § 303A.02.

[27] *See NYSE Manual* § 303A.02(b)(i).

[28] *See NYSE Manual* § 303A.02(b)(ii).

[29] *See NYSE Manual* § 303A.02(b)(iii).

[30] *See NYSE Manual* § 303A.02(b)(iv).

[31] *See NYSE Manual* § 303A.02(b)(v).

[32] *See* Commentary to *NYSE Manual* § 303A.02(b).

[33] *See NYSE Manual* § 303A.02(a)(ii).

[34] *See NYSE Manual* § 303A.03.

[35] *See NYSE Manual* § 303A.14. The policy must be applied to compensation received after October 2, 2023.

[36] *See NYSE Manual* § 303A.14.

[37] *See NYSE Manual* § 303A.04(a).

[38] *See NYSE Manual* § 303A.04(b)(i).

[39] *See NYSE Manual* § 303A.04(b)(ii).

[40] *See* Commentary to *NYSE Manual* § 303A.04.

[41] *See NYSE Manual* § 303A.05(a). As of July 1, 2013, compensation committee members must satisfy additional independence requirements as set forth in § 303A.02(a)(ii). In determining the independence of a director who will serve on an issuer's compensation committee, the board of directors must consider all factors specifically relevant to determining whether that director has a relationship to the issuer that is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to (i) any sources of compensation of such director, including any consulting, advisory, or other compensatory fee paid by the issuer; and (ii) whether such director is affiliated with the issuer, any of its subsidiaries, or any affiliates of its subsidiaries. Smaller reporting companies (as defined in Exchange Act Rule 12b-2) are not required to comply with §303A.02(a)(ii) or the second paragraph of the Commentary to §303A.02(a). *See* § 303A.00.

[42] *See NYSE Manual* § 303A.05(b)(i)(A).

[43] *See NYSE Manual* § 303A.05(b)(i)(B).

[44] *See NYSE Manual* § 303A.05(b)(i)(C).

[45] *See NYSE Manual* § 303A.05(b)(ii).

[46] *See NYSE Manual* § 303A.05(b)(iii).

[47] *See NYSE Manual* § 303A.05(c)(iv).

[48] *See NYSE Manual* § 303A.05(c)(ii).

[49] *See NYSE Manual* § 303A.05(c)(iii).

[50] *See* Commentary to *NYSE Manual* § 303A.05.

[51] *See NYSE Manual* §§ 303A.06, 303A.07(a).

[52] *See NYSE Manual §* 303A.07(a); *see also* Commentary to *NYSE Manual* § 303A.07(a). While the NYSE does not require that an audit committee include a person who satisfies the definition of audit committee financial expert as set out in Item 407(d)(5)(ii) of Regulation S-K, a board may presume that such a person has accounting or related financial management expertise.

[53] *See NYSE Manual* § 303A.07(b)(i)(A).

[54] *See NYSE Manual* § 303A.07(b)(i)(B).

[55] *See NYSE Manual* § 303A.07(b)(ii).

[56] *See NYSE Manual* § 303A.07(b)(iii).

[57] *See NYSE Manual* § 303A.07(b)(iii)(A).

[58] *See NYSE Manual* § 303A.07(b)(iii)(B).

[59] *See id.*

[60] *See NYSE Manual* § 303A.07(b)(iii)(C).

[61] *See id.*

[62] *See NYSE Manual* § 303A.07(b)(iii)(D).

[63] *See NYSE Manual* § 303A.07(b)(iii)(E).

[64] *See NYSE Manual* § 303A.07(b)(iii)(F).

[65] *See NYSE Manual* § 303A.07(b)(iii)(G).

[66] *See NYSE Manual* § 303A.07(b)(iii)(H).

[67] *See NYSE Manual* § 303A.07(c); *see also* Commentary to *NYSE Manual* § 303A.07(c).

[68] *See NYSE Manual* § 302.00. This Section 302 is not applicable to companies whose only securities listed on the Exchange are non-voting preferred and debt securities, passive business organizations (such as royalty trusts), or securities listed pursuant to 5.2(j)(2) (Equity Linked Notes), 5.2(j)(3) (Investment Company Units), 5.2(j)(4) (Index-Linked Exchangeable Notes), 5.2(j)(5) (Equity Gold Shares), 5.2(j)(6) (Equity-Index Linked Securities, Commodity- Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities and Multifactor Index-Linked Securities), 5.2(j)(8) (Exchange-Traded Fund Shares), Rule 8.100 (Portfolio Depositary Receipts), 8.200 (Trust Issued Receipts), 8.201 (Commodity-Based Trust Shares), 8.202 (Currency Trust Shares), 8.203 (Commodity Index Trust Shares), 8.204 (Commodity Futures Trust Shares), 8.300 (Partnership Units), 8.400 (Paired Trust Shares), 8.600 (Managed Fund Shares), 8.601 (Active Proxy Portfolio Shares), 8.700 (Managed Trust Securities), and 8.900 (Managed Portfolio Shares). Foreign private issuers may follow home-country practice with respect to shareholder meetings. *See NYSE Manual* § 103.00.

[69] *See NYSE Manual* § 312.03(a); *see also* Commentary to *NYSE Manual* § 303A.08.

[70] *See NYSE Manual* § 312.03(b)(iii): For example, a sale of stock to any of such parties at a discount to the then market price would be treated as equity compensation under Section 303A.08, notwithstanding that shareholder approval may not be required under Sections 312.03(b) or 312.03(c). Consequently, the company would be required to either: (i) obtain shareholder approval of such sale, or (ii) issue such shares under an equity compensation plan that had previously been approved by shareholders and for which shareholder approval under Section 303A.08 is not otherwise required. Moreover, shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding the fact that the transaction does not require approval under this subparagraph or one or more of the other subparagraphs.

[71] *See NYSE Manual* § 312.04(h); Minimum Price" means a price that is the lower of: (i) the Official Closing Price immediately preceding the signing of the binding agreement; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement.

[72] *See NYSE Manual* § 312.03(b)(i). Shareholder approval will not be required if such transaction is a cash sale that meets the Minimum Price requirement.

[73] *See NYSE Manual* § 312.03(b)(ii).

[74] *See NYSE Manual* § 312.03(c). Shareholder approval will not be required for any issuance involving: (1) any public offering for cash; or (2) any other private financing (that is not a public offering for cash) in which the issuer is selling securities for cash, if it involves a sale of common stock, or securities convertible into or exercisable for common stock, at a price at least equal to the lesser of either the stock's official closing price or the average official closing price for the five trading days immediately preceding entry into the binding agreement, provided that if these securities are issued in connection with an acquisition of the stock or assets of another company, shareholder approval will be required if the issuance of such securities alone or when combined with any other present or potential issuance of common stock or securities convertible into common stock in connection with such acquisition, is equal to or exceeds either 20% of the number of shares of common stock or 20% of the voting power outstanding before the issuance.

[75] *See NYSE Manual* § 312.03(d).

[76] *See NYSE Manual* § 314.00. For purposes of this rule, the term "related party transaction" refers to transactions required to be disclosed pursuant to Item 404 of Regulation S-K under the Securities Exchange Act. In the case of foreign private issuers, the term "related party transactions" refers to transactions required to be disclosed pursuant to Form 20-F, Item 7.B.

[77] *See NYSE Manual* § 303A.09; *see also* Commentary to *NYSE Manual* § 303A.09.

[78] *See NYSE Manual* § 303A.10; *see also* Commentary to *NYSE Manual* § 303A.10.

[79] *See NYSE Manual* § 202.05.

[80] *See NYSE Manual* § 202.06(B).

[81] *See NYSE Manual* §§ 303A.00, 303A.12(b), 303A.12(c).

[82] *See NYSE Manual* § 303A.11.

[83] *See NYSE Manual* § 303A.11.

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ANNEX C: NASDAQ QUANTITATIVE LISTING CRITERIA AND CORPORATE GOVERNANCE STANDARDS

There are three distinct markets within Nasdaq: the Nasdaq Global Market (NGM), the Nasdaq Global Select Market (NGSM), and the Nasdaq Capital Market (NCM). The NGSM mandates the highest initial listing requirements, while its maintenance requirements are identical to those of the NGM. The NGM, in turn, has more stringent quantitative listing and maintenance requirements than the NCM.[1]

Except as noted below, the quantitative listing and maintenance criteria applicable to non-Canadian foreign private issuers for the NGM, NGSM, and NCM are identical to those of domestic US issuers and Canadian issuers.[2] However, all foreign private issuers (including Canadian issuers) may elect to follow home-country practice in lieu of compliance with certain Nasdaq corporate governance requirements.[3] An issuer of a security listed on either the NGM or NCM may, at any time, apply to transfer the respective security to the NGSM as long as it satisfies all of the requirements for listing on the NGM and it meets the additional financial and liquidity requirements described below.[4]

NGM Quantitative Listing and Maintenance Standards

NGM Quantitative Initial Listing Standards

An issuer, whether a domestic US issuer or a foreign private issuer, generally must meet one of the following standards to be listed on the NGM.[5]

	Entry Standard 1	Entry Standard 2	Entry Standard 3/4
	Income Standard	**Equity Standard**	**Market Value or Total Assets/ Total Revenue Standard**
Minimum bid price[6]	At least $4 per share	At least $4 per share	At least $4 per share
Unrestricted publicly held shares[7]	At least 1.1 million	At least 1.1 million	At least 1.1 million
Number of round lot holders[8]	At least 400	At least 400	At least 400
Stockholders' equity	At least $15 million[9]	At least $30 million[10]	—
Number of registered and active market-makers	At least three[11]	At least three[12]	At least four[13]
Market value of unrestricted publicly held shares (for an issuer listing in connection with IPO, including ADRs, this must be satisfied from the offering proceeds)	At least $15 million[14]	At least $18 million[15]	At least $20 million[16]
Annual pre-tax income from continuing operations in the most recently completed fiscal year or in two of the last three most recently completed fiscal years	At least $1 million[17]	—	—
Operating history	—	Two-year operating history[18]	—
Market value of listed securities	—	—	$75 million for Market Value Standard[19]

	Entry Standard 1	Entry Standard 2	Entry Standard 3/4
Total assets and total revenue	—	—	$75 million, each in total assets and total revenue, for the most recently completed fiscal year or two of the last three most recently completed fiscal years for Total Assets/Total Revenue Standard[20]

NGM Quantitative Maintenance Standards

Once an issuer has been listed on the NGM, it must continue to satisfy one of the following maintenance standards.

	Maintenance Standard 1	Maintenance Standard 2/3
	Equity Standard	**Market Value/Standard or Total Assets/ Total Revenue Standard**
Minimum bid price[21]	$1 per share	$1 per share
Total Holders[22]	At least 400	At least 400
Stockholders' equity	At least $10 million[23]	—
Market value of publicly held shares	At least $5 million[24]	At least $15 million[25]
Number of publicly held shares	At least 750,000[26]	At least 1.1 million[27]
Registered and active market-makers	At least two[28]	At least four[29]
Market value of listed securities	—[30]	$50 million for Market Value Standard[31] (No requirement for Total Assets/Total Revenue Standard)[32]
Total assets and total revenue	—	$50 million each, in total assets and total revenue, for the most recently completed fiscal year or two of the last three most recently completed fiscal years for Total Assets/Total Revenue Standard[33] (No requirement for Market Value Standard)

NGSM Quantitative Listing and Maintenance Standards

NGSM Quantitative Initial Listing Standards

The issuer must meet one of the following financial standards:

Financial Requirement	Standard 1: Earnings	Standard 2: Capitalization with Cash Flow	Standard 3: Capitalization with Revenue	Standard 4: Assets with Equity
Aggregate income from continuing operations before income taxes	At least $11 million over the prior three fiscal years[34]	—	—	—

Financial Requirement	Standard 1: Earnings	Standard 2: Capitalization with Cash Flow	Standard 3: Capitalization with Revenue	Standard 4: Assets with Equity
Positive income from continuing operations before income taxes in each of the prior three fiscal years	Required[35]	—	—	—
Income from continuing operations before income taxes	At least $2.2 million in each of the two most recent fiscal years[36]	—	—	—
Aggregate cash flows	—	At least $27.5 million over the prior three fiscal years[37]	—	—
Positive cash flows in each of the prior three fiscal years	—	Required[38]	—	—
Market capitalization	—	Average of at least $550 million over prior 12 months[39]	Average of at least $850 million over prior 12 months[40]	At least $160 million[41]
Total revenue in the previous fiscal year	—	At least $110 million[42]	At least $90 million[43]	—
Total assets	—	—	—	At least $80 million[44]
Stockholders' equity	—	—	—	At least $55 million[45]
Minimum bid price[46]	$4 per share	$4 per share	$4 per share	$4 per share

Liquidity Requirements

An issuer must also meet the following liquidity requirements:

- 2,200 total holders[47] or 450 round lot holders;[48] and
- 1.25 million unrestricted publicly held shares[49] with a $45 million minimum market value.[50]

In computing the number of unrestricted publicly held shares, Nasdaq will not consider shares held by an officer, director, or 10% or greater shareholder of the company.[51]

In addition, where the issuer meets the requirements of the NGM Income Standard or the NGM Equity Standard (as detailed above), it must have at least three registered and active market-makers.[52] Otherwise, the issuer must have at least four registered and active market-makers.[53]

NGSM Quantitative Maintenance Requirements

Once an issuer has been listed on the NGSM, it is subject to the same maintenance standards as issuers listed on the NGM, as described above.[54]

NCM Quantitative Listing and Maintenance Standards

NCM Quantitative Initial Listing Standards

For initial listing on the NCM, an issuer must meet one of the following standards:

	Standard 1: Equity	Standard 2: Market Value of Listed Securities	Standard 3: Net Income
Stockholders' equity	At least $5 million[55]	At least $4 million[56]	At least $4 million[57]
Market value of unrestricted publicly held shares (for an issuer listing in connection with IPO, including ADRs, this must be satisfied from the offering proceeds)	At least $15 million[58]	At least $15 million[59]	At least $15 million[60]
Two-year operating history	Required[61]	—	—
Market value of listed securities	—	At least $50 million[62]	—
Net income	—	—	At least $750,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years[63]

Additionally, each issuer must satisfy the following requirements:

- at least 300 round lot shareholders;[64]
- at least 1 million unrestricted publicly held shares;[65]
- a minimum bid price of $4 a share;[66]
- at least three registered and active market-makers;[67] and
- in the case of ADRs, at least 400,000 must be issued.[68]

NCM Maintenance Requirements

For continued listing on NCM, an issuer must maintain:[69]

- either: (1) stockholders' equity of at least $2.5 million (Equity Standard); (2) a market value of listed securities of at least $35 million (Market Value of Listed Securities Standard); or (3) net income of at least $500,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years (Net Income Standard);[70]
- at least 300 public shareholders;[71]
- at least 500,000 publicly held shares;[72]
- a market value of publicly held shares of at least $1 million;[73]
- a minimum bid price of $1 a share;[74] and
- at least two registered and active market-makers, one of which may be a market-maker entering a stabilizing bid.[75]

Failure to Meet Continuing Listing Requirements (NGM, NGSM, and NCM)

The Listing Qualifications Department will immediately notify any company that fails to meet a maintenance requirement. Depending on the type of deficiency, the Listings Qualifications Department will issue one of the following four types of notifications: (i) a Staff Delisting Determination, which is a notification that, unless appealed, will subject the company to immediate suspension and delisting; (ii) a notification of deficiency for which the company may submit a plan of compliance to the Listing Qualifications Department for review; (iii) a notification of deficiency, which automatically grants the company a cure or compliance period; or (iv) a letter of public reprimand.[76]

Nasdaq Corporate Governance Requirements

In addition to the quantitative listing criteria set out above, listed companies must comply with the Nasdaq rules relating to corporate governance described below, with two key exceptions:

- *Foreign Private Issuers*. A listed foreign private issuer is permitted to follow home-country practice in lieu of Nasdaq's corporate governance standards, other than the Nasdaq's requirements that it must (1) provide Nasdaq with notification of any non-compliance by the issuer with Nasdaq corporate governance requirements; (2) have an audit committee that meets the requirements (including independence requirements) of Exchange Act Rule 10A-3; and (3) abide by the Nasdaq voting rights requirements. A foreign private issuer making its IPO or first US listing on Nasdaq that follows home-country practice in lieu of the Nasdaq corporate governance requirements must disclose in its registration statement or on its website each requirement which it does not follow and describe the home-country practice followed by it in lieu of such requirements.[77]
- *Controlled Companies.* A controlled company is one in which more than 50% of the voting power for the election of directors is held by an individual, a group or another company. Master Limited Partnerships ("MLPs") often qualify as controlled companies. A controlled company is not required to comply with Nasdaq requirements to have a majority of independent directors or a compensation committee, or requirements relating to independent director oversight of director nominations.[78]

Majority of Independent Directors

A majority of the issuer's board of directors must consist of independent directors.[79] The board of directors must affirmatively determine that the director has no relationship with the issuer that would impair his or her independence,[80] and the issuer must disclose in its annual proxy (or, if it does not file a proxy, on its annual report on Form 10-K — or Form 20-F for foreign private issuers, if applicable — filed with the SEC) those directors that the board of directors has determined to be independent.[81]

Ownership of an issuer's stock, by itself, is not a bar to an independence finding.[82] The Nasdaq rules define an independent director to mean a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship that, in the opinion of the company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.[83]

A director cannot be independent if he or she:

- is, or at any time in the past three years was, employed by the issuer or any parent or subsidiary (as defined below) of the issuer;[84]
- has accepted, or has a family member (as defined below) who has accepted, any compensation from the issuer or any parent or subsidiary of the issuer in excess of $120,000 during any period of 12 consecutive months within the three years preceding the determination of independence,[85] other than:
  - compensation for board or board committee service;[86]

  - compensation paid to a family member who is a non-executive employee of the issuer or a parent or subsidiary of the issuer;[87] or
  - benefits under a tax-qualified retirement plan, or non-discretionary compensation;[88]
- is a family member of an individual who is, or at any time during the past three years was, employed by the issuer or any parent or subsidiary of the issuer as an executive;[89]
- is, or has a family member who is, a partner in, or controlling shareholder or executive officer of, any organization to which the issuer made, or from which the issuer received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more,[90] other than:
  - payments arising solely from investments in the issuer's securities;[91] or
  - payments under non-discretionary charitable contribution matching programs;[92]
- 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 executive officers of the issuer serves on the compensation committee of such other entity;[93] or
- is, or has a family member who is, a current partner of 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;[94] or
- in the case of an investment company, in lieu of the above paragraphs, a director who is an "interested person" of the Company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.[95]

For these purposes, a "parent or subsidiary" covers entities that the issuer controls and consolidates with its financial statements as filed with the SEC (but not if the issuer reflects such entity solely as an investment in its financial statements).[96] A "family member" is defined to include a person's spouse, parents, children, siblings, mothers- and fathers-in-law, sons- and daughters-in-law, brothers- and sisters-in-law, and anyone (other than domestic employees) who shares such person's home.[97]

Meetings of Independent Directors

Independent directors must have regularly scheduled meetings at which only independent directors are present.[98] Those meetings should occur not less than twice a year.[99]

Recovery of Erroneously Awarded Compensation ("Claw Back" Rules)

The listed company must adopt a written policy that provides for the reasonably prompt recovery of erroneously awarded incentive-based compensation received by executive officers and comply with such policy if the listed company is required to prepare an accounting restatement due to a material noncompliance by the listed company with any financial reporting requirement under the securities laws. This includes any such restatement required to correct any material errors in previously issued financial statements or errors that would result in a material misstatement if such errors were corrected in the current period or left uncorrected in the current period.[100]

Each listed company must also file disclosures with respect to such erroneously awarded compensation recovery policy as required by the federal securities laws and any applicable SEC rule.[101]

Director Nominees

Director nominees must be selected, or recommended for the board of directors' selection, either by a majority of the independent directors in a vote in which only independent directors participate or by a nominations committee

comprised solely of independent directors.[102] Each issuer must certify that it has adopted a formal written charter or board resolution addressing the nominations process (and such related matters as may be required under the federal securities laws).[103] In certain circumstances a single non-independent director, who is not a current officer or employee (or family member of an officer or employee), may serve for up to two years on an independent nominations committee composed of at least three members.[104]

Compensation Committee

An issuer must have, and certify that it has and will continue to have, a compensation committee composed of at least two independent directors.[105] In order to serve as a member of the listed company's compensation committee, the board of directors must affirmatively determine that the director does not have a relationship to the company that is material to that director's ability to be independent from management. Relevant factors in this determination include, but are not limited to:

- the source of any compensation received by such director, including any consulting, advisory, or other compensatory fee paid by the company to such director; and
- any affiliations between the director and the company, a subsidiary of the company, or an affiliate of a subsidiary of the company.[106]

Under certain limited circumstances, if the compensation committee is composed of at least three members, one director who does not otherwise meet the independence requirements and who is not currently an executive officer or employee or a family member of an executive officer may serve on the compensation committee for up to two years if the board of directors determines it is required by the best interests of the issuer and its shareholders. Such an exception must be disclosed on the company's website or in the proxy statement for the next annual meeting subsequent to such determination (or, if the company does not file a proxy, in its Form 10-K or 20-F), and such disclosure must include the nature of the relationship and the reasons for the determination. In addition, the issuer must provide any disclosure required by Instruction 1 to Item 407(a) of Regulation S-K regarding its reliance on this exception.[107]

The compensation committee must have a written charter that:[108]

- addresses the scope of the committee's responsibilities, including structure, process, and membership requirements;
- addresses the committee's responsibility for determining, or recommending to the board for determination, the compensation of the chief executive officer and all other executive officers of the company (the chief executive officer may not be present during voting or deliberations on his or her compensation); and
- sets forth the following rights and responsibilities with respect to the use of compensation consultants, legal counsel, or other adviser by the compensation committee:
  - the ability, in its sole discretion, to retain or obtain the advice of a compensation consultant, legal counsel, or other adviser. The compensation committee will be directly responsible for the appointment, compensation, and oversight of the services provided by any such compensation consultant, legal counsel, or other adviser. The compensation committee must provide for appropriate funding for payment of reasonable compensation. The compensation committee may retain or obtain the advice of such consultant, legal counsel, or other adviser only after considering the following:
    - any other services provided to the issuer by the employer of such compensation consultant, legal counsel, or other adviser;
    - any other fees paid by the issuer to the employer of the compensation consultant, legal counsel, or other adviser as a percentage of the total revenue of that employer;

- the policies and procedures of the employer of the compensation consultant, legal counsel, or other adviser with respect to the prevention of conflicts of interest;
- any business or personal relationships between any member of the compensation committee and such compensation consultant, legal counsel, or other adviser;
- any ownership of the issuer's equity by such compensation consultant, legal counsel, or other adviser; and
- any business or personal relationship between the compensation consultant, legal counsel, or other adviser or such person's employer and any of the issuer's executive officers.

Audit Committees

Sarbanes-Oxley

An issuer's audit committee must satisfy the independence and other requirements of Exchange Act Rule 10A-3 (implementing Section 301 of Sarbanes-Oxley).[109]

Charter

Each issuer must certify that it has a written audit committee charter and that the audit committee will review and assess the adequacy of the audit committee charter on an annual basis.[110] The charter must specify:

- the scope of the audit committee's responsibilities, and how it carries out those responsibilities, including structure, processes, and membership requirements;[111]
- the audit committee's responsibility for ensuring its receipt from the outside auditors of a formal written statement delineating all relationships between the auditor and the issuer, and the audit committee's responsibility for engaging in a dialogue with the auditor with respect to any disclosed relationships or services that might impact the objectivity and independence of the auditor and for taking, or recommending that the full board take, appropriate action to oversee the independence of the outside auditor;[112]
- the committee's purpose of overseeing the accounting and financial reporting processes of the issuer and the audits of the financial statements of the issuer;[113] and
- the specific audit committee responsibilities and authority necessary to comply with the audit committee requirements of Sarbanes-Oxley concerning responsibilities relating to: (1) registered public accounting firms; (2) complaints relating to accounting, internal accounting controls or auditing matters; (3) authority to engage advisers; and (4) funding as determined by the audit committee.[114]

Composition

The issuer must have, and certify that it has and will continue to have, an audit committee of at least three members, each of whom must:

- be independent, within the meaning of the Nasdaq director independence rules discussed above;
- meet the requirements for audit committee independence, set out in Exchange Act Rule 10A-3(b)(1), that, subject to certain limited exceptions:[115] (1) such member be a member of the board of directors of the issuer; (2) such member (other than in his or her capacity as a member of the board of directors, the audit committee, or another board committee) not accept directly or indirectly any consulting, advisory, or other compensatory fee from the issuer or any subsidiary thereof; and (3) such member not be an affiliated person of the issuer or any subsidiary thereof;[116]

- not have participated in the preparation of the financial statements of the issuer or any current subsidiary of the issuer at any time during the past three years; and
- be able to read and understand fundamental financial statements, including an issuer's balance sheet, statement of comprehensive income, and cash flow statement, at the time of appointment.[117]

In addition, each issuer must certify that it has, and will continue to have, one member of the audit committee who has past employment experience in finance or accounting, requisite professional certification in accounting, or other comparable experience or background which results in financial sophistication.[118] Note that a director who qualifies as an audit committee financial expert under Item 407(d)(5)(ii) and (iii) of Regulation S-K will be presumed to meet this financial sophistication requirement.[119] Under certain circumstances a single director who meets the independence requirements of Exchange Act Rule 10A(m)(3) but not the independence requirements of the Nasdaq rules, who is not a current officer or employee (or family member of an officer or employee), may serve for up to two years on an audit committee. Such a person may not, however, chair the audit committee.[120]

Responsibility and Authority

The audit committee must have the specific responsibilities and authority needed to satisfy Exchange Act Rule 10A-3(b)(2), (3), (4) and (5) (concerning responsibilities relating to: (1) registered public accounting firms; (2) complaints relating to accounting, internal accounting controls, or auditing matters; (3) authority to engage advisers; and (4) funding as determined by the audit committee).[121]

Cure Periods

The Nasdaq rules provide for certain cure periods if an audit committee member ceases to be independent for reasons outside the member's reasonable control, or if there is a vacancy on the audit committee.[122]

Shareholder Meetings

An issuer must hold an annual meeting of shareholders no later than one year after the end of the issuer's fiscal year-end.[123] A newly listed company that was not previously subject to a requirement to hold an annual meeting is required to hold its first meeting within one year after its first fiscal year-end following listing.[124]

Quorum

An issuer must provide for a quorum as specified in its bylaws for any meeting of the holders of its common stock; provided that in no case shall such quorum be less than 33 1/3% of the outstanding shares of the issuer's common voting stock.[125] Issuers organized as limited partnerships are required to have a quorum of at least 33 1/3% of the outstanding limited partnership interests.[126]

Proxy Solicitation

An issuer must solicit proxies and provide proxy statements for all meetings of shareholders and must provide copies of such proxy solicitation to Nasdaq.[127]

Conflicts of Interest and Related Party Transactions

An issuer must have its audit committee or another independent committee of the board of directors review all related-party transactions for potential conflicts of interest on an ongoing basis. A "related-party transaction" for this purpose means those transactions required to be disclosed pursuant to Item 404 of Regulation S-K (and includes transactions and loans between management and the issuer for amounts over $120,000) or, in the case of foreign private issuers, pursuant to Item 7.B of Form 20-F (and includes transactions and loans between the issuer and enterprises under common control of the issuer, associates, and individuals owning an interest in the voting power of the company that gives them significant influence or key management).[128]

Shareholder Approval of Certain Transactions

An issuer must obtain shareholder approval prior to the issuance of securities:

- when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants,[129] subject to limited exceptions;[130]
- when the issuance or potential issuance will result in a change of control of the issuer;[131]
- in connection with the acquisition of the stock or assets of another company: (1) if any director, officer, or substantial shareholder of the issuer has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in a 5% or greater increase in outstanding common shares or voting power;[132] or (2) where, other than in a public offering for cash: (a) the common stock to be issued has or will have upon issuance voting power equal to 20% or more of the voting power outstanding before the issuance of the stock or convertible securities, or (b) the number of shares of common stock to be issued is or will be 20% or more of the number of shares of common stock outstanding before the issuance of the stock or convertible securities;[133] or
- in connection with a transaction other than a public offering involving the sale, issuance, or potential issuance by the issuer of common stock (or securities convertible into or exercisable for common stock) at a price below the lesser of either the closing price or the average closing price for the previous five days on nasdaq.com, which together with sales by certain affiliates of the issuer equals 20% or more of the common stock or voting power outstanding before the issuance.[134]

An exception may be made upon application to Nasdaq when a delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise and the audit committee (or other comparable body of the board of directors comprised solely of independent, disinterested directors) expressly approves reliance on this exception.[135]

Only shares actually issued and outstanding (excluding treasury shares or shares held by a subsidiary) are to be used for any calculation under the shareholder approval requirement. Shareholder approval must be obtained prior to the issuance of certain private financing instruments, generally in the form of convertible securities under which the number of shares that will be issued is uncertain until the conversion occurs, unless the instrument contains certain features (potentially a cap on the number of shares that can be issued upon conversion or a floor on the conversion price) and the issuance will not result in a change of control.[136]

Shareholder approval is not required for a public offering. Generally, any securities offering registered with the SEC and which is publicly disclosed and distributed in the same general manner and extent as a firm-commitment underwritten securities offering will be considered a public offering for purposes of the shareholder approval rules.[137]

Auditor Registration

An issuer must be audited by an independent public accountant that is registered as a public accounting firm with the Public Company Accounting Oversight Board, as provided for in Section 102 of Sarbanes-Oxley.[138]

Code of Conduct

An issuer must adopt a code of conduct applicable to all directors, officers, and employees and make it publicly available. A code of conduct satisfying this requirement must comply with the definition of a “code of ethics” set out in Section 406(c) of Sarbanes-Oxley and any regulations promulgated thereunder. Also, the code must provide for an enforcement mechanism. Any waivers of the code for directors or executive officers must be approved by the issuer’s board and must be disclosed on a Form 8-K or, where a Form 8-K is not required, must be distributed via press release (foreign private issuers shall disclose such waivers either by distributing a press

release or including disclosure in a Form 6-K). Alternatively, an issuer, including a foreign private issuer, may disclose waivers on its website in a manner that satisfies the requirements of Item 5.05(c) of Form 8-K.[139]

Notification of Non-Compliance

An issuer must promptly notify Nasdaq as soon as an executive officer of the issuer discovers any non-compliance by the issuer with the Nasdaq corporate governance standards.[140]

Corporate Governance Certification

After the initial certification, an updated certification form is required only if a change in the company's status results in the prior certification no longer being accurate.[141]

Nasdaq Communication and Notification Requirements

Except in "unusual circumstances," Nasdaq requires an issuer to make prompt disclosure to the public through any Regulation FD-compliant method of disclosure of material information that would reasonably be expected to affect the value of its securities or influence investors' decisions.[142]

The issuer must notify Nasdaq prior to the release of certain types of information (and should make that notification at least 10 minutes prior to the release if the release is made during Nasdaq market hours or prior to 6:50 a.m. Eastern Standard Time if the release is made outside of Nasdaq market hours), including:

- financial-related disclosure (including earnings releases and restatements);
- corporate reorganizations and acquisitions;
- new products or discoveries, or developments regarding customers or suppliers;
- material senior management changes or a change in control;
- resignation or termination of independent auditors or withdrawal of a previously issued audit report;
- events regarding its securities (e.g., defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, or public or private sales of additional securities);
- significant legal or regulatory developments; and
- any event requiring the filing of a Form 8-K.[143]

An issuer (other than an issuer solely of ADRs) must notify Nasdaq on the appropriate form not later than 15 calendar days prior to certain events, including:

- establishing or materially amending a stock option plan, purchase plan, or other equity compensation arrangement pursuant to which stock may be acquired by officers, directors, employees, or consultants without shareholder approval;[144]
- issuing securities that may result in a change of control of the issuer;[145]
- issuing any common stock (or security convertible into common stock) in connection with the acquisition of the stock or assets of another company, if an officer, director, or substantial shareholder of the issuer has a 5% or greater interest (or if such persons collectively have a 10% or greater interest) in the company to be acquired;[146] or
- entering into a transaction that may result in the potential issuance of common stock (or securities convertible into common stock) greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis.[147]

An issuer must also file a form prescribed by Nasdaq within 10 days after any aggregate increase or decrease of any class of shares listed on Nasdaq that exceeds 5% of the amount of securities of the class outstanding.[148]

Corporate Governance Requirements for Foreign Private Issuers

A listed foreign private issuer is permitted to follow home-country practice in lieu of Nasdaq's corporate governance standards, other than the Nasdaq's requirements that it must:[149]

- provide Nasdaq with notification of any non-compliance by the issuer with Nasdaq corporate governance requirements;[150] and
- have an audit committee that meets the requirements (including independence requirements) of Exchange Act Rule 10A-3.[151]

A listed foreign private issuer that follows home-country practice in lieu of the Nasdaq corporate governance requirements must disclose in its annual report on Form 20-F each requirement that it does not follow and describe the home-country practice followed by it in lieu of such requirements (if the listing foreign issuer is not required to file its annual report on Form 20-F, it may make this disclosure only on its website).[152] In addition, a foreign private issuer making its IPO or first US listing on Nasdaq must make the same disclosure in its registration statement or on its website.[153]

ENDNOTES

[1] *See generally* Nasdaq Rule 5300 Series, 5400 Series, 5500 Series.

[2] *See* Nasdaq Rule 5225(b)(2).

[3] *See* Nasdaq Rule 5615(a)(3).

[4] *See* Nasdaq Rules 5305(c)-(d).

[5] A company formed by a reverse merger is subject to additional initial listing requirements. *See* Nasdaq Rule 5110(c). In order to apply for listing, a reverse merger company must also (i) have been trading for at least one year in the U.S. over-the-counter market, on another national securities exchange, or on a regulated foreign exchange, following the filing with the SEC or other regulatory authority of all required information about the transaction, including audited financial statements for the reverse merger company; and (ii) have maintained a minimum closing price of $4 per share for at least 30 of the most recent 60 trading days. In order to be approved for listing, at the time of approval, the reverse merger company must (i) have timely filed all periodic financial reports required by the SEC or other regulatory authority during the year preceding the initial listing, including one annual report containing audited financial statements for a full fiscal year; and (ii) have maintained a minimum closing price of $4 per share for at least 30 of the most recent 60 trading days. However, a reverse merger company will not be required to meet the above additional conditions if it lists in connection with a firm-commitment underwritten public offering with gross proceeds of at least $40 million.

[6] *See* Nasdaq Rule 5405(a)(1).

[7] *See* Nasdaq Rule 5405(a)(2). Note: Effective August 2019, Nasdaq's initial listing criteria were revised to exclude securities subject to resale restrictions for any reason from the calculation of publicly held shares, market value of publicly held shares and round lot shareholders.

[8] *See* Nasdaq Rule 5405(a)(3). A "round lot" or "normal unit of trading" is defined as 100 shares of a security. *See* Nasdaq Rule 5005(a)(40). Note: Effective August 2019, the round lot shareholder requirements were revised to also require that at least 50% of the minimum required number of round lot holders must each hold unrestricted securities with a minimum value of $2,500.

[9] *See* Nasdaq Rule 5405(b)(1)(B).

[10] *See* Nasdaq Rule 5405(b)(2)(A).

[11] *See* Nasdaq Rule 5405(b)(1)(D).

[12] *See* Nasdaq Rule 5405(b)(2)(D).

[13] *See* Nasdaq Rules 5405(b)(3)(C),5405(b)(4)(C).

[14] *See* Nasdaq Rule 5405(b)(1)(C).

[15] *See* Nasdaq Rule 5405(b)(2)(C).

[16] *See* Nasdaq Rules 5405(b)(3)(B), 5405(b)(4)(B).

[17] *See* Nasdaq Rule 5405(b)(1)(A).

[18] *See* Nasdaq Rule 5405(b)(2)(B).

[19] *See* Nasdaq Rule 5405(b)(3)(A). Current publicly traded companies must meet this criteria and the $4 bid price requirement for 90 consecutive trading days prior to applying for listing if qualifying to list only under the Market Value Standard.

[20] *See* Nasdaq Rule 5405(b)(4)(A).

[21] *See* Nasdaq Rule 5450(a)(1).

[22] *See* Nasdaq Rule 5450(a)(2).

[23] *See* Nasdaq Rule 5450(b)(1)(A).

[24] *See* Nasdaq Rule 5450(b)(1)(C).

[25] *See* Nasdaq Rules 5450(b)(2)(C), 5450(b)(3)(C).

[26] *See* Nasdaq Rule 5450(b)(1)(B).

[27] *See* Nasdaq Rules 5450(b)(2)(B), 5450(b)(3)(B).

[28] *See* Nasdaq Rule 5450(b)(1)(D).

[29] *See* Nasdaq Rules 5450(b)(2)(D), 5450(b)(3)(D).

[30] On January 22, 2026, Nasdaq proposed an amendment to Rule 5450 to require a minimum Market Value of Listed Securities of at least $5 million for continued listing of all primary equity securities on the Nasdaq Global Market. *See* SR-NASDAQ-2026-004. This proposed amendment to Nasdaq Rule 5450 remains pending as of April 2026.

[31] *See* Nasdaq Rule 5450(b)(2)(A).

[32] On January 22, 2026, Nasdaq proposed an amendment to Rule 5450 to require a minimum Market Value of Listed Securities of at least $5 million for continued listing of all primary equity securities on the Nasdaq Global Market. *See* SR-NASDAQ-2026-004. This proposed amendment to Nasdaq Rule 5450 remains pending as of April 2026.

[33] *See* Nasdaq Rule 5450(b)(3)(A).

[34] *See* Nasdaq Rule 5315(f)(3)(A)(i).

[35] *See* Nasdaq Rule 5315(f)(3)(A)(ii).

[36] *See* Nasdaq Rule 5315(f)(3)(A)(iii).

[37] *See* Nasdaq Rule 5315(f)(3)(B)(i).

[38] *See* Nasdaq Rule 5315(f)(3)(B)(ii).

[39] *See* Nasdaq Rule 5315(f)(3)(B)(iii).

[40] *See* Nasdaq Rule 5315(f)(3)(C)(i).

[41] *See* Nasdaq Rule 5315(f)(3)(D)(i).

[42] *See* Nasdaq Rule 5315(f)(3)(B)(iii). Average market capitalization of at least $550 million over the prior 12 months and total revenue of at least $110 million in the previous fiscal year.

[43] *See* Nasdaq Rule 5315(f)(3)(C)(ii).

[44] *See* Nasdaq Rule 5315(f)(3)(D)(ii).

[45] *See* Nasdaq Rule 5315(f)(3)(D)(iii).

[46] *See* Nasdaq Rule 5315(e)(1). The issuer also must have at least 1,250,000 in unrestricted publicly held shares. *See* Nasdaq Rule 5315(e)(2).

[47] *See* Nasdaq Rule 5315(f)(1)(B). Companies affiliated with another company listed on NGSM and those with common stock or equivalents currently trading may, in the alternative, have a minimum of 550 beneficial shareholders and an average monthly trading volume over the prior 12 months of at least 1.1 million shares a month *See* Nasdaq Rule 5315(f)(1)(A).

[48] *See* Nasdaq Rule 5315(f)(1)(C). At least 50% of such round lot holders must each hold unrestricted securities with a market value of at least $2,500.

[49] *See* Nasdaq Rule 5315(e)(2).

[50] *See* Nasdaq Rule 5315(f)(2)(C). “Seasoned companies” (those with common stock or equivalents trading) will be required to have a market value of at least $110 million or $100 million and a stockholders’ equity of $110 million. *See* Nasdaq Rules 5315(f)(2)(A) and (B). A closed-end management investment company registered under the Investment Company Act of 1940 will be required to have a market value of at least $70 million. *See* Nasdaq Rule 5315(f)(2)(D).

[51] *See* Nasdaq Rule 5310(d).

[52] *See* Nasdaq Rule 5315(e)(3).

[53] *See* Nasdaq Rule 5315(e)(3).

[54] *See* Nasdaq Rule 5305(e).

[55] *See* Nasdaq Rule 5505(b)(1)(A).

[56] *See* Nasdaq Rule 5505(b)(2)(B).

[57] *See* Nasdaq Rule 5505(b)(3)(B).

[58] *See* Nasdaq Rule 5505(b)(1)(B).

[59] *See* Nasdaq Rule 5505(b)(2)(C).

[60] *See* Nasdaq Rule 5505(b)(3)(C).

[61] *See* Nasdaq Rule 5505(b)(1)(C).

[62] *See* Nasdaq Rule 5505(b)(2)(A). Current publicly traded companies must meet this requirement and the $4 bid price requirement for 90 consecutive trading days prior to applying for listing if qualifying to list only under the Market Value of Listed Securities Standard.

[63] *See* Nasdaq Rule 5505(b)(3)(A).

[64] *See* Nasdaq Rule 5505(a)(3). At least 50% of such round lot holders must each hold unrestricted securities with a market value of at least $2,500.

[65] *See* Nasdaq Rule 5505(a)(2).

[66] *See* Nasdaq Rule 5505(a)(1). In certain circumstances, an issuer that meets either the Equity (Nasdaq Rule 5505(b)(1)) or Net Income (Nasdaq Rule 5505(b)(3)) Standards may have a minimum closing price of $3 per share and an issuer that meets the Market Value of Listed Securities Standard (Nasdaq Rule 5505(b)(2)) may have a minimum closing price of $2 per share. In each case, the issuer must have: (i) net tangible assets over $2 million (if the issuer has been in continuous operation for at least three years); (ii) net tangible assets over $5 million (if the issuer has been in continuous operation for less than three years); or (iii) average revenue of at least $6 million for the last three years; and the security meets such applicable closing price for at least five days prior to approval.

[67] *See* Nasdaq Rule 5505(a)(4).

[68] *See* Nasdaq Rule 5505(a)(6).

[69] On January 22, 2026, Nasdaq proposed an amendment to Rule 5550 to require a minimum Market Value of Listed Securities of at least $5 million for continued listing of all primary equity securities on the Nasdaq Capital Market (including those securities meeting the Equity and Net Income Standards). *See* SR-NASDAQ-2026-004. This proposed amendment to Nasdaq Rule 5550 remains pending as of April 2026.

[70] *See* Nasdaq Rule 5550(b).

[71] *See* Nasdaq Rule 5550(a)(3).

[72] *See* Nasdaq Rule 5550(a)(4).

[73] *See* Nasdaq Rule 5550(a)(5).

[74] *See* Nasdaq Rule 5550(a)(2).

[75] *See* Nasdaq Rule 5550(a)(1).

[76] *See* Nasdaq Rule 5810.

[77] *See* Nasdaq Rules 5615(a)(3), 5605(c), 5625, 5640. *See also* Nasdaq IM-5615-3.

[78] *See* Nasdaq Rules 5615(c)(1)-(2), 5605(b), 5605(e).

[79] *See* Nasdaq Rule 5605(b)(1).

[80] *See* Nasdaq IM-5605.

[81] *See* Nasdaq Rule 5605(b)(1).

[82] *See* Nasdaq IM-5605.

[83] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2); *See* Nasdaq IM-5605.

[84] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2)(A).

[85] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2)(B).

[86] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2)(B)(i).

[87] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2)(B)(ii).

[88] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2)(B)(iii).

[89] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2)(C).

[90] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2)(D).

[91] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2)(D)(i).

[92] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2)(D)(ii).

[93] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2)(E).

[94] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2)(F).

[95] *See* Nasdaq Rules 5005(a)(20), 5605(a)(2)(G); Nasdaq IM-5605.

[96] *See* Nasdaq IM-5605.

[97] *See* Nasdaq Rules 5005(a)(18), 5605(a)(2).

[98] *See* Nasdaq Rule 5605(b)(2) (the rule refers to these meetings as *executive sessions*).

[99] *See* Nasdaq IM-5605-2.

[100] *See* Nasdaq Rule 5608(a)-(b). The policy must be applied to any incentive-based compensation granted after October 2, 2023.

[101] *See* Nasdaq Rule 5608(b)(2).

[102] *See* Nasdaq Rule 5605(e)(1)(A)-(B).

[103] *See* Nasdaq Rule 5605(e)(2).

[104] *See* Nasdaq Rule 5605(e)(3). Independent director oversight of director nominations does not apply in cases where the right to nominate a director belongs legally to a third party (although certain committee composition requirements remain). *See* Nasdaq Rule 5605(e)(4). Note that this rule also does not apply if the issuer is subject to a binding obligation inconsistent with the rule, and such obligation predates November 2003. *See* Nasdaq Rule 5605(e)(5).

[105] *See* Nasdaq Rule 5605(d)(2)(A).

[106] *Id*.

[107] *See* Nasdaq Rule 5605(d)(2)(B). Rule 5605(d)(4) provides for a cure period for companies that fall out of compliance with these requirements. Rule 5650(d)(5) includes certain exceptions for smaller reporting companies.

[108] *See* Nasdaq Rules 5605(d)(1), 5605(d)(3).

[109] *See* Nasdaq Rule 5605(c)(2); Nasdaq IM-5605, Nasdaq IM-5605-3, Nasdaq IM-5605-4, Nasdaq IM-5605-5.

[110] *See* Nasdaq Rule 5605(c)(1).

[111] *See* Nasdaq Rule 5605(c)(1)(A).

[112] *See* Nasdaq Rule 5605(c)(1)(B).

[113] *See* Nasdaq Rule 5605(c)(1)(C).

[114] *See* Nasdaq Rules 5605(c)(1)(D), 5605(c)(3).

[115] *See* Nasdaq Rule 5605(c)(2)(A).

[116] *See generally* Exchange Act Rule 10A-3(b)(1). In the case of investment company issuers, the term "affiliated person" is replaced with "interested person," as defined in Section 2(a)(19) of the Investment Company Act of 1940.

[117] *See* Nasdaq Rule 5605(c)(2)(A).

[118] *Id*.

[119] *See* Nasdaq IM-5605-4.

[120] *See* Nasdaq Rule 5605(c)(2)(B).

[121] *See* Nasdaq Rule 5605(c)(3). Audit committees for issuers that are investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting-related services for the issuer, as well as the issuer's employees.

[122] *See generally* Nasdaq Rule 5605(c)(4).

[123] *See* Nasdaq Rule 5620(a). An issuer organized as a limited partnership is only required to hold an annual meeting of the limited partners if such meeting would otherwise be required under state law or the issuer's partnership agreement. *See* Nasdaq Rule 5615(a)(4)(D).

[124] *See* Nasdaq IM-5620.

[125] *See* Nasdaq Rule 5620(c). Non-US companies that are not foreign private issuers may rely on home-country practice if home-country law mandates a quorum requirement that prohibits the company from establishing a quorum requirement provided by Nasdaq. Any company relying on this exception must provide a statement from independent home-country counsel regarding such restriction and disclose such reliance publicly. Foreign private issuers may follow home-country practice with respect to shareholder meetings. *See* Nasdaq Rule 5615(a)(3).

[126] *See* Nasdaq Rules 5615(a)(4)(E), 5620(c)(i).

[127] *See* Nasdaq Rule 5620(b). Note that foreign private issuers are not subject to the US proxy rules. *See* Nasdaq Rule 5615(a)(3). An issuer organized as a limited partnership will only be required to solicit a proxy if a meeting of the limited partners will be held where a vote will be required. *See* Nasdaq 5615(a)(4)(F).

[128] *See* Nasdaq Rule 5630(a).

[129] *See* Nasdaq Rule 5635(c). *See also* Nasdaq IM-5635-1 paragraph (2). "Material amendments" to an equity compensation arrangement include any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spin-off, or similar transaction), any material increase in benefits to participants, any material expansion of the class of participants eligible to participate in the plan, and any expansion in the types of options or awards provided under the plan.

[130] *See* Nasdaq Rule 5635(c). The exceptions include: (1) warrants or rights issued generally to all security holders of the issuer or stock purchase plans available on equal terms to all security holders of the issuer; (2) certain tax-qualified, non-discriminatory employee benefit and parallel non-qualified plans; (3) plans or arrangements involving mergers or acquisitions, either when conversions, replacements, or adjustments of outstanding options or other equity compensation awards are necessary to reflect the transaction, or when shares available under certain plans acquired in acquisitions or mergers are to be used for certain post-transaction grants; and (4) employment inducements to new employees. The items described under (2) and (4) above must be approved by the issuer's independent compensation committee or a majority of independent directors. *See* Nasdaq Rule 5635(c)(1)-(4).

[131] *See* Nasdaq Rule 5635(b).

[132] *See* Nasdaq Rule 5635(a)(2).

[133] *See* Nasdaq Rule 5635(a)(1)(A)-(B).

[134] *See* Nasdaq Rule 5635(d)(1)-(2).

[135] *See* Nasdaq Rule 5635(f).

[136] *See* Nasdaq Rule 5635(e)(1); *see also* Nasdaq IM-5635-4.

[137] *See* Nasdaq IM-5635-3.

[138] *See* Nasdaq Rule 5210(b); *see also* 15 U.S.C. Section 7212.

[139] *See* Nasdaq Rule 5610.

[140] *See* Nasdaq Rule 5625.

[141] *See Nasdaq Frequently Asked Questions: — Non-US Companies (Identification Number 400); see generally* Nasdaq Rule 5600 Series.

[142] *See* Nasdaq Rule 5250(b)(1); *see also* Nasdaq IM-5250-1.

[143] *See* Nasdaq IM-5250-1.

[144] *See* Nasdaq Rule 5250(e)(2)(A)(i).

[145] *See* Nasdaq Rule 5250(e)(2)(B).

[146] *See* Nasdaq Rule 5250(e)(2)(C).

[147] *See* Nasdaq Rule 5250(e)(2)(D).

[148] *See* Nasdaq Rule 5250(e)(1).

[149] *See* Nasdaq Rule 5615(a)(3).

[150] *See* Nasdaq Rules 5615(a)(3), 5625; *see also* Nasdaq IM-5615-3.

[151] *See* Nasdaq Rule 5615(a)(3); *see also* Nasdaq IM-5615-3.

[152] *See* Nasdaq Rule 5615(a)(3)(B)(i).

[153] *See* Nasdaq Rule 5615(a)(3)(B)(ii).

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ANNEX D: EXCHANGE ACT REPORTING REQUIREMENTS

Form 8-K

Form 8-K requires a current report in a variety of circumstances, including the following. In most cases, a Form 8-K is due within four business days after the event in question:

- entry into or amendment of a material definitive agreement not made in the ordinary course of business;
- termination of a material definitive agreement not made in the ordinary course of business;
- bankruptcy or receivership;
- shutdowns or receipt of order or notice of mine safety violations;
- material cybersecurity incidents;
- the acquisition or disposition (including by purchase, lease, exchange, merger, consolidation, mortgage, destruction, or succession) of a significant amount of assets (including a business) other than in the ordinary course of business by the company;
- public announcement or release disclosing material nonpublic information regarding the company's results of operations or financial condition for an annual or quarterly fiscal period that has ended;
- creation of a material, direct financial obligation or an obligation under an off-balance sheet arrangement, whether or not the company is a party to the agreement;
- occurrence of any event that accelerates or increases a material direct financial obligation or a material obligation under an off-balance sheet arrangement, whether or not the company is a party to the transaction under which the triggering event occurs;
- exit or disposal activities to which the company is committed under which material charges will be incurred under GAAP;
- determination that the company is required to record a material impairment charge under GAAP;
- receipt of a notice of delisting or failure to satisfy a continued listing rule or standard or transfer of listing from a national securities exchange or inter-dealer quotation system;
- unregistered sales of equity securities by the company aggregating at least 1% of the outstanding class (5% for smaller reporting companies);
- material modifications to the rights of holders of the company's registered securities;
- a change in the company's accountants previously engaged in auditing the company's financial statements or hiring of other accountants as principal accountants;
- determination that investors should no longer rely on previously issued financial statements or a related audit report or completed interim review;
- a change in control of the company;
- the resignation of a director of the company or refusal of a director to stand for re-election since the date of the last annual stockholders' meeting because of a disagreement with the company with respect to the company's affairs;

- any (i) departure of a director or principal executive officer, president, principal financial officer, principal accounting officer, or principal operating officer, or person performing similar functions, (ii) election of directors other than by stockholder vote and (iii) appointment of a principal officer;
- a description of any material plan, contract, or arrangement by which a newly appointed principal officer is covered, or participates in, or any modification to any such agreement involving a principal officer;
- a description of any material plan, contract, or arrangement to which a director is a party, or participates in, or any modification to any such agreement involving a director;
- any amendment to the company's certificate of incorporation or bylaws if the company did not propose the amendment in a previously filed proxy statement, and any change in fiscal year other than by stockholder vote or certificate of incorporation or bylaw amendment;
- the results of any matter submitted to a vote of stockholders (or the solicitation of any stockholder authorization or consent); and
- temporary suspension of trading under an employee benefit plan.

Form 10-Q

Form 10-Q is intended to update the most recent year-end and interim disclosures and must include a variety of information, including the following.

Financial Statements and MD&A

Form 10-Q must include condensed financial statements. These are unaudited but must be subject to a Statement of Accounting Standard No. 100 review by the company's independent accountants and include:

- a statement of comprehensive income for the most recent fiscal quarter, for the period between the end of the preceding fiscal year and the end of the most recent fiscal quarter and for corresponding periods of the preceding fiscal year;
- a balance sheet as of the end of the most recent fiscal quarter and as of the end of the preceding fiscal year; and
- a statement of cash flows for the period between the end of the preceding fiscal year and the end of the most recent fiscal quarter and for the corresponding period of the preceding fiscal year.

Although not required, the statements of comprehensive income and cash flows may also be presented for the cumulative 12-month period ending at the end of the most recent fiscal quarter and for the corresponding preceding period.

The financial statements must contain appropriate notes and be accompanied by an MD&A section, which enables readers to assess material changes in financial condition and results of operation. Known trends and uncertainties not apparent on the face of the financial statements should also be discussed.

Starting with an IPO company's first Form 10-Q filing, financial statements must be in XBRL format.[1] XBRL is an open technology standard that facilitates the electronic tagging of individual pieces of data in financial statements so that the data can be extracted easily and processed using an XBRL-compatible viewer. All operating company filers (including foreign private issuers) are required to embed XBRL data directly into the body of an SEC filing, rather than tag the information in a separate exhibit.[2]

Other Disclosures

Form 10-Q also requires disclosure of:

- material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the company with unconsolidated entities or other persons that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses;
- material changes to risk factors since the Form 10-K;
- material legal proceedings commenced or terminated (or which changed materially) during the period;
- quantitative and qualitative information about market risk associated with risk-sensitive financial instruments entered into by the company; and
- changes in securities or defaults upon senior securities;
- any other materially important event not previously reported on Form 8-K that occurred during the reporting period, in which case a Form 8-K may not need to be filed with respect to that event. Certain exhibits are also required to be attached to the Form 10-Q.

Certification

Certifications of the chief executive officer and chief financial officer under Sections 302 and 906 of Sarbanes-Oxley must accompany each Form 10-Q as exhibits.

Form 10-K

Generally speaking, the annual report on Form 10-K requires comprehensive information about an issuer, including the following.

Audited Financial Statements

- Audited balance sheets as of the end of each of the two most recent fiscal years;
- audited statements of income and cash flows for each of the three fiscal years preceding the date of the most recent audited balance sheet set forth in the Form 10-K; and
- summary financial data for each of the previous five fiscal years (or from inception).

Each financial report containing financial statements must be prepared in accordance with (or reconciled to) GAAP. The company must identify any non-GAAP financial measures and include a presentation of the most directly comparable GAAP financial measure and a reconciliation of the disclosed non-GAAP financial measure to the most directly comparable GAAP financial measure.

EGCs benefit from a phased-in approach to complying with the foregoing financial statement requirements. At the time of its IPO, an EGC is required to provide two, rather than three, years of audited financial statements. After its IPO, an EGC will phase into full compliance by adding one additional year of financial statements in each future year until the EGC presents the traditional three years of audited financial statements plus two additional years of summary financial data. The required MD&A will cover only the years for which audited financial statements are provided. Thus, an EGC will not be required to provide audited financial statements, summary financial data or MD&A disclosure for periods prior to those presented in its IPO registration statement.

Except with respect to certain accounting standards, the company may choose to provide the long-form disclosure, even if it identifies itself as an EGC.

Description of the Company

- description of the company's business;
- risk factors affecting the company's business;
- unresolved comments from the SEC Staff;
- cybersecurity risk management, strategy, and governance
- description of material property and employees;
- pending legal proceedings;
- information about directors and executive officers, their compensation, and related-party transactions, which can be incorporated by reference to the company's proxy statement;
- all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the company with unconsolidated entities or other persons that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses must be disclosed as a separately captioned subsection of the MD&A;
- description of material contractual obligations of the company; and
- information regarding the company's equity compensation plans.

Miscellaneous

- Disclosure as to whether or not the company has adopted a code of ethics for its principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions, and, if not, why it has not. In addition, the company must either: (i) file its code of ethics as an exhibit to its annual report; (ii) post the text of its code of ethics, or relevant portions thereof, on its website, provided that the company must disclose its website address and intention to provide disclosure in this manner in its annual report; or (iii) provide an undertaking in its annual report to provide a copy of its code of ethics to any person without charge upon request;
- disclosure as to whether or not the company's audit committee includes among its members at least one audit committee financial expert;
- description of the leadership structure of the company's board of directors, such as whether there is a combined CEO/Chairman or a lead independent director, and an explanation of why that structure is appropriate for the company (this information may be included in the company's proxy statement);
- description of the role of the company's board of directors in risk oversight (this information may be included in the company's proxy statement);
- an internal control report that states the responsibility of management for establishing and maintaining internal control over financial reporting and contains an assessment, as of the end of the most recent fiscal year, of the effectiveness of internal control over financial reporting;
- for accelerated filers (including large accelerated filers), beginning with the second Form 10-K, an auditor's report attesting to the effectiveness of the company's internal control over financial reporting;[3]
- for accelerated filers (including large accelerated filers), the company's website address and whether the company will make available, free of charge, on or through its website, its Form 10-Ks, Form 10-Qs, current reports on Form 8-K, and all amendments to those reports. If the company is not making its filings available in

this manner, it must disclose why it is not doing so and whether the company will provide electronic or paper copies of its filings free of charge upon request; and

- for certain companies involved in mining operations, information concerning mine safety violations and certain other regulatory matters required to be disclosed by Dodd-Frank.

Because information from Form 10-Ks is incorporated by reference into certain other registration statements registering shares of an issuing company's securities under the Securities Act, such as Form S-8 registration statements covering shares issued under incentive stock plans, many issuers use the Form 10-K to update risk factors relating to the company's business and investments in the various classes of the company's securities which may be publicly traded. Although this information is not expressly required by the disclosure requirements of Form 10-K, investors have become accustomed to seeing business risk disclosure. Accordingly, the trading prices of the company's securities are generally unaffected by the mere inclusion of such information. Of course, the substance of the disclosure can still impact the market's perception of the value of the company's securities and, consequently, the trading prices.

Attention should be directed towards the section of the Form 10-K regarding MD&A. This section is scrutinized by the SEC because it is a narrative explanation of the company's financial statements and accompanying notes. In addition, MD&A is a means by which management informs investors of its view of the company's financial performance and condition. It also provides them with information that is not shown in the financial statements, as well as trends and risks that have caused the company to perform the way it has or are reasonably likely to affect the company's performance in the future. The SEC has placed particular emphasis on disclosure of off-balance sheet arrangements and aggregate contractual obligations. Management should view MD&A as the SEC does, as a means of increasing the transparency of the company's financial performance and providing investors with the information necessary to make informed investment decisions.

As described above, if the company qualifies as an emerging growth company, its MD&A is required to cover only the years for which the company's audited financial statements are provided. Additionally, as long as the company qualifies as an EGC, it is also exempt from:

- the detailed compensation discussion and analysis narrative requirement in registration and proxy statements and instead may provide scaled executive compensation disclosure under the requirements that apply to smaller reporting companies;
- the executive compensation provisions of Dodd-Frank;
- the requirement to comply with new or revised GAAP accounting pronouncements applicable to public companies until those standards also apply to private companies; and
- any future PCAOB rules mandating auditor rotation or expanded narrative in the auditor report and any other future PCAOB rules, unless the SEC makes certain determinations regarding the importance of a particular rule to investor protection and capital formation.

The Form 10-K must be signed by the company's principal executive officer or officers, its principal financial officer or officers, its controller or principal accounting officer (or persons performing similar functions), and by at least the majority of the board of directors. The company must indicate in a transmittal letter accompanying the filing whether the financial statements in the report reflect a change from the preceding year in any accounting principles or practices or in the method of applying any such principles or practices.

The precise level of liability that is attributable to the directors and signing officers is uncertain. However, every effort should be made to have the Form 10-K reviewed by the directors, signing officers, and other officers and employees of the company who may have valuable input at the earliest practicable date. Sufficient time should be provided to solicit and receive comments from all such persons.

Certification

In addition to the execution by the persons listed above, the company's principal executive officer or officers and principal financial officer or officers must each make two separate certifications of each Form 10-K and each Form 10-Q. These certifications are required by Sections 302 and 906 of Sarbanes-Oxley. The content and wording of these certifications must be exactly the same as the SEC prescribes in the forms.

Proxy Statements

The SEC proxy rules are quite extensive. They require full disclosure to stockholders with respect to matters to be acted on at each annual or special meeting of stockholders. If a majority of stockholders act by consent without a meeting, the SEC rules require the company to disseminate essentially identical information to the non-consenting stockholders.

Preliminary Proxy Statement

Preliminary proxy materials need not be filed with the SEC if the *only* matters to be acted upon at the meeting are:

- the election of directors;
- the selection of accountants;
- a vote on a stockholder proposal;
- the adoption or approval of an amendment to certain stock option or similar plans;
- a vote to approve executive compensation or the frequency with which future votes on executive compensation will be held; and
- in each case, the company does not comment upon or refer in the proxy material to a solicitation in opposition of any company proposal to be presented at the meeting.

If other matters are to be acted on, preliminary copies of the proxy statement, and any other material to be distributed with it, must be filed with the SEC at least 10 calendar days before the company distributes the definitive proxy statement to stockholders. Since the company may need additional time to comply with comments of the SEC, if SEC comments are expected, preliminary proxy materials should be submitted to the SEC approximately four weeks prior to the scheduled mailing date. Copies of the proxy materials in final form as well as the annual report to stockholders (which must be delivered to the stockholders with or prior to the proxy materials for the annual meeting) must be filed with the SEC when they are first mailed to the stockholders.[4] Regardless of the method of distribution used for its proxy materials, the company must provide all proxy materials and its annual report, free of charge, on a website hosted by the company or a third party (in addition to the SEC's EDGAR site).

Written questionnaires should be used to obtain from directors and officers of the company information required to be included in the proxy statement.

Broker-Dealer Search

The company is also obligated to inquire as to the number of beneficial owners of shares held in "street name" by brokers, dealers, and other nominees, and it must supply those holders with sufficient quantities of proxy materials for forwarding to the beneficial owners. The company's transfer agent will be familiar with the steps necessary to comply with the broker-dealer search.

Content of Proxy Statement

As noted above, the proxy rules contain detailed provisions regarding what must be included in the proxy statement. The form of proxy must indicate in boldface type whether or not the proxy is being solicited on behalf of

the company's board of directors, or, if provided other than by a majority of the board of directors, it must indicate in boldface type on whose behalf the solicitation is made and the interest of that person in the matters to be acted upon. It must also provide a specifically designated blank space for dating the proxy card, and it must clearly and impartially set forth each separate matter intended to be acted upon, whether or not related to or conditioned upon another matter, and whether proposed by the company or a securityholder. In addition, the proxy card must provide a means of withholding authority to vote for each director nominee.

Information must be supplied with respect to each director nominee relating to his or her ownership of the company's securities and the securities of any of its affiliates, the nominee's business experience, and the nominee's principal occupation and certain related-party transactions. Similar information is also required with respect to certain officers of the company, as well as disclosure regarding compensation paid to such officers.

Particular attention should be directed towards the Compensation Discussion and Analysis section of the proxy statement (CD&A). A CD&A is required in proxy statements involving the election of directors, the approval of a compensatory agreement in which any director, director nominee, or executive officer will participate, any pension or retirement plan in which any such person will participate, or the grant or extension to any such person of options, warrants, or rights to purchase any securities, other than warrants or rights issued to security holders as such, on a pro rata basis. A company's CD&A is generally subject to particular scrutiny by the SEC. This section is intended to provide a narrative explanation of the company's compensation policies for its named executive officers (who generally consist of the chief executive officer, chief financial officer, and next three most highly compensated executive officers), and the key factors in the decision-making process for implementing such policies. Such disclosure should include information regarding the objectives of the company's compensation program, what the compensation program is designed to reward, the individual elements of compensation under that program, how those elements are determined, how the company determines the amount (and, where applicable, the formula) for each element of compensation, how each compensation element is evaluated by the company, and how the company's decisions regarding the compensation element help to reach the company's objectives.

In addition to the CD&A, the proxy statement will include detailed tabular disclosure about the compensation paid and equity awarded to named executive officers.

Smaller reporting companies and EGCs are permitted to dispense with the detailed CD&A and provide scaled executive compensation disclosure. The scaled disclosure generally covers the three, rather than five, most highly compensated executive officers for a period of two, rather than three, years and will include substantially reduced narrative discussion about the company's compensation programs and philosophies.

Additional information may be required, depending upon the nature of the subject matter (e.g., approval of a benefit plan or an acquisition) with respect to which the proxy is solicited.

Even if the company does not desire to solicit proxies from its public stockholders, an "Information Statement" containing substantially the same information as a proxy statement must be filed with the SEC and mailed to all stockholders prior to any annual or other meeting of stockholders.

Stockholder Proposals

In certain circumstances, a stockholder may request to include a proposal in the company's proxy statement. The submission of stockholder proposals and requirements regarding inclusion in the company's proxy materials of such proposals is governed by Exchange Act Rule 14a-8 and is also subject to any advance notice provisions in the company's bylaws. A stockholder is eligible to submit a proposal under Rule 14 a-8 if the stockholder provides in a written statement a proof that such stockholder has continuously held the company's securities entitled to vote on the proposal at the meeting in at least the market values and for the time periods specified below and continues to hold these securities through the date of the meeting.

- $2,000 three years
- $15,000 two years
- $25,000 one year

A stockholder is limited to no more than one proposal for a particular stockholders' meeting. In some circumstances, the company is permitted to exclude a stockholder proposal from the company's proxy materials after submitting its reasons for exclusion to the SEC.[5]

Say on Pay, Frequency, and Golden Parachute Votes

Pursuant to Dodd-Frank, the SEC adopted rules requiring public companies to provide stockholders with the opportunity to vote, on an advisory, non-binding basis, on the following matters at any annual meeting at which directors will be elected and for which executive compensation disclosure is required to be included in the proxy statement:

- to approve the compensation of the company's named executive officers (a Say on Pay Vote); and
- to approve the frequency with which future Say on Pay Votes should be held (a Frequency Vote), with stockholders receiving a choice of every one, two, or three years, or to abstain from the Frequency Vote, and the company's board of directors making a recommendation as to the desired frequency.

The Say on Pay Vote is an overall approval or disapproval of an issuer's compensation of its named executive officers and must relate to all of an issuer's executive compensation disclosure included in the proxy statement, including the CD&A, compensation tables, and other required narrative executive compensation disclosure. The Say on Pay vote does not cover director compensation or disclosure relating to policies and practices concerning risk management and risk-taking incentives (except to the extent such discussion is included in the CD&A). In subsequent proxy statements, the company is required to discuss in its CD&A whether and how it considered the results of the most recent Say on Pay Vote in structuring its executive compensation. The company also is required to disclose its decision on how frequently it will hold the Say on Pay Vote no later than the earlier of: (i) 150 calendar days after the date of the stockholder meeting at which a Frequency Vote was held or; (ii) 60 calendar days prior to the deadline for submission of stockholder proposals for the next annual meeting following the annual meeting at which a Frequency Vote was held.

In addition, public companies must include a non-binding, advisory vote to approve golden parachute payments (a Golden Parachute Vote) in any proxy statement in which stockholders are asked to approve a merger, acquisition, consolidation, or proposed sale or other disposition of all or substantially all of the company's assets, unless such golden parachute payments have been approved as part of the Say on Pay Vote.

Smaller reporting companies do not have to provide a Say on Pay Vote or Frequency Vote until the first annual or other meeting of stockholders held on or after January 21, 2013 at which directors are to be elected and for which executive compensation disclosure is required to be included in the corresponding proxy statement. EGCs are exempt from the Say on Pay Vote, Frequency Vote, and Golden Parachute Vote requirements for as long as they qualify as EGCs. After a company ceases to qualify as an EGC, it must hold a Say on Pay Vote within one year of ceasing to qualify as an EGC or, if later, by the end of the third year after its IPO.

ENDNOTES

[1] *See* Regulation S-K Item 601(b)(101)(i).

[2] *See Final Rule: Inline XBRL Filing of Tagged Data*, Release No. 33-10514 (June 28, 2018).

[3] Smaller reporting companies and non-accelerated filers are not subject to the auditor attestation requirement. EGCs are exempt from the requirement for the duration of their on-ramp period.

[4] Instead of mailing a full set of proxy materials and the annual report to its stockholders, the company may elect to notify stockholders of the availability of proxy materials on an Internet website. Such "Notice of Internet Availability of Proxy Materials" must be sent at least 40 calendar days in advance of the meeting date.

[5] *See* Exchange Act Rule 14a-8(i) and SEC Staff Legal Bulletin No. 14M, 17 C.F.R. § 240.14a-8 (2025).

LATHAM & WATKINS LLP

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