IPO Report

2025

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Note From the Editors

This year's IPO Report offers a detailed review of the IPO market and outlook, including a breakdown of IPOs by industry and the number of IPOs from the leading states over the past five years. We also take a look at the IPO market by the numbers and the profile of successful IPO candidates.

We examine how to prepare cybersecurity disclosures, considerations for current and former shell companies, and the prevalence of EGC elections. The report covers important topics for pre-IPO companies, including how to assemble a board of directors, facilitate pre-IPO communications and test the waters to find IPO investors.

Please **subscribe** to our mailing lists to stay up to date on the latest developments related to IPOs and the capital markets space, and don't forget to check out our **M&A Report** and forthcoming Venture Capital Report.

Thanks for reading.

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What's Inside

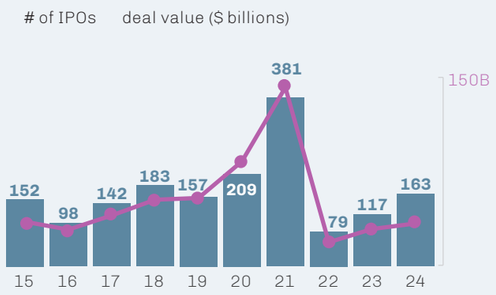
US Market Review and Outlook

Steady capital market gains, the paring of interest rates by the Federal Reserve, and a decline in inflation all contributed to an environment conducive to increased IPO activity from recent lows.

The number of US IPOs increased in 2024. With 163 IPOs in 2024, deal activity increased by 39% from the 117 IPOs completed in 2023, surpassing the 157 IPOs completed in 2019 before the recent market peak in 2020 and 2021.

Total gross proceeds for IPOs completed in 2024 were $23.7 billion, up 25% from $19.0 billion in 2023. Despite the increase, total gross proceeds in 2024 were still more than $20 billion below the figure for 2019 notwithstanding a comparable number of IPOs in both years.

US IPOs
2015 to 2024



163
IPOs in 2024,
a 39% increase

$23.7B
deal value in 2024,
a 25% increase

The overall composition of the IPO market as measured by offering size remains very different than five years ago. In 2020, there were 20 IPOs with gross proceeds of less than $25 million, 44 IPOs with gross proceeds between $25 and $100 million and 145 IPOs with gross proceeds of greater than $100 million. By contrast, in 2024, the number of IPOs with gross proceeds of less than $25 million ballooned to 99; IPOs with gross proceeds between $25 and $100 million dwindled to 11; and there were only 53 IPOs with gross proceeds of greater than $100 million.

While the number of IPOs with gross proceeds of greater than $100 million did almost double from the prior year, the 2024 figure is still only half of the median figure (103) for the five-year period from 2017 to 2021.

The median offering size for IPOs in 2024 was unchanged from $10 million in 2023 and is a fraction of the $144.2 million median that prevailed over the five-year period from 2017 to 2021.

The median annual revenue of IPO companies in 2024 was $19.6 million, more than double the $9.0 million median in 2023, but well below the $66.9 million median that prevailed during the five-year period from 2017 to 2021.

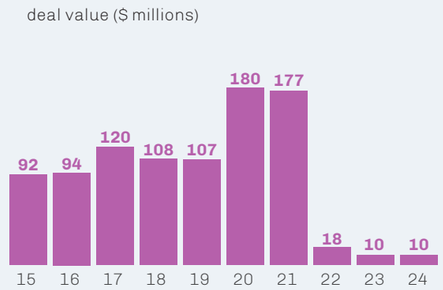
In 2024, 45% of life sciences IPO companies had revenue, up from 33% for 2023 and almost identical to the figure (46%) for the five-year period from 2017 to 2021.

The median annual revenue of non-life sciences IPO companies in 2024 was $29.0 million, up by almost one-third from $21.9 million in 2023, but well short of the $192.7 million median from 2017 to 2021.

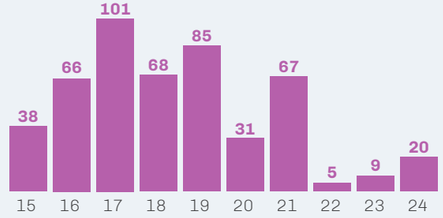
The percentage of profitable IPO companies increased to 51% in 2024 from 46% in 2023 and from 28% of all IPO companies between 2017 and 2021. Three of the 31 life sciences IPO companies in 2024 (10%) were profitable, compared to 61% of the non-life sciences IPO companies—the highest percentage for non-life sciences IPO companies since 2012.

Looking at just those IPOs with gross proceeds of at least $100 million, three of the 18 life sciences companies in 2024 (17%) were profitable, compared to 49% of the non-life sciences companies.

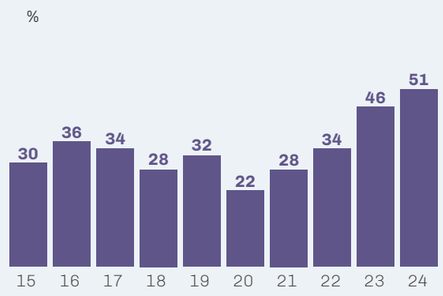
Median IPO Offering Size
2015 to 2024



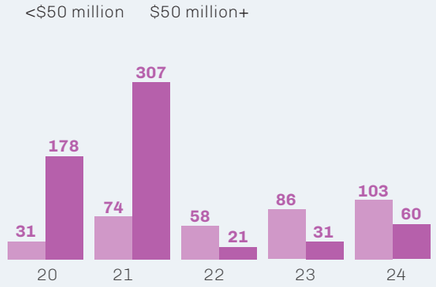
Median Annual Revenue of IPO Companies
2015 to 2024



Percentage of Profitable IPO Companies
2015 to 2024



IPOs by Offering Size
2020 to 2024



IPOs by emerging growth companies (EGCs) accounted for 90% of the year's IPOs, compared to 91% in 2023 and the 89% average that has prevailed since enactment of the JOBS Act in 2012.

There were four billion-dollar IPOs in 2024, led by the $1.54 billion offering by Viking Holdings and the $1.44 billion offering by StandardAero. The 2024 billion-dollar IPO count is well below the 20 billion-dollar IPOs in 2020 and 26 in 2021 but also trails the nine in both 2018 and 2019.

The number of IPOs with gross proceeds of at least $500 million compares more favorably. Those increased from seven in 2023 to 15 in 2024; and the 2024 count trails the median over the ten-year period from 2012 to 2021 of 19 by only four.

The median IPO company in 2024 ended its first day of trading up less than one percent from its offering price. In comparison, the median IPO company in 2023 ended its first day of trading unchanged from its offering price. Over the five-year period from 2017 to 2021, the median IPO company produced a first-day gain of 13%.

DIRECT LISTINGS

There was a single direct listing in 2024, down from four in 2023. In total, there have been less than 20 direct listings since 2018—the year of the first direct listing (Spotify). Direct listings will continue to be a relevant option for well-established companies that seek to provide liquidity for existing shareholders but do not require an infusion of new capital because the listed shares are sold by existing shareholders.

There were five "moonshots" (IPOs in which the stock price doubles on the opening day) in 2024, compared to six in 2023. Mirroring 2023, only one of 2024's moonshot IPOs ended the year above its offering price. The other four ended the year down a median of 84% from their offering price.

The percentage of "broken" IPOs (in which the stock closes below the offering price on the first trading day) declined to 42% in 2024 from 50% in 2023. In comparison, 24% of IPOs over the five-year period from 2017 to 2021 were broken. A slightly higher percentage of 2024 life sciences IPOs (45%) than non-life sciences IPOs (41%) were broken.

2024 IPO companies ended the year trading a median of 17% below their offering price. While this represents an improvement from the statistics for 2022 (the median decline from offering price to end of year was 55%) and 2023 (a 56% median decline), these returns stand in contrast to performance in the stock market at large, where the Dow ended 2024 up 13%, and the Nasdaq and S&P 500 were up 29% and 23%, respectively.

Closer examination of the 2024 IPOs, however, yields a more nuanced picture. The median 2024 IPO company that raised gross proceeds of less than $25 million (99 companies) ended the year down 44% from its offering price. The median 2024 IPO company that raised gross proceeds of at least $100 million ended the year with a gain of 7%, IPOs with gross proceeds of at least $200 million ended the year with a median gain of 19%, and IPOs with gross proceeds of at least $500 million ended the year with a median gain of 62%.

The year's best-performing IPOs were by Nano Nuclear Energy (trading 522% above its offering price at year-end), Reddit (up 381%), Unusual Machines (up 321%), LandBridge (up 280%) and Astera Labs (up 268%).

At the end of 2024, only 36% of all the year's IPO companies were trading above their offering price. For IPOs with gross proceeds of less than $25 million in 2024, 74% were trading below their offering at year-end. Larger IPOs fared better. 56% of IPOs that raised gross proceeds of at least $100 million in 2024 were trading above their offering price at year-end and 77% of IPOs that raised at least $500 million were trading up.

Individual components of the IPO market fared as follows in 2024:

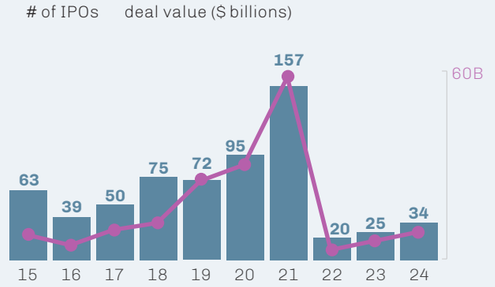
- **Venture-Backed IPOs:** The number of IPOs by venture-backed US issuers increased to 34 in 2024 from 25 in 2023, but the figures for both years are well below the median of 75 over the five-year period from 2017 to 2021. The market share of this segment declined to 47% in 2024 from 48% in 2023 and lags the 58% total market share for the five-year period from 2017 to 2021. The median offering size for US-issuer venture-backed IPOs in 2024 was $165.1 million, compared to $85.0 million in 2022 and $140.0 million over the five-year period from 2017 to 2021. At year-end, US-issuer venture-backed IPO companies were trading down a median of 8% from their offering price.

- **PE-Backed IPOs:** The number of IPOs by PE-backed US issuers increased to 12 in 2024 from just four in 2023. Despite the increase, the 2024 figure remains well below the median of 26 over the five-year period from 2017 to 2021. PE-backed issuers accounted for 17% of all US-issuer IPOs in 2024, up from 8% in 2023 but below the 23% figure over the five-year period from 2017 to 2021. The median offering size for PE-backed IPOs in 2024 was $369.9 million, compared to $240.5 million in 2022 and $335.9 million over the five-year period from 2017 to 2021. The median 2024 PE-backed IPO company ended the year up 7% from its offering price.

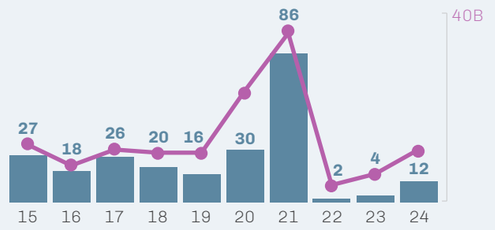
- **Life Sciences IPOs:** There were 31 life sciences company IPOs in 2024, up from 21 in 2023, but well below the median of 74 over the five-year period from 2017 to 2021. The life sciences company share of the IPO market was 19% in 2024, up slightly from 18% in 2023, but less than half of the 39% over the five-year period from 2017 to 2021. The median offering size for life sciences IPOs in 2024 was $110.0 million, up from $80.0 million in 2023, and was 3% higher than the $106.7 million median from 2017 to 2021. The median 2024 life sciences IPO company ended the year trading down 9% from its offering price.

- **Tech IPOs:** Deal flow in the technology sector increased to 39 IPOs in 2024 from 35 IPOs in 2023 but remains well below the median of 59 over the five-year period from 2017 to 2021. The tech sector's share of the US IPO market declined to 24% in 2024, from 30% in 2023 and 35% over the five-year period from 2017

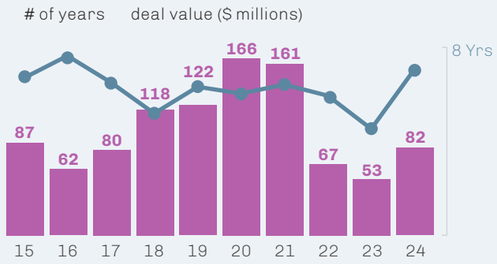
Venture-backed IPOs
2015 to 2024



Private Equity–Backed IPOs
2015 to 2024



Median Time to IPO and Median Amount Raised Prior to IPO
2015 to 2024

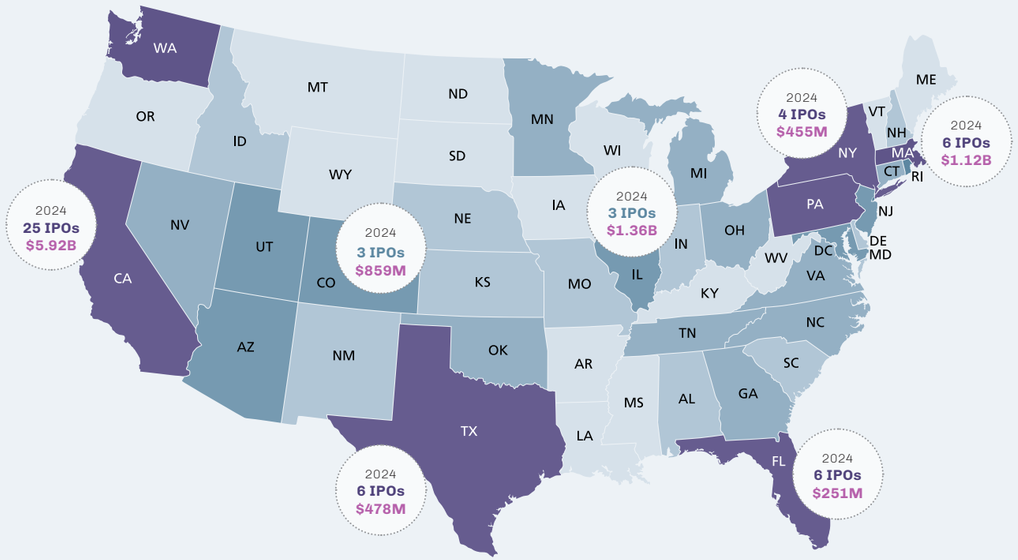


to 2021. The median offering size for tech IPOs in 2024 was only $18.0 million, up from $8.4 million in 2023 but well below the $227.3 million over the five-year period from 2017 to 2021. Tech IPO companies ended the year a median of 11% below their offering price.

– **Foreign-Issuer IPOs:** The number of US IPOs by foreign issuers increased from 65 in 2023 to 93 in 2024. Foreign-issuer IPOs accounted for 56% of the US market in both 2023 and 2024, representing the first two years where foreign-issuer IPOs outpaced IPOs by US issuers. Among foreign issuers, companies from mainland China led the year with 31 IPOs, followed by companies from Hong Kong (23 IPOs), Singapore (15 IPOs) and Australia (five IPOs). Foreign-issuer IPO companies ended the year down a median of 42% from their offering price, although this was largely driven by poorly performing smaller IPOs. Foreign issuer IPOs that raised gross proceeds of at least $100 million ended the year with a median gain of 35% from their offering price.

IPOs by State
2020-2024

15+ IPOs 10-14 IPOs 4-9 IPOs 1-3 IPOs



Leading IPO States
2020-2024

	CA	MA	NY	TX	FL	PA	WA	IL	CO	NJ
2024	25	6	4	6	6	2	1	3	3	1
2023	18	3	1	7	5	1	1	-	-	2
2022	11	8	4	5	4	2	2	1	-	2
2021	97	31	33	16	15	6	7	5	7	4
2020	52	27	10	10	2	7	5	5	3	4
2020-2024	203	75	52	44	32	18	16	14	13	13

OUTLOOK

IPO market activity in the coming year will depend on several factors, including the following:

– **Economic Growth:** US GDP increased by 2.8% in 2024, down slightly from 2.9% in 2023 and is forecast to slow further in 2025. The new administration's policy objectives are likely to have varied impacts on the economy. Tax cuts and a broader focus on deregulation may boost investor confidence, but tariffs and immigration crackdowns could fuel inflation while curtailing growth, raising the specter of stagflation.

– **Capital Market Conditions:** Stable capital market conditions absent volatile swings have long been a precursor to a buoyant IPO market, although by themselves are not sufficient to get potential IPO candidates off the sidelines. The Dow, Nasdaq Composite Index and S&P 500 all posted double digit gains for the second consecutive year. Continued capital market growth and stability will be one of the building blocks for a healthy IPO market in the coming year, but a continued slowing of inflation and easing of interest rates may be needed for momentum to accelerate.

– **Venture Capital Pipeline:** The overall level of venture capital investment increased from $163.1 billion in 2023 to $215.5 billion in 2024. The number of venture-backed companies raising rounds of at least $100 million increased from 258 in 2023 to 384 in 2024. While the number for 2024 is well shy of the peak of 859 in 2021, it stands above the 349 completed in 2020. The continued ability of companies to raise "IPO-sized" rounds diminishes the urgency for them to go public, but VCs invest with the expectation of capital being returned, and as time from investment increases so will the pressure to execute an exit, especially if market conditions are favorable.

– **Private Equity Impact:** PE activity in 2024 was buoyed by easing inflation, declining interest rates, and pressure to deploy dry powder. The US PE deal count increased by 13% to almost 8,500 deals while deal value increased 19% to $838.5 billion. Despite a decline in PE fundraising both globally (a 20% decline from $594.7 billion in 2023 to $476.1 billion in 2024) and in the US (a 27% decline from $394.8 billion in 2023 to $287.3 billion in 2024), private equity firms continue to sit on a near-record level of undeployed capital. With general partners eager to return capital to their backers and institutional investors looking for predictable returns, PE-backed IPOs are likely to see increased demand in 2025.

Despite strong market fundamentals, some uncertainty remains regarding the trajectory of the economy, and the extent to which the new administration will pursue perceived hardline policy objectives only exacerbates this. The IPO market enters 2025 with a broad array of highly qualified and tested companies in the IPO pipeline and a significant upturn in activity is well within expectations assuming market conditions remain conducive. ■

SPAC IPOs

There were 57 SPAC IPOs in 2024 with total proceeds of $8.7 billion, compared to 31 in 2023 with gross proceeds of $3.5 billion. The SPAC IPO market is unlikely to ever match the ebullient heights of 2020 and 2021 when there were 248 and 613 SPAC IPOs, respectively, but SPAC business combinations will remain an attractive alternative path for companies to access public markets for various reasons, including a shorter overall timeline, access to an experienced management team, and lower cost than a traditional IPO.

Data compiled by Tim Gallagher, a senior corporate analyst in WilmerHale's Corporate Practice.

Data Sources: WilmerHale compiled all data in this report unless otherwise indicated. Direct listings and offerings by SPACs, REITs, bank conversions, closed-end investment trusts, oil & gas limited partnerships and unit trusts are excluded from IPO data, except as otherwise indicated. Offering proceeds exclude proceeds from exercise of underwriters' over-allotment options, if applicable. Venture capital data is sourced from SEC filings and PitchBook. Private equity–backed IPO data is sourced from SEC filings and Refinitiv.

IPO Market by the Numbers

PROFILE OF SUCCESSFUL IPO CANDIDATES

What does it really take to go public? There is no single profile of a successful IPO company, but in general, the most attractive candidates share the following attributes:

- **Outstanding Management Team:** An investment truism is that investors invest in people, and this is even truer for IPO companies. Every company going public needs experienced and talented management with high integrity, a vision for the future, energy to withstand the rigors of the IPO process and public company life, and a proven ability to execute. An IPO is not the best time for a fledgling CEO or CFO to cut their teeth.
- **Market Differentiation:** IPO candidates need a superior technology, product or service in a large and growing market. Ideally, they are viewed as market leaders in their industry. Appropriate intellectual property protection is expected of technology companies, and in some sectors, such as life sciences and medical devices, patents are de rigueur.
- **Substantial Revenue:** Substantial revenue is generally expected—at least $75 million annually—in order to provide a platform for attractive levels of profitability and market capitalization.
- **Revenue Growth:** Consistent and strong revenue growth—25% or more annually—is usually needed, unless the company has other compelling features. The company should have visibility into sustained growth to avoid the negative market reaction that can accompany revenue or earnings surprises.
- **Profitability:** Strong IPO candidates generally have track records of strong earnings and a demonstrated ability to enhance margins over time, although IPO investors often appear to value growth more than near-term profitability.
- **Market Capitalization:** The company's potential market capitalization should be at least $300 million in order to facilitate development of a liquid trading market. Substantial post-IPO ownership by insiders may mean a larger market cap is required to provide ample public float.

Other factors indicative of IPO success can vary based on a company's industry and size. For example, many life sciences companies have little or no revenue and are not profitable. More mature companies are likely to have greater revenue and higher market caps but slower growth rates. High-growth companies are likely to be smaller and usually have a shorter history of profitability.

Beyond these objective measures, IPO candidates need to be ready for public ownership in a range of other areas, including accounting preparation, corporate governance, financial and disclosure controls and procedures, external communications, legal and regulatory compliance, and a variety of corporate housekeeping tasks. ■

HOW DO YOU COMPARE?

The IPO market of the past three years has been notably different than the preceding three-year period. Not only did deal flow fall by more than one half but the proportion of smaller IPOs increased inordinately. The attributes of these smaller IPO companies are often very different than a typical IPO, so IPOs with less than $50 million in gross proceeds have been excluded from the tables where noted below.

METRIC	2019–2021	2022–2024
Average annual number of IPOs	249	120
Median offering size (all IPOs)	$163.9 million (18% < $50 million and 17% > $500 million)	$12.2 million (69% < $50 million and 7% > $500 million)

The figures below are based on IPOs by US-incorporated issuers with gross proceeds of at least $50 million.

METRIC	2019–2021	2022–2024
IPO companies qualifying as EGCs under the JOBS Act	91%	80%
Median annual revenue of IPO companies	$102.2 million (43% < $50 million and 17% > $500 million)	$63.8 million (46% < $50 million and 37% > $500 million)
IPO companies that are profitable	23%	33%
IPOs with selling stockholders and median percentage of offering represented by those shares	Percentage of IPOs—21% Percentage of offering—33%	Percentage of IPOs—19% Percentage of offering—33%
IPOs with directed share programs and median percentage of offering represented by those shares	Percentage of IPOs—49% Percentage of offering—5%	Percentage of IPOs—46% Percentage of offering—5%
IPO companies disclosing adoption of an ESPP	77%	67%
IPO companies using a "Big 4" accounting firm	84%	87%
Stock exchange on which the company's common stock is listed	Nasdaq—76% NYSE—24%	Nasdaq—67% NYSE—33%
Median underwriting discount	7%	7%
Underwriting discount less than 7.0%	40%	44%
Number of SEC comments contained in initial comment letter	Median—16 25th percentile—12 75th percentile—21	Median—22 25th percentile—17 75th percentile—27
Median number of Form S-1 amendments filed before effectiveness	Four	Five
Number of days from initial submission to effectiveness of Form S-1	Median—99 25th percentile—81 75th percentile—146	Median—167 25th percentile—118 75th percentile—261

Data compiled by Tim Gallagher, a senior corporate analyst in WilmerHale's Corporate Practice.

Preparing for Cybersecurity Disclosure as a Public Company

By Gregory Wiessner and Joseph Odegaard

The SEC, investment banks and other stakeholders are increasingly focused on cybersecurity in IPO companies given the potential financial, legal and reputational risks. Cyber incidents, whether unintentional events or deliberate attacks on company networks, can have significant impacts on a company, including the loss or theft of valuable company data; the disclosure of sensitive company, customer or personal information; the destruction or corruption of important files; and the disruption of business operations. These impacts may lead to remediation costs, increased cybersecurity protection costs, lost revenue, litigation, regulatory investigations and reputational harm. As a result of these risks, companies need to carefully consider their disclosure obligations—both in the Form S-1 and in post-IPO filings with the SEC—relating to cybersecurity risks and related processes and practices.

In July 2023, the SEC adopted rule amendments to enhance disclosures about cybersecurity risk management, strategy, governance and incident reporting that have led to operational and governance changes for many public companies. The new rules represent a significant expansion of the SEC's 2018 guidance on cybersecurity disclosure by public companies. The 2018 guidance, which remains in effect and applies equally to IPO companies, emphasizes the importance of maintaining comprehensive policies and procedures related to cybersecurity risks and incidents, and requires companies to establish and maintain appropriate disclosure controls and procedures that enable them to make accurate and timely disclosures of material cybersecurity events.

CYBERSECURITY DISCLOSURES

The 2023 rules as well as the older 2018 guidance make clear that a number of SEC disclosure requirements can result in an obligation to disclose cybersecurity risks and incidents, depending on a company's particular circumstances, and, in the case of a publicly held company, to update its prior cybersecurity-related disclosures.

Form S-1

Risk Factors. Under Item 105 of Regulation S-K, cybersecurity risks should be disclosed if those risks are among the "most significant factors that make investments in the company's securities speculative or risky." Companies are encouraged to consider the following issues:

- the occurrence of prior cybersecurity incidents, including their severity and frequency;
- the probability of the occurrence and potential magnitude of cybersecurity incidents;
- the adequacy of preventive actions taken to reduce cybersecurity risks and the associated costs, including, if appropriate, discussing the limits of the company's ability to prevent or mitigate certain cybersecurity risks;
- the aspects of the company's business and operations that give rise to material cybersecurity risks and the potential costs and consequences of such risks, including industry-specific risks and third-party supplier and service provider risks;
- the costs associated with maintaining cybersecurity protections, including, if applicable, insurance coverage relating to cybersecurity incidents or payments to service providers;
- the potential for reputational harm;
- existing or pending laws and regulations that may affect the requirements to which companies are subject relating to cybersecurity and the associated costs to companies, including litigation and regulatory enforcement; and
- remediation costs associated with cybersecurity incidents.

Caution should be taken not to describe risks that have already materialized as hypothetical in nature. This can be especially challenging for cyber disclosure when there is a pattern of attempted, but seemingly thwarted, incursions. Such a pattern does not, however, require that companies disclose granular detail about any incidents that may compromise their remediation efforts or cybersecurity defenses.

MD&A. Regarding a company's disclosure of known events, trends and uncertainties under Item 303 of Regulation S-K, the 2018 guidance notes that companies should consider "the cost of ongoing cybersecurity efforts (including enhancements to existing efforts), the costs and other consequences of cybersecurity incidents, and the risks of potential cybersecurity incidents, among other matters." Other potential costs that companies should consider include loss of intellectual property, costs of remediation and preventive measures, insurance, litigation, regulatory investigations, legislative developments, and reputational and competitive harm.

Business. Appropriate disclosure must be provided regarding a company's description of its business under Item 101 of Regulation S-K, particularly where "cybersecurity incidents or risks materially affect a company's products, services, relationships with customers or suppliers, or competitive conditions."

Legal Proceedings. The occurrence of a cybersecurity incident may require disclosure under Item 103 of Regulation S-K if it results in a material pending legal proceeding.

Financial Statements. A cybersecurity incident may also impact a company's financial statements, and the 2018 guidance states the SEC's expectation "that a company's financial reporting and control systems would be designed to provide reasonable assurance that information about the range and magnitude of the financial impacts of a cybersecurity incident would be incorporated into its financial statements on a timely basis as the information becomes available."

Form 10-K

Cybersecurity Risk Management, Strategy and Governance. In addition to the above disclosures, new Item 1C to Form 10-K directs public companies to provide the information required by new Item 106 of Regulation S-K. Annually, a company must disclose company processes to assess, identify and manage material cybersecurity risks; any material impacts the company has suffered from cybersecurity risks, including previous cybersecurity incidents; management's role and expertise in assessing and managing material cybersecurity risks; and the board of directors' oversight of cybersecurity risks. Disclosure is also required regarding the relevant experience of members of management who are responsible for assessing and managing cybersecurity risk, which need only be in such detail as "necessary to fully describe the nature of the expertise." This may include prior cybersecurity work experience; any relevant degrees or certifications; or any knowledge, skills or additional background in cybersecurity.

FORM 8-K REPORTING OBLIGATIONS

What disclosure is required? In July 2023, the SEC adopted Item 1.05 (Material Cybersecurity Incidents) of Form 8-K, which requires a company, if it determines that it has experienced a material cybersecurity incident, to report under Item 1.05 of Form 8-K the material aspects of the nature, scope and timing of the incident, and the material impact or reasonably likely material impact on the company, including its financial condition and results of operations.

How does the SEC define a cybersecurity incident? "Cybersecurity incident" means an unauthorized occurrence, or a series of related unauthorized occurrences, whether unintentional or malicious, on or conducted through a company's information systems that jeopardizes the confidentiality, integrity or availability of a company's information systems or any information residing therein. The term "information systems" casts a wide net, capturing electronic information resources owned or used by the company, including physical or virtual infrastructure controlled by such information resources, or components thereof, organized for the collection, processing, maintenance, use, sharing, dissemination or disposition of the company's information to maintain or support the company's operations. Because the definition of "information systems" covers electronic information resources "owned or used" by the company, a company is required to disclose a cybersecurity incident suffered by a third-party service provider's system if that incident has a material impact on the company.

What is the scope of disclosure? While companies should continue to ensure that disclosure of cyber risk and the extent of incidents is accurate and not misleading, companies need not disclose "specific or technical information" about their incident response or cybersecurity systems, related networks and devices, or potential system vulnerabilities in such detail as would impede the company's response or remediation of the incident.

How should a company assess the materiality of a cybersecurity incident? Whether a cybersecurity incident is "material" is to be analyzed under the traditional securities law definition of materiality, meaning an incident is material if "there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision, or if it would have "significantly altered the 'total mix' of information made available." Companies must consider both qualitative and quantitative factors when assessing the materiality of a cybersecurity incident, including, but not limited to:

- quantitative financial impacts, including reasonably expected lost revenue, remediation costs, expenses from legal and regulatory proceedings, and impacts on net income and total and current assets;
- operational importance of affected systems, including any impact to the company's key systems or information the company considers its "crown jewels";
- duration of the incident and disruption, method of detection and readiness of response;
- ability to restore affected systems and the expected integrity of those systems once restored;
- nature, scope and magnitude of compromised data;
- harm to reputation, brand perception, and relationships with customers, vendors and other business partners; and
- likelihood of regulatory actions and litigation.

The inability to determine the full extent of the incident or ongoing nature of the company's investigation is not a relevant consideration. Companies may consider voluntarily disclosing cyber incidents that have not been determined to be material through other channels, including Form 8-K Items 7.01 or 8.01, but should continue to reassess Item 1.05 reporting obligations as new developments arise.

DISCLOSURE CONTROLS AND PROCEDURES

Every public company must maintain "disclosure controls and procedures" designed to ensure that information required to be disclosed in SEC reports is accurately recorded, processed, summarized and reported within the time periods specified in SEC rules, and is accumulated and communicated to the company's management to allow timely decisions regarding required disclosure. In light of new Item 1.05 of Form 8-K, it is important for companies to coordinate their cybersecurity incident response plans with appropriate disclosure controls and procedures relating to cybersecurity incidents that may be material. As an initial matter, companies should focus on their internal processes for evaluating incidents and escalating information within the organization, their incident response procedures, the interaction of their technical experts with their disclosure committee (or other group within the company that performs a similar function), and the process for promptly assessing the materiality of events for purposes of Form 8-K reporting.

Management and Board Oversight. The new rules require disclosure of management and board oversight of cyber risk, including the reporting processes used to escalate information. Companies should identify the personnel who are most likely to become aware of a cyber incident and educate them on reporting requirements and communication channels. Companies are also encouraged to review the allocation of cyber risk responsibility and oversight between the board and management and educate directors and the IT team on reporting obligations and trends.

Incident Response Plan. A comprehensive incident response plan is a central tool companies should implement before a threat materializes to ensure compliance with disclosure obligations and readiness of response.

Updating Controls and Procedures. The constantly changing threat of cyberattack dictates that companies regularly review and update disclosure controls and procedures to reflect technological realities, the evolving threat environment, disclosure trends at peer companies and corporate developments. Companies are encouraged to assess and benchmark their controls against recognized cybersecurity frameworks, such as those published by the National Institute of Standards and Technology, or other suitable industry standards. Companies that are active in acquisitions should also quickly fold new subsidiaries into the control environment and add cybersecurity as a key item for due diligence and integration planning.

Regulation FD. The 2018 guidance indicates that companies should adopt policies and procedures to prevent selective disclosures of material nonpublic information regarding cybersecurity risks and incidents and ensure that any Regulation FD-required disclosure is made either simultaneously (for intentional disclosures) or promptly (for unintentional disclosures).

CYBERSECURITY ENFORCEMENT

In October 2024, the SEC announced charges against four companies involving materially misleading cybersecurity disclosure. The charges stemmed from an investigation related to the SEC's case against SolarWinds. The SEC alleged that each of the companies negligently minimized its cybersecurity incident in public disclosures, including, in two of the cases, framing cybersecurity risks in generic or hypothetical terms despite knowing the threats had materialized, and in the others, understating the impacts from cyber incidents. These companies agreed to pay civil penalties between $990,000 and $4 million to settle the charges.

These actions reflect a trend of SEC enforcement centered on misleading disclosure and deficient controls and procedures. For example, in recent years, three other companies have agreed to pay civil penalties of $35 million, $1 million and $2.1 million, respectively, to settle similar cybersecurity charges.

In a June 2024 statement, the Director of the SEC Division of Corporation Finance confirmed that the new cybersecurity rules did not limit private, Regulation FD-compliant disclosure of cyber incidents, including disclosure to parties under a duty of confidentiality or otherwise not subject to Regulation FD.

Insider Trading. Beyond disclosure, the 2018 guidance reminds companies and their insiders to implement policies and procedures ensuring compliance with the insider trading laws in connection with information about cybersecurity risks and incidents. In designing compliance controls, companies are encouraged to consider whether to impose trading restrictions when facing cybersecurity incidents. ■

Selected WilmerHale Capital Markets Transactions

75+
public offerings, Rule 144A placements, PIPE financings, and other capital markets transactions in 2024

$58B+
raised for leading companies across various industries in 2024

S&P Global
Exchange Offers
$7,795,451,000
March 2023 and August 2024
Rule 144A Placement of Senior Notes
$750,000,000
September 2023
Counsel to Issuer

Analog Devices
Exchange Offer
$427,480,000
September 2023
Public Offering of Senior Notes
$1,100,000,000
April 2024
Counsel to Issuer

ThermoFisher Scientific
Public Offerings of Senior Notes
$5,450,000,000
August and December 2023
CHF1,070,000,000
March 2024
Counsel to Issuer

Veralto
Rule 144A/Regulation S Private Placements of Senior Notes
$2,100,000,000
€500,000,000
September 2023
Counsel to Issuer

State Street
Public Offerings of Senior Notes
$9,300,000,000
March, August, October and November 2024 and February 2025
Public Offerings of Preferred Stock
$3,100,000,000
January and July 2024 and February 2025
Counsel to Issuer

Medtronic
Public Offerings of Senior Notes
$2,000,000,000
March 2023
€3,000,000,000
June 2024
Counsel to Issuer

Akamai
Rule 144A Placement of Senior Notes
$1,265,000,000
August 2023
Counsel to Issuer

DTCC
Rule 144A Placements of Senior Notes
$1,000,000,000
May 2023
$1,250,000,000
June 2024
Counsel to Issuer

Casella
Public Offerings of Common Stock
$517,500,000
June 2023
$517,500,000
September 2024
Counsel to Issuer

Eastman
Public Offerings of Senior Notes
$500,000,000
Green Bond
March 2023
$1,250,000,000
February and August 2024
Counsel to Issuer

McCormick
Public Offerings of Senior Notes
$500,000,000
April 2023
$500,000,000
October 2024
Counsel to Issuer

Nuvalent
Public Offerings of Common Stock
$345,000,000
October 2023
$575,000,000
September 2024
Counsel to Issuer

mks Technology for Productivity
Public Offering of Common Stock by Selling Stockholders
$193,520,000
June 2023
Rule 144A Placement of Convertible Senior Notes
$1,400,000,000
May 2024
Counsel to Issuer

disc medicine
Public Offering of Common Stock
$177,984,000
June 2024
Public Offering of Common Stock and Pre-Funded Warrants
$259,325,000
January 2025
Counsel to Underwriters

Avadel
Public Offering of Ordinary Shares and Non-Voting Convertible Preferred Shares
$143,750,000
April 2023
Exchange Offer
$106,268,000
April 2023
Counsel to Underwriters

Beam Therapeutics
Public Offering of Common Stock and Pre-Funded Warrants
$500,000,000
March 2025
Counsel to Issuer

Astria Therapeutics
Public Offering of Common Stock
$125,010,500
February 2024
Counsel to Issuer

Arvinas
PIPE Placement of Common Stock and Pre-Funded Warrants
$350,000,000
November 2023
Counsel to Issuer

Candel Therapeutics
Public Offering of Common Stock and Pre-Funded Warrants
$92,000,000
December 2024
Counsel to Underwriters

MicroStrategy
Rule 144A Placements of Convertible Senior Notes
$6,213,750,000
March, June, September and November 2024
At-the-Market Equity Offering Program
$21,000,000,000
October 2024
Counsel to Issuer

Celldex therapeutics
Public Offerings of Common Stock
$230,500,000
November 2023
$460,506,000
March 2024
Counsel to Underwriters

Ocular Therapeutix
Public Offering of Common Stock
$115,115,000
December 2023
PIPE Placement of Common Stock and Pre-Funded Warrants
$325,000,000
February 2024
Counsel to Issuer

dynatrace
Public Offerings of Common Stock by Selling Stockholders
$1,252,250,000
February and November 2023
Counsel to Underwriters

Apellis
Public Offering of Common Stock and Pre-Funded Warrants
$402,500,000
February 2023
Counsel to Issuer

trevi Therapeutics
Public Offering of Common Stock
$50,000,000
December 2024
Counsel to Issuer

Viridian
Public Offering of Common Stock
$150,000,000
January 2024
Public Offering of Common Stock and Preferred Stock
$258,750,000
September 2024
Counsel to Underwriters

voyager therapeutics
Public Offering of Common Stock and Pre-Funded Warrants
$99,996,500
January 2024
Counsel to Issuer

Verve Therapeutics
Public Offering of Common Stock
$143,750,000
December 2023
Counsel to Issuer

Choice Hotels
Public Offering of Senior Notes
$600,000,000
June 2024
Counsel to Issuer

Dyne Therapeutics
Public Offerings of Common Stock
$719,469,000
January and May 2024
Counsel to Issuer

Terns Pharmaceuticals
Public Offering of Common Stock and Pre-Funded Warrants
$172,672,000
September 2024
Counsel to Issuer

Amylyx
Public Offering of Common Stock
$69,000,000
January 2025
Counsel to Underwriters

Kymera
Public Offerings of Common Stock and Pre-Funded Warrants
$574,999,000
January and August 2024
Counsel to Underwriters

Solid Biosciences
PIPE Placement of Common Stock and Pre-Funded Warrants
$108,858,500
January 2024
Public Offering of Common Stock and Pre-Funded Warrants
$199,987,500
February 2025
Counsel to Issuer

So You Went Public via a Reverse Merger? Are You a Shell Company?

Special Considerations for Current and Former Shell Companies

By Caroline Dotolo and Glenn R. Pollner

In recent years, a variety of alternative paths to public ownership and trading liquidity have emerged. The reverse merger is among one of the oldest alternatives to a conventional IPO for a private company seeking to become publicly traded and, due to a confluence of factors, has recently gained greater marketplace acceptance. Reverse mergers are a potentially attractive transaction structure in particular for private companies with significant cash needs, such as life science companies that, for various reasons, may not be able to immediately access the IPO market.

A "reverse merger IPO" is a mechanism for a private company to become a public company. The mechanism is referred to as a "reverse" merger because, as a practical matter, the private company effectively acquires the public company with the pre-merger stockholders of the private company owning a majority of the stock of the combined company, even though the public company is nominally the legal acquirer.

Typically, the parties to a reverse merger have taken the view that the public company is not, as a technical matter, a "shell company," even if it is actively looking for a merger partner and not prioritizing its historical business.

"Shell company" is defined in Rule 12b-2 of the Exchange Act as a registrant that has:

> (1) no or nominal operations; and
>
> (2) either: (i) no or nominal assets; (ii) assets consisting solely of cash and cash equivalents; or (iii) assets consisting of any amount of cash and cash equivalents and nominal other assets.

Because the public companies involved in reverse mergers typically have had more than "no or nominal" operations or assets, generally still employed a management team and other personnel, and owned assets other than cash and cash equivalents, including intellectual property assets, most recent reverse merger transactions have historically proceeded on the basis that the public company was not a "shell company."

The SEC has begun to challenge those assumptions, however, with significant consequences. In the adopting release for the SEC's final rules related to "Special Purpose Acquisition Companies, Shell Companies, and Projections," issued in January 2024, the SEC specifically stated, when discussing new Rule 145a under the Securities Act, that the rule will apply to any "company that has assumed the appearance of having more than 'nominal' assets or operations," and further that the applicable shell company rules will apply "in situations where, in substance, a shell company business combination is used to convert a private company into a public company," including to "any company that sells or otherwise disposes of its historical assets or operations in connection with or as part of a plan to combine with a non-shell private company in order to convert the private company into a public one." This would include the increasingly common "fire sale CVR," in which the public company issues, in a pre-closing dividend to its pre-closing stockholders, a contingent value right (CVR) with respect to the right to receive the proceeds of the sale or other monetization of any and all legacy assets of the public company. The Staff has indicated that it views this sort of arrangement as essentially ensuring that the public company is a shell company. To that end, companies should be prepared for the Staff, as part of its review of a reverse merger Form S-4, to ask for an analysis concerning whether the public company is a shell company or whether it could become one prior to closing.

If one of the parties in a business combination transaction is deemed to be a "shell company," other than a "business combination related shell company" (i.e., a SPAC), then there are a number of consequences, including:

- **Form S-3:** The combined company will not be eligible to use a registration statement on Form S-3 until 12 months after the business combination/reverse merger, meaning the combined company must use a registration statement on Form S-1 within the first 12 months. In addition, the combined company will be ineligible to satisfy the disclosure requirements of Form S-1 through incorporation by reference until three years after the completion of the transaction.
- **Form S-8:** The combined company will not be eligible to use a registration statement on Form S-8 for any equity plans or awards until at least 60 calendar days after the filing of the Super 8-K for the transaction.
- **Super 8-K:** The combined company must file, within four business days of the closing of the transaction, a "Super 8-K," which is a Form 8-K that contains all the information required by Form 10 to register a class of securities under the Exchange Act.
- **Financial Statements:** The combined company must file the financial statements for the acquired company within four business days of completion of the business combination/reverse merger (with no available extensions).
- **"Ineligible Issuer":** The combined company will be an "ineligible issuer" for three years following closing of the business combination/reverse merger. During that three-year period, the combined company cannot, among other things:
  - qualify as a well-known seasoned issuer (WKSI), meaning it may not file an automatically effective shelf registration statement on Form S-3 even if the combined company had a public equity float greater than $700 million;
  - rely on the safe harbor under Rule 163A, which establishes a broad exemption from quiet period

BASIC STRUCTURE OF A REVERSE MERGER

In a typical reverse merger:

- a privately held company merges with a publicly listed company;
- the pre-merger stockholders of the private company own a majority of the stock of the combined company upon completion of the merger;
- the management and other employees of the private company become the management and employees of the combined company;
- the composition of the combined company board reflects representation proportional to the post-closing ownership split, although this is subject to compliance with SEC and exchange listing rules and negotiation;
- the business of the private company becomes the business of the public company; and
- the combined company changes its name to that of the private company.

In many cases, the combined company will seek to raise additional capital (either privately, concurrently with the completion of the merger, or publicly, following the merger) to extend its cash runway.

restrictions for certain communications made more than 30 days prior to the public filing of a registration statement; or

- use a free writing prospectus, including term sheets and bona fide electronic road shows.

— **Rules 144 and 145**: Importantly, affiliates of the private company that receive shares of the public company in the merger are presumptively deemed to be statutory underwriters with respect to resales of those securities pursuant to Rule 145, and as a result, those securities may not be included in the Form S-1 resale registration statement and would only be eligible for resale under Rule 144, if available, or in a fixed price offering in which such investors are named as underwriters in the prospectus. Pursuant to Rule 145, Rule 144 will not be available for the resale of restricted securities until one year after the date the Super 8-K is filed and then only if, among other things, the company has filed all reports required to be filed under the Exchange Act for the past 12 months (other than Form 8-K reports). These requirements will remain in place for the life of the former shell company. This means that an investor reselling restricted securities of the company must always verify that the company is current in its Exchange Act reporting before relying on Rule 144 for the resale.

— **Investment Bank Coverage:** Securities Act Rules 137 through 139 provide safe harbors from certain communications being "prospectuses" or distribution of such communications being deemed to be participation in an offering by an issuer. Former shell companies, and communications regarding such issuers, are not eligible for such rules until three full calendar years after ceasing to be a shell company. This likely will not prevent the combined company from obtaining coverage from investment banking analysts. However, those investment banks that do provide coverage may take a more cautious approach to publishing research about the company, particularly in close proximity to an offering of securities by the company.

While none of these restrictions will prohibit a company from raising capital, they will impact the speed with which a company can raise capital and the methods by which a company communicates information in connection with an offering.

As a result, care should be taken early in the structuring discussions regarding a potential reverse merger transaction to prevent the public company merger partner from being deemed a "shell company." For example, the parties should consider what personnel and operations are at the public company, how the value of the public company is determined in the transaction (including whether any value is ascribed to the company's legacy assets and operations), and whether the combined company will retain any of the legacy assets or operations following the closing instead of including a CVR that contemplates all legacy assets being liquidated, with the proceeds being distributed to pre-closing stockholders.

With the change in administration in 2025, it remains to be seen whether the SEC will adopt a different approach with respect to SPACs and shell companies. Of note, in January 2024, the now-current Acting Chairman of the SEC, Mark Uyeda, issued a dissenting statement on the final rules related to "Special Purpose Acquisition Companies, Shell Companies, and Projections" when they were adopted. ■

STOCK EXCHANGES

Nasdaq and the NYSE impose more stringent listing standards on companies that become public through a transaction that is treated by the exchange as a reverse merger, generally requiring that the company trade on a regulated exchange and file all required Exchange Act reports, including audited financial statements, for at least one year following the reverse merger, and that the company maintain the requisite minimum share price for a sustained period, and for at least 30 of the 60 trading days immediately prior to its listing application.

Assembling a Public-Ready Board of Directors

Jenna El-Fakih and Emma Schlager

SEC rules, stock exchange rules and state laws impose a variety of independence and other requirements on boards and board committees of public companies. Few private companies satisfy all these requirements, and an IPO presents both a need and an opportunity to reset the board. An essential element of a company's IPO planning is to assess the composition of the company's board and board committees and develop a plan to come into full compliance with the applicable requirements within the prescribed timelines.

Although phase-in rules apply to many of these requirements, a company planning to go public ideally should begin discussing potential changes in board composition that may be needed to satisfy all the requirements at least six to 12 months before the IPO. Time will be needed to identify and vet new directors.

Companies are often surprised by how challenging it can be to recruit new directors. This task has increased in difficulty due to a variety of factors, including more stringent independence requirements, the heavier workloads now expected of directors, a perception of increased personal exposure to liability, and investor policies against director "over-boarding" (several major institutional investors will vote against a director if that director sits on more than four boards or, in the case of a director who is an executive officer, sits on more than two boards). The company should also plan for the possibility that existing directors affiliated with venture capital or private equity investors may want to leave the board shortly following the IPO.

BOARD OF DIRECTORS

— **Independence:** Subject to phase-in rules, Nasdaq and NYSE require a majority of the members of the board, and all members of the audit, compensation, and nominating and corporate governance committees, to be independent within one year after the company's IPO.

— **Determination of Independence:** In order for a director to be considered independent, Nasdaq and the NYSE require that:

- the director not have any relationship with the company that would be prohibited by that stock exchange's "bright-line" independence standards; and
- the board, after taking into account all relevant information, affirmatively determine that the director is independent.

— **Impact of Stock Ownership:** Stock ownership, regardless of how high the level, is generally not viewed as an impediment to independence (but may preclude service on the audit committee, as noted below).

— **Diversity:** There have been recent changes in both Nasdaq rules and state law requirements on board diversity. Additionally, in an update to its 2025 voting

BRIGHT-LINE INDEPENDENCE STANDARDS

While there are some differences between the bright-line independence standards of Nasdaq and the NYSE, as a general matter a person cannot be considered independent if:

- the person is, or at any time during the past three years was, an employee of the company, with an exception for interim service as an executive officer (for a period not exceeding one year under Nasdaq rules; NYSE rules do not specify a maximum period of interim service);
- a family member of the person is, or at any time during the past three years was, an executive officer of the company;
- the person (or a family member) has, or at any time during the past three years had, a "compensation committee interlock," which exists when an executive officer of Company A serves on the compensation committee of Company B at the same time that a director of Company A (or a family member) serves as an executive officer of Company B;
- the person (or a family member) has, or at any time during the past three years had, certain specified relationships with the company's auditor, including the company's internal auditor in the case of the NYSE;
- the person (or a family member) has certain specified relationships with another entity that, in the past three years, received payments from or made payments to the company for property or services in excess of:
  - in the case of Nasdaq, the greater of $200,000 and 5% of the recipient's gross revenues for that year; or
  - in the case of the NYSE, the greater of $1 million and 2% of the other company's gross revenues for that year; or
- the person (or a family member) received compensation from the company in excess of $120,000 during any 12-month period within the past three years, other than compensation for service on the board or a board committee, compensation paid to a family member as a non-executive employee, and certain other exempted payments.

policies, proxy advisory firm Institutional Shareholder Services announced that it would indefinitely halt consideration of gender and racial and/or ethnic diversity of a company's board when making vote recommendations on director elections, while Glass Lewis indicated that it will continue to apply its existing diversity-related proxy voting policies for the 2025 proxy season.

- ***Nasdaq:*** On December 11, 2024, the U.S. Court of Appeals for the Fifth Circuit vacated the board diversity rules adopted by Nasdaq and approved by the SEC in 2021. The now-vacated rules required Nasdaq-listed companies to (i) annually disclose, in a standardized matrix format, aggregated information on the voluntarily self-identified gender, racial/ethnic and LGBTQ+ status of their directors and (ii) have, or explain why they do not have, a specified number of diverse directors.
- ***State Laws:*** Previously, California required public companies headquartered in California to have up to three female directors and up to three directors from "underrepresented communities." In 2022, these requirements were struck down by California state courts on the basis that the diversity quotas constitute unlawful discrimination in violation of the equal protection clause of the California constitution. In May 2023, a federal court invalidated one of these requirements on the grounds that it constitutes a "racial quota" in violation of the U.S. Constitution's equal protection clause.

  However, certain states continue to have additional board diversity requirements for companies headquartered and/or incorporated in the state. For example, Washington requires public companies incorporated in Washington (subject to several exceptions, including for emerging growth companies, smaller reporting companies and controlled companies) to have boards on which at least 25% of the members are women or to provide a "board diversity discussion and analysis" to stockholders. In addition, Maine requires public companies that are subject to the Maine Business Corporation Act and whose shares are listed on a major U.S. stock exchange to have up to three female directors.
- ***Item 407(c):*** Companies must still continue to comply with Item 407(c) of Regulation S-K, which requires companies to disclose if their nominating committee considers diversity when identifying director nominees and if so, how. Companies should also remain mindful of any diversity disclosure expectations of their large stockholders.

— **Size:** Neither SEC, Nasdaq nor NYSE rules stipulate board size.

AUDIT COMMITTEE

— **General:** Subject to phase-in rules, Nasdaq and NYSE require listed companies to have an audit committee composed of at least three directors, each of whom is (1) independent within the meaning of the general Nasdaq or NYSE rules described above and (2) independent within the stricter meaning of Rule 10A-3.

— **"Super Independence":** Rule 10A-3 precludes a person from serving on the audit committee if the person:
- accepts, directly or indirectly, any consulting, advisory or other compensatory fees from the company (other than compensation for board service and certain retirement compensation); or
- is an "affiliate" of the company (a person who, directly or indirectly, controls, is controlled by or is under common control with, the company).

— **Impact of Stock Ownership**: A person can be an "affiliate" due to large stock ownership. Rule 10A-3 contains a safe harbor for ownership of 10% (post-offering) or less. Ownership of 20% (post-offering) is viewed by many practitioners as the upper bound, although even higher examples exist.

— **Financial Literacy:** Nasdaq and NYSE rules require each member of the audit committee to be financially literate, with at least one member having experience in finance or accounting.

— **Audit Committee Financial Expert:** Each public company is required to disclose annually whether or not its audit committee has at least one member who is an "audit committee financial expert," as defined in SEC rules, and, if not, to explain why it does not. This effectively requires every public company to have an audit committee financial expert.

— **Size:** Nasdaq and NYSE require the audit committee to have at least one member by the listing date, at least two members within 90 days of the listing date, and at least three members within one year of the listing date.

OTHER STANDING COMMITTEES

Post-IPO, public company boards—particularly among larger companies—sometimes voluntarily create other standing committees to help fulfill board duties. According to the 2024 U.S. Spencer Stuart Board Index, among S&P 500 companies, the average number of standing board committees is 4.2, with the following prevalence:

— Finance committee—26% (down from 30% in 2019)

— Executive committee—25% (down from 30% in 2019)

— Science and technology committee—17% (up from 10% in 2019)

— Environment, health and safety committee—13% (up from 10% in 2019)

— Risk committee—12% (unchanged from 2019)

— Public policy/social and corporate responsibility committee—7% (down from 9% in 2019)

— Legal/compliance committee—5% (unchanged from 2019)

— Investment/pension committee—3% (down from 4% in 2019)

— Acquisitions/corporate development committee—2% (up from 1% in 2019)

— Strategy and planning committee—1% (unchanged from 2019)

COMPENSATION COMMITTEE

— **General:** Nasdaq and NYSE require listed companies to have a compensation committee composed of directors who are independent within the meaning of the general Nasdaq or NYSE rules described above.

— **"Enhanced Independence":** Nasdaq and the NYSE require that, in determining the independence of members of the compensation committee, the board must consider all factors relevant to whether a director has a relationship that is material to that director's ability to be independent of management, including:
- the source of compensation of such director, including any consulting, advisory or other compensatory fees paid by the company to such director; and
- whether such director is affiliated with the company.

— **Impact of Stock Ownership:** Nasdaq and the NYSE have indicated that ownership of company stock, even if it represents a controlling interest, does not automatically disqualify a director from service on the compensation committee.

— **Rule 16b-3:** Section 16(b) of the Securities Exchange Act of 1934 requires directors, officers and 10% stockholders to disgorge to the company any "profit" realized through any purchase and sale (or any sale and purchase) of equity securities of the company within a period of less than six months. Rule 16b-

3 provides that the grant of a stock option or other equity compensation award will not be considered a matchable purchase if the grant is approved by a board committee consisting of two or more directors, each of whom is a "non-employee director" within the meaning of Rule 16b-3. Although workarounds exist, it is generally desirable for each member of the compensation committee to qualify as a "non-employee director."

- **Size:** Nasdaq requires that the compensation committee consist of at least two directors, while the NYSE does not specify a minimum number of members.

NOMINATING AND CORPORATE GOVERNANCE COMMITTEE

- **NYSE:** NYSE rules require each listed company to have a nominating or corporate governance committee composed solely of independent directors under the NYSE's general definition of independence.
- **Nasdaq:** Although not mandating that each listed company establish a nominating or corporate governance committee, Nasdaq rules require director nominees to be selected, or recommended for selection by the board, either by a nominating committee composed solely of independent directors or by a majority of the independent members of the board. Most Nasdaq-listed companies elect to have a nominating and corporate governance committee to satisfy this requirement.
- **Size:** Neither NYSE nor Nasdaq prescribe any minimum size for the nominating and corporate governance committee.

EXEMPTIONS

- **Controlled Companies:** A controlled company is exempt from the requirements that a majority of the directors be independent and that the board maintain a separate compensation committee and a separate nominating and corporate governance committee (or, in the case of Nasdaq, have a majority of the independent directors make nominations). A controlled company is not exempt from audit committee requirements.
- **Smaller Reporting Companies:** A smaller reporting company is required to comply with all director independence and board committee requirements, except that it is exempt from the "enhanced independence" requirements for compensation committee members described above.
- **Foreign Private Issuers:** A foreign private issuer is permitted to follow its home-country practices in lieu of some corporate governance requirements as long as it satisfies Exchange Act requirements for audit committees and makes public disclosure of the home-country practices it follows. A foreign private issuer is also exempt from the requirements that a majority of the directors be independent and that the board maintain a separate compensation committee and a separate nominating and corporate governance committee (or, in the case of Nasdaq, have a majority of the independent directors make nominations).

An important threshold question for an IPO company that qualifies for exemptions from corporate governance requirements is whether to take advantage of the exemptions, as the absence of these investor protections may be perceived negatively in the market and adversely affect the marketing of the offering. ■

DEFINITIONS

Controlled Company: A company in which a majority of the voting power for the election of directors is held by an individual, a group or another company.

Smaller Reporting Company: A company that, as of the last business day of its most recently completed second fiscal quarter, has a public float of less than $250 million or, if the company has a public float of less than $700 million or has no public float, had less than $100 million in revenue in its most recent fiscal year.

Foreign Private Issuer: A company organized under the laws of a foreign country and in which 50% or less of its outstanding voting securities are directly or indirectly owned of record by U.S. residents, or in which a majority of its executive officers or directors are not U.S. citizens or residents, a majority of its assets are not located in the U.S., and its business is not administered principally in the U.S.

Emerging Growth Company: A company that had total annual gross revenues of less than $1.235 billion (subject to adjustment every five years for inflation, with the next adjustment due in 2027) during its most recently completed fiscal year. A company's EGC status lasts until the last day of the fiscal year following the fifth anniversary of its IPO, subject to earlier termination in specified circumstances.

BOARD COMPOSITION PHASE-IN RULES

ELEMENT	NASDAQ	NYSE
Requirements to Qualify for Phase-In	Immediately prior to listing, the company did not have a class of common stock registered under the Exchange Act.	
Independent Board of Directors	The board must have a majority of independent directors within one year of the listing date.	
Audit Committee	**Number**: At least one member by the listing date, at least two members within 90 days of the listing date and at least three members within one year of the listing date. **Independence:** At least one independent member by the listing date, at least a majority of independent members within 90 days of the listing date, and must be fully independent within one year of the listing date.[1]	**Number:** At least one member by the listing date, at least two members within 90 days of the listing date and at least three members within one year of the listing date. **Independence:** At least one independent member by the listing date, at least a majority of independent members within 90 days of the listing date, and must be fully independent within one year of the listing date.
Compensation Committee	**Number:** At least one member by the listing date and at least two members within one year of the listing date. **Independence:** At least one independent member by the earlier of the date the IPO closes and five business days from the listing date, at least a majority of independent members within 90 days of the listing date, and must be fully independent within one year of the listing date.	**Number:** No minimum size is prescribed. **Independence:** At least one independent member by the earlier of the date the IPO closes and five business days from the listing date, at least a majority of independent members within 90 days of the listing date, and must be fully independent within one year of the listing date.
Nominating Committee	**Number:** The company may choose not to establish a nominating committee and may instead rely on a majority of the independent directors to discharge these responsibilities. If the company elects to establish a nominating committee, no minimum size is prescribed. **Independence:** If the company elects to establish a nominating committee, the committee must have at least one independent member by the earlier of the date the IPO closes and five business days from the listing date, at least a majority of independent members within 90 days of the listing date, and must be fully independent within one year of the listing date.	**Number:** No minimum size is prescribed. **Independence:** At least one independent member by the earlier of the date the IPO closes and five business days from the listing date, at least a majority of independent members within 90 days of the listing date, and must be fully independent within one year of the listing date.

[1] Nasdaq also has a temporary "exceptional and limited circumstances" exception for one non-independent member. This exception allows one director who is independent under Rule 10A-3 but not independent under the general Nasdaq standard, and who is not a current executive officer or employee of the company (or a family member of a current executive officer of the company), to serve on the audit committee for up to two years if the board determines that such service is required by the best interests of the company and its stockholders. A person serving on the audit committee under this exception may not chair the audit committee. Similar exceptions apply to the compensation and nominating committees of Nasdaq-listed companies. Very few companies take advantage of these exceptions. A company that relies on the "exceptional and limited circumstances" exception with respect to its audit, compensation or nominating committee cannot concurrently rely on Nasdaq's phase-in rules with respect to the same committee.

Prevalence of EGC Elections

Caroline Dotolo and Molly W. Fox

The JOBS Act was enacted in 2012 to encourage capital formation as an engine of economic growth, and its cornerstone is the creation of an "IPO on-ramp" that provides emerging growth companies (EGCs) with a phase-in period to come into full compliance with certain disclosure and accounting requirements. The phase-in period can continue until the last day of the fiscal year following the fifth anniversary of an IPO but may be shorter for many companies.

The prevalence of elections for some items of EGC relief—such as the ability to submit a draft Form S-1 registration statement for confidential SEC review and to provide reduced executive compensation disclosure—has remained consistently high across different types of EGCs.

Practices with respect to other items of relief—particularly those related to financial disclosure and the application of new or revised accounting standards—have varied, often reflecting the company's size, maturity or industry, and have exhibited several strong trends over time as investor expectations and market practices have evolved.

Confidential Submission of Form S-1

— **Description:** An EGC is able to submit a draft Form S-1 registration statement to the SEC for confidential review instead of filing it publicly on the SEC's EDGAR system (and in 2017, a similar nonpublic review process became available to all companies going public). A confidentially submitted Form S-1 need not be filed publicly until 15 days before the road show commences, enabling an EGC to delay disclosure of its IPO plans and sensitive information to competitors and employees. Confidential review can also enable an EGC to abandon its IPO plans without requiring public disclosure if market conditions preclude an offering.

— **Prevalence:** Overall rates of adoption have consistently remained very high—97% of all EGCs since enactment of the JOBS Act (and 85% of non-EGCs) have taken advantage of confidential review since the SEC extended this benefit to all public companies in 2017.

Omission of CD&A

— **Description:** An EGC is allowed to provide "scaled" executive compensation disclosure and therefore need not provide Compensation Discussion and Analysis (CD&A); compensation information is required only for three named executive officers (including the CEO); and only three of the seven compensation tables otherwise required must be provided.

— **Prevalence:** EGCs have uniformly and overwhelmingly embraced the ability to provide reduced executive compensation disclosure. Overall, 99% of all EGCs (including all EGCs since 2020) have excluded CD&A from their Form S-1.

Reduced Financial Disclosure

— **Description:** An EGC is required to provide only two years of audited financial statements (instead of three years), plus unaudited interim financial statements, and is only required to include MD&A for the periods presented in the required financial statements.

— **Prevalence:** Overall, the percentage of EGCs electing to provide only two years of audited financial statements has increased dramatically, from 27% in 2012 to 98% in 2024. From the outset, life sciences companies—for which older financial information is often irrelevant—were likely to provide only two years of audited financial statements, with the percentage choosing this option reaching 100% each year since 2022. Technology companies—which generally have substantial revenue and often have profitable operations—were slower to adopt this practice, but the percentage providing only two years of audited financial statements grew from 22% in 2012 to 91% in 2022 and 100% in both 2023 and 2024.

Two Years of Audited Financial Statements

	2012–2016	2017–2019	2020–2024	OVERALL
Life Sciences	87%	97%	99%	94%
Technology	37%	63%	90%	66%
All EGCs	65%	84%	94%	81%

Accounting Standards Election

— **Description:** An EGC may elect not to be subject to any accounting standards that are adopted or revised on or after April 5, 2012, until these standards are required to be applied to nonpublic companies.

— **Prevalence:** Through 2016, the vast majority of EGCs opted out of the extension of time to comply with new or revised accounting standards. At that time, the decision appears to have been motivated by the uncertain value of the deferred application of future, unknown accounting standards and concerns that a company's election to take advantage of the extended transition period could make it more difficult for investors to compare the company's financial statements to those of its peers. Starting in 2017, a major shift occurred, with the percentage of EGCs adopting the extended transition period jumping from 11% through 2016 to 50% between 2017 and 2019 and to 93% between 2020 and 2024. This trend appears to have been motivated by the desire of many EGCs to delay the application of new revenue recognition and lease accounting standards (which became mandatory for public companies in 2018–2019) or, at a minimum, to take more time to evaluate the effects of these standards before adopting them. ■

Delayed Application of New or Revised Accounting Standards

	2012–2016	2017–2019	2020–2024	OVERALL
Life Sciences	75%	85%	89%	36%
Technology	75%	86%	83%	41%
All EGCs	82%	90%	96%	50%

EXITING EGC STATUS

In many cases, a company exiting EGC status qualifies as a smaller reporting company (SRC) under SEC rules and can continue to enjoy most of the disclosure and financial reporting accommodations that are available to EGCs. Generally, a company qualifies as an SRC if it has:

— Public float of less than $250 million; or

— Less than $100 million in annual revenues and either no public float or a public float of less than $700 million

IS ADDITIONAL RELIEF FOR EGCS COMING?

In a speech delivered in February 2025 and with a view toward making IPOs attractive again, Mark Uyeda, Acting Chairman of the SEC, said that he asked the SEC staff to:

— Review the EGC definition and recommend potential changes, including how a company qualifies and the duration for which it retains the status; and

— Consider how EGCs could benefit from having an on-ramp to comply with certain existing disclosure obligations.

Surviving the Quiet Period

How Safe Harbors Can Facilitate Pre-IPO Communications

Stephanie Leopold and Gwen Ljung

One of the more vexing aspects of the IPO process for management is the "quiet period," during which a company must rein in its publicity activities. Lawyers lecture their clients about the rules, underwriters fret over the consequences of a misstep and companies are frustrated by the restrictions—which begin long before the IPO is completed.

THE QUIET PERIOD

Section 5 of the Securities Act of 1933 is generally intended to ensure that offers are not made prior to the filing of a registration statement and that sales of securities are made only pursuant to a prospectus that meets all SEC disclosure requirements. The SEC has broadly construed the term "offer" to include many types of public communications that have the intent or effect of promoting a company to prospective investors or otherwise generating interest in the company or its securities. Section 5 therefore may limit a company's ability to publicly release information about itself or otherwise engage in promotional activities—for example, through press releases, media interviews, website postings or social media—even if the communications do not specifically reference the company's contemplated IPO.

Section 5 has the effect of imposing a quiet period on a company throughout the IPO process. The quiet period ends 25 days after the IPO offering date. The quiet period is generally considered to commence not later than the organizational meeting and often as early as the company's selection of the lead managing underwriters.

The quiet period is divided into three parts, with different restrictions applicable to each. Notwithstanding these restrictions, oral and written "test-the-waters" communications with eligible institutional investors are permitted at any time during the IPO process.

Pre-Filing Period

Prior to publicly filing the Form S-1 registration statement, a company is prohibited from making any offers—whether oral or written—to sell its securities. The confidential submission of a draft Form S-1 to the SEC does not constitute a public filing for this purpose.

Waiting Period

During the period of time between the Form S-1's public filing and its effectiveness (which usually occurs shortly before pricing), a company cannot effect any sales, but it can make:

- oral offers (such as statements made during road show presentations);
- written offers by means of a preliminary prospectus that contains an estimated offering price range and meets other SEC rules; and
- written offers pursuant to a written communication called a "free writing prospectus."

Post-Offering Period

During the period beginning on the offering date and ending 25 days later, oral offers remain permissible, written offers may be made, and sales may be effected.

"TEST-THE-WATERS" COMMUNICATIONS

- A company going public may engage in oral or written "test-the-waters" communications with eligible institutional investors to determine their interest in a contemplated securities offering, as discussed on page 30.

PERMISSIBLE COMMUNICATIONS

Notwithstanding these restrictions, the JOBS Act and several SEC safe harbors provide relief for many types of communications during the quiet period.

Rule 163A—Communications More Than 30 Days Before Public Filing

Rule 163A establishes a broad exemption from quiet period restrictions for communications made more than 30 days prior to the initial public filing of the Form S-1 if:

- the communication is made by or on behalf of the company (communications by underwriters and other IPO participants do not qualify);
- the communication does not reference the IPO; and
- the company takes reasonable steps to prevent the communicated information from being further distributed during the period beginning 30 days prior to public filing and ending 25 days after the offering date (for example, by inquiring about the publication schedule before agreeing to an interview).

Rule 169—Factual Business Communications

Rule 169 enables a company to continue to disseminate regularly released, ordinary-course information both prior to and during the IPO process if the communication:

- consists of factual information about the company, its business or financial developments, or other aspects of its business, or advertisements and other information concerning the company's products or services;
- is of a type regularly released by the company in the ordinary course of business;
- is released or disseminated by employees or agents of the company who historically have provided such information;
- is consistent in all material respects with the timing, manner and form of release or dissemination of similar past releases or disseminations;
- does not include information about, and is not released in connection with, the IPO; and
- is intended for use by persons (such as customers, suppliers or business partners) other than investors or potential investors in the company.

Rule 169 does not cover "forward-looking" statements, such as financial forecasts or information about future plans, expectations or objectives.

Rule 135—Announcement of Intent to Conduct Public Offering Before Filing Registration Statement

Rule 135 permits a public announcement that a company is planning a public offering. The announcement must include specified disclaimers and legends, and be limited to the following information:

- the name of the issuer;
- the title, amount and basic terms of the securities offered;
- the amount of the offering, if any, to be made by selling stockholders;
- the anticipated timing of the offering;
- a brief statement of the manner and purpose of the offering, without naming the underwriters; and
- whether the issuer is directing its offering to only a particular class of purchasers.

Rule 134—Announcement of Proposed Public Offering After Filing Registration Statement

Rule 134 permits a public announcement that a company proposes to make a public offering of securities. The announcement cannot be made until the company has publicly filed a registration statement for the offering, must include specified legends, and must be limited to:

- specified factual information about the legal identity and business locations of the company;
- a brief indication of the general type of business of the company;
- specified factual information about the terms of the offering, including the security offered, the anticipated offering timetable, the price or price range and the intended use of proceeds, and the identity of the underwriters;
- instructions for obtaining the preliminary prospectus, once available, and purchasing the shares offered; and
- procedural information for participation by the company's officers, directors and employees in a directed share program.

Price and price-related information must be excluded until an estimated offering price range has been disclosed in the Form S-1.

CONSEQUENCES OF VIOLATIONS

If the SEC staff believes that a violation has occurred, several sanctions may be invoked:

- **Cooling-Off Period:** The staff may impose a "cooling-off period" that forces the company to delay its IPO for a period of time determined by the staff. Although imposed infrequently, a cooling-off period can jeopardize any IPO given market volatility.
- **Rescission Risk Disclosure:** The company may be required to include "rescission risk disclosure" in its Form S-1—an acknowledgment that the company could be required to repurchase the shares sold in the IPO at the original offering price for a period of one year following the date of the violation.
- **Corrective Disclosure:** The company may be required to include as part of its Form S-1—and therefore assume legal responsibility for—the statements that were made in violation of quiet period restrictions or to cite the impermissible public statements and explain why the statements are or may be inaccurate. This disclosure can be embarrassing and may require the prospectus to disclose projections or other forward-looking information that would not otherwise be included. The process of agreeing with the staff on the exact wording of the disclosure could also delay the offering.
- **Civil Penalties:** The SEC can seek monetary penalties against a company and its directors and officers, or seek the imposition of a cease-and-desist order against future violations.

Apart from the possibility of SEC sanctions for violations, the effect of the quiet period rules is felt through the ongoing monitoring of public communications to avoid violations, the modification or curtailment of communications that would present concerns, and, in some cases, self-imposed cooling-off periods—such as a deliberate delay in the initial public filing of the Form S-1 for a period of 30 days so that a published article can qualify for the Rule 163A safe harbor.

CAUTIONARY TALES

Several prominent companies, including Google and salesforce.com, committed quiet period violations during the IPO process that were heavily publicized at the time and resulted in sanctions. More recently, in July 2024, Pershing Square USA Ltd. withdrew a planned IPO between launch and pricing, which, in part, may have been related to a written communication sent by Bill Ackman, Pershing Square's CEO, to a group of institutional and high-net-worth investors that contained information that appeared to conflict with information included in the preliminary prospectus. The withdrawal occurred voluntarily before the SEC acted, but it is likely that the SEC would have required a cooling-off period or other sanction and delayed the IPO had it not been withdrawn.

PREPARING FOR THE QUIET PERIOD

The quiet period is not a time for bold experimentation in publicity practices, but it need not be completely suffocating either. Careful planning can help a company avoid the mistakes that are commonplace—and potentially harmful to its IPO—while maintaining a program of necessary public communications. In addition to educating management on the quiet period, important planning steps include:

- **External Communications Policy:** The company should adopt an external communications policy that designates the only representatives authorized to publicly communicate on behalf of the company, and instructs employees to refer external inquiries regarding the company to such authorized company representatives.
- **Legal Review:** Counsel should review all press releases and other written communications prior to dissemination and the company should consult with counsel before engaging in any other public communications, such as conference speaking engagements.
- **Adherence to Established Disclosure Practices:** The company should adhere to an established and consistent pattern of routine disclosure practices. The Rule 169 safe harbor—which the company will rely on for many of its public communications beginning 30 days before the initial public filing of the Form S-1—is limited to factual business communications in the ordinary course of business that are consistent with past practices in timing, manner and form.
- **Coordination with Underwriters:** The company should review all proposed press releases and other publicity activities with the managing underwriters. ■

Companies contemplating an IPO often would like to get investor feedback—both in advance of the formal

MONITORING FOR VIOLATIONS

The SEC has long sought to detect and prohibit gun-jumping violations and other impermissible public communications by companies in the quiet period. After a company submits its Form S-I, the SEC staff, as part of its review process, routinely conducts internet searches on the company, browses its website, looks at news stories and online materials mentioning the company and reviews relevant industry publications and databases. These activities, which continue throughout the SEC review process, help the staff uncover potential violations of the quiet period restrictions.

“Testing the Waters” to Find IPO Investors

Andrea Sorrentino and Timothy J. Kolankowski

IPO process, to validate the company’s decision to go public and begin to familiarize potential investors with the company, and after commencement of the formal IPO process, to further educate target investors about the company and get a sense of the company’s potential valuation. Although not commonplace, this feedback historically was sought in IPOs through “non-deal” road shows held at least 30 days prior to the initial Form S-1 filing (in reliance on the Rule 163A safe harbor from quiet-period violations) and preliminary road shows conducted after the initial Form S-1 filing. Before the enactment of the JOBS Act in 2012, there was no clear legal basis for other forms of IPO pre-marketing.

“TEST-THE-WATERS” COMMUNICATIONS

The JOBS Act permits “emerging growth companies” (EGCs) and their authorized representatives to engage in oral or written “test-the-waters” communications with eligible institutional investors at any time prior to or following the submission or filing of the Form S-1 to determine their investment interest in a contemplated IPO. Potential investors eligible for test-the-waters communications consist of “qualified institutional buyers” (as defined in Rule 144A) and institutions that are “accredited investors” (as defined in Regulation D).

Test-the-waters communications can be brief and casual (such as a single conversation), or extensive and formal (such as a series of investor meetings). These communications can be used proactively to pre-market an offering, or as a defensive measure to exempt a communication that would otherwise constitute an unlawful offer of securities. The proposed IPO may be discussed during test-the-waters meetings.

In late 2019, the SEC adopted Rule 163B to permit any company (and its authorized representatives)—not just EGCs—to engage in test-the-waters communications in connection with any registered securities offering, not just IPOs.

PROCEDURES AND CAUTIONS

Before engaging in test-the-waters communications, underwriters generally will require written authorization from the company to ensure such communications do not constitute unlawful offers of securities. The company and underwriters should also agree in advance on the form and content of any materials that will be used in test-the-waters communications. Questionnaires or certifications can be used to confirm that all recipients of test-the-waters communications qualify as eligible institutional investors, although as a practical matter underwriters ordinarily know whether the investors to be approached are eligible. The company should not authorize anyone other than its underwriters to engage in test-the-waters communications.

A company should exercise caution with respect to test-the-waters communications. Under the federal securities laws and the underwriting agreement for the IPO, the company can face potential liability for these communications. The JOBS Act and Rule 163B do not require test-the-waters materials to be filed with the SEC. However, the company should assume that the SEC staff, as part of its review of the Form S-1, will request copies of any written test-the-waters communications and presentation slides. The staff may raise questions if the test-the-waters communications disclose material information that is not included in the Form S-1.

MARKET PRACTICES

- In recent years, test-the-waters meetings have become increasingly common and are viewed as a critical aspect of the marketing effort for an IPO, rather than being primarily feedback-oriented. In many sectors, particularly life sciences and technology, test-the-waters meetings are now routine. In other industries, these meetings are less common, although interest continues to grow among IPO candidates.
- As test-the-waters meetings have become more commonplace, institutional investors have become increasingly selective as to which meetings they are willing to take in advance of the road show. In addition, some institutional investors may be unwilling to participate in test-the-waters meetings prior to the public filing of the Form S-1.
- Test-the-waters communications generally should cease before the road show commences, and many underwriters insist on a buffer (one week is typical) between the last test-the-waters meeting and the beginning of the road show. While underwriters may attend, most underwriters do not allow research analysts to attend test-the-waters meetings and impose a limit on the number of investors (typically in the range of 45 to 65) with whom the company may hold test-the-waters meetings. ■

GUIDELINES FOR “TEST-THE-WATERS” COMMUNICATIONS

Underwriters are likely to have detailed guidelines and procedures for test-the-waters communications. Typical guidelines and procedures include the following:

- Communications may only be with qualified institutional buyers and/or institutions that are accredited investors.
- Presentations should not disclose material information that will not be included in the Form S-1 for the offering, and must be factual, balanced and not misleading. Appropriate explanatory statements and disclaimers should be included.
- Information should not be included in presentation materials that the company is unwilling to include in the Form S-1 if so requested by the SEC staff following review of such materials.
- If presentation slides are used, they should be reviewed in advance by counsel.
- Copies of presentation slides and written materials should not be provided to attendees.
- Historical financial information is permitted, but projections should be avoided.
- General valuation concepts may be discussed, but binding indications of interest may not be solicited.
- Q&A is permitted, as long as responses are provided orally.
- Presentations should not be recorded.
- Follow-up information should not be provided by email or otherwise in writing.

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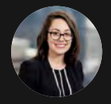

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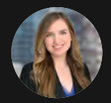

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