THE INITIAL PUBLIC OFFERINGS LAW REVIEW

Editor
David J Goldschmidt

THE LAWREVIEWS

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PREFACE

Welcome to the inaugural edition of *The Initial Public Offerings Law Review*. While it is largely agreed that the first 'modern' initial public offering (IPO) was by the Dutch East India Company (VOC) in 1602, IPOs now take place in nearly every corner of the world and involve a wide variety of companies in terms of size, industry and geography. Several of the earliest exchanges are still at the forefront of the global IPO market, such as the NYSE and LSE, however, the world's major stock exchanges now are scattered around the globe, and many of them are now public companies themselves. Aside from general globalisation, shifting investor sentiment and economic, political and regulatory factors have also influenced the development and evolution of the global IPO market. For example, markets in the Asia-Pacific region, including Hong Kong, Shanghai and Tokyo, have enjoyed a significantly stronger presence in the global IPO arena in recent years owing to economic growth in the Asian markets.

Every exchange operates with its own set of rules and requirements for conducting an IPO. Country-specific regulatory landscapes are often dramatically different between jurisdictions as well. Whether a company is looking to list in its home country or is exploring listing outside of its own jurisdiction, is it important that the company and its management are aware of the requirements from the outset as well as potential pitfalls that may derail the offering. Moreover, once a company is public, there are ongoing jurisdiction-specific disclosure and other requirements with which it must comply.

Virtually all markets around the globe have experienced significant volatility in recent years. In 2016, the uncertainty surrounding the US presidential election, the unexpected outcome of the Brexit vote and numerous other geopolitical issues facing regions throughout the world furthered the general decline in both overall deal count and proceeds raised. Moving forward, however, many regions have a healthy IPO pipeline for the coming 12 months, including many household names.

The Initial Public Offerings Law Review seeks to introduce the reader to the global IPO regulatory environment and main stock exchanges in 16 different jurisdictions. Each chapter provides a general overview of the IPO process in the region, addresses regulatory and exchange requirements and presents key offering considerations. We hope this inaugural edition of *The Initial Public Offerings Law Review* introduces the reader to the intricacies of taking a company public in these jurisdictions and serves as a helpful handbook for companies, directors and managers.

David J Goldschmidt
Skadden, Arps, Slate, Meagher & Flom LLP
New York
March 2017

Chapter 16

UNITED STATES

David J Goldschmidt[1]

I INTRODUCTION

A long-time leader in the initial public offerings (IPO) arena, the United States is home to the two largest stock exchanges by market capitalisation in the world, the New York Stock Exchange (NYSE) and the Nasdaq Stock Market (NASDAQ). Before the existence of these exchanges, however, the first US IPO took place in the 1780s by the Bank of North America.[2] Clearly, the US offering process and regulatory landscape has changed dramatically since that time. The modern US IPO market is regulated by both federal statutes and agencies, as well as the rules of the exchange on which a company is listed. Foremost among the statutes are the Securities Act of 1933, as amended (the Securities Act), which regulates offerings, and the Securities Exchange Act of 1934, as amended (the Exchange Act), which provides for market regulation once a company is public. More recent regulation of the IPO market has come through the Sarbanes-Oxley Act of 2002 (SOX), the Jumpstart Our Business Startups Act of 2012 (the JOBS Act) and the Fixing America's Surface Transportation Act in 2015 (the FAST Act), which, despite its name, made additional changes to the IPO landscape. Administering, amending and interpreting the federal securities laws is the responsibility of the US Securities and Exchange Commission (SEC), the agency that, among other things, reviews IPO registration statements and ensures regulatory compliance both during the IPO process and once companies are public.

Not dissimilar to other markets around the globe, the US IPO market experienced significant volatility in recent years. In 2016, US IPOs had their weakest year by number of new issuances since 2009 and the weakest year in proceeds raised since 2003. Healthcare, technology and financial services were the leading sectors for US IPOs in 2016.

There were 105 IPOs in 2016, compared with 170 US IPOs in 2015 (in contrast to 275 IPOs in 2014 and 222 in 2013).[3] Contributing to the decline in the number of IPOs in 2016 was the fact that many companies pursued a 'dual-track' process, ultimately consummating company sales rather than IPOs. The increased availability of venture capital and private equity funding has also enabled some companies to delay going public. Notwithstanding the downturn in the overall number of US IPOs, windows of opportunity have existed, with several notable IPOs being successfully consummated over the past few

1 David J Goldschmidt is a partner at Skadden, Arps, Slate, Meagher & Flom LLP.

2 Museum of American Finance, America's First IPO, available at www.moaf.org/exhibits/americas_first_ipo/index (last visited 24 March 2017).

3 *Renaissance Capital US IPO Market 2016 Annual Review*, 16 December 2016. Includes IPOs with a market capitalisation of at least $50 million and excludes closed-end funds and SPACs. Source: Renaissance Capital.

years. Despite the uncertainty surrounding the ongoing effects of the Brexit vote, the new US presidential administration's fiscal and monetary policies and other global events, there is optimism that 2017 will see a resurgence in the US IPO market.

The decision to 'go public' requires careful consideration by a company and its management. Issuers must be mindful that the US public company disclosure system results in reduced confidentiality for the issuer and its management. Moreover, a considerable amount of liability arises for the company, its directors and its management from being public in the US, and the expense of complying with public company reporting obligations should not be minimised. Despite these factors, going public in the US is an exciting event for any company, and the resulting liquidity for existing investors, and the visibility and prestige that comes from listing on US exchanges, is very attractive for many domestic and foreign companies.

Unless there is a compelling business reason, domestic issuers generally list in the United States rather than pursuing a primary (or dual) listing in another country. Foreign issuers, called foreign private issuers (FPIs),[4] often opt to list solely in the United States as well. Some foreign companies that are already listed on an exchange in their home country also choose to list in the United States. For these companies, a US listing can provide several benefits, including increased visibility (which results in an expanded market for new products and services), an ability to use the US listing as currency for acquisitions and the creation of a more diverse investor base (which increases liquidity in the company's shares).

II GOVERNING RULES

i Main stock exchanges

The primary stock exchanges in the United States are the NYSE and NASDAQ. While each operate with their own, independent set of standards for initial listing and continued listing compliance, many of these requirements are substantially similar across the two exchanges. The creation of the NYSE can be traced to the signing of the Buttonwood Agreement in May 1792.[5] Also known as the 'Big Board', the NYSE is the largest stock exchange by market capitalisation in the world. NASDAQ is a significantly younger exchange, having commenced operations in 1971. NASDAQ is known as the world's first electronic stock market. Unlike the NYSE, whose historic trading floor and official 'ringing of the bell' each day for opening and closing of trading hours is legendary, NASDAQ exists purely as an electronic platform with no physical trading space.

4 Rule 405 of the Securities Act defines an FPI as 'any foreign issuer other than a foreign government except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter: (i) More than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and (ii) Any of the following: (A) The majority of the executive officers or directors are United States citizens or residents; (B) More than 50 percent of the assets of the issuer are located in the United States; or (C) The business of the issuer is administered principally in the United States.' The determination date for FPI status in connection with an IPO is a date within 30 days before the filing of the initial registration statement.

5 So-called because 24 stockbrokers signed the agreement under a buttonwood tree on Wall Street. Library of Congress, History of the New York Stock Exchange, available at www.loc.gov/rr/business/hottopic/stock_market.html (last visited 24 March 2017).

Both the NYSE and NASDAQ welcome domestic and foreign issuers as well as dual listings. Historically, Nasdaq was viewed as the 'go-to' exchange for technology companies, with the NYSE operating as the primary exchange for brick-and-mortar companies. However, this has changed in recent years, with issuers from all industries listing on both exchanges.

ii Overview of listing requirements

The NYSE and NASDAQ each maintain standards for initial listing and continued listing on their respective markets. The standards include financial thresholds and other quantitative benchmarks as well as requirements relating to corporate governance.

Over the years, the quantitative listing requirements for the NYSE and NASDAQ have become increasingly similar, such that the requirements themselves generally are not determinative of which exchange a company will select. Meeting the quantitative listing requirements is rarely a deciding factor for exchange selection except for the smallest companies that will qualify to list only on the lowest NASDAQ market tier. Similarly, the corporate governance requirements are substantially similar due in large part to SOX, which considerably changed the governance requirements for US public companies. Even if a company meets all of the listing standards, each exchange reserves the right to deny listing to a company.

A US company seeking to list on the NYSE must meet minimum distribution and size criteria, which include, among other things, at least 400 round lot shareholders, a post-IPO market value of publicly held shares of $40 million and a stock price of at least $4. The company must also meet one of the exchange's two financial criteria: the earnings test or global market capitalisation test. For IPO companies, the NYSE will accept the underwriters' representation that the offering will satisfy certain of the requirements once the IPO is consummated.[6]

A non-US company may qualify to list on the NYSE in one of two ways – under the standards for domestic issuers or under the alternate listing standards for FPIs. The FPI-specific listing standards are designed to attract major foreign companies with an existing, substantial market for the company's shares in its home jurisdiction. For example, under the minimum distribution and size criteria, the round lot shareholder requirement is 5,000 (versus 400 under the domestic standard), the market value of publicly held shares must be at least $100 million, or $60 million for companies qualifying under the affiliated company test (versus $40 million under the domestic standard) and 2.5 million shares are required to be publicly held (versus 1.1 million under the domestic standard). To qualify under the alternate listing standards for FPIs, the company must also meet one of the financial tests: the earnings test or one of the valuation or revenue tests (or qualify under the affiliated company test).

As a general matter, both the NYSE and NASDAQ permit an FPI to follow the governance rules of their home jurisdictions, subject to certain exceptions.

Unlike the NYSE, NASDAQ has three separate market tiers, The NASDAQ Global Select Market, The NASDAQ Global Market and The NASDAQ Capital Market. Similar to the NYSE, NASDAQ has liquidity requirements, including number of round lot holders, number of publicly held shares and market value of publicly held shares, as well as financial standards. For example, companies seeking to list on The NASDAQ Global Select Market must qualify under one of four tests: earnings, capitalisation with cash flow, capitalisation

6 There are alternative standards in certain instances, including for real estate investment trusts with less than three years of operating history and special purpose acquisition companies.

with revenue or assets with equity. To demonstrate the similarities between the requirements of NASDAQ and the NYSE, a company seeking to list on The NASDAQ Global Select Market would need 450 round lot holders (400 for NYSE), 1.25 million publicly held shares (1.1 million for NYSE) and a market value of publicly held shares of $45 million ($40 million for NYSE). The quantitative requirements for listing on The NASDAQ Global Market and The NASDAQ Capital Market become increasingly less demanding; however, the corporate governance requirements are the same across all three NASDAQ tiers.

The cost of listing on the NYSE and NASDAQ varies somewhat in approach. The NYSE calculates fees based on the exact number of shares listed, subject to a minimum and maximum fee, whereas NASDAQ bases its fee on a share range. For example, to list on The NASDAQ Global Select Market and The NASDAQ Global market, the cost for listing up to 30 million shares is $125,000, including a $25,000 application fee; listing 30–50 million shares is $150,000, including a $25,000 application fee; listing 50–100 million shares is $200,000, including a $25,000 application fee; and listing over 100 million shares is $225,000, including a $25,000 application fee. On the NYSE, fees for an IPO are $0.004 per share, plus a $25,000 application fee and a $50,000 special one-time fee, with a minimum of $150,000 and maximum of $295,000, which includes the special one-time fee of $50,000.

iii Overview of law and regulations

IPOs in the United States are governed by federal rules and regulations with oversight by the SEC. The main rules and regulations come from the Securities Act and the Exchange Act.

By way of background, the Securities Act was passed in response to the 1929 US stock market crash. It was designed to prevent fraud and misrepresentation in connection with public securities offerings by requiring that investors receive adequate and accurate information in order to make their investment decisions. The system is disclosure-based, meaning a judgment is not made by the SEC on the quality of the IPO company or the securities being offered. In general terms, Section 5 of the Securities Act requires registration for any offer or sale of any security unless an exemption from registration is available.[7]

Market regulation, on the other hand, comes through the Exchange Act, which, among other things, created the SEC. The Exchange Act requires periodic reporting by companies with registered securities (i.e., generally companies that have made a Securities Act registered public offering and companies with a security registered on a national exchange or companies with total assets exceeding $10 million and a class of equity security held of record by more than 2,000 persons or 500 persons who are not accredited investors). Over the years, the SEC has sought to harmonise the Securities Act and the Exchange Act, by providing for integrated disclosure between Securities Act and Exchange Act forms.

Arguably, the next most significant piece of legislation was in 2002 with the passing of SOX, which came in response to significant US accounting scandals. The main goals of SOX were to strengthen financial disclosures, deter fraud and heighten corporate responsibility and accountability through various measures, including through increased executive liability. While not monumentally influential on the actual IPO process, SOX did have a tremendous effect on the governance requirements for companies post-IPO.

The most recent major changes came with the passing of the JOBS Act in April 2012. The JOBS Act created a new category of issuers called emerging growth companies (EGCs),

7 Generally, under Section 5, a security may not be 'offered' unless a registration statement is on file with the SEC and may not be sold until the registration statement is declared effective by the SEC.

which generally are companies with less than $1 billion in annual gross revenues in their most recently completed fiscal year. EGCs are entirely exempt from certain, or subject to reduced, regulatory requirements for a limited period of time. The benefits afforded to EGCs pursuant to the JOBS Act include allowing EGCs to provide reduced financial information in SEC filings, including in IPO registration statements; permitting EGCs to submit registration statements confidentially to the SEC for review prior to making them publicly available; providing for the ability of EGCs to 'test the waters' with institutional investors to determine investor appetite in the offering; relaxing restrictions on securities analyst communications and carving out other areas for reduced compliance (or exceptions) for EGCs. The benefits provided for under the JOBS Act for EGCs were further modified by the FAST Act in December 2015.

Also integral to the IPO process is the Financial Industry Regulatory Authority (FINRA), an independent non-governmental agency that aims to provide investor protection through the regulation of broker-dealers. During the IPO process, the underwriters make a filing with FINRA in connection with the initial submission of the registration statement to the SEC and every amendment thereafter.

III THE OFFERING PROCESS

i General overview of the IPO process

A typical US IPO takes approximately 16–20 weeks, assuming that no significant issues arise that delay or complicate the process. Often, delays are caused by disclosure or financial statement issues that could have been addressed in the early offering stages. The IPO process can be divided into four distinct phases:

a preparation and analysis (known as the pre-filing phase);

b filing and SEC review (the phase between filing the registration statement with the SEC and responding to, and clearing comments from, the SEC);

c marketing the IPO; and

d the pricing and closing of the offering.

The IPO team, also known as the 'working group' consists of several key parties including the company, company counsel, the underwriters, underwriters' counsel and the company's accountants. The roles of each are described in more detail below. During the pre-filing phase, even before the first meeting of the working group, a company works with its outside counsel to prepare for the IPO. Preparatory tasks include reviewing the company's current corporate and capital structure, as well as analysing its organisational documents (such as its charter and bylaws) to ensure that the company is best-positioned for life as a public company. In-house and outside counsel will also examine the company's existing corporate governance structure and begin to address any changes that may be needed prior to the IPO. In many instances, a company's private governance practices are not suitable for a public company and changes are often required for SOX compliance, including the creation of new committees of the board. Committee charters and other corporate policies may need to be drafted or modified. The underwriters will provide guidance on the governance structure from the perspective of marketing the deal and may suggest changes for marketing reasons. During this phase of the IPO process, a company may also need to prepare new equity compensation plans and employment agreements (or amend current ones) and address other general housekeeping matters. The company's in-house finance team and outside auditors should begin preparing the necessary financial statements that will be required in the registration statement. It is important that the company's auditors are involved early in the process as accounting issues are a common source of SEC comments and potential delay. Also at this time, companies should begin to seek any necessary and required approvals for the IPO and begin to develop a plan for public reporting after the IPO.

Preparation of the registration statement typically begins with an initial organisational meeting attended by the full working group, followed by drafts of the registration statement being circulated among the group. The registration statement describes the company and its business; provides risk factors regarding the company, its business and the offering; and includes financial and other information including use of proceeds, company capitalisation, management's discussion and analysis (MD&A) of financial condition and results of operation, and certain relationships and related party transactions. For domestic companies, the registration statement generally is filed with the SEC under cover of a Form S-1, while FPIs generally use a Form F-1. Contained within the registration statement is the prospectus, a stand-alone document that is provided to investors. The exhibits to the registration statement, which are delineated in the applicable form, as well as other information, such as the expenses of the offering and certain undertakings by the company, are not circulated to prospective investors as part of the prospectus and can only be found in filings with the SEC. Filings with the SEC are generally made available to the public at www.sec.gov. At a certain point in the drafting phase, the registration statement is sent to the financial printer, which will then run any changes to the document on its system and ultimately file the document electronically with the SEC through an electronic system known as EDGAR (Electronic Data Gathering, Analysis, and Retrieval).

While the registration statement is being drafted, due diligence is conducted by underwriters' counsel and the underwriters. Business due diligence is conducted by the underwriters to ensure that the company's business and operations are as it purports them to be. During legal due diligence, counsel examines various books, records and agreements as well as other material documents of the company to ensure that the registration statement is accurate and not misleading. As will be explained further below, the process of due diligence provides a defence against liability for false and misleading statements under Section 11 and Section 12 of the Securities Act. It also provides counsel with a basis for delivering certain opinions to the underwriters at the closing of the offering.

Also at this time, the underwriting agreement, comfort letter and other transactional documentation are negotiated. The underwriting agreement is the main contract that binds the underwriters and the company for the sale of the securities. Through the underwriting agreement, the securities are purchased by the underwriters from the company and are then resold to the public by the underwriters. The agreement contains the pricing terms, various representations and warranties, and provides for indemnities and closing conditions. While negotiation of the underwriting agreement begins early in the IPO process, it is not actually signed until the pricing of the offering.

Before the filing of the registration statement with the SEC, the company's board of directors (and potentially the company's shareholders) will approve the filing of the registration statement and other corporate activities associated with the offering. Additionally, the stock exchange will be determined and the exchange listing process will begin.

After the registration statement is filed with the SEC, it typically takes up to 30 days to receive SEC comments. During the period between filing the registration statement and receiving the first round of SEC comments, preparation of the company for life as a public company continues. This includes establishing certain corporate governance policies and practices, writing charters and required governance documentation, and continuing attention to the stock exchange listing application.

When comments are received from the SEC they arrive in the form of a letter. The company, underwriters, counsel and accountants respond to the comments by filing an amendment to the registration statement to address the SEC comments. They also write a response letter back to the SEC. Typically, there are several rounds of back and forth between the company and the SEC before the SEC will allow the registration statement to 'go effective'. During this time, FINRA also reviews the underwriting arrangements.

During the marketing phase, the underwriters and the company conduct a 'road show', which is typically a two- to three-week period of investor meetings across the United States and often in Europe and other jurisdictions. Prior to the roadshow, the deal team will print red herrings or 'reds', which are glossy copies of the preliminary prospectus. These will be handed out during the investor meetings. The books are called 'reds' due to the red banner that appears at the top of the preliminary prospectus, stating that the information is not complete and may be changed, and that the document is not an offer to sell the securities. Over the course of the roadshow, the underwriters will collect non-binding indications of interest from potential investors.

When the roadshow is completed, the underwriters will look to price the deal based on the demand for the securities. SEC and FINRA clearance must be obtained by that time, so that the registration statement can be declared effective by the SEC and pricing can take place. Securities may only be sold once the registration statement is declared effective by the SEC.

At the time of pricing, the company and the underwriters agree on the final price of the securities and execute the underwriting agreement. After pricing, the underwriters confirm sales and allocate shares. The securities begin to trade the day after pricing. The company files with the SEC the final prospectus that includes the final price of the stock, the underwriter compensation and the amount of proceeds the company will receive from the offering.

The offering typically closes on a T+3 schedule (meaning three business days after pricing). At closing, various documents are exchanged between the company and the underwriters, including legal opinions, the comfort letter from the accountants, lock-up agreements (which 'lock up' certain existing shareholders from selling their shares for typically 180 days) and other closing certificates.

The working group acts in concert to ensure that each of the IPO stages described above progresses as seamlessly as possible. A company's internal team is crucial to the IPO process. The company ensures that the offering documents are accurate in describing the business, and the risks relating to the offering and the company, among other disclosures. Further, the company's internal finance team is critical in preparing the financial statements and other financial disclosure along with assistance from the company's outside auditors. Management of the company also needs to be available for drafting sessions, diligence calls and participation in the road show. While the company is the key component of the IPO team, the other players have essential roles to ensure the success of the offering.

Company counsel guides the company through the offering process, from preparatory structuring through the closing of the offering. Company counsel assists with drafting the required registration statement disclosure, negotiates agreements and other offering documentation, and assists the company in complying with applicable securities laws.

The underwriters design the marketing effort, set the company's valuation, lead the roadshow and assist the company in describing its business in a compelling way. They arrange investor meetings and control the book-building process. They also participate in certain aftermarket trading activities.

Underwriters, counsel assist the underwriters through the offering process. They prepare the initial draft of the underwriting agreement, assist with drafting other documents and negotiate agreements with company counsel. They advise the underwriters on FINRA compliance (including making the required filings with FINRA) and other issues, such as research reports, trading restrictions and testing-the-waters activities.

The company's auditors are important in drafting the MD&A section of the prospectus. The auditors assist the company with its required financial statements and deliver what is known as a 'comfort letter', which ensures the accuracy of the financial data in the prospectus. All financial data in the prospectus must be comforted by the auditors as part of the underwriters' due diligence. Any factual information in the prospectus that is not comforted by the auditors must be backed up by the company. The auditors also assist the other members of the working group in responding to any financial or accounting comments from the SEC.

There are also several other key players in the IPO process including the financial printer, who prints the preliminary and final prospectuses and files the registration statement with the SEC, the transfer agent, and market maker or specialist. The company may also enlist the services of an IPO consultant, a compensation consultant and a public relations firm.

ii Pitfalls and considerations

Navigating the IPO process is not easy, and without careful planning, there are many potential pitfalls that could derail the offering. Several of the key considerations in the IPO process come early in the planning stages when the company is preparing to become a public company.

One of the first crucial steps is to review existing agreements to identify any consents that may be required for the IPO to occur. Companies should also examine their current corporate structure and capitalisation early in the process to ensure that they correctly align with public company operations and the contemplated offering. For example, a company may need to increase the number of authorised shares or wish to authorise blank check preferred stock. Companies should also consider defensive measures such as creating a classified board and limiting the ability of shareholders to call meetings or act by written consent.

Companies must also spend significant time preparing their post-IPO governance structure. Current policies, charters and other governance-related documents should be reviewed to determine any necessary changes required to comply with public company governance requirements, and often additional policies, charters and structural changes are required. Note that, as a general matter, FPIs may follow the governance requirements of their home jurisdictions instead of the requirements for domestic issuers, subject to certain exemptions and requirements.

Stock options also can prove to be a sticky issue in the IPO process. For grants up to two years before an IPO, a company should be prepared for the SEC to ask for valuation support. Due to this, it is important for a company to obtain independent valuations for options to avoid cheap stock accounting charges.

Companies must review all related party transactions prior to filing the registration statement to determine which, if any, must be disclosed in the registration statement. In addition, companies may wish to unwind certain transactions prior to the IPO. Further, any loans to executive officers and directors must be unwound prior to the first filing of the registration statement.

Early in the planning stages, a company should also work with its counsel to determine what financial statements will be required in the registration statement as well as any related MD&A issues. As a general matter, companies are required to include in the IPO registration statement three years of income statements, two years of balance sheet information and five years of selected financial statements. EGCs, however, are only required to include two years of audited financial statements and two years of selected financial statements in their IPO registration statement.

Foreign issuers in particular need to be mindful of any reconciliation that may be required with respect to any non-GAAP or certain non-International Financial Reporting Standards (IFRS) financial statements. If financial statements are not prepared in accordance with US GAAP or English-language IFRS as issued by the International Accounting Standards Board (IASB), the financial statements must be reconciled to US GAAP. Mergers and acquisition activity may also trigger additional required financial statements such as *pro formas* and target financial statements depending on the significance and timing of the mergers and acquisitions activity. Financial statement preparedness often drives (and delays) the timing of an offering. In addition, companies should also be mindful of SEC 'hot buttons.' In recent years these have included revenue recognition, cheap stock, segment reporting and loss contingencies.

Issuers must also be extremely careful of what is known as 'gun jumping'. As a general matter, there are certain restrictions on communications when a company is contemplating or conducting a securities offering that are intended to prevent a company from conditioning the market for the offering. The communications covered by the 'gun jumping' restrictions are extensive and include press releases, social media activity and interviews, among other forms of communications. When a company acts in violation of these rules, this is gun jumping. The SEC may deem an action as gun jumping even if it was purely accidental. Companies must be mindful of the rules from the outset, even before the registration statement is filed. In the event that the SEC determines that gun jumping has occurred, it may impose a cooling-off period during which the company must delay the offering. Gun jumping may also trigger sanctions, fines or rescission rights.

Aside from mechanical issues, it is crucial that a company be prepared to access market windows. This means being vigilant during the planning stages to ensure that the company is best-positioned to move forward at the appropriate time when market windows are 'open'.

It should not be minimised that becoming a public company exposes the issuer and other offering participants to liability under the US securities laws. In particular, Section 11 of the Securities Act states that if any part of an effective registration statement 'contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition such person knew of such untruth or omission) may sue' every person who signed the registration statement; every underwriter, experts and current and future members of the board of directors who are named in the registration statement, among others.

While a due diligence defence is available to underwriters, experts and directors, it is not available to the company. The company is 'strictly liable' under Section 11 of the

Securities Act, subject to a limited exception if the company can prove the purchaser of the securities knew of the untruth. Additional liability is imposed by Section 12(a)(2) of the Securities Act on any person who offers or sells a security by means of a prospectus or oral communication that contains a material misstatement or omission.

iii Considerations for foreign issuers

While many of the procedural elements involved in a US IPO by a domestic issuer are essentially the same as those for an FPI, FPIs are provided with significant relief in several areas that are designed to encourage them to go public in the United States.

For example, while EGCs are permitted to submit draft registration statements confidentially to the SEC, FPIs may also do so in certain circumstances. The enumerated instances are not in lieu of the general ability for EGCs to submit confidential draft registration statements, such that an FPI that qualifies as an EGC can always submit confidentially to the SEC under the provisions for EGCs. However, FPIs, regardless of EGC status, may submit draft registration statements confidentially to the SEC if the FPI is a foreign government registering its debt securities; is listed or is concurrently listing its securities on a non-US securities exchange; is being privatised by a foreign government; or can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.[8]

Moreover, in the registration process, FPIs typically utilise Form F-1 to register with the SEC instead of Form S-1 (the form for domestic issuers). Form F-1 contains reduced disclosure requirements compared to Form S-1. Notwithstanding this, however, the underwriters may encourage the issuer to provide disclosure akin to what is required for a domestic issuer for marketing purposes. Notable differences in Form F-1 include, among others, compensation disclosure. Unlike domestic companies, FPIs are able to disclose more limited compensation information, particularly as it relates to individual compensation, compared to domestic issuers, unless the information is publicly disclosed elsewhere by the FPI.

FPIs also have flexibility with their financial statement presentation. They may prepare and file their financial statements in accordance with US GAAP, IFRS or local GAAP. FPIs that utilise the English-language version of IFRS as issued by the IASB need not provide a reconciliation to US GAAP. However, if non-IASB IFRS or local GAAP is used, generally reconciliations to US GAAP must be included. In addition, FPIs have different 'staleness' dates (the date after which financial information may not be used) from domestic issuers.

As a structural matter, instead of directly offering stock to the public, FPIs may choose to offer securities in the United States through the use of American Depositary Receipts (ADRs). ADRs are stand-alone securities (separate from the stock of the FPI) that represent a certain number of shares of the FPI. The underlying shares are held with a depositary that contracts with the company. In many instances, investors find ADRs more attractive than holding shares directly in a foreign corporation and can result in favourable currency conversions on dividends and other cash distributions.

8 SEC, Non-Public Submissions from Foreign Private Issuers, available at http://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm (last visited 20 March 2017).

Once the company is public, an FPI is not required to file quarterly reports on Form 10-Q, annual reports on Form 10-K or periodic reports on Form 8-K like a domestic issuer. Instead, an FPI files annual reports on Form 20-F[9] within four months following the company's fiscal year end and must furnish to the SEC on Form 6-K information that it:

a makes or is required to make public in the jurisdiction where it is domiciled or in which it is incorporated or organised;

b files or is required to file with a stock exchange on which its securities are traded, if made public by that exchange; or

c distributes or is required to distribute to its security holders.[10]

Pursuant to the rules of the stock exchanges, FPIs are required to file semi-annual unaudited financial information under cover of Form 6-K.

FPIs also enjoy the benefit of being exempt from the US proxy rules that generally require proxy solicitation in connection with shareholder meetings. They also need not comply with the rules for presenting shareholder proposals.

Further, FPIs are exempt from filing insider trading reports under Section 16 of the Exchange Act, as well as from the short-swing profit rules, which generally prohibit a company insider from profiting from company stock that is bought and sold within a six-month period. Additional regulations from which FPIs are exempt include Regulation FD, which prohibits the selective disclosure of material, non-public information; Regulation G, which addresses the use of non-GAAP financial measures; and Regulation BTR, which covers trading during pension fund blackout periods.

Both the NYSE and NASDAQ provide accommodations to FPIs in the corporate governance arena. To utilise these exemptions, an FPI must disclose in its annual report on Form 20-F how the company's governance practices differ from those required for a domestic company under the rules of the applicable exchange.

IV POST-IPO REQUIREMENTS

Once a company becomes public, there are several ongoing governance and reporting requirements with which the company must comply. These requirements are considerably different for domestic issuers than for FPIs, which are provided relief from compliance in many instances as discussed above.

Domestic companies are required to file annual, quarterly and periodic reports with the SEC. The due date for these filings is based upon the company's filer status as either a large accelerated filer, accelerated filer or non-accelerated filer. Among other requirements, large accelerated filers are companies that have a public float of $700 million or more, whereas accelerated filers have a public float of more than $75 million but less than $700 million. For a newly public company, regardless of filer status, the annual report on Form 10-K is due 90 days after the company's fiscal year end. This would be shortened to 75 days for an accelerated filer and 60 days for a large accelerated filer for subsequent Form 10-K filings. Quarterly reports on Form 10-Q are due 40 days after the company's fiscal quarter end for large accelerated filers and accelerated filers, and 45 days for all other filers. Periodic reports

9 Certain Canadian FPIs are able to file annual reports on Form 40-F, which has significantly reduced disclosure requirements compared to a Form 10-K or Form 20-F.

10 Form 6-K.

on Form 8-K are typically due within four business days of the triggering event for all types of filers. There are various activities that trigger the need to file (or furnish) a Form 8-K, including entering into or terminating a material agreement, consummating a significant acquisition or the departure of a director or executive officer. Form 8-K is also used to satisfy necessary disclosure under Regulation FD, which generally prohibits disclosure of material information to certain people without disclosing it to the public as well. As previously discussed, FPIs generally file annual reports on Form 20-F and other reports under cover of Form 6-K.

Post-IPO, domestic companies must also file proxy statements, which are due 120 days after the company's fiscal year end if certain information in the Form 10-K incorporates, by reference, information from the proxy statement (as is typically the case) and that must comply with the detailed US proxy rules. Domestic companies are required to hold annual meetings, for which significant advance preparation is required.

The company's board of directors and board of committees must hold regular meetings. Directors and certain officers of the company, among others, must also file reports relating to their shareholdings and be mindful of the rules regarding trading by insiders. In addition, various annual certifications are required to be delivered to the exchange on which the company is listed.

One of the more onerous requirements for many companies is compliance with what is known as SOX 404, which addresses a company's internal control over financial reporting. A company's:

a management must report on the company's internal control over financial reporting; and

b auditor is required to attest to the assessment of management.

This is not required in a company's IPO registration statement nor in the first annual report following its IPO. However, in the second annual report, the above part (a) is required and part (b) may be required depending on a company's filer status or other special designation.

V OUTLOOK AND CONCLUSION

As we look towards the coming years in the US IPO market, significant attention will be focused on the new presidential administration and the changes that it may bring through any regulatory or policy actions that affect capital-raising in the United States. The appointment of a new chairman of the SEC may bring a shift in focus and reduced regulatory activity. In addition, geopolitical events may also affect the US market. Regardless of the uncertainty that may exist, it can be expected that the US IPO market will remain at the forefront of the global IPO arena.

Appendix 1

ABOUT THE AUTHORS

STEPHAN HUTTER

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Dr Stephan Hutter is a partner in Skadden's Frankfurt office, where he focuses on international capital markets transactions, cross-border corporate transactions and bank financings. He has a broad range of experience in initial public offerings, capital increases and high-yield debt financings involving international securities offerings of German, Austrian and Swiss companies, including dual listings and private placements of shares, and debt securities in the United States. For more than a decade, Dr Hutter has been named by industry surveys as a market-leading German and European capital markets practitioner for equity and debt transactions, and has spoken and published on international securities laws transactions and issues.

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Dr Katja Kaulamo is a partner in the corporate group in Skadden's Frankfurt office, where she advises on a wide range of international corporate and capital markets transactions. Dr Kaulamo has extensive experience in capital markets transactions representing issuers, underwriters and selling shareholders in connection with initial public offerings, capital increases, rights offerings, block trades and offerings of convertible and hybrid capital instruments, as well as investment grade and high-yield debt. Her practice also includes capital markets-related regulatory advice, corporate governance and other corporate matters. Dr Kaulamo is cited as a leading capital markets lawyer in *Chambers Global*, *Chambers Europe*, *The Legal 500*, *IFLR1000* and *JUVE* (Germany).

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Christopher Betts primarily focuses on China-related capital markets, M&A transactions and general corporate advice. Mr Betts advises major corporations, investment banks and private equity funds on a broad range of corporate and securities matters such as listings on the Hong Kong Stock Exchange (including Hong Kong depositary receipt listings, secondary listings, spin-offs and listings by companies with VIE arrangements), rights issues, share placements and other fundraising activities, takeovers, and mergers and acquisitions. Mr Betts has been named a leading lawyer for capital markets work in Hong Kong and China by *Chambers*

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David J Goldschmidt represents US and international issuers and investment banks in a variety of financing matters, including public offerings and private placements of debt and equity securities, and international securities offerings. He also counsels US and international clients on an ongoing basis, including advising on corporate governance, SEC filings and disclosure issues. He has extensive experience advising issuers and underwriters on offerings by high-technology and communications companies. Mr Goldschmidt is also very active in representing and advising real estate investment trusts in connection with capital market transactions, including many initial public offerings and general corporate matters, as well as representing issuers and investment banks in connection with private and public securities offerings by Israeli companies. He is also involved in developing new financial products. Mr Goldschmidt serves on Skadden's policy committee. He was named *Who's Who Legal 2016* Capital Markets Lawyer of the Year, and has repeatedly been selected for inclusion in *Chambers USA*, *Chambers Global*, *The Legal 500 US*, *The Best Lawyers in America*, *IFLR1000*, *Who's Who Legal* and *Euromoney*.

ALEXEY KIYASHKO

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Alexey Kiyashko has practised law in Skadden's Moscow, New York and Paris offices. Co-head of Skadden's Moscow office, Mr Kiyashko rejoined the Moscow office in February 2002 after working as counsel at the European Bank for Reconstruction and Development in London. He focuses on international M&A and corporate finance transactions, and has been repeatedly ranked as a leading individual in *Chambers Global*, *Chambers Europe* and *The Legal 500 EMEA*. Mr Kiyashko was a member of the Moscow Exchange's Committee on Primary Equity Markets, a committee advising the Moscow Exchange and the Russian securities market regulator on how to improve the legislative and regulatory framework for the equity capital markets in Russia.

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Alexander Kovriga is a member of Skadden's corporate practice and has experience in a variety of corporate finance, M&A and joint venture transactions in Russia. Mr Kovriga's recent corporate finance experience includes advising Russia-based companies on a wide range of transactions, including IPOs and secondary offerings, public and private placements, as well as offerings of American Depositary Shares and Global Depositary Receipts. Mr Kovriga previously practised in Skadden's New York office, where he focused on mergers and acquisitions and private equity matters. He is a native Russian speaker and is fluent in English and German.

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Danny Tricot leads Skadden's European corporate finance practice and is based in the London office. His capital markets work includes acting for issuers and underwriters on a broad range of equity and debt transactions. Mr Tricot has advised on initial public offerings, rights offerings and private placings. He has been involved in equity listings in London and on various international exchanges. Most of the offerings that he has worked on have included a Rule 144A component. He has worked across several European jurisdictions, and also in growth markets, with extensive experience in the Middle East, Africa and Russia.

Chambers UK has described Mr Tricot as 'an incredibly hard-working lawyer' who displays 'a balance of commerciality and technical brilliance'. He also is listed in *Chambers Europe*, *Chambers Global*, *The Legal 500* and *IFLR1000*. He was named as one of only three lawyers in *Financial News*' Top 100 Rising Stars 2007, and in 2016 he was featured in *Financial News*' Hall of Fame. Mr Tricot's work has been repeatedly recognised for its quality and innovation in various international awards, including several commendations in the *Financial Times*' 'Innovative Lawyers' reports.

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Adam M Howard focuses on international corporate finance and public M&A transactions. He has advised both issuers and underwriters in connection with offerings of equity and debt securities and listings in London and on various international exchanges. In 2016, Mr Howard was named by *Financial News* as one of their 40 Under 40 Rising Stars in Legal Services. In 2015, Mr Howard received The M&A Advisor's European Emerging Leaders Award, which recognises industry professionals who have reached a significant level of success and made notable contributions to their industry and community.

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