The Initial Public Offerings Law Review

Second Edition

Editor
David J Goldschmidt

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THE INITIAL PUBLIC OFFERINGS LAW REVIEW

SECOND EDITION

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PREFACE

Welcome to the second edition of *The Initial Public Offerings Law Review*. This publication introduces the reader to the main stock exchanges around the globe and their related IPO regulatory environments, and provides insight into the legal and procedural IPO landscapes in 21 different jurisdictions. Each chapter gives a general overview of the IPO process in the region, addresses regulatory and exchange requirements, and presents key offering considerations.

The global IPO landscape is ever-changing. While several of the oldest stock exchanges, such as the New York Stock Exchange and London Stock Exchange, are still at the forefront of the global IPO market, the world's major stock exchanges now are scattered around the globe and many are now publicly traded companies themselves. IPOs take place in nearly every corner of the world and involve a wide variety of companies in terms of size, industry and geography. 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.

Virtually all markets around the globe have experienced significant volatility in recent years; however, 2017 marked a resurgence for many IPO markets. The number of 2017 IPOs and total proceeds raised were led by the Asia-Pacific exchanges, with many other regions also experiencing improvement over recent years. Despite the increase in available private capital, which has enabled issuers to remain private for longer periods of time, there is continued optimism for 2018 in terms of both global deal count and proceeds. The strong global IPO pipeline includes many well-known companies across a range of industries, and it is anticipated that these companies will seek to list on a variety of stock exchanges around the world.

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, it is important that the company and its management are aware from the outset of the legal requirements as well as potential pitfalls that may impact the offering. Moreover, once a company is public, there are ongoing jurisdiction-specific disclosure and other requirements with which it must comply. This second edition of *The Initial Public Offerings Law Review* introduces the intricacies of taking a company public in these jurisdictions and serves as a guide for issuers and their directors and management.

David J Goldschmidt
Skadden, Arps, Slate, Meagher & Flom LLP
New York
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Chapter 19

UNITED STATES

David J Goldschmidt[1]

I INTRODUCTION

A long-time leader in the initial public offering (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). Since the establishment of the first US exchange, the US offering process and regulatory landscape have changed dramatically, with the modern US IPO market regulated by both federal statutes and agencies, as well as the rules of the exchange on which a company is listed. Foremost among the governing 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 that has contributed to the evolution 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. Several additional legislative changes were proposed in 2017 through the Financial CHOICE Act of 2017 and the Encouraging Public Offerings Act of 2017; however, it is unclear what form these measures will take if they are passed. The duty of 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 has experienced significant volatility over the past decade. However, the 2017 market showed significant improvement over 2016, with 166 deals compared to 103 in 2016 (in contrast to 152 IPOs in 2015, 277 in 2014, 217 in 2013 and 138 in 2012).[2] Notably, 2017 saw the continued resurgence of the special purpose acquisition company (SPAC), with 29 SPAC IPOs in 2017 compared to 14 in 2016.[3] There was also a significant return of Chinese issuers to the US market. Healthcare and financial services sectors led the number of 2017 IPO issuances, followed by technology issuers.

An important factor affecting the current IPO market flow is the increased availability of private capital. This has allowed issuers to remain private longer by enabling them to access capital outside of the public market. Additionally, other strategies can provide companies (and

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

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their venture capital and private equity backers) with alternative exit avenues, such as being acquired by a publicly traded SPAC. Notwithstanding this, there is significant optimism about 2018, with many 'unicorns' and other companies across many sectors in the pipeline.

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 may result in reduced confidentiality for the company and its management. Moreover, additional liability arises for the issuer, its directors and its management from being public in the US. Further, the expense of complying with public company reporting obligations should not be minimised. Despite these factors, going public in the US is an exciting (and often long-anticipated) event for any company. The resulting liquidity for existing investors, as well as 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 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 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, on the other hand, 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 22 January 2018).

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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' issuers. However, this has changed in recent years, with companies 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. 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 any company.

A US company seeking to list on the NYSE must meet minimum distribution and size criteria, which include, among others, at least 400 round lot shareholders, a post-IPO market value of publicly held shares of US$40 million and a stock price of at least $4. The company also must 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 also must 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 its home jurisdiction, subject to certain exceptions.

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 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

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.

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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 million to 50 million shares is $150,000, including a $25,000 application fee; listing 50 million to 100 million shares is $200,000, including a $25,000 application fee; and listing more than 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 are contained in 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 that a judgement is not made by the SEC on the quality of the IPO company or the securities being offered. 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; 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).[7] 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 significant 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), which generally are companies with less than $1.07 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

7 Slightly different numerical standards apply to banks, savings and loan holding companies or bank holding companies.

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information in SEC filings, including in IPO registration statements; permitting EGCs to submit draft registration statements confidentially to the SEC for review prior to making them publicly available; providing for the ability of EGCs to 'test-the-waters'[8] with potential qualified 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. In June 2017, the SEC announced that it would expand the confidential IPO registration statement review process to include all issuers, not just EGCs. Several additional legislative changes were proposed in 2017 through the Financial CHOICE Act of 2017 and the Encouraging Public Offerings Act of 2017 which, if ultimately passed, also would extend certain EGC benefits to other types of issuers, including the ability to 'test the waters'.

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 must file information 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 to 20 weeks, assuming that no significant issues arise that delay or complicate the process. Adequate planning and preparation are crucial to the IPO process as delays are often 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 full 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 by-laws) to ensure that the company is best-positioned for life as a public company. In-house and outside counsel also will 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

8 Through 'testing-the-waters' activities, an issuer or someone authorised to act on its behalf may make oral or written communications with certain qualified potential investors prior to or after the filing of the registration statement.

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compliance, including the creation of new board committees. Additionally, 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 additional corporate changes for marketing reasons. During this phase of the IPO process, a company also may need to prepare new equity compensation plans and employment agreements (or amend current ones) and address other general corporate housekeeping matters. The company's in-house finance team and outside auditors should begin preparing the financial statements that will be required in the registration statement. It is important that the company's auditors are involved early in the IPO process as accounting issues are a common source of SEC comments and potential delay. Also at this time, companies should begin to seek any 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 the use of proceeds from the offering, company capitalisation, management's discussion and analysis (MD&A) of the company's 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 (or Form S-11 in the case of a real estate investment trust), while FPIs generally use a Form F-1. Contained within the registration statement is the prospectus, which is the stand-alone document 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 be found in filings with the SEC. Filings with the SEC generally are 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 with the SEC through an electronic system known as EDGAR (Electronic Data Gathering, Analysis and Retrieval).

Concurrent with the drafting of the registration statement, legal due diligence is conducted by the company's counsel and underwriters' counsel. 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, due diligence provides a defence against liability for claims of false and misleading statements under Section 11 and Section 12 of the Securities Act. It also provides counsel with a basis for delivering certain legal opinions to the underwriters at the closing of the offering. Business due diligence is also conducted by the underwriters to ensure that the company's business and operations are as it purports them to be.

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

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signed until near the end of the IPO process when the offering is priced. The comfort letter is delivered by the company's auditors to address the accuracy of the financial data included in the prospectus. All financial data in the prospectus should be supported or confirmed 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.

Before filing the registration statement with the SEC, the company's board of directors (and potentially the company's shareholders) will approve the filing 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 continues to position the issuer for life as a public company. This includes continuing to establish certain corporate governance policies and practices, writing charters and required governance documentation, and continuing to advance 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 by filing an amendment to the registration statement to address the SEC comments. The company also writes a response letter to the SEC. Typically, there are several rounds of back and forth between the company and the SEC before it 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 'roadshow', which is typically a two- to three-week period of investor meetings across the US, 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. The roadshow is separate from any 'testing-the-waters' activities that already may have been conducted by or on behalf of an eligible issuer.

When the roadshow is complete, the underwriters will look to price the deal based on the demand for the securities. As securities only may be sold once the registration statement is declared effective by the SEC, clearance from the SEC and FINRA must be obtained by this time to enable the registration statement to be declared effective by the SEC and for pricing to take place. 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. Following pricing, the company files the final prospectus with the SEC. The final prospectus includes the determined sale price of the stock, the underwriters' compensation and the amount of proceeds the company will receive from the offering.

The offering typically closes on a T+2 schedule (meaning two business days after pricing). At closing, various executed documents are exchanged between the company and the underwriters, including legal opinions, the comfort letter, lock-up agreements (which 'lock up' certain existing shareholders from selling their shares for a certain period (typically 180 days)) and other closing certificates.

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As described above, the working group acts in concert to ensure that each of the IPO stages progress as seamlessly as possible. A company's internal team is crucial to the IPO process. The company ensures that the offering documents accurately describe 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 roadshow. 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 issuer 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 assists the issuer through the offering process. They prepare the initial draft of the underwriting agreement, contribute to 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 any permitted '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 the comfort letter. They 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, which 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 or a public relations firm.

ii Pitfalls and considerations

Navigating the IPO process can be difficult, and without careful planning, there are many potential pitfalls that could affect 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 or approvals 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 prior to the offering. Companies should also consider public company 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. Existing policies, charters and other governance-related documents should be reviewed to determine any necessary changes that may be required to comply with public

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company governance requirements. Often, additional policies, charters and structural changes are required as well. 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 can also 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. Because of 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 addition, companies may wish to unwind certain transactions prior to the IPO for optical, legal or other reasons. 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 work with its counsel to determine what financial statements will be required in the registration statement as well as begin to address any related MD&A issues. Generally, 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. Mergers and acquisitions activity may 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 also should be mindful of SEC 'hot buttons'. In recent years, these have included revenue recognition, cheap stock, segment reporting and loss contingencies.

Foreign issuers in particular need to be aware 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.

Issuers must 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 violates these rules, this is gun jumping. The SEC may deem an action as gun jumping even if it was purely accidental. Therefore, companies must be mindful of the rules from the outset, even before the registration statement is filed. The consequences for gun jumping can be significant. 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 the technical legal considerations, 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'. The company's underwriters will be able to advise on the most advantageous time to launch the offering.

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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, as well as every underwriter, expert, and current and future member of the board of directors 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. These measures are designed to encourage FPIs to go public in the United States.

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.[9] 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. Notwithstanding the accommodations, however, the underwriters may encourage the issuer to provide disclosure akin to what is required for a domestic issuer for marketing purposes.

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 issuer. In many instances, investors find ADRs more attractive than holding shares directly in a foreign corporation as ADRs may result in favourable currency conversions on dividends and other cash distributions.

9 Historically, certain FPIs were permitted to file their registration statements confidentially with the SEC. While this ability remains in place, the changes in 2017 that enable all issuers to file confidentially make this 'benefit' significantly less relevant.

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Once the company is public, unlike a domestic issuer, 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. Instead, an FPI files annual reports on Form 20-F[10] within four months of 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.[11]

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

Post IPO, 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 on 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 its filer status, the annual report on Form 10-K is due 90 days after the company's fiscal year end. This is 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 on Form 8-K are

10 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.

11 Form 6-K.

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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 by domestic issuers 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 also required to hold annual meetings, for which significant advance preparation is required.

The company's board of directors and the committees of the board 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 (1) management must report on the company's internal control over financial reporting and (2) an 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 (1) is required and part (2) may be required depending on a company's filer status or other special designation.

V OUTLOOK AND CONCLUSION

There is significant optimism surrounding the US IPO market for 2018. As noted, 2017 witnessed several proposed and implemented changes to the IPO landscape, and additional action is expected in 2018. Further, there are indications that the newly appointed SEC chairman, Jay Clayton, is focused on easing regulatory burdens and encouraging US IPOs, by both domestic companies and FPIs. Several key factors will affect the market, including US tax reform issues, federal reserve activity and the impact of future presidential actions. Regardless of any uncertainty that may exist, it is expected that the US IPO market will remain at the forefront of the global IPO arena.

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Appendix 1

ABOUT THE AUTHORS

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Christopher Betts is a capital markets partner in the Hong Kong office of Skadden, Arps, Slate, Meagher & Flom. Mr Betts has been named a leading lawyer for capital markets work in Hong Kong and China by *Chambers Global*, *Chambers Asia* and *IFLR1000*. He also was named one of *Law360*'s 2015 'rising stars' under 40 for capital markets. Mr Betts speaks fluent Mandarin. His work has been repeatedly recognised for its innovation, including by the *Financial Times* in its 'Asia Pacific Innovative Lawyer' reports.

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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 also is 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 also is 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

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Adam M Howard focuses on international capital markets 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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Danny Tricot heads Skadden's European capital markets practice and is based in the London office. His 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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