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PERSPECTIVE

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New Year's Resolution: Going Public

By Sara L. Terheggen

A company contemplating an IPO has weighed the alternatives and decided going public is the right strategy. The important IPO readiness process has been undertaken including aligning the business, structure, financial, leadership, governance, communication and operational layers of the company. It is now time to prepare a timeline, assign responsibility and execute the IPO process. The process outlined below is intended to provide broad guidance and every company will differ depending on preparation and market timing. Regardless, the key to success is approaching the process realistically and having the strategic foresight to be prepared for changes along the way.

Before the Organizational Meeting

An important step is identifying challenges and developing a plan to manage those expectations. These may include:

Structural Issues: It is important to identify structural changes that may be necessary. These may include restructuring of capitalization, likelihood of a stock split, significant changes needed to employment arrangements, necessity for any spinouts or whether there will be any selling shareholders.

Organize Diligence: The focus will be on drafting the S-1 so it is important to tackle any time-consuming activities beforehand. While diligence will be ongoing, setting up the data room and populating it can save time and allow company representatives to focus more of their attention on disclosure. Outside counsel can provide a standard diligence request list to get started on this.

Initial Draft of S-1: Outside counsel can put together the basic shell of the S-1. Very often, companies will prepare an initial draft of the business section. While bankers will offer to put this together, it can be helpful for key members of management to tell their story initially free of outsider input. While this story will be refined significantly throughout the process, it is helpful to have the company lay the

foundation at the outset to save time during the initial drafting sessions.

Weeks 1-2 after Go

For the first couple of weeks, the focus will be on disclosure, financials and communication.

Disclosure: The initial drafting sessions will focus on the business section and summary, followed by risk factors and management's discussion & analysis sections (MD&A). Another important aspect of disclosure will be collecting questionnaires from directors, officers and 5 percent holders. The information collected will help complete certain sections of the S-1, including management, capitalization, related party transactions and executive compensation. Finally, companies should also be identifying material contracts that will need to be filed as exhibits.

Financials: To the extent this was not determined in advance, it must be determined what financials are necessary to include. This is impacted by whether the company is an emerging growth company. The underwriters will often want quarterly financial data for the prior two fiscal years and these will require auditor review which can add to the lead time necessary to get the S-1 on file. To the extent they have not already, the company should have their financial teams review MD&A precedent and begin drafting before or in the first couple of weeks of this process.

Communication: The company will be subject to rules and restrictions on communication. Outside counsel can provide a set of guidelines and work with the company on context-specific questions. Establishing guidelines early and adhering to them is critical to ensure the company does not end up with gun jumping issues that could negatively impact the IPO.

Weeks 3-5

Disclosure and diligence will remain a central focus. Underwriters may start scheduling diligence calls with customers and specific regulatory experts. The questionnaires will start coming back and counsel will begin

to flesh out sections of the S-1, as well as conduct the necessary independence analysis. It is quite typical for the underwriters counsel to provide a draft of the underwriting agreement during this time. This agreement will be negotiated prior to submission of the S-1. Most companies will aim to submit the S-1 confidentially to the SEC about four weeks after the organizational meeting. Once submitted, the initial SEC review process typically takes 30 days.

Weeks 5-9

With the initial draft submitted, the company will focus on disclosure, governance and roadshow preparation.

Disclosure: In addition to updating financial information (as necessary), the company will consider whether any confidential treatment is required for exhibits filed with the S-1. Such confidential treatment requests should be completed prior to the public filing.

Governance: The company will consider any charter amendments that will be necessary, as well as establish and implement new policies that conform to SEC and exchange public company standards. These policies include a code of ethics, corporate governance guidelines, insider trading, disclosure controls and other policies depending on the company. In addition, the board develops charters for each committee.

Roadshow Preparation: The bankers and company will work on a roadshow deck. Everything in the roadshow materials should be supported by information in the S-1. Underwriters' counsel will prepare a circle-up of the S-1 and the deck highlighting statements that they request back-up for and the company will have to satisfy these requests.

Weeks 9 through Pricing

The timing here will depend significantly on the number of SEC comments and anticipated amendments that will be required prior to the public filing. At this point, there are a number of operational things happening. Underwriters are clearing their committees in preparation for the roadshow. Company and counsel are working

through remaining issues with the SEC, including cheap stock. The S-1 is being finalized to be publicly filed at least 15 days in advance of the road show.

Roadshow

The company and underwriter team will go on the road from anywhere between seven and 14 days to market the offering to potential investors. During this time, counsel for both sides will work together to address any last minute issues with the SEC, work on closing documents, finalize stock exchange and FINRA approvals, prepare Form 3s for all insiders and draft the Form 8-A that will register the securities.

Pricing and Closing

Upon approval of the pricing terms, the underwriting agreement will be executed and the final prospectus with all of the pricing terms will be filed. This is often done the same day as pricing. Closing is a fairly routine process that involves executing certificates and opinions and working with the transfer agent and exchange to finalize details in preparation for closing.

Conclusion

The actual timeline and process for IPO execution can vary depending on the company. The good news is that outside advisors are well prepared to assist with this process and guide a company through any challenges along the way to help ensure the company meets its new year's resolution to go public.

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