IPO Report

2018

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2018 IPO Report – What's Inside

REVIEW

The IPO market produced 142 IPOs in 2017, a total that was 45% higher than the 98 IPOs in 2016 and just shy of the 152 IPOs in 2015, but still lower than the annual average of 155 IPOs over the five-year period from 2011 to 2015.

The year started slowly, with 20 IPOs in the first quarter. Activity more than doubled in the second quarter, reaching 45 IPOs. The third quarter saw the pace of new offerings slow, with 27 IPOs—the lowest third-quarter tally in the last five years. The fourth quarter produced 50 IPOs, with November accounting for almost half—the second busiest November since the dot-com era.

Total gross proceeds for the year were $30.51 billion—65% above the 2016 total of $18.54 billion and 21% higher than the $25.17 billion raised in 2015, but 25% below the $40.93 billion average for the five-year period preceding 2016.

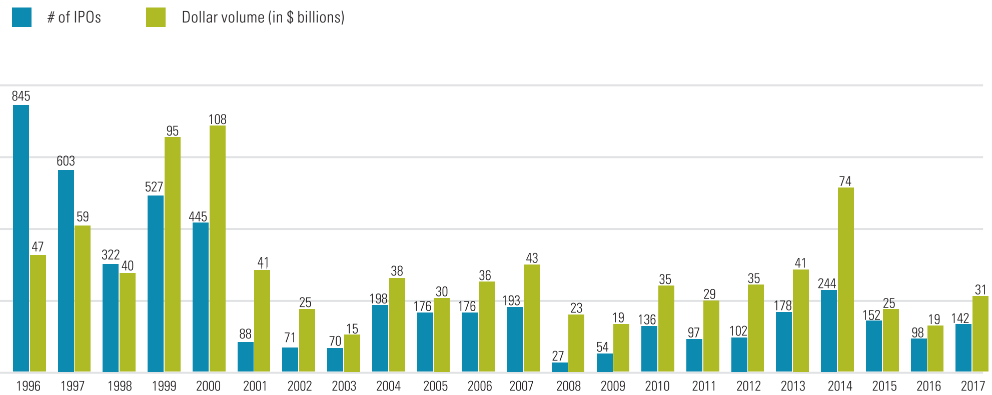
IPOs by emerging growth companies (EGCs) accounted for 87% of the year's IPOs, up from 84% in 2016 but below the 93% recorded in 2015. Since the enactment of the JOBS Act in 2012, 85% of all IPOs have been by EGCs.

The median offering size for all 2017 IPOs was $120.0 million—27% above the $94.5 million median for 2016 and 22% higher than the $100.7 million median over the five-year period from 2011 to 2015.

The median offering size for life sciences IPOs in 2017 was $79.1 million, 42% above the $55.5 million median deal size in 2016 and 22% above the $65.0 million median for the five-year period from 2011 to 2015. By contrast, the median offering size for non–life sciences IPOs in 2017 was $151.0 million—up 15% from the $131.6 million median in 2016 and 10% higher than the $137.7 million median for the five-year period preceding 2016.

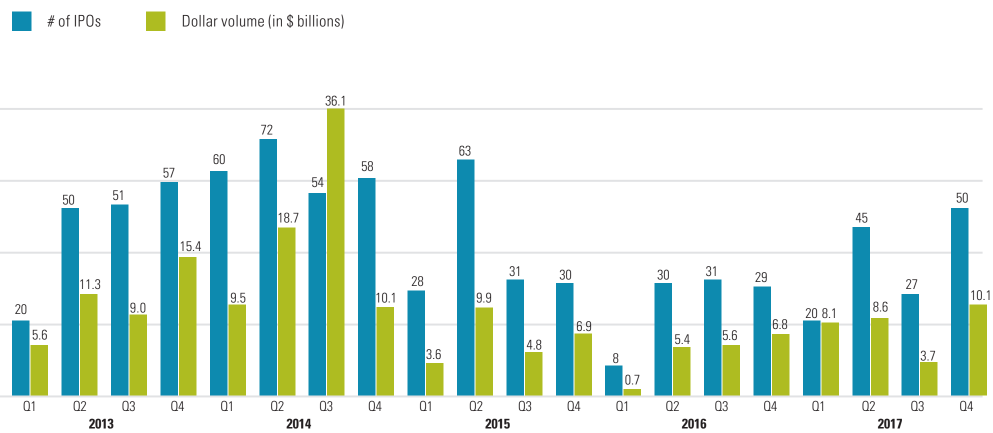
In 2017, the median offering size for IPOs by EGCs was $105.0 million, compared to $454.4 million for IPOs by non-EGCs—both tallies representing the highest annual levels since 2012. From 2012 to 2016, the median EGC IPO

US IPOs by Year – 1996 to 2017



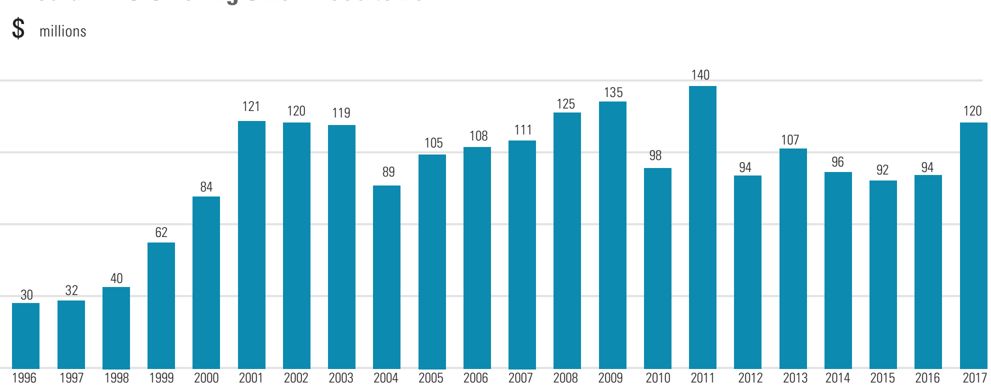
Source: SEC filings

US IPOs by Quarter – 2013 to 2017



Source: SEC filings

Median IPO Offering Size – 1996 to 2017



Source: SEC filings

offering size was $85.9 million, compared to $421.1 million for non-EGC IPOs.

The median annual revenue of all IPO companies in 2017 was $101.4 million, 53% above the $66.5 million median for 2016 and more than two and a half times the $37.8 million median for 2015. IPO companies over the five-year period from 2010 to 2014 had median annual revenue of $92.7 million.

Only 15, or 34%, of the year's life sciences IPO companies were revenue generating. The median non–life sciences IPO company in 2017 had annual revenue of $212.8 million, a figure only 3% higher than the $205.8 million median for 2016, but 37% above the $154.0 million median over the five-year period from 2011 to 2015.

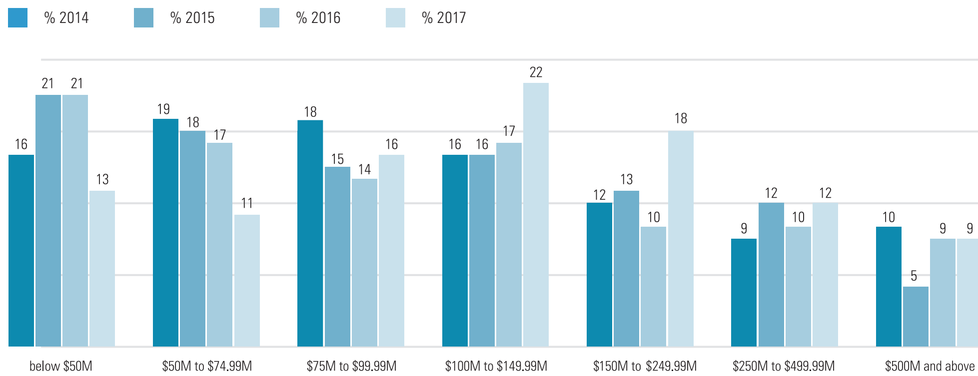
EGC IPO companies in 2017 had median annual revenue of $61.4 million, compared to $1.93 billion for non-EGC IPO companies. The median annual revenue for non–life sciences EGC IPO companies in 2017 was $151.8 million, 40% above the $108.2 median that prevailed from enactment of the JOBS Act through 2016.

The percentage of profitable IPO companies declined from 36% in 2016 to 34% in 2017. Only two life sciences IPO companies in 2017, or 5% of the sector's total, were profitable, compared to 11% over the five-year period from 2012 to 2016. In 2017, 47% of non–life sciences IPO companies were profitable, down from 54% over the five-year period from 2012 to 2016.

In 2017, the average IPO produced a first-day gain of 14%, compared to 12% for the average IPO in 2016 and 16% in 2015. The average life sciences IPO company gained 13% in first-day trading in 2017, compared to 14% for the year's non–life sciences IPO companies. This contrasts with 2016, when the average life sciences company rose 6% on its first trading day—less than half the 16% gain achieved by non–life sciences IPO companies.

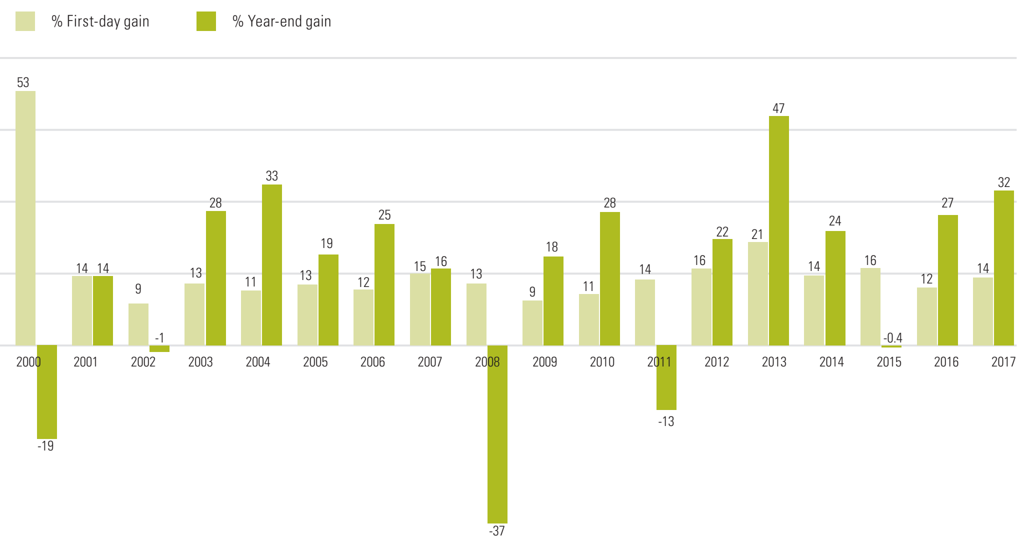
As in 2016, there was a solitary "moonshot" (an IPO that doubles in price on its opening day) in 2017—down from an annual average of six moonshots between 2013 and 2015. The 2016 and 2017 counts are more in line

Distribution of IPO Offering Size – 2014 to 2017

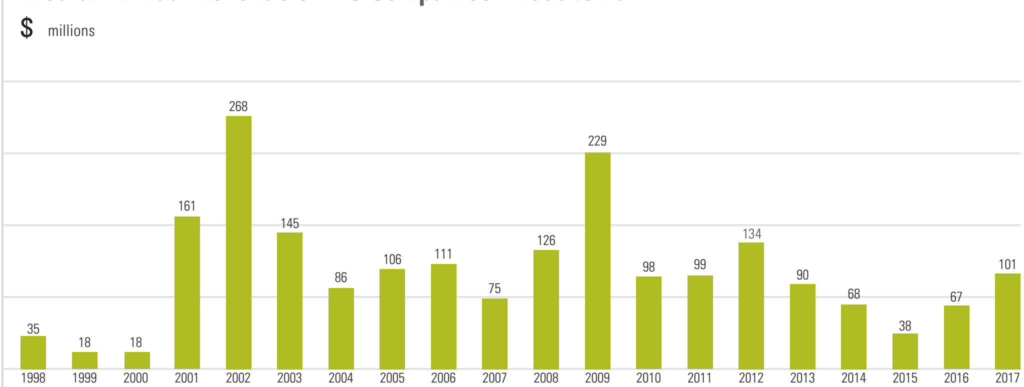


Source: SEC filings

Average IPO First-Day and Year-End Gain by Year – 2000 to 2017



Median Annual Revenue of IPO Companies – 1998 to 2017



Source: SEC filings and IPO Vital Signs with the incidence of moonshots that followed the dot-com bust, when no more than a pair occurred each year.

In 2017, 20% of IPOs were “broken” (IPOs whose stock closes below the offering price on their first trading day). This figure is down from 24% in 2016 and 26% in 2015, and represents the second-lowest annual level since 2004. In 2017, 25% of life sciences company IPOs were broken, compared to 18% of non–life sciences company IPOs.

The average 2017 IPO company ended the year 32% above its offering price—with the average life sciences IPO company trading 35% above its offering price by year-end, compared to 30% for the average non–life sciences IPO company. This comparison reverses sector aftermarket performance in 2016, which saw the average life sciences IPO company end the year trading 16% above its offering price, compared to 34% for the average non–life sciences IPO company.

The year’s best performers were a pair of life sciences companies, AnaptysBio (trading 571% above its offering price at year-end) and argenx (up 271%), followed by tech companies Roku (up 270%) and SMART Global Holdings (up 206%).

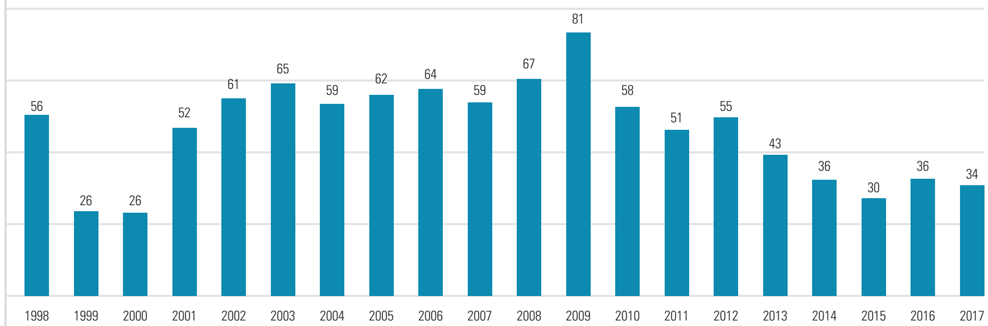
At the end of 2017, 30% of the year’s IPO companies were trading below their offering price—a statistic that included 39% of life sciences IPO companies, compared to 26% of their non–life sciences counterparts.At year-end, 44% of all 2017 IPOs were trading at least 25% above their offering price.

Individual components of the IPO market fared as follows in 2017:

— ***VC-Backed IPOs***: The number of IPOs by venture capital–backed US issuers increased by 28%, from 39 in 2016 to 50 in 2017, while their market share declined slightly, from 50% to 48%. The median offering size for US venture-backed IPOs increased by 29%, from $75.0 million in 2016 to $96.8 million in 2017. The median deal size for non–VC-backed companies was $156.0 million in 2017, up 6% from $147.0 million in 2016. The average 2017 US-issuer VC-backed IPO gained 35% from its offering price through year-end.

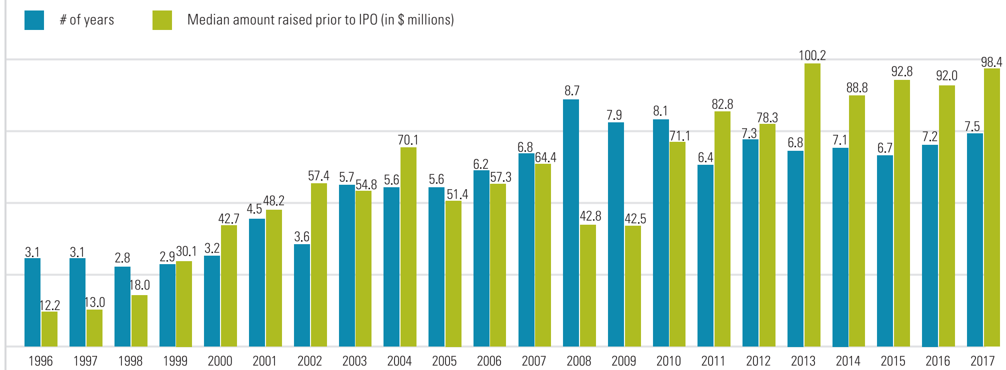
Percentage of Profitable IPO Companies – 1998 to 2017

%



Source: SEC filings and IPO Vital Signs

Median Time to IPO and Median Amount Raised Prior to IPO – 1996 to 2017



Source: Dow Jones VentureSource and SEC filings

— ***PE-Backed IPOs***: Private equity–backed IPOs by US issuers increased by 44%, from 18 in 2016 to 26 in 2017. Overall, PE-backed issuers accounted for 25% of all US-issuer IPOs in 2017, compared to 23% in both 2015 and 2016. The median deal size for PE-backed IPOs in 2017 was $233.3 million, compared to $101.8 million for all other IPOs. The average PE-backed IPO in 2017 gained 26% from its offering price through year-end.

— ***Life Sciences IPOs***: There were 44 life sciences company IPOs in 2017, an increase of 10% from the 40 in 2016. Although the sector’s market share declined from 41% in 2016 to 31% in 2017—its lowest level since 2013—the 2017 market share compares favorably to the 17% figure over the five-year period from 2009 to 2013. The average life sciences IPO company in 2017 ended the year up 35% from its offering price, compared to a 30% year-end gain for non–life sciences IPO companies.

— ***Tech IPOs***: Deal flow in the technology sector increased by 69%, from 26 IPOs in 2016 to 44 IPOs in 2017. The sector’s market share increased for the second year in a row, reaching 31% in 2017 after rising from 23% in 2015 to 27% in 2016—although the tech sector’s 2017 market share remains well below the 46% it enjoyed in 2011. The average tech IPO ended the year with a gain of 32% from its offering price, compared to 31% for non-tech IPOs.

— ***Foreign-Issuer IPOs***: The number of US IPOs by foreign issuers almost doubled, from 20 in 2016 (20% of the market) to

38 in 2017 (27% of the market). Among foreign issuers, Chinese companies led the year with 16 IPOs (the highest annual number of IPOs from China since 2010), followed by companies from the United Kingdom (four IPOs) and Canada (three IPOs). The average foreign issuer IPO company ended the year trading 19% above its offering price.

In 2017, 55 companies based in the eastern United States (east of the Mississippi River) completed IPOs, compared to 49 for western US–based issuers. California led the state rankings with 25 IPOs, followed by Massachusetts (16 IPOs), New York (13 IPOs), Texas (11 IPOs) and Pennsylvania (five IPOs).

OUTLOOK

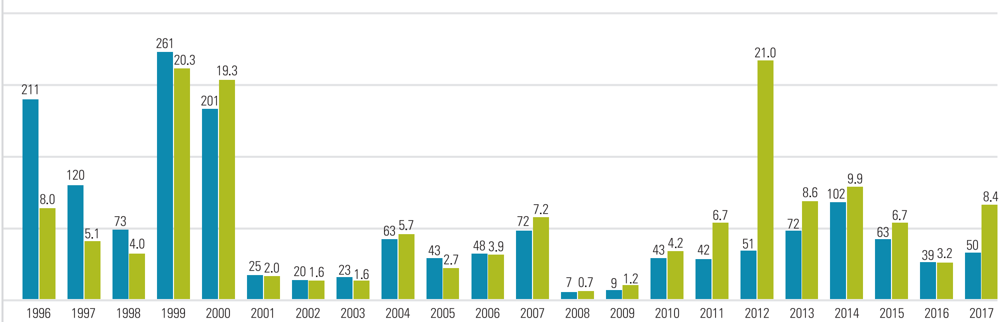
IPO market activity in the coming year will depend on a number of factors, including the following:

— ***Economic Growth***: Despite an unexpected slowdown in the fourth quarter of 2017, the US economy grew 2.3% last year—an increase from the 1.6% growth rate for 2016. A strengthening global economy coupled with the overhaul of US corporate and individual income tax rates in late 2017 may spur higher growth this year, although increasing interest rates and inflationary pressures pose headwinds. Geopolitical concerns, including rising international trade tensions, the growing likelihood of a messy Brexit and potential military conflicts in several regions of the world, could also dampen near-term economic growth.

— ***Capital Market Conditions***: The major US stock indices posted solid gains in 2017, with the Dow Jones Industrial Average up 25%, the Nasdaq Composite Index up 28% and the S&P 500 up 19%. Moreover, each index ended every quarter sequentially higher. However, the current market cycle, at almost nine years old, is the second-longest bull market on record, and the sharp market corrections that occurred several times in the first quarter of 2018 serve as a reminder that a market downswing is inevitable. Strong capital market conditions, if sustained, will likely contribute to increased IPO activity.

Venture Capital–Backed IPOs – 1996 to 2017

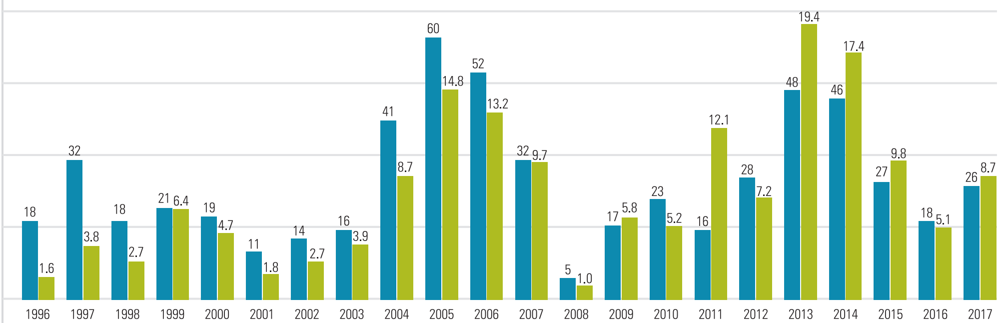
of VC-backed IPOs Dollar volume (in $ billions)



Source: Dow Jones VentureSource and SEC filings
Based on US IPOs by VC-backed US issuers.

Private Equity–Backed IPOs – 1996 to 2017

of PE-backed IPOs Dollar volume (in $ billions)



Source: Thomson Reuters and SEC filings
Based on US IPOs by PE-backed US issuers.

— ***Venture Capital Pipeline***: The pool of IPO candidates remains large and vibrant, including approximately 170 "unicorns" (private companies with valuations exceeding $1 billion). Although many VC-backed companies continue to be able to raise private "IPO-sized" rounds and delay their public debuts, investor demand for cash returns, coupled with the attractive valuations and solid aftermarket performance of VC-backed IPOs in 2017, should prompt additional VC-backed IPOs in 2018. The extent to which VC-backed companies—and other EGCs that remain on the sidelines—decide to pursue IPOs, and the timing of these decisions, will continue to have a substantial effect on the overall IPO market.

— ***Private Equity Impact***: Fundraising in 2017 finally surpassed the longstanding record of 2008. Private equity firms sitting on record levels of "dry powder" (unspent capital that investors have committed to provide) are eager to put their reserves to work, but the elevated inflow of capital is intensifying competition for quality deals and driving up prices in some segments. At the same time, PE firms will face pressure to exit investments—via IPOs or sales of portfolio companies—and return capital to investors.

The IPO market has begun 2018 on a promising note, with 41 IPOs in the first quarter of the year—the second-highest number of IPOs in the first quarter of any year since 2000, trailing only the 60 IPOs in the first quarter of 2014. ■

CALIFORNIA

After two consecutive years of contraction, the California IPO market rebounded to produce 25 IPOs in 2017, a 32% increase from the 19 in 2016, but trailing the average of 41 IPOs over the four-year period from 2012 to 2015. Gross proceeds in 2017 were $6.22 billion—the fifth-highest annual level since 2000.

The largest California IPO in 2017 came from Snap ($3.4 billion), followed by offerings from Emerald Expositions Events ($264 million) and Denali Therapeutics (at $250 million, the nation's largest life sciences IPO of the year).

The California IPO market continues to be dominated by technology and life sciences companies, which together accounted for all but five of the state's offerings in 2017, or 80% of the total (a decline from the 87% over the five-year period from 2012 to 2016), compared to an average of 57% for the rest of the country.

The number of venture-backed California IPOs increased by one-half, from 12 in 2016 to 18 in 2017. The 2017 tally represents 37% of all US-issuer VC-backed IPOs, up from 31% in 2016 but below the 47% recorded during the five-year period from 2012 to 2016.

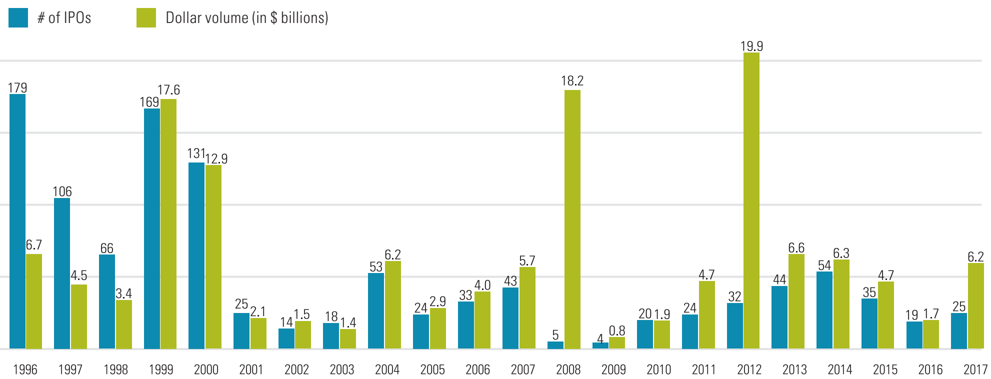
The average 2017 California IPO produced a first-day gain of 18%. The state's top performers were Roku (up 68% in first-day trading) and MuleSoft (up 46%).

At year-end, 76% of the state's IPOs were trading above their offering price, with the average California IPO up 56% from its offering price.

California accounted for three of the four best-performing IPOs in the United States in 2017, led by AnaptysBio (up 571% at year-end). The eleven best-performing California IPOs were all by technology and life sciences companies.

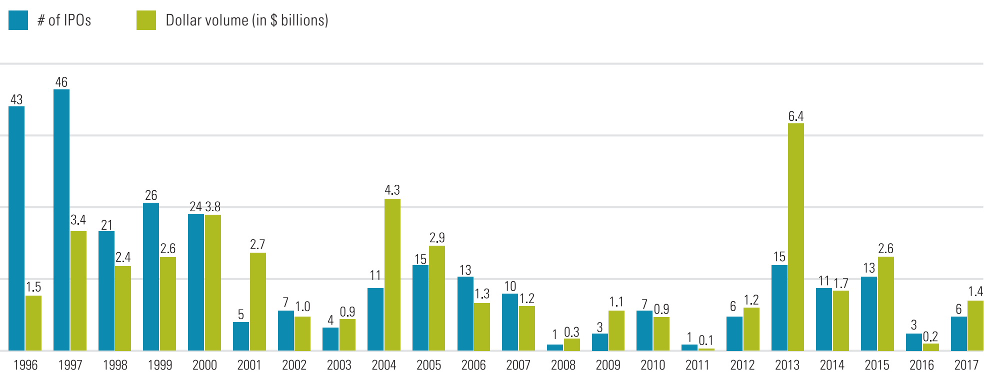
With the largest pool of venture capital–backed companies in the United States and a wealth of entrepreneurial talent, California should remain a major source of attractive IPO candidates in 2018, particularly from the technology and life sciences sectors.

California IPOs – 1996 to 2017



Source: SEC filings

Mid-Atlantic IPOs – 1996 to 2017



Source: SEC filings

MID-ATLANTIC

The mid-Atlantic region of Virginia, Maryland, North Carolina, Delaware and the District of Columbia produced six IPOs in 2017, doubling the tally from 2016 but falling well below the annual double-digit count that prevailed from 2013 to 2015.

North Carolina led the region for the third time in the last five years, with four IPOs. Maryland and Virginia accounted for the remaining two.

The region's total proceeds in 2017 were $1.40 billion. The largest mid-Atlantic IPOs of 2017 came from JELD-WEN Holding, based in North Carolina ($575 million), and Maryland-based Laureate Education ($490 million)—the first IPO in history by a "public benefit corporation" (a special type of for-profit corporation that is intended to produce a public benefit and to operate in a responsible and sustainable manner).

The average 2017 mid-Atlantic IPO produced a first-day gain of 9%, led by Appian (up 25% in first-day trading) and Dova Pharmaceuticals (up 17%).

At year-end, all but one of the region's IPOs were trading above their offering price, with the average mid-Atlantic IPO up 58%. The best-performing mid-Atlantic IPOs of the year were from Appian (up 162% at year-end) and JELD-WEN Holding (up 71%).

Given the mid-Atlantic's continuing strengths in life sciences, technology and other industries, the region should experience continued recovery in IPO activity in the coming year.

NEW ENGLAND

The number of New England IPOs increased by 42% from 12 in 2016 to 17 in 2017—the third-highest annual count since 2000, trailing only the 23 IPOs in 2007 and the 32 in 2014.

Massachusetts accounted for all but one of the region's IPOs in 2017. The state's tally was the second-highest state total in the country for the fifth consecutive year, trailing only California.

Gross proceeds in the region increased 38%, from $1.22 billion in 2016 to $1.67 billion in 2017.

The largest New England IPOs in 2016 were by Biohaven Pharmaceuticals ($168 million) and J.Jill ($152 million).

Life sciences companies accounted for 13 of the region's IPOs in 2017 (or 76% of the total), representing 42% of all life sciences IPOs by US issuers.

The region also produced two notable tech company IPOs in 2017—CarGurus ($150 million) and Casa Systems ($78 million), both of which performed well in the aftermarket.

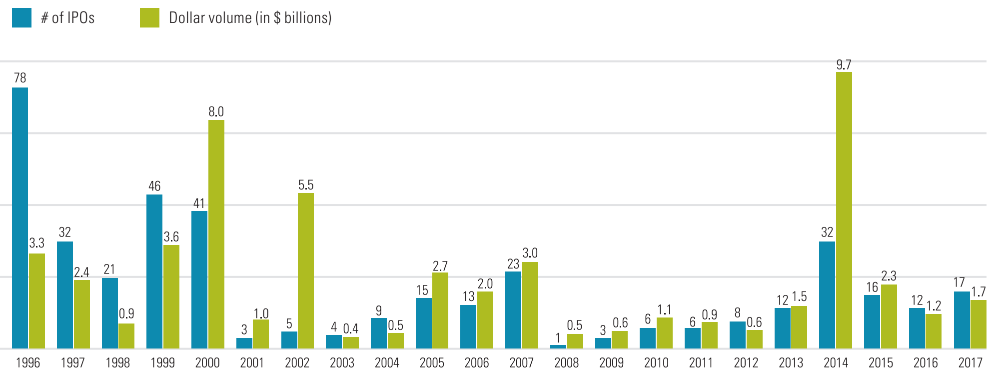
The number of venture-backed New England IPOs increased from nine in 2016 to 14 in 2017, the region accounting for 27% of all US-issuer VC-backed IPOs in 2017—the highest percentage in at least the last 20 years, surpassing the region's 25% market share in both 2007 and 2014.

The average 2017 New England IPO ended its first trading day 11% above its offering price. The region's top performer was Rhythm Pharmaceuticals (up 77% in first-day trading).

At year-end, the average New England IPO was up 30% from its offering price, led by Boston Omaha (up 149% at year-end) and Akcea Therapeutics (up 117%).

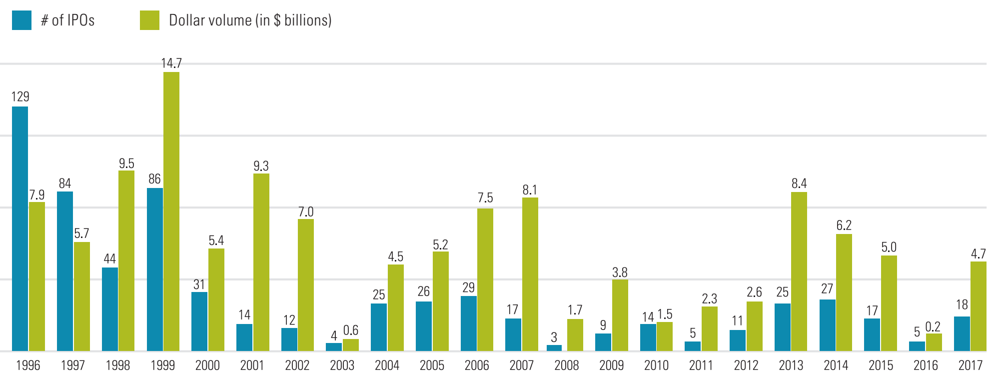
With the region's world-renowned universities and research institutions serving as incubators for emerging tech and life sciences companies, and with strong levels of venture capital investment, New England should continue to generate attractive IPO candidates in the coming year.

New England IPOs – 1996 to 2017



Source: SEC filings

Tri-State IPOs – 1996 to 2017



Source: SEC filings

TRI-STATE

The number of IPOs in the tri-state region of New York, New Jersey and Pennsylvania jumped from an uncharacteristic low of five in 2016 to 18 in 2017.

New York produced 13 of the region's 2017 IPOs, with Pennsylvania accounting for the remaining five. For the first time in at least 20 years, New Jersey failed to produce a single IPO.

Gross proceeds from tri-state IPOs in 2017 were $4.72 billion, led by Altice USA's offering, with $1.92 billion in proceeds—the nation's second-largest IPO in 2017.

The year's next-largest tri-state IPOs came from PQ Group Holdings ($508 million), Evoqua Water Technologies ($500 million) and Blue Apron Holdings ($300 million).

The average 2017 tri-state IPO produced a first-day gain of 8%. The region's top performers in first-day trading were Avenue Therapeutics (up 38% from its offering price) and MongoDB (up 34%).

At year-end, the average tri-state IPO was up 15% from its offering price. The best-performing tri-state IPO of the year was Hamilton Lane (up 121% at year-end), followed by BeyondSpring and Athenex (both up 45%).

With the level of venture capital activity in the tri-state region trailing only that of California, the coming year should see a continued rebound in deal flow from the life sciences and technology sectors, coupled with offerings from larger, more established financial services and private equity–backed companies. ■

PROFILE OF SUCCESSFUL IPO CANDIDATES

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

- *Outstanding Management:* An investment truism is that investors invest in people, and this is even truer for companies going public. Every company going public needs experienced and talented management with high integrity, a vision for the future, lots of energy to withstand the rigors of the IPO process and a proven ability to execute. An IPO is not the best time for a fledgling CEO or CFO to cut his or her teeth.
- *Market Differentiation:* IPO candidates need a superior technology, product or service in a large and growing market. Ideally, they are viewed as market leaders. Appropriate intellectual property protection is expected of technology companies, and in some sectors patents are *de rigueur*.
- *Substantial Revenue:* With some exceptions, substantial revenue is expected—at least $50 million to $75 million annually—in order to provide a platform for attractive levels of profitability and market capitalization.
- *Revenue Growth:* Consistent and strong revenue growth—25% or more annually—is usually needed, unless the company has other compelling features. The company should be able to anticipate continued and predictable expansion to avoid the market punishment that accompanies revenue and earnings surprises.
- *Profitability:* Strong IPO candidates generally have track records of earnings and a demonstrated ability to enhance margins over time, although IPO investors often appear to value growth more highly than near-term profitability.
- *Market Capitalization:* The company's potential market capitalization should be at least $200 million to $250 million, in order to facilitate development of a liquid trading market. If a large portion of the company will be owned by insiders following the IPO, a larger market cap may be needed to provide ample float.

HOW DO YOU COMPARE?

Set forth below are selected metrics about the IPO market, based on combined data for all US IPOs from 2013 through 2017.

Percentage of IPO companies qualifying as EGCs under JOBS Act	86%
Median offering size	$100.1 million (16% below $50 million and 9% above $500 million)
Median annual revenue of IPO companies	$70.2 million (44% below $50 million and 20% above $500 million)
Percentage of IPO companies that are profitable	36%
State of incorporation of IPO companies	Delaware—93% No other state over 1%
Percentage of IPOs including selling stockholders, and median percentage of offering represented by those shares	Percentage of IPOs—25% Median percentage of offering—34%
Percentage of IPOs including directed share programs, and median percentage of offering represented by those shares	Percentage of IPOs—39% Median percentage of offering—5%
Percentage of IPO companies disclosing adoption of ESPP	44%
Percentage of IPO companies using a "Big 4" accounting firm	77%
Stock exchange on which the company's common stock is listed	Nasdaq—64% NYSE—36%
Median underwriting discount	7%
Number of SEC comments contained in initial comment letter	Median—29 25th percentile—22 75th percentile—40
Median number of Form S-1 amendments (excluding exhibits-only amendments) filed before effectiveness	Five
Time elapsed from initial confidential submission to initial public filing of Form S-1 (EGCs only)	Median—69 calendar days 25th percentile—46 calendar days 75th percentile—110 calendar days
Time elapsed from initial confidential submission (if EGC) or initial public filing to effectiveness of the Form S-1	Median—117 calendar days 25th percentile—90 calendar days 75th percentile—176 calendar days
Median offering expenses	Legal—$1,500,000 Accounting—$850,000 Total—$3,205,000

Other factors can vary based on a company's industry and size. For example, many life sciences companies will have much smaller revenue and not be profitable. More mature companies are likely to have greater revenue and market caps, but slower growth rates. High growth companies are likely to be smaller, and usually have a shorter history of profitability.

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

The cornerstone of the JOBS Act is the creation of an "IPO on ramp" that provides "emerging growth companies" (EGCs) with a phase-in period, which can continue until the last day of the fiscal year following the fifth anniversary of an IPO, to come into full compliance with certain disclosure and accounting requirements. Although the overwhelming majority of all IPO candidates qualify as EGCs, different items of EGC relief are being adopted at different rates, with some additional variation among types of IPO companies.

CONFIDENTIAL SUBMISSION OF FORM S-1

An EGC is able to submit a draft Form S-1 registration statement to the SEC for confidential review instead of filing it publicly on the SEC's EDGAR system. A Form S-1 that is confidentially submitted must be substantially complete, including all required financial statements and signed audit reports. The SEC review process for a confidential submission is the same as for a public filing. A confidentially submitted Form S-1 must be filed publicly no later than 15 days before the road show commences.

Confidential submission enables an EGC to maintain its IPO plans in secrecy and delay disclosure of sensitive information to competitors and employees until much later in the process, although it also delays any perceived benefits of public filing. Depending on the timing, confidential review also means that the EGC can withdraw the Form S-1 without any public disclosure at all if, for example, the SEC raises serious disclosure issues that the EGC does not want made public or market conditions preclude an offering. Confidential submission has been widely adopted by EGCs.

REDUCED FINANCIAL DISCLOSURE

EGCs must provide only two years of audited financial statements (instead of three years), plus unaudited interim financial statements, and need not present selected financial data for any period prior to the earliest audited period (instead of five years). Similarly, an EGC is only required to include MD&A for the periods presented in the required financial statements.

Life sciences companies, for which older financial information is often irrelevant, have overwhelmingly embraced the option of providing only two years of audited financial statements and two years of selected financial data. Technology companies, which generally have substantial revenue and often have profitable operations, are more likely than life sciences companies to provide three years of audited financial statements and at least three years of selected financial data, although the percentage doing so has declined significantly over the past two years.

ACCOUNTING AND AUDITING RELIEF

EGCs may choose not to be subject to any accounting standards that are adopted or revised on or after April 5, 2012, until these standards are required to be applied to nonpublic companies. This election must be made on an "all or nothing" basis, and a decision not to adopt the extended transition is irrevocable. The delayed application of new or revised accounting standards could make it difficult for investors to compare a company's financial statements to those of its non-EGC comps and make it harder for a company to transition out of EGC status. Since enactment of the JOBS Act, technology companies have been twice as likely as life sciences companies to adopt the extended transition period, and the percentage of technology EGCs doing so spiked from 18% in 2016 to 55% in 2017, generally motivated by a desire to delay application of the new revenue recognition standard.

EGCs are automatically exempt from any future mandatory audit firm rotation requirement and any rules requiring that auditors supplement their audit reports with additional information about the audit or financial statements of the company—such as the requirement to make disclosure about critical audit matters (CAMs) under new auditing standard AS 3101. Any other new auditing standards will not apply to audits of EGCs unless the SEC determines that application of the new rules to audits of EGCs is necessary or appropriate in the public interest. To date, the SEC has applied all new auditing standards to audits of EGCs.

REDUCED EXECUTIVE COMPENSATION DISCLOSURE

An EGC need not provide Compensation Discussion and Analysis (CD&A); compensation information is required only for three named executive officers (including the CEO); and only three of the seven compensation tables otherwise required must be provided. The use of these reduced compensation disclosures is almost universal practice among EGCs, without apparent investor pushback.

SECTION 404(B) EXEMPTION

EGCs are exempt from the requirement under Section 404(b) of the Sarbanes-Oxley Act that an independent registered public accounting firm audit and report on the effectiveness of a company's internal control over financial reporting (ICFR), beginning with the company's second Form 10-K. Most EGCs are adopting this exemption at the time it becomes applicable to them, although the decision need not be disclosed in advance in the Form S-1. ■

EGC ELECTIONS

Based on IPOs initiated after enactment of the JOBS Act and completed by EGCs through 2017, below are the rates of adoption with respect to several key items of EGC relief:

ITEM	LIFE SCIENCES COMPANIES	TECH COMPANIES	OTHER COMPANIES
Confidential submission of Form S-1	96%	96%	90%
Two years of audited financial statements	88%	40%	63%
Deferred application of new or revised accounting standards	10%	20%	16%
Omission of CD&A	100%	99%	97%

New SEC Staff Policies and Practices to Encourage Public Offerings

The JOBS Act of 2012 was intended to spur job creation and economic growth by improving access to the capital markets for startup and emerging companies. Over the past year, the SEC staff has been taking additional steps—through changes in staff policies and practices rather than formal rules—to encourage IPOs and follow-on offerings.

NONPUBLIC REVIEW OF REGISTRATION STATEMENTS

In July 2017, the staff changed its review procedures to allow any company, regardless of its status as an emerging growth company (EGC), to submit a draft registration statement for "nonpublic review," and made the new nonpublic review process available for a wider range of offerings and registration statements (see article on pages 11–14).

OMISSION OF CERTAIN FINANCIAL STATEMENTS

In January 2016, to further streamline the IPO process for EGCs, the FAST Act amended the JOBS Act to permit an EGC to omit from its Form S-1 financial information that relates to a historical period that the company reasonably believes will not be required to be included in the Form S-1 at the time of the contemplated offering, as long as the company amends the Form S-1 to include all required financial information before distributing a preliminary prospectus to investors.

Shortly thereafter, the staff issued an interpretation that narrowed the usefulness of the amendment. In its interpretation, the staff concluded that a company may not omit interim financial statements for a period that will be included within required financial statements covering a longer interim or annual period at the time of the offering, even though the shorter period will not be presented separately at that time. In August 2017, the staff effectively reversed this interpretation and announced that, under new staff policy, an EGC may omit from its draft registration statements interim financial information that it reasonably believes it will not be required to present separately at the time of the offering.

A non-EGC is not eligible for the FAST Act relief. Under the new staff policy, however, a non EGC may omit from its draft registration statements submitted for nonpublic review annual and interim financial information that it reasonably believes it will not be required to present separately at the time that it publicly files its registration statement. A non-EGC may not omit any required financial information from its filed registration statements.

By omitting financial statements from submissions and filings of the Form S-1, a company may be able to avoid offering delays and to eliminate some of the costs associated with the preparation and audit of financial statements.

MANDATORY ARBITRATION PROVISIONS

Brokerage account agreements and other consumer contracts routinely include provisions requiring claims to be resolved through arbitration rather than court proceedings. Public companies historically have not sought to impose mandatory arbitration for stockholder claims, and an attempt to do so in connection with a 2012 IPO was abandoned after encountering significant investor criticism and staff and political opposition.

In public comments made in July 2017, one SEC commissioner expressed support for permitting IPO companies to include mandatory arbitration provisions in their corporate charters, but SEC action on this topic does not appear imminent. In subsequent congressional testimony, when asked whether he would support the ability of public companies to require arbitration of stockholder claims, SEC Chair Clayton stated that he is "not anxious to see a change in this area" and that "this is not an area that is on my list of where we could do better."

STAFF REVIEW OF REGISTRATION STATEMENTS

Staff comment letters on IPO registration statements have become more focused on the most significant issues presented by a company's business and its disclosures. Reflecting this focus, the typical number of comments in the first comment letter has dropped from 30-40 several years ago to 20-25 today.

The staff typically does not review registration statements for follow-on offerings, but a proposed follow-on offering generally cannot proceed until the staff confirms it will not review the registration statement. Staff "no-review" decisions are now being communicated faster, sometimes within one day after filing. ■

ENCOURAGEMENT OF FURTHER RELIEF

Rule 3-13 under Regulation S-X has long permitted companies to seek SEC relief to permit the omission of required financial statements or the substitution of "appropriate statements of comparable character" if the relief is "consistent with the protection of investors." Such requests can be bolstered by demonstrating that satisfaction of the requirement would involve "unreasonable effort or expense"—the general standard contained in Rule 409 under the Securities Act for relief from SEC disclosure requirements.

Historically, the process of seeking relief was time-consuming and its outcome uncertain, but on numerous recent occasions senior staff members have expressed an increased willingness to consider requests for modifications. In public commentary, SEC Chair Jay Clayton stated that there are circumstances in which the SEC's reporting rules may require public companies to make disclosures that are burdensome to generate but may not be material to the total mix of information available to investors. He encouraged companies to consider whether modifications to their financial reporting requirements in these situations may be helpful in connection with capital-raising activities and indicated that the staff is placing a high priority on responding with timely guidance to such requests for modifications.

Grants of requested relief are generally not publicly disclosed (although relief correspondence may be subject to disclosure pursuant to Freedom of Information Act requests), so it is difficult to predict how far the staff's flexibility will extend. Anecdotal evidence suggests that some relief requests may represent a bridge too far, such as the omission from an initial submission of audited financial statements that are otherwise required.

OVERVIEW

July 2017, the SEC staff changed its review procedures to allow any company, regardless of its status as an emerging growth company (EGC), to submit a draft registration statement for "nonpublic review." In announcing the new policy, the staff indicated that the nonpublic review process is intended to be similar to the confidential submission process available only to EGCs under the JOBS Act. The nonpublic review process does not limit the confidential submission process for EGCs, and the staff continues to review those submissions in the normal course.

The new nonpublic review process is based on staff policy and not the JOBS Act. Thus, other key benefits of the JOBS Act, including reduced financial and executive compensation disclosure, the deferred application of new or revised accounting standards, and the ability to engage in "test-the-waters" communications, remain available only to EGCs. Extension of these accommodations to non-EGCs would require additional legislation or formal SEC rulemaking.

ELIGIBILITY

The nonpublic review process is available to all companies (including foreign issuers), except asset-backed issuers. Compared to the confidential submission process under the JOBS Act, which is limited to IPOs by EGCs on Form S-1 (for US issuers) or Form F-1 (for foreign private issuers), the nonpublic review process is available for a wider range of offerings and registration statements:

— a company's initial registration statement under the Securities Act (most importantly, a Form S-1 or Form F-1 for an IPO);

— a company's initial registration statement under Section 12(b) of the Exchange Act (most importantly, Form 10 or Form 20-F to register a class of security under the Exchange Act in conjunction with listing on a national securities exchange); and

— the submission of a draft registration statement (but not amendments thereto) for a follow-on public offering submitted prior to the end of the twelfth month following the effective date of a company's initial registration statement under the Securities Act or registration statement under Section 12(b) of the Exchange Act.

CONTENTS OF NONPUBLIC SUBMISSION

The requirements for the contents of a registration statement submitted for nonpublic review are similar to those applicable to a confidential submission. The registration statement must be substantially complete, including all required financial statements, signed audit reports and exhibits, but need not be signed by the company, its directors or its principal officers, include consents from auditors or other experts, state the proposed maximum offering size on the outside front cover, or be accompanied by the SEC registration fee. As with a confidential submission, the required signatures, consents and SEC registration fee are provided upon the first public filing following nonpublic review.

A non-EGC is not eligible for the FAST Act relief that permits an EGC to omit certain financial statements otherwise required by Regulation S-X. Under staff policy, however, a non EGC may omit from its draft registration statements annual and interim financial information (including financial statements of an acquired business and pro forma financial information to reflect business combinations) that it reasonably believes it will not be required to present separately at the time that it publicly files its registration statement. A non-EGC may not omit any required financial information from its filed registration statements.

SEC AND FINRA REVIEW

The timing and nature of the SEC and FINRA review processes for a draft Form S-1 submitted for nonpublic review are generally the same as for a confidential submission by an EGC and for a public filing.

As in the case of confidential submission, the SEC and FINRA will initiate their reviews upon nonpublic submission, with the timing and nature of review generally the same as for a public filing, and the SEC staff will publicly release its comment letters and company responses on EDGAR no earlier than 20 business days following the effective date of the registration statement. The SEC registration fee is paid upon public filing, while the FINRA filing fee is paid upon the initial nonpublic submission.

PUBLIC FILING REQUIREMENTS

If a company elects to submit a draft registration statement for nonpublic review, the company must publicly file the registration statement (including the initial submission and all amendments) on EDGAR no later than:

— in the case of an IPO, 15 days before commencing the road show (or 15 days before the requested date of effectiveness, if there is no road show);

— in the case of Exchange Act registration, 15 days before the anticipated date of effectiveness of the registration statement for listing on a national securities exchange; and

— in the case of a follow-on offering, 48 hours before the requested time and date of effectiveness.

There is no requirement that the initial nonpublic draft registration statement and amendments thereto be publicly filed concurrently as long as all are filed within the required time frame. Upon public filing, the previous nonpublic submissions need not be signed or include consents.

CONFIDENTIALITY CONSIDERATIONS

Although the confidential review process (available only to EGCs) and the nonpublic review process (available to any company) are similar, they present different confidentiality considerations, due to the risk that materials submitted during nonpublic review may be subject to disclosure in response to a Freedom of Information Act (FOIA) request prior to public filing.

In contrast to the FOIA exemption accorded by the JOBS Act to confidential submissions by an EGC, a draft Form S-1 (and supplemental information) that is submitted by a non-EGC to the SEC in accordance with the nonpublic

Continued on page 14

COMPARISON OF PUBLIC FILING, CONFIDENTIAL SUBMISSION AND NONPUBLIC REVIEW

SUBJECT	PUBLIC FILING	CONFIDENTIAL SUBMISSION	NONPUBLIC REVIEW
Origin of Process:	Securities Act, since May 27, 1933	JOBS Act, since April 5, 2012	Staff policy, since July 10, 2017
Eligibility:			
Companies	All companies	EGCs only	All companies, except asset-backed issuers
Registrations	All types	IPOs on Form S-1 (US issuers) or Form F-1 (foreign private issuers) only	IPOs, Form 10 and 20-F registrations, and follow-on offerings within one year after IPO or Form 10 or Form 20-F registration
Contents of Filing/Submission:			
Completeness of filing/submission	Complete	Substantially complete (except for disclosures EGCs are permitted to omit)	Substantially complete (except for disclosures EGCs are permitted to omit)
Specification of proposed maximum offering size on cover	Required	Not required until public filing	Not required until public filing
Financial statements	Required (subject to permitted omissions)	Required (subject to permitted omissions)	Required (subject to permitted omissions)
Accounting standards election (EGCs only)	Required	Not required until public filing	Not required until public filing
Signatures	Required	Not required until public filing	Not required until public filing
Signed audit reports	Required	Required	Required
Consents	Required	Not required until public filing	Not required until public filing
Exhibits	Required	Required	Required
SEC registration fee	Required	Not required until public filing	Not required until public filing
FINRA filing fee	Required	Required	Required

SUBJECT	PUBLIC FILING	CONFIDENTIAL SUBMISSION	NONPUBLIC REVIEW
SEC and FINRA Review:			
Timing and nature of SEC review	Unchanged	Unchanged	Unchanged
Public release of SEC review correspondence	20 business days following effective date	20 business days following effective date	20 business days following effective date
Timing and nature of FINRA review	Unchanged	Unchanged	Unchanged
Public Filing Requirements:			
IPO	Initial filing	15 days before road show (or 15 days before effectiveness, if no road show)	15 days before road show (or 15 days before effectiveness, if no road show)
Exchange Act registration	Initial filing	Not applicable	15 days before effectiveness
Follow-on offering	Initial filing	Not applicable	48 hours before requested time and date of effectiveness
Confidentiality Considerations:			
Confidential treatment requests	Permitted	Permitted, but not necessary prior to public filing	Permitted, and advisable prior to public filing to help preserve confidentiality
Confidentiality of filing/submission	None, subject to confidential treatment requests	Exempt from disclosure in response to FOIA requests, until public filing	Staff keeps submission confidential, subject to potential disclosure in response to FOIA requests
Public announcement of filing/submission	Permitted	Permitted	Permitted, but may subject submission to disclosure in response to FOIA requests
Submission Mechanics:			
Submission via EDGAR	Required	Required	Required
Form type	Form S-1 (initial filing) and Form S-1/A (amendments)	DRS (initial submission) and DRS/A (amendments)	DRS (initial submission) and DRS/A (amendments)

review process is not exempt from FOIA, and potentially could be disclosed in response to a FOIA request prior to public filing. Similarly, review correspondence associated with nonpublic review may be subject to FOIA requests before such correspondence is publicly released in accordance with normal staff practice.

A Form S-1 submitted for nonpublic review, along with related supplemental information and review correspondence on the Form S-1, would be subject to release in response to FOIA requests unless exempt from disclosure under a specific FOIA exemption. Assuming proper procedures under SEC Rule 83 are followed, FOIA Exemption 4—covering "trade secrets and commercial or financial information" that is "privileged or confidential"—should exempt the entire Form S-1 (along with supplemental information and review correspondence) from disclosure as long as the company has not publicly disclosed the fact that it has submitted a Form S-1 for nonpublic review. Otherwise, the release of any materials in response to a FOIA request would disclose the fact that the company has submitted a Form S-1 for nonpublic review, which fact should constitute "trade secrets and commercial or financial information" that is "privileged or confidential."

A non-EGC that wishes to keep confidential the fact that it has submitted a draft Form S-1 for nonpublic review—and the entire contents of the Form S-1—should submit the Form S-1 pursuant to a Rule 83 confidential treatment request. In lieu of the normal Rule 83 procedures, the staff has indicated that a company may make this request electronically using submission type DRSLTR when submitting the draft Form S-1 and that, if doing so, the company need not send paper copies of the request and the materials to the SEC's Division of Corporation Finance or FOIA office. The company should include a legend at the top of each page of the electronically submitted draft Form S-1 indicating that the company has requested confidential treatment for the draft Form S-1 pursuant to Rule 83. In this circumstance, there is no need to redact any information from the Form S-1 upon its submission.

If a non-EGC publicly announces that it has submitted a Form S-1 for nonpublic review, the SEC may not be able to withhold the entire Form S-1 in response to a FOIA request, as the fact that the company has submitted the Form S-1 will no longer be confidential. In this circumstance, if a FOIA request is made for the Form S-1, the company must substantiate its request for confidentiality of specific information contained in the Form S-1, in accordance with the procedures prescribed by SEC Rule 80. The outcome of this process is likely to be the release of portions of the Form S-1. Nonetheless, for a non-EGC that wishes to keep its IPO plans and the contents of its Form S-1 confidential as long as possible, there is no downside to submitting the Form S-1 for nonpublic review as compared to the alternative of public filing from the outset, notwithstanding the risk of potential disclosure in response to a FOIA request.

When a company responds to staff comments on the Form S-1 or submits supplemental information during the nonpublic review process, confidential treatment may be sought under Rule 83. The staff has indicated that if a company does not seek confidential treatment for its response letters at the time of submission, the company should identify in the response letters the information for which it intends to seek confidential treatment upon public filing, to ensure that the staff does not include that information in its comment letters. Under Rule 418(b), the company may also request that the staff return supplemental materials provided during nonpublic review.

SUBMISSION MECHANICS

A company submitting a draft registration statement for nonpublic review follows the same procedures as an EGC for obtaining EDGAR filer codes and confidentially submitting a draft registration statement. As with confidential submissions by an EGC, a draft registration statement for nonpublic review is submitted on the EDGAR system using form types DRS (for the initial submission) and DRS/A (for amendments). The submission must also be accompanied by a cover letter confirming that the company will publicly file the registration statement and nonpublic draft submissions within the required time frame.

ADVANTAGES AND DISADVANTAGES

The advantages of nonpublic review are similar to the advantages of confidential submission: the ability to delay disclosure of the company's offering or registration plans and the information contained in the submission; the ability to abandon the company's offering or registration plans without any public disclosure at all; an extension of the time period during which the company may rely on the Rule 163A safe harbor from gun-jumping violations; and—for IPOs—delay of the deadline by which all company loans to directors and executive officers must be repaid until the first public filing of the Form S-1.

As in the case of a confidential submission, nonpublic review delays any perceived benefits of public filing, such as favorable publicity or the attraction of potential acquirers. Although Rule 135 permits a company to announce the submission of a draft Form S-1 for nonpublic review, doing so will, as discussed above, make the Form S-1 potentially vulnerable to disclosure in response to FOIA requests. On balance, it seems likely that most companies will conclude that the benefits of nonpublic review outweigh the disadvantages and will elect to submit a draft registration statement for nonpublic review rather than publicly file the registration statement at the outset.

For an IPO, EGCs ordinarily will prefer the existing confidential submission process under the JOBS Act. For qualifying follow-on offerings or Exchange Act registrations for which the JOBS Act's confidential submission process is not available, EGCs (and other companies) should find the nonpublic review process attractive. Nonpublic review should be particularly welcome for a follow-on offering, as the process will enable a company to determine before public filing whether the registration statement will be reviewed by the staff, thereby enabling the company to minimize the period of time between public disclosure of a proposed follow-on offering and pricing of the offering (as little as 48 hours, if the staff does not review the submission and pricing occurs immediately after effectiveness of the registration statement). ■

WHAT IS AN ICO?

An initial coin offering (ICO) is the sale of virtual coins or tokens, often as a means of capital raising by startup companies that are involved in blockchain technology. Depending on the terms of the offering, purchasers may use virtual currencies (such as Bitcoin or Ether) or fiat currency (such as good old American dollars) to purchase the coins or tokens. ICOs have experienced significant publicity and rapid growth over the past year. CoinDesk reports that ICO sales soared from $250 million in 2016 to $5.5 billion in 2017, and have already topped $6 billion in 2018. As a result, ICOs may be an appealing fundraising method for startups as well as established companies focused on blockchain technology.

THE SEC'S STANCE

Most ICOs thus far have proceeded largely outside of regulatory oversight, and without the investor protections and disclosures that apply to securities offerings. This fact, along with various instances of high-profile fraud in the ICO market, has caught the SEC's attention.

In July 2017, the SEC weighed in on the question of whether offerings of cryptocurrencies are subject to the federal securities laws. Following its investigation of an offering of digital tokens by "The DAO," an unincorporated virtual organization, the SEC issued a report making clear its view that traditional securities law analysis applies to new technologies. According to the SEC, the federal securities laws apply regardless of whether the issuer is a traditional company or a decentralized autonomous organization, whether the securities are purchased using US dollars or virtual currencies, and whether the securities are distributed in certificated form or through distributed ledger technology.

Both the Securities Act and the Exchange Act include a broad definition of the term "security" that encompasses a variety of instruments, including an "investment contract." The facts and circumstances test established in 1946 by the US Supreme Court in *SEC v. W.J. Howey Co.* has long been applied to determine whether a particular instrument should be considered an investment contract and therefore a security. In essence, the *Howey* test seeks to determine whether the instrument involves an investment of money in a common enterprise with profits to come solely from the efforts of others. In the DAO report, the SEC applied the *Howey* test to the facts and circumstances of the DAO offering and determined that the DAO tokens were investment contracts and therefore subject to the federal securities laws.

Since the issuance of the DAO report, the SEC has ramped up its warnings about ICOs that fail to comply with US securities laws. SEC Chair Clayton has been very vocal about his concerns with respect to ICOs in speeches and congressional testimony and has expressed his personal view that most ICOs are actually offerings of securities. He has also indicated that the SEC is looking closely at the disclosures of public companies that shift their business models to capitalize on the perceived promise of distributed ledger technology. In September 2017, the SEC Division of Enforcement established a cyber unit focused on misconduct involving distributed ledger technology and ICOs.

The SEC has brought a number of enforcement actions involving ICOs. While many of these cases involved schemes to defraud investors, the SEC is also bringing actions in connection with ICOs it considers to be unregistered offerings and sales of securities in violation of the federal securities laws. More enforcement activity appears to be on the horizon. The SEC has reportedly sent subpoenas and information requests to dozens of ICO issuers, focused in part on the use of "simple agreements for future tokens," or SAFTs—instruments that automatically convert into the tokens issued in a subsequent ICO. States have also begun bringing enforcement actions for violations of state securities laws.

WHAT'S NEXT?—SECURITIES LAW COMPLIANCE

An essential first step in any ICO is to determine whether the securities laws apply to the offering. While some companies may take the position that their token has "utility" and therefore is not a security—a position that may in fact be correct in some circumstances—one recent SEC enforcement order highlighted that even a token with practical use could be a security. The determination of whether an instrument is a security does not turn on its label as a "utility token" but instead requires an assessment of the economic realities of the transaction. In the DAO report and subsequent commentary, the SEC has made it clear that tokens and offerings that incorporate features and marketing efforts emphasizing the potential for profits based on the entrepreneurial or managerial efforts of others contain the hallmarks of a security under US law.

Going forward, most ICOs are likely to be made in a manner designed to comply with exemptions from federal and state registration requirements. As a practical matter, an ICO needs to qualify for exemptions that allow general solicitation of potential investors to facilitate the marketing of the offering. For example, at the federal level, Rule 506(c) of Regulation D permits a private placement of any size if the issuer limits purchasers to accredited investors and meets Regulation D's other requirements, including the imposition of transfer restrictions. It may also be possible to conduct an ICO pursuant to Regulation A (which has a maximum offering size of $50 million within a 12-month period) or under Regulation Crowdfunding (although its maximum offering size is only $1.07 million within a 12-month period).

Registration of an ICO under the Securities Act—as with a conventional IPO—is also a possibility and would eliminate the transfer restrictions otherwise applicable following offerings under Regulation D or Regulation Crowdfunding.

OUTLOOK

An ICO requires careful planning and can present pitfalls. However, with the ongoing maturation of the ICO market, including the entry of professional investors and greater clarity on the securities law requirements of an ICO, the technique is becoming a viable alternative for capital formation for some companies. ■

Counsel of Choice for Public Offerings

Serving industry leaders in technology, life sciences, cleantech, financial services, communications and beyond

Blue Apron
Initial Public Offering of Common Stock
$300,000,000
Counsel to Issuer
July 2017

rhythm
Initial Public Offering of Common Stock
$137,827,500
Counsel to Underwriters
October 2017

editas medicine
Public Offerings of Common Stock
$160,998,500
Counsel to Issuer
March and December 2017

ThermoFisher SCIENTIFIC
Public Offerings of Common Stock
$1,725,000,000
and
Senior Notes
$1,500,000,000
Counsel to Issuer
August 2017

agios
Public Offering of Common Stock
$546,250,000
Counsel to Issuer
January 2018

arsanis
Initial Public Offering of Common Stock
$46,000,000
Counsel to Issuer
November 2017

Huntington Ingalls Industries
Rule 144A Placement of Senior Notes
$600,000,000
Counsel to Issuer
December 2017

CarGurus
Initial Public Offering of Common Stock
$172,960,000
Counsel to Underwriters
October 2017

Voyager Therapeutics
Public Offering of Common Stock
$62,100,000
Counsel to Issuer
November 2017

ThermoFisher SCIENTIFIC
Public Offerings of Senior Notes
€3,100,000,000
Counsel to Issuer
March and July 2017

Medtronic
Public Offerings of Senior Notes
$2,000,000,000
Counsel to Issuers
March 2017

genpact Transformation Happens Here
Public Offerings of Common Stock
$589,800,000
Counsel to Issuer
August and November 2017

Discovery Communications
Public Offering of Senior Notes
$650,000,000
Counsel to Issuer
March 2017

Epizyme
Public Offering of Common Stock
$160,994,250
Counsel to Issuer
September 2017

Entegris
Rule 144A Placement of Senior Unsecured Notes
$550,000,000
Counsel to Issuer
November 2017

Spark Therapeutics
Public Offering of Common Stock
$402,500,000
Counsel to Issuer
August 2017

Kala Pharmaceuticals
Initial Public Offering of Common Stock
$103,500,000
Counsel to Issuer
July 2017

nabriva Therapeutics
Public Offering of Ordinary Shares
$80,000,000
Counsel to Issuer
September 2017

idera
Public Offering of Common Stock
$57,500,000
Counsel to Issuer
October 2017

Karyopharm Therapeutics
Public Offering of Common Stock
$155,250,000
Counsel to Issuer
April 2018

MacroGenics
Public Offering of Common Stock
$109,968,750
Counsel to Underwriters
April 2018

PTC Therapeutics
Public Offering of Common Stock
$124,384,000
Counsel to Issuer
April 2018

Ocular Therapeutix
Public Offerings of Common Stock
$62,375,000
Counsel to Issuer
January 2017 and January 2018

PerkinElmer For the Better
Public Offering of Senior Notes
€300,000,000
Counsel to Issuer
April 2018

Zynerba Pharmaceuticals
Public Offering of Common Stock
$57,960,000
Counsel to Underwriters
January 2017

Apellis
Initial Public Offering of Common Stock
$163,731,500
Counsel to Issuer
November 2017

State Street
Public Offering of Fixed-to-Floating Rate Notes
$750,000,000
Counsel to Issuer
May 2017

Acacia Communications, Inc.
Initial Public Offering of Common Stock
$119,025,000
Counsel to Issuer
May 2016

Tetraphase Pharmaceuticals
Public Offering of Common Stock
$65,695,500
Counsel to Issuer
August 2017

Eaton Vance Investment Managers
Public Offering of Notes
$300,000,000
Counsel to Issuer
April 2017

Akamai
Rule 144A Placement of Convertible Senior Notes
$1,150,000,000
Counsel to Issuer
May 2018

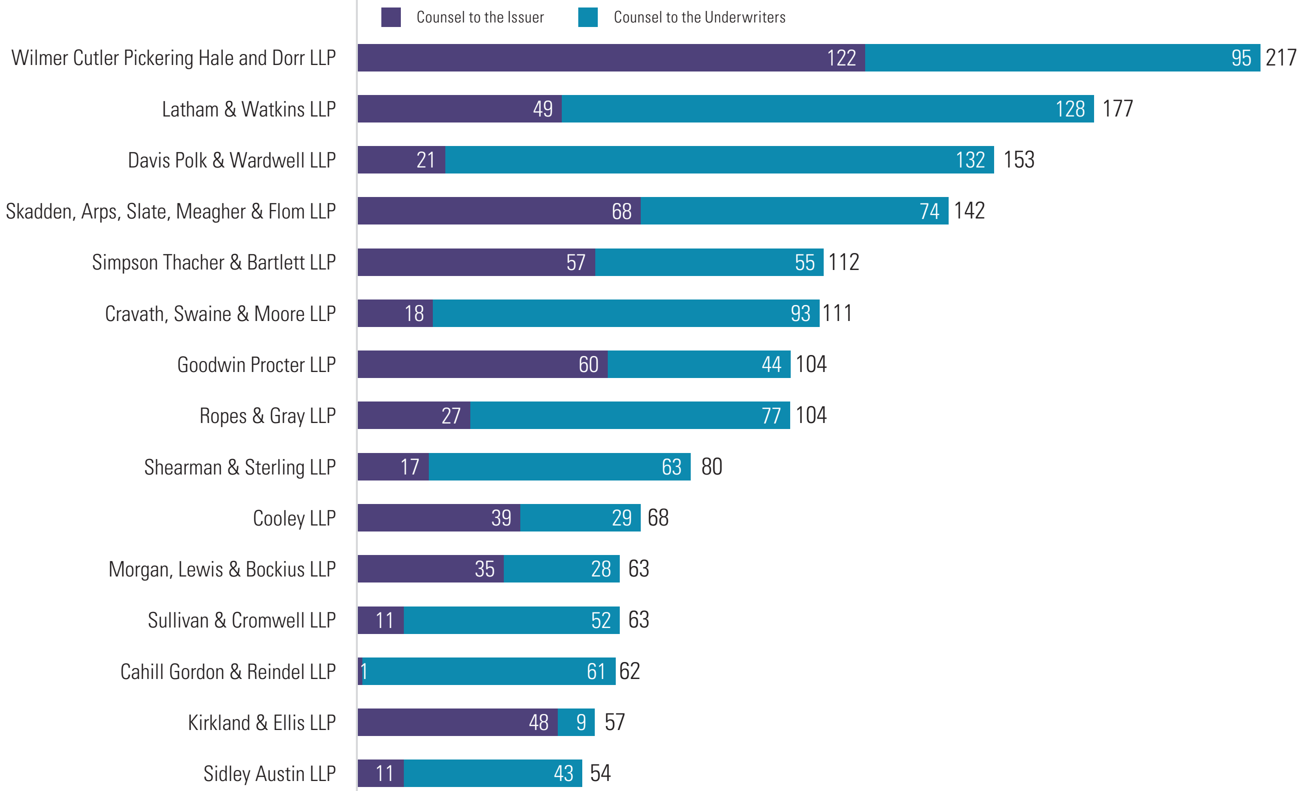
Aileron Therapeutics
Initial Public Offering of Common Stock
$56,250,000
Counsel to Issuer
July 2017

Analog Devices
Public Offering of Senior Notes
$750,000,000
Counsel to Issuer
March 2018

casa systems
Initial Public Offering of Common Stock
$89,700,000
Counsel to Issuer
December 2017

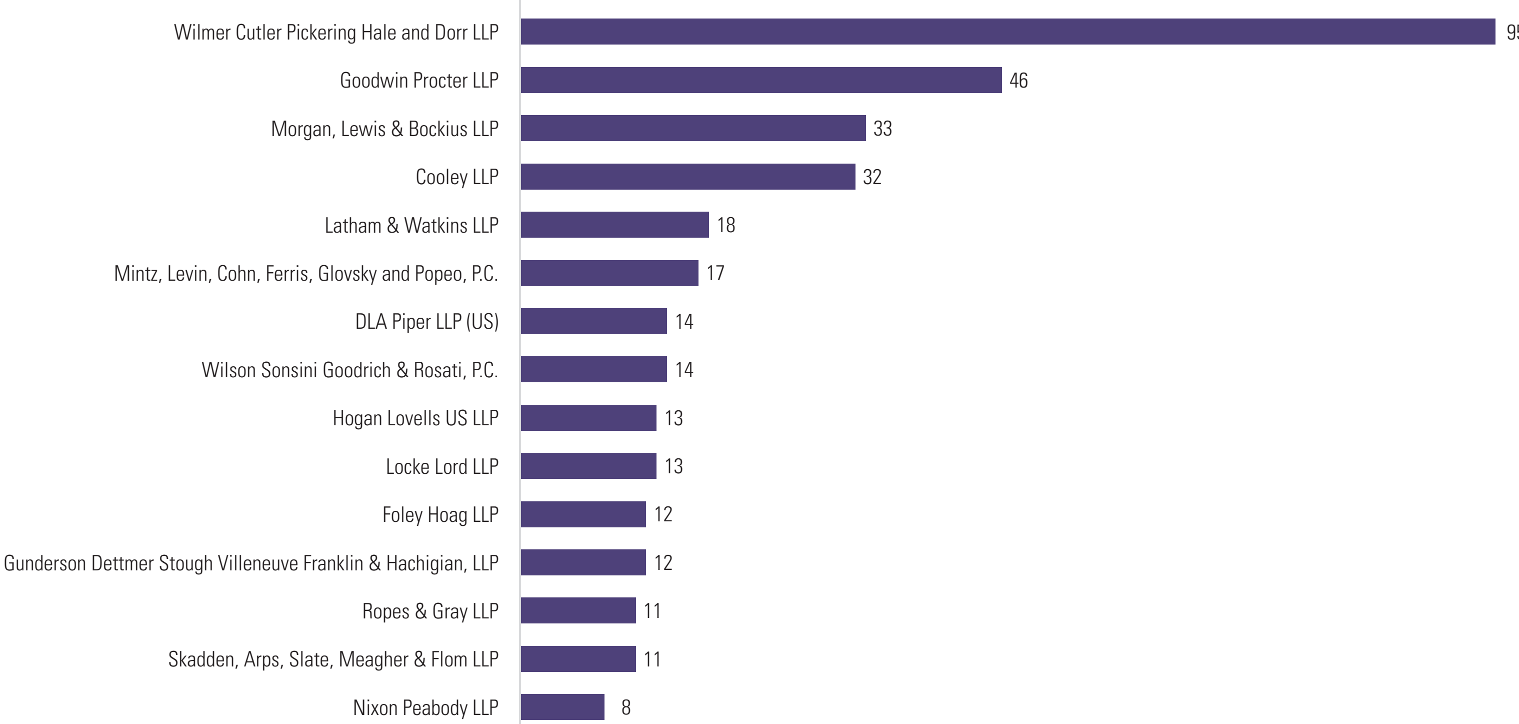
WilmerHale®

Eastern US IPOs – 1996 to 2017



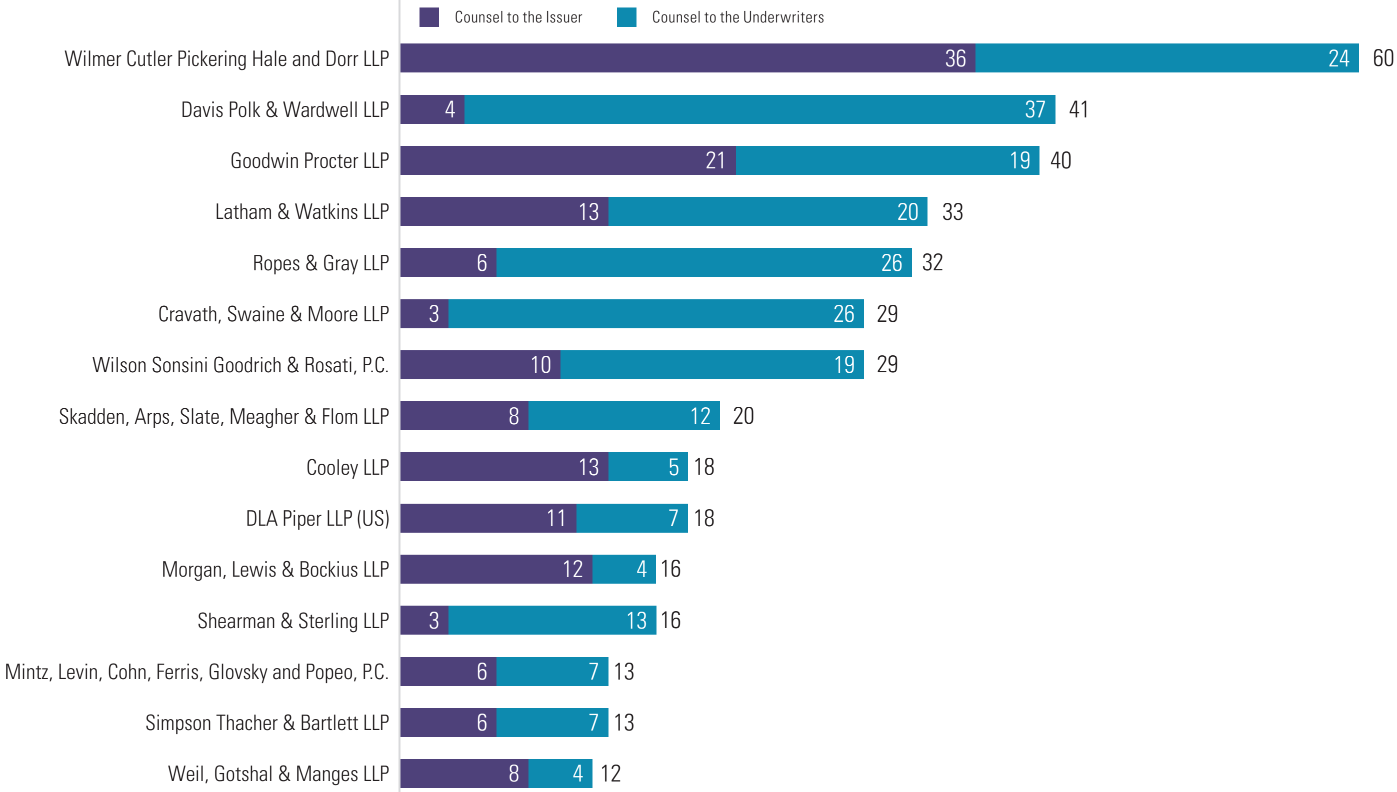
Source: SEC filings

Company Counsel in Eastern US VC-Backed IPOs – 1996 to 2017



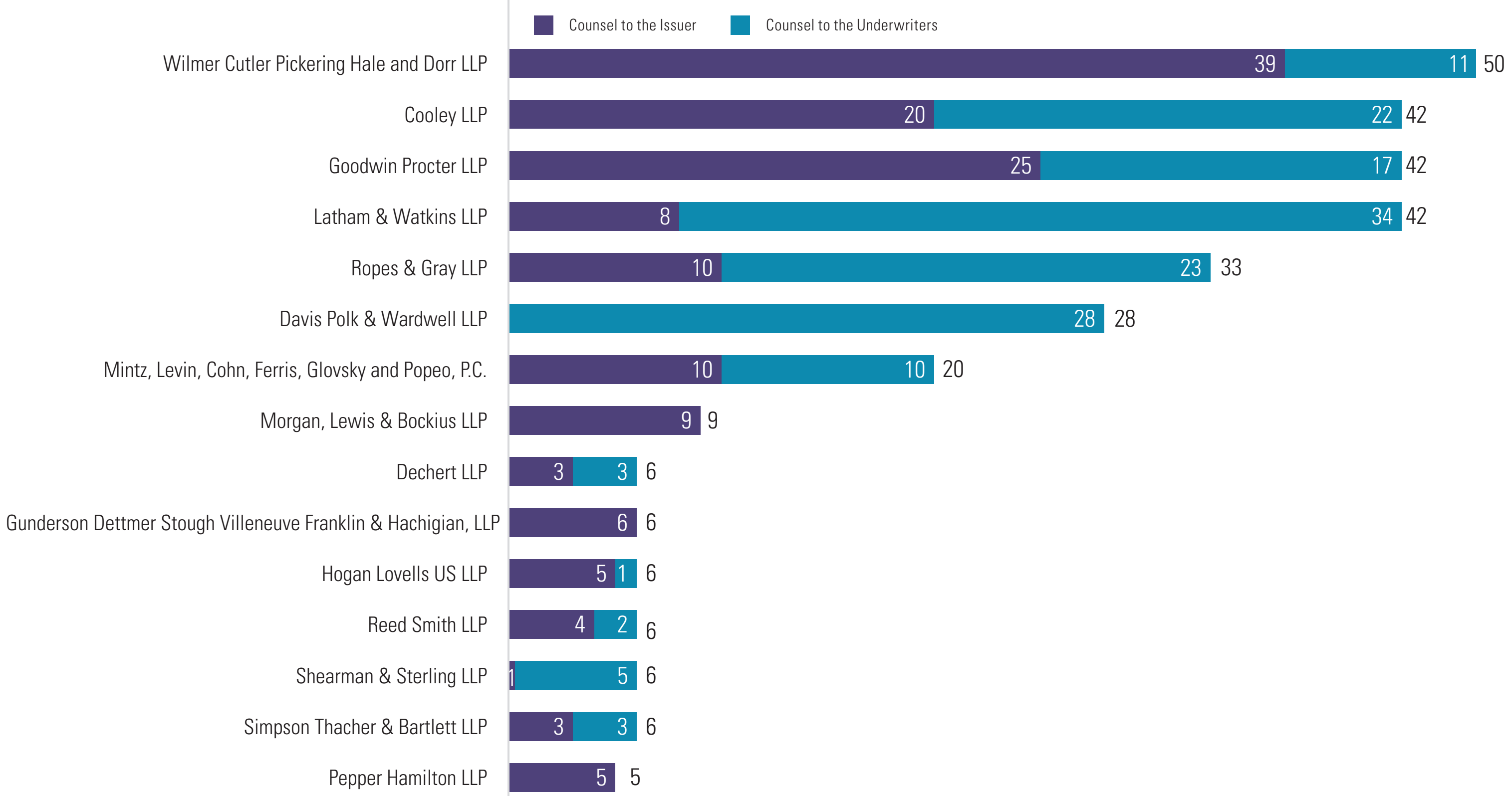
Source: Dow Jones VentureSource and SEC filings
The above charts are based on companies located east of the Mississippi River.

Eastern US Technology Company IPOs – 2000 to 2017



Source: SEC filings

Eastern US Life Sciences Company IPOs – 2004 to 2017



Source: SEC filings

The above charts are based on companies located east of the Mississippi River.

SEC Shines Spotlight on Cybersecurity Disclosures

Few business topics are as prominent in the financial markets, corporate boardrooms and the public mind as cybersecurity. A continuing stream of recent, high-profile data breaches—with no end in sight—has led to an even sharper focus on cybersecurity disclosure.

On February 21, 2018, the SEC issued an interpretive release updating prior staff guidance on public company cybersecurity disclosure and related obligations. Much of the new guidance reiterates staff guidance issued in 2011, while also stressing the importance of cybersecurity policies and procedures and the application of disclosure controls and procedures, insider trading laws and Regulation FD to cyber matters. Companies and their advisers need to take the SEC's new guidance into account when making disclosure decisions and otherwise carrying out their obligations under the federal securities laws.

GENERAL DISCLOSURE GUIDANCE

The new guidance summarizes the basic disclosure requirements applicable to registration statements and reports filed with the SEC. Noting that SEC rules do not explicitly reference cybersecurity risks and incidents, the guidance makes clear that a number of these disclosure requirements nevertheless impose an obligation to disclose such risks and incidents, depending on a company's particular circumstances.

Tailored Disclosures and Materiality. As in the 2011 guidance, the new guidance counsels against generic cybersecurity-related disclosures. The SEC also continues to recognize that companies are not required to include disclosures that would provide a road map for how to breach a company's security protections. As noted in the guidance, companies are not expected to "publicly disclose specific, technical information about their cybersecurity systems, the related networks and devices, or potential system vulnerabilities in such detail as would make such systems, networks and devices more susceptible to a cybersecurity incident."

A central tenet of tailored disclosure is a company's materiality determinations. The new guidance notes that in evaluating materiality in the context of cybersecurity matters, "companies generally weigh, among other things, the potential materiality of any identified risk and, in the case of incidents, the importance of any compromised information and of the impact of the incident on the company's operations." Other relevant considerations include the potential magnitude of the cybersecurity risk or incident, particularly where data may be compromised, and the range of harm that could be caused, such as harm to the company's reputation, financial performance, and customer and vendor relationships, as well as the possibility of litigation or regulatory investigations or actions.

Disclosure Timing. The new guidance recognizes how difficult the timing of disclosure of cybersecurity matters can be, acknowledging that companies may require some time to understand the scope of a cybersecurity incident and thus to determine whether disclosure is required. The guidance also states, however, that "an ongoing internal or external investigation—which often can be lengthy—would not on its own provide a basis for avoiding disclosures of a material cybersecurity incident."

Disclosure Updates. The new guidance reminds companies to watch for situations where they need to correct prior cybersecurity disclosures. In addition to describing the "duty to correct" prior disclosures that were materially inaccurate or omitted material facts when made, the guidance raises the possibility that there may be a "duty to update" prior disclosures that become materially inaccurate after they are made—"for example, when the original statement is still being relied upon by reasonable investors"—while acknowledging that this may not be required under the federal securities laws.

SPECIFIC DISCLOSURE CONSIDERATIONS

The new guidance highlights specific disclosure areas to which companies should pay particular attention and identifies a number of considerations companies should weigh in determining whether and to what extent disclosure may be required.

Risk Factors. Pointing to the requirements under Item 503(c) of Regulation S-K, the new guidance notes that cybersecurity risks should be disclosed if those risks are among the "most significant factors that make investments in the company's securities speculative or risky." In drafting such disclosure, companies are encouraged to consider the following issues:

— the occurrence of prior cybersecurity incidents, including their severity and frequency;

— the probability of the occurrence and potential magnitude of cybersecurity incidents;

— the adequacy of preventative actions taken to reduce cybersecurity risks and the associated costs, including, if appropriate, discussing the limits of the company's ability to prevent or mitigate certain cybersecurity risks;

— the aspects of the company's business and operations that give rise to material cybersecurity risks and the potential costs and consequences of such risks, including industry-specific risks and third-party supplier and service provider risks;

— the costs associated with maintaining cybersecurity protections, including, if applicable, insurance coverage relating to cybersecurity incidents or payments to service providers;

— the potential for reputational harm;

— existing or pending laws and regulations that may affect the requirements to which companies are subject relating to cybersecurity and the associated costs to companies; and

— litigation, regulatory investigation and remediation costs associated with cybersecurity incidents.

In addition, the guidance indicates that companies may need to disclose previous or ongoing cybersecurity incidents—including those that may have affected the company directly, or affected suppliers, customers, competitors and others—in order to place discussions of these risks in the appropriate context.

MD&A. As it relates to a company's disclosure of known events, trends and uncertainties under Item 303 of Regulation S-K, the new guidance notes that companies should consider "the cost of ongoing cybersecurity efforts (including enhancements to existing efforts), the costs and other consequences of cybersecurity incidents, and the risks of potential cybersecurity incidents, among other matters." Other potential costs that companies should consider include:

— loss of intellectual property;

— immediate costs of the incident;

— costs associated with implementing preventative measures;

— maintaining insurance;

— responding to litigation and regulatory investigations;

— preparing for and complying with proposed or current legislation;

— engaging in remediation efforts;

— addressing harm to reputation; and

— loss of competitive advantage that may result.

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

Legal Proceedings. With respect to disclosure of material pending legal proceedings under Item 103 of Regulation S-K, the new guidance notes that cybersecurity issues could give rise to a disclosure obligation.

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

Board Risk Oversight. The new guidance indicates that required disclosures about how a company's board administers its risk oversight function under Item 407(h) of Regulation S-K and Item 7 of Schedule 14A should include a discussion of the board's role in overseeing the management of cybersecurity risks where such risks are material to a company's business. As part of this disclosure, the guidance encourages companies to include a discussion about how the board interacts with management on cybersecurity issues.

POLICIES AND PROCEDURES

Disclosure Controls and Procedures. As a "key element" of enterprise-wide risk management, the new guidance encourages companies to "adopt comprehensive policies and procedures related to cybersecurity and to assess their compliance regularly, including the sufficiency of their disclosure controls and procedures as they relate to cybersecurity disclosure." Sufficient disclosure controls and procedures should be designed to (a) ensure that relevant information about cybersecurity risks and incidents is processed and reported to the appropriate personnel and (b) facilitate policies and procedures intended to prohibit corporate insiders from trading on the basis of material nonpublic information about cybersecurity risks and incidents.

Insider Trading. The new guidance reminds companies and their insiders to comply with the insider trading laws in connection with information about cybersecurity risks and incidents. The guidance explains the SEC's view that, because cybersecurity risks and incidents may involve material nonpublic information, "directors, officers, and other corporate insiders would violate the antifraud provisions if they trade the company's securities in breach of their duty of trust or confidence while in possession of that material nonpublic information."

The new guidance also encourages companies to maintain policies and procedures to prevent insider trading on the basis of all types of material nonpublic information, including cybersecurity risks and incidents. When a cybersecurity incident occurs, or when a company is investigating such an incident, the guidance advises that consideration should be given as to whether trading restrictions should be imposed.

Regulation FD. The new guidance cautions companies to keep Regulation FD in mind and not to make selective disclosures of material nonpublic information regarding cybersecurity risks and incidents until such information has been publicly disseminated. The SEC expects that companies have in place policies and procedures to ensure that such selective disclosures are not made and that any Regulation FD–required disclosure be made either simultaneously (for intentional disclosures) or promptly (for non-intentional disclosures).

NEXT STEPS BY THE SEC

In a separate statement, SEC Chair Clayton indicated that the SEC and its staff will monitor disclosures to determine whether additional SEC action is needed. In light of the SEC's continuing focus on cybersecurity matters, and public interest in the topic generally, cybersecurity remains a potential area for future SEC rulemaking. ■

SEC ANNOUNCES FIRST CYBER DISCLOSURE ENFORCEMENT CASE

Barely two months after issuing new cybersecurity guidance, the SEC announced its first cyber disclosure enforcement proceeding. In a settlement with Yahoo arising out of a massive data breach suffered by Yahoo between 2014 and 2016, the SEC concluded that Yahoo's disclosure controls and procedures were deficient, and also found disclosure violations in the MD&A and risk factor disclosures contained in Yahoo's Form 10-Q and 10-K filings. Yahoo agreed to pay a civil penalty of $35 million to settle the SEC's charges.

Board Oversight of Cybersecurity

Cybersecurity is one of the highest-priority issues for public company executives and directors. In February 2018, the SEC—in a much-anticipated release—said that companies should disclose how their boards address the oversight of cybersecurity. Noting the importance of providing investors with sufficient information on the role of the board of directors in risk management, the SEC said that disclosure about the board's risk oversight function should include discussion of the board's role in overseeing the management of cybersecurity risks, where such risks are material to a company's business. The SEC also encouraged companies to address how the board engages with management on cybersecurity issues.

In view of the SEC's new guidance, and for other reasons, we are at an inflection point for board oversight of cybersecurity risks. Below are considerations for boards facing this responsibility.

TAILORING OVERSIGHT TO THE RISKS

There are a number of effective models for board oversight of cybersecurity. Because cybersecurity poses different risks to different companies, the most effective approach for a given company should be tailored to its business, including the data for which the company is responsible (especially personally identifiable information, such as payment data or health information, as well as key proprietary data and third-party data) and the risks to that data.

CHOOSING THE RIGHT OVERSIGHT STRUCTURE

Boards can use various structures to oversee cybersecurity risks. In many companies, the audit committee retains primary oversight of cybersecurity risks, consistent with its role in oversight of risks facing the enterprise generally. In some companies, primary oversight of cybersecurity is assigned to a risk committee that oversees a range of the company's enterprise risks. In still other companies, a designated technology or cybersecurity committee is tasked with primary oversight of technology-related risks, including those related to cybersecurity. And finally, in some companies, the board as a whole oversees cybersecurity risks. The differing approaches taken by boards reflect that cybersecurity is not a topic that lends itself to a "one size fits all" model.

THE CADENCE OF OVERSIGHT

No matter where primary oversight of cybersecurity risks is assigned, to be effective, board oversight should include regular meetings with the company's chief information security officer. There should be appropriate protocols for elevating to the board (or to the committee with primary oversight responsibility) information about cybersecurity risks and incidents between those meetings.

TOOLS FOR BOARD EVALUATION OF RISKS

The committee (or the board as a whole) also should consider what measurements to use to evaluate the company's cybersecurity risks and the effectiveness of its controls to address those risks, using appropriate benchmarks to peers and regulatory requirements. Directors will need to decide whether those evaluations should be made by management, internal audit, an external adviser, or some combination over time. The committee (or the board as a whole) should have access to a dashboard—similar to those used in enterprise risk management or audit processes—to look at critical issues, assess how the company is doing, and watch for trends.

EXPERT ADVICE

Boards sometimes ask whether they need to have a cybersecurity expert on the board or on the committee with primary oversight responsibility for cybersecurity risks, akin to the current requirement for financial experts on the audit committee. While such expertise can be useful, it is not required, and subject matter expertise should be only one consideration in determining the makeup of an effective board of directors. A board should ensure that it has members who are able to converse meaningfully with management and its advisers on this topic, but directors need not be cybersecurity experts themselves. Boards and board committees should retain outside experts to advise them as needed.

PREPARATION IS KEY

A board should assure itself that the company has protocols in place to evaluate and address a cyber incident quickly. This usually includes informing itself as to the internal and external resources that the company has engaged to help it in the event of a problem. The board should know that the company has effective internal and external legal, forensic, communications and other experts to call upon if there is a significant incident.

It is also advisable for the board to understand if management has undertaken incident response planning and exercises to see how the company would respond to various potential breach scenarios, and to hear reports on the results of those exercises. The directors also should inquire about the company's crisis management policies and protocols and the steps management has taken to implement appropriate disclosure controls and procedures regarding cybersecurity information, including trading restrictions on corporate insiders when management is investigating a potential breach.

MANAGEMENT RESPONSIBILITY

Directors should remember that their role is to oversee the company's risk management, not to manage those risks themselves. The board's work should be focused on ensuring that the company identifies its key risks and has adequate policies, procedures, resources, personnel and organizational structures to manage those risks effectively. ■

RED FLAGS

As with every key area of risk for a company, directors should ask questions and encourage management to take the time needed to answer them completely, involving outside advisers as needed. Directors should be on the alert for potential signs indicating that cybersecurity resources may be insufficient and should be mindful of reported cyber incidents at peer companies. Directors should respond quickly to red flags, including, where appropriate, by requesting an independent assessment of the health of the company's cybersecurity program.

The dislike among institutional investors and governance advocates for multi-class capital structures reached a fever pitch in 2017. Nevertheless, half of all US technology companies (and 21% of all US companies) in the IPO class of 2017 went public with multiple classes of common stock—the highest levels in at least a decade—and this trend does not appear to be abating.

WHAT IS A MULTI-CLASS CAPITAL STRUCTURE?

While most public companies have a single class of common stock that provides the same voting and economic rights to every stockholder, in recent years an increasing number of companies have gone public with a multi-class capital structure under which some or all pre-IPO stockholders hold shares of common stock that are entitled to multiple votes (typically 10) per share, while the public is issued a separate class of common stock that is entitled to only one vote per share, or no voting rights at all. If the multi-class capital structure was implemented upon incorporation or early in the company's life, the high-vote stock is typically held only by the founders and perhaps other selected pre-IPO stockholders; if the structure is implemented shortly before the IPO, the high-vote stock is typically held by all pre-IPO stockholders.

Supporters of multi-class capital structures believe that the technique can enable company founders to pursue strategies to maximize long-term stockholder value rather than seeking to satisfy the quarter-to-quarter expectations of short-term investors. Critics, however, believe that this technique entrenches the holders of the high-vote stock, insulating them from takeover attempts and the will of the public stockholders, and that the mismatch between voting power and economic interest may increase the possibility that holders of high-vote stock will pursue a riskier business strategy. The inclusion of sunset provisions has done little to blunt this criticism—although commonly used, sunset provisions historically have been structured such that the disparate voting rights will not be eliminated for an extended period of time, if ever.

INVESTORS REACH A SNAP-PING POINT

In March 2017, Snap became the first IPO company in decades to sell non-voting shares to the public, with the founders holding the outstanding high-vote stock and the founders and other pre-IPO stockholders holding the outstanding low-vote stock.

Investor reaction was swift and loud:

- Snap's action was publicly decried by the Council of Institutional Investors, which also sent letters to the management and boards of Snap and other companies, urging them to reconsider their multi-class structures or, at a minimum, to include a time-based sunset provision
- The primacy of a "one share, one vote" model was highlighted in model governance guidelines and other policy statements from groups such as the Investor Stewardship Group, a collective of some of the largest US-based institutional investors and global asset managers
- Proxy advisory firms ISS and Glass Lewis continued the use of their voting policies on problematic governance practices to recommend votes against directors at recently public companies with multi-class structures
- More recently, in the first public speech following his appointment, new SEC Commissioner Robert J. Jackson, Jr., expressed hope that the national securities exchanges will propose listing standards addressing (and limiting) the use of perpetual dual-class stock

In addition, major stock index providers have begun to exclude from their indexes non-voting securities, or the securities of companies with unequal voting rights. Exclusion from stock indexes could make it more difficult, or impossible, for some fund managers to buy the excluded securities, which could adversely affect the trading liquidity and market price of the excluded securities.

RECENT TRENDS

The prevalence of multi-class capital structures among US IPO companies has soared over the past decade. As recently as 2009, no tech IPO company had a multi-class capital structure, and between 2007 and 2014 only 10% of tech IPO companies had one. Between 2015 and 2017, that figure nearly quadrupled to 39%, reaching 50% in 2017. Looking at the broader IPO market, in 2017, 21% of all US IPO companies employed a multi-class structure—almost three times the rate that prevailed between 2007 and 2016—and three of the year's IPOs were completed by companies whose capital structures included a class of non-voting stock.

OUTLOOK

Boards of many IPO companies still believe that a multi-class capital structure, although disfavored by institutional investors and governance advocates, serves legitimate purposes and furthers long-term stockholder interests. The board of a company considering the implementation of a multi-class capital structure needs to balance the intended benefits of the technique against the risks of entrenchment, the potential for adverse investor sentiment (which could be partly mitigated by inclusion of a sunset provision of five years or less) and the potential consequences of being excluded from major stock indexes. ■

SUNSET PROVISIONS

To assess market practices with respect to sunset provisions, we reviewed the multi-class capital structures of all VC-backed tech companies (whose capital structures tend to draw the most attention) that completed IPOs from 2007 to 2017. In this sample of 41 companies, 85% included some sort of sunset provision. Among these companies:

- 51% had time-based sunset provisions, under which the disparate voting rights are eliminated after the passage of a specified period of time (ranging from 5 to 20 years, with 5-10 years being the most common
- 77% had dilution-based sunset provisions, under which the disparate voting rights are eliminated once the high-vote stock represents less than a specified percentage (ranging from 5% to 25%, with 10% being the most common) of all outstanding stock or voting power
- 29% had both time-based and dilution-based sunset provisions

Regulation A and Direct Listings Emerge as Alternatives to Traditional IPOs

Regulatory and market changes are creating alternative paths to capital and public trading for companies that do not wish to pursue traditional IPOs. Two emerging alternatives, a "Regulation A IPO" and a "direct listing," are discussed below. Neither approach is suitable for all companies, but each offers potential advantages for those with appropriate needs and attributes.

REGULATION A IPOS

For decades, despite requiring less extensive disclosure than in a traditional IPO, Regulation A was plagued by deficiencies and essentially unworkable for most IPOs.

The JOBS Act and related SEC rules increased the maximum offering size under Regulation A from $5 million to $50 million in any 12-month period and created two tiers of Regulation A offerings (known as Tier 1 and Tier 2) with different requirements. Offerings conducted under Tier 2 are not subject to blue sky registration and offering requirements, and the SEC's investment limits on non-accredited investors in Tier 2 offerings do not apply if the securities are listed on a national securities exchange upon completion of the offering. As a result, Tier 2 of Regulation A is a viable alternative to a traditional IPO for smaller companies that can qualify for exchange listing and whose capital needs can be met with an offering of $50 million or less.

Although parts of the Regulation A IPO process are similar to a traditional IPO process, other aspects differ. The description below assumes that the company conducts the offering under Tier 2 and concurrently lists its common stock on a national securities exchange.

Disclosure Requirements

A Regulation A offering is made pursuant to an "offering statement" on Form 1-A, which is analogous to a registration statement on Form S-1. The Form 1-A consists of Part I, containing basic information about the company and the offering, and Part II, containing additional disclosures about the company's business, management, operations, ownership, material risks, operating results and financial condition, related party transactions and the offering. Part II is referred to as the "offering circular" and is analogous to a prospectus in a traditional IPO.

In general, the disclosure requirements under Form 1-A are less extensive than the disclosure requirements under Form S-1. However, the offering circular for a company concurrently listing its common stock on a national securities exchange must comply with the prospectus disclosure requirements of Form S-1. For this purpose, if the company qualifies as a "smaller reporting company" under SEC rules (generally defined as a company with a public float of less than $75 million), it can provide the scaled disclosure available to smaller reporting companies, but the company cannot rely on the disclosure relief available to an emerging growth company (EGC) for the Form 1-A even if the company qualifies as an EGC.

The Form 1-A for a Tier 2 offering must include financial statements for each of the two preceding fiscal years, prepared in accordance with GAAP and Regulation S-X, and audited by an independent public accounting firm that is registered with the PCAOB. If the offering statement is "qualified" by the SEC (analogous to effectiveness of a Form S-1) more than nine months after the company's most recently completed fiscal year-end, unaudited interim financial statements as of a date no earlier than six months after the most recently completed fiscal year end are also required.

SEC Filing and Review

The Form 1-A is filed on the SEC's EDGAR system and undergoes staff review. The staff review process is similar to that undertaken in connection with a traditional IPO. The company is permitted to submit a draft Form 1-A for nonpublic review but must publicly file the Form 1-A (and amendments thereto) at least 21 days before the offering statement is qualified. Upon completion of staff review, the offering statement is qualified and the offering can commence.

Offering Process

Offerings under Tier 2 of Regulation A typically are conducted on an ongoing basis for a specified period of time, often subject to extension and the company's right to offer additional shares (which may exceed the 15% cap on the over-allotment option in traditional IPOs). Regulation A IPOs usually involve underwriters or other intermediaries acting on a "best efforts" basis rather than on the basis of a firm-commitment underwriting. If underwriters participate in the offering, FINRA's review and approval of the compensation arrangements are required.

Similar to the use of a preliminary prospectus in a traditional IPO, a preliminary offering circular distributed to prospective investors in a Regulation A offering may omit the offering price and price-dependent information as long as an offering circular that includes the previously omitted information is filed with the SEC within two business days after the offering is qualified. Post-qualification supplements to the offering circular are often used to provide updates on the company or the offering prior to its termination.

Oral and written "test-the-waters" (TTW) communications are permitted in Regulation A offerings, whether or not the company is an EGC and without the investor limitations imposed on TTW communications by EGCs, enabling companies to solicit any investors at any time without regard to the "quiet period" applicable to traditional IPOs. In Regulation A offerings, TTW materials must be filed with the SEC and become publicly available, in contrast to traditional IPOs, in which TTW materials need not be made publicly available. TTW materials used after the Form 1-A is publicly filed must be accompanied by the most recent preliminary offering circular or a link to the Form 1-A. A preliminary offering circular must be provided at least 48 hours before the sale of securities to investors who indicated an interest in investing before the offering statement is qualified, including those persons that responded to the company's TTW materials.

The stock exchange listing process is similar to the listing process in a traditional IPO. Concurrently with qualification of the offering, and as a condition to exchange listing, the company files a Form 8-A with the SEC to register its common stock under the Exchange Act.

Public Reporting

Following a Regulation A IPO in which its common stock is listed on a national securities exchange, the company becomes subject to the normal public reporting and other requirements of the Exchange Act (in contrast, following a Regulation A offering in which the company does not list its common stock on a national securities exchange, the public reporting requirements are more relaxed). If the company qualifies as an EGC, it can take advantage of the reduced disclosure requirements and exemptions available to EGCs. The company must also comply with the rules of the stock exchange on which its common stock is listed, including applicable corporate governance requirements.

DIRECT LISTINGS

With the rise of very large, well-capitalized private companies boasting valuations in excess of $1 billion, the concept of a "direct listing" has emerged. In a direct listing, the company files a registration statement to become a reporting company under the Exchange Act and concurrently lists its shares on a stock exchange, without underwriters and without a concurrent public offering of newly issued shares.

Registration Requirements

In a direct listing, the company files a Form 10 under the Exchange Act. The Form 10 requires disclosure of substantially the same information required in a Form S-1 for a traditional IPO, except for the omission of offering-related items. Alternatively, the company may file a Form S-1 (or Form F-1, for a foreign private issuer) to register the resale of some or all of its outstanding shares. In the absence of a resale Form S-1, public resales must be made in reliance on Rule 144, which is unlikely to provide sufficient liquidity for an active trading market to develop for at least six months and potentially longer. Apart from resale considerations, the rules of the exchange on which the company is listing, or the SEC staff, may require the company to file a Form S-1 in conjunction with the initial listing if, among other considerations, the transaction is viewed as constituting a distribution of securities. If a Form S-1 is filed, the company may file a Form 8-A instead of a Form 10 to register its common stock under the Exchange Act.

SEC Filing and Review

The Form 10 or Form S-1 is filed on the SEC's EDGAR system and undergoes the same type of staff review as in a traditional IPO. The company is permitted to submit a draft Form 10 or Form S-1 for nonpublic review but must publicly file the Form 10 or Form S-1 (and amendments thereto) at least 15 days before it becomes effective. A Form S-1 can be declared effective upon completion of staff review, while a Form 10 automatically becomes effective 60 days after filing unless withdrawn and refiled due to ongoing staff review. Upon effectiveness of the Form 10 or Form S-1, stock exchange listing can be completed and trading can commence.

Listing Process

Nasdaq and NYSE both permit the listing of eligible securities registered under the Exchange Act without a concurrent public offering as long as applicable listing requirements are satisfied. The overall listing process is similar to the listing process in a traditional IPO, although aspects of the process are more difficult in the absence of a concurrent public offering and require ongoing dialog and coordination with the exchange. In a direct listing, the company does not engage investment banking firms to act as underwriters but may need to retain investment bankers to provide assistance and advice with respect to the registration and listing process.

Public Reporting

Following a direct listing, the company becomes subject to the normal public reporting and other requirements of the Exchange Act. If eligible, the company can take advantage of the reduced disclosure requirements and exemptions available to EGCs. The company must also comply with the corporate governance requirements and other rules of the stock exchange on which its common stock is listed.

A direct listing does not include a traditional roadshow, although the company may wish to undertake similar activities to familiarize investors with the company in conjunction with listing. For example, if the company qualifies as an EGC, it may hold TTW meetings with eligible institutional investors. An "investor day" or "non-deal roadshow" is also possible if conducted in accordance with SEC rules.

OUTLOOK

Compared to a traditional IPO, a Regulation A IPO offers the potential for a less burdensome IPO process, lower cost and greater flexibility in the timing and size of the offering. However, companies choosing this course are likely to encounter many of the same challenges faced by companies completing small IPOs, such as limited trading liquidity, the difficulty of achieving and maintaining stock exchange listing, the potential unavailability of research coverage, and the costs and burdens of being a public company. To date, only a handful of companies have completed Regulation A IPOs, and the stocks of most of them have performed poorly in the public market.

A direct listing offers the potential for a faster and less expensive path to public trading than a traditional IPO. Despite the success of Spotify's direct listing in April 2018, in which Spotify achieved an initial market capitalization in excess of $25 billion, the technique remains largely unproven. As a practical matter, a direct listing is a good fit for relatively few private companies—those that do not require an immediate capital infusion and are of sufficient value and investor interest to qualify for stock exchange listing and enjoy meaningful trading liquidity without the aftermarket support provided by underwriters (or the stabilizing influence of lockup agreements for the first 180 days) in a traditional IPO. ■

An underwriting agreement may be the most unbalanced, least negotiable and most densely written contract a company will ever sign, yet it is also one of the most important, since it establishes the terms on which the underwriters purchase the shares for the company's IPO. The following summary is intended to provide a basic understanding of the structure and purpose of a typical underwriting agreement.

PARTIES

The lead managing underwriters, on behalf of all underwriters, and the company sign the underwriting agreement. If the offering includes selling stockholders, an attorney-in-fact (often a company officer) typically signs the underwriting agreement on their behalf.

PURCHASE AND SALE OF THE SHARES

The underwriting agreement provides that the underwriters will purchase the IPO shares from the company and any selling stockholders, and the company and selling stockholders will sell the IPO shares to the underwriters. The purchase price is the public offering price less the underwriting discount. The purchase obligations of the underwriters are several—meaning each underwriter is responsible only for its own purchase obligation and not the purchase obligations of other underwriters if they default—rather than joint and several.

The underwriting agreement also includes an over-allotment option (commonly called the "green shoe") that permits the underwriters to purchase additional shares. The over allotment option—granted by the company and/or selling stockholders—typically equals 15% of the firmly committed portion of the offering and must be exercised within 30 days after the date of the underwriting agreement.

REPRESENTATIONS AND WARRANTIES

Purposes

The underwriting agreement contains extensive representations and warranties from the company and any selling stockholders. The representations are made solely for the benefit of the underwriters and do not extend to investors. The recourse of investors against the company and the underwriters (and selling stockholders, if any) for misstatements or omissions in the prospectus comes from the liability provisions of the federal securities laws.

The principal purpose of the representations is due diligence. By forcing the company to consider and consciously determine whether each representation is true, the representations focus the company on important topics that must be satisfactorily addressed. This assists the due diligence process for both the company and the underwriters and enhances the quality of prospectus disclosures. A secondary purpose is to allocate risk and liability between the parties.

Company Representations

In general, the company provides representations with respect to its operations, assets, financial statements, capitalization, compliance with obligations, litigation, corporate status and authority, and the Form S-1, the prospectus and the offering. Additional representations may cover other topics that are important to the company's business, such as intellectual property or regulatory matters.

The company's representations can be negotiated to some extent. Underwriters often accept the inclusion of materiality and knowledge qualifiers in appropriate representations and may show flexibility on minor wording changes. Wholesale revisions or the deletion of entire representations generally will be rejected by underwriters.

Selling Stockholder Representations

Each selling stockholder typically provides representations relating to the holder's ownership of and authority to sell the shares being sold by it, and the accuracy of the information supplied by the holder for inclusion in the prospectus. Representations from selling stockholders are several, and not joint and several.

Underwriter Representations

The underwriters do not provide any representations in the underwriting agreement.

CLOSING ARRANGEMENTS

The IPO is typically closed two business days after signing the underwriting agreement. At the closing, the shares being sold are delivered in book-entry form against payment of the purchase price by same-day funds. The closing includes the shares subject to the over-allotment option if it has been exercised; if the option is subsequently exercised, a second closing must be held. A custody agreement and power of attorney typically are used to facilitate arrangements with selling stockholders.

The closing is subject to the satisfaction or waiver of various conditions relating to things largely within the company's control (such as the accuracy of its representations and warranties) as well as things beyond the company's control (such as general market or geopolitical conditions). Although the language of the closing conditions is broad and nearly nonnegotiable, an IPO is very likely to close once the underwriting agreement is signed.

COMPANY COVENANTS

The company agrees to various covenants relating to the offering and post-closing matters. These covenants are customary and not particularly burdensome in practice.

PAYMENT OF OFFERING EXPENSES

Offering expenses paid by the underwriters typically consist of the fees and expenses of underwriters' counsel; road show expenses of the underwriters and the electronic road show hosting cost; expenses incurred in connection with company visits and drafting sessions; due diligence expenses; and other syndicate expenses.

The company typically pays all other offering expenses, including the fees and expenses of the company's counsel and independent accountants; the financial printer's charges; road show expenses of the company (if a charter airplane is used, the cost is typically split with the underwriters); stock exchange listing fees and expenses; FINRA and blue sky filing fees and the associated legal fees and expenses of the underwriters' counsel; the SEC registration fee; and the transfer agent's charges. If the company defaults at the closing, or if the closing conditions are not satisfied, the company usually must reimburse the underwriters' out-of-pocket expenses.

If the offering includes selling stockholders, the company normally incurs the expense of preparing the necessary documentation and the selling stockholders pay the underwriting discount on the shares sold by them. If the selling stockholders are entitled to include sales in the offering pursuant to a registration rights agreement, the company is often obligated to pay the legal fees of one counsel to represent all selling stockholders (usually subject to a dollar cap).

INDEMNIFICATION AND CONTRIBUTION ARRANGEMENTS

The underwriting agreement sets out the indemnification and contribution obligations of the parties with respect to offering liabilities. Attempts to make substantive changes to these provisions are likely to be strongly resisted by the underwriters.

Indemnification Obligations of the Company

The company agrees to indemnify each underwriter against any damages or liabilities arising out of material misstatements or omissions in the Form S-1 or any prospectus, except to the extent based on written information supplied by the underwriter for inclusion in the Form S-1 or prospectus (this exception is very narrow). An emerging growth company (EGC) will also provide indemnification for material misstatements or omissions in its written "test-the-waters" communications. If the offering includes a directed share program (DSP), the company will provide indemnification with respect to the operation of the DSP, including for purchase defaults by participants. There is no dollar limit on the company's indemnification obligations to the underwriters.

Indemnification Obligations of Selling Stockholders

If the offering includes selling stockholders, each agrees, severally and not jointly, to indemnify the underwriters against any damages or liabilities arising out of material misstatements or omissions in the Form S-1 or any prospectus to the extent based on written information supplied by the selling stockholder for inclusion in the Form S-1 or prospectus. The maximum amount of each selling stockholder's indemnification obligation is usually equal to the gross proceeds (or perhaps net proceeds) from the sale of its shares.

Indemnification Obligations of the Underwriters

Each underwriter agrees, severally and not jointly, to indemnify the company, the company's directors and officers, and the selling stockholders against any damages or liabilities arising out of material misstatements or omissions in the Form S-1 or any prospectus to the extent based on written information supplied by the underwriters for inclusion in the Form S-1 or prospectus. The underwriting agreement does not include a cap on the indemnification obligations of the underwriters. The indemnification obligations of the underwriters are of limited practical value because of the extremely narrow scope of those obligations.

Contribution Obligations

If indemnification is unavailable or otherwise insufficient to hold harmless an indemnified party, the indemnifying party is required to contribute to any amounts paid on a claim by the indemnified party in such proportion as is appropriate to reflect the relative benefits received by the parties from the offering (and, if required by applicable law, the relative fault of the parties).

Enforcement

A party seeking indemnification for a claim brought against it must notify the indemnifying party. The indemnifying party can participate in the defense of the claim with its own counsel, or assume the defense of the claim with counsel reasonably satisfactory to the indemnified party. Without the written consent of the indemnified party, the indemnifying party cannot settle a claim unless the settlement includes an unconditional release of the indemnified party and does not include an admission of fault by the indemnified party.

In contrast to its representations in the underwriting agreement, for which the company has no realistic exposure following the closing, its indemnification obligations can result in real liability. The indemnification provisions are only among the parties to the underwriting agreement and do not extend to investors or limit any claims they may bring following the offering.

MISCELLANEOUS PROVISIONS

The underwriting agreement also includes provisions relating to closing defaults, survival of obligations, disclaimers of fiduciary responsibilities, notices, governing law, waivers of the right to a jury trial, and other miscellaneous matters. ■

WHAT CAN BE NEGOTIATED?

The company can negotiate various aspects of the underwriting arrangements in advance in some circumstances, particularly in large offerings or if the company has significant leverage in the selection of managing underwriters. The following is a list of items that may be negotiable:

- The involvement of specific investment banking and equity capital markets personnel in the IPO.
- The underwriting discount for the IPO generally, and the underwriting discount on inside purchases in the IPO, if any.
- Reimbursement of a portion of the company's offering expenses, either directly or through a reduction in the underwriting discount.
- The duration of the lockup, as well as early release conditions.
- Selected terms of the underwriting agreement, such as the representations and indemnification provisions for any selling stockholders.
- The initiation of post-IPO research coverage by an underwriter in accordance with its policies (but not the specific recommendation, research rating or price target).
- An agreement not to serve as a managing underwriter for specified competitors during the pendency of the offering.
- The selection of underwriters' counsel.

Board and Committee Requirements When Going Public

SEC, Nasdaq and NYSE rules impose a variety of independence and other requirements for boards and board committees of public companies. Few private companies satisfy all these requirements. An essential element of a company's IPO planning is to assess the composition of the company's board and board committees, and develop a plan to come into full compliance with the applicable requirements within the prescribed timelines.

BOARD OF DIRECTORS

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

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

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

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

— *Size*: Neither SEC, Nasdaq nor NYSE rules stipulate board size, as long as the board is large enough to populate all required committees.

AUDIT COMMITTEE

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

— *SEC Rule 10A-3*: Rule 10A-3 precludes a person from serving on the audit committee if the person:

- accepts, directly or indirectly, any consulting, advisory or other compensatory fees from the company (other than compensation for board service and certain retirement compensation); or
- is an "affiliate" of the company (a person who, directly or indirectly, controls, is controlled by, or is under common control with, the company).

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

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

BOARD AND COMMITTEE INDEPENDENCE PHASE-IN RULES

ELEMENT	NASDAQ	NYSE
Independent board of directors	The board must be composed of a majority of independent directors within one year of the listing date.	
Audit Committee	*Number:* The audit committee is required to have a minimum of three members at all times. *Independence:* The audit committee must have at least one independent member by the listing date, at least a majority of independent members within 90 days of listing, and must be fully independent within one year of listing.[1]	*Number:* The audit committee must have at least one member by the listing date, at least two members within 90 days of the listing date, and at least three members within one year of the listing date. *Independence:* The audit committee must have at least one independent member by the listing date, at least a majority of independent members within 90 days of the effective date of its Form S-1, and must be fully independent within one year of the effective date of the Form S-1.
Compensation Committee	*Number:* The compensation committee is required to have a minimum of two members at all times. *Independence:* The compensation committee must have at least one independent member by the listing date, at least a majority of independent members within 90 days of listing, and must be fully independent within one year of listing.	*Number:* No minimum size is prescribed. *Independence:* The compensation committee must have at least one independent member by the earlier of the date the IPO closes or five business days from the listing date, at least a majority of independent members within 90 days of the listing date, and must be fully independent within one year of the listing date.
Nominating Committee	*Number:* The company may choose not to establish a nominating committee and may instead rely upon a majority of the independent directors to discharge these responsibilities. If the company elects to establish a nominating committee, no minimum size is prescribed. *Independence:* If the company elects to establish a nominating committee, the committee must have at least one independent member by the listing date, at least a majority of independent members within 90 days of listing, and must be fully independent within one year of listing.	*Number:* No minimum size is prescribed. *Independence:* The nominating committee must have at least one independent member by the earlier of the date the IPO closes or five business days from the listing date, at least a majority of independent members within 90 days of the listing date, and must be fully independent within one year of the listing date.

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

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

COMPENSATION COMMITTEE

— *General*: Nasdaq and NYSE require listed companies to have a compensation committee composed of members of the board of directors who are independent within the meaning of the general Nasdaq or NYSE rules described above. Nasdaq requires that the compensation committee consist of at least two directors, while the NYSE does not specify a minimum number of members for the compensation committee.

— *Determination of Independence*: Nasdaq and the NYSE require that, in determining the independence of members of the compensation committee, the board must consider all factors relevant to whether a director has a relationship that is material to that director's ability to be independent of management, including:

- the source of compensation of such director, including any consulting, advisory or other compensatory fees paid by the company to such director; and
- whether such director is affiliated with the company.

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

— *SEC Rule 16b-3*: Section 16(b) of the Exchange Act requires directors, executive officers and 10% stockholders to disgorge to the company any "profit" realized through any purchase and sale (or any sale and purchase) of equity securities of the company within a period of less than six months. Rule 16b-3 provides that the grant of a stock option will not be considered a matchable purchase if the grant is approved by a board committee consisting of two or more directors, each of whom is a "non-employee director" within the meaning of SEC Rule 16b-3. Although workarounds exist, it is desirable for each member of the compensation committee to qualify as a "non-employee director."

CORPORATE GOVERNANCE AND NOMINATING COMMITTEE

— *NYSE*: NYSE rules require each listed company to have a nominating or corporate governance committee composed solely of independent directors under the NYSE's general definition of independence.

— *Nasdaq*: Although not mandating that each listed company establish a nominating or corporate governance committee, Nasdaq rules require director nominees to be selected, or recommended for selection by the board, by either a nominating committee composed solely of independent directors or by a majority of the independent members of the board. Most Nasdaq-listed companies elect to have a nominating and corporate governance committee to satisfy this requirement.

— *Size*: Neither NYSE nor Nasdaq prescribe any minimum size for the nominating and corporate governance committee.

CONTROLLED COMPANY EXEMPTION

— A "controlled company" in which a majority of the voting power for the election of directors is held by an individual, a group, or another company is exempt from the requirements that a majority of the directors be independent and that the board maintain a separate compensation committee and a separate corporate governance and nominating committee (or, in the case of Nasdaq, have a majority of the independent directors make nominations). A controlled company is not exempt from audit committee requirements.

— Before taking advantage of the controlled company exemption from corporate governance requirements, an eligible IPO company should seek input from its managing underwriters, as the absence of these investor protections may be perceived negatively in the market and adversely affect the marketing of the offering. ■

BRIGHT-LINE INDEPENDENCE STANDARDS

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

— he or she is, or at any time during the past three years was, an employee of the company;

— his or her family member is, or at any time during the past three years was, an executive officer of the company;

— he or she (or a family member) has, or at any time during the past three years had, a "compensation committee interlock," which exists when an executive officer of Company A serves on the compensation committee of Company B at the same time that a director of Company A (or his or her family member) serves as an executive officer of Company B;

— he or she (or a family member) has, or at any time during the past three years had, certain specified relationships with the company's auditor, including the company's internal auditor in the case of the NYSE;

— he or she (or a family member) has certain specified relationships with another entity that, in the past three years, received payments from or made payments to the company for property or services in excess of:

- in the case of Nasdaq, the greater of $200,000 and 5% of the recipient's gross revenues for that year; or
- in the case of the NYSE, the greater of $1 million and 2% of the other company's gross revenues for that year; or

— he or she (or a family member) received compensation from the company in excess of $120,000 during any twelve-month period within the past three years, other than compensation for service on the board or a board committee, compensation paid to a family member as a non-executive employee, and certain other exempted payments.

The simple question of whether an individual is a company officer often requires a surprisingly complicated answer because SEC rules, state corporate law, federal tax law and common parlance provide multiple definitions of "officer." The answers under these different definitions are significant, as they can trigger various disclosure obligations and potential liabilities for officers of public companies.

CORPORATE OFFICERS

A company's "corporate officers" are defined by state corporate law and the company's bylaws. Typical bylaws provide that a company will have a president, one or more vice presidents, a treasurer, a secretary and such other officers as the board determines. Corporate officers have the authority and duties specified in the bylaws or established by the board, and generally can create binding obligations on behalf of the company. In addition, employees with titles ordinarily conferred on officers (such as vice president) can have "apparent authority" or "implied authority" to bind the company in dealing with third parties even if they are not appointed corporate officers. There are no specific SEC disclosure obligations that flow from "corporate officer" status.

OFFICERS

Rule 3b-2 under the Exchange Act defines a company's "officers" as its president, vice president, secretary, treasury or principal financial officer, controller or principal accounting officer, and any person routinely performing corresponding functions for the company. This definition, although expansive, has limited practical significance since most required disclosures relating to company management apply to "executive officers" and not "officers" generally.

EXECUTIVE OFFICERS

Rule 3b-7 under the Exchange Act defines a company's "executive officers" as its president; any vice president in charge of a principal business unit, division or function; any other officer who performs a policy-making function; and any other person who performs similar policy-making functions.

NAMED EXECUTIVE OFFICERS

Item 402(a)(3) of Regulation S-K defines a company's "named executive officers" (NEOs) as anyone who served as the principal executive officer or principal financial officer during the company's previous fiscal year, regardless of compensation, and the other three highest-paid executive officers who were serving as executive officers at the end of the company's previous fiscal year (plus up to two additional individuals who served as executive officers during the last completed year and for whom disclosure would have been required but for the fact that they were not serving as executive officers of the company at the end of the year). Emerging growth companies (EGCs) are only required to have three NEOs (including anyone who served as the principal executive officer during the previous fiscal year), plus up to two additional individuals who served as executive officers during the last completed year and for whom disclosure would have been required but for the fact that they were not serving as executive officers at the end of the year.

PRINCIPAL OFFICERS

Various SEC rules and forms reference—but do not define—a company's "principal executive officer" (almost always the CEO), "principal financial officer" (almost always the CFO) and "principal accounting officer" (usually the CFO or controller). These officers must sign (and potentially have personal liability for) registration statements (such as a Form S-1 for an IPO) and certain other SEC filings.

SECTION 16 OFFICERS

Specified "officers" of every public company are subject to the public reporting and short-swing liability provisions of Section 16 of the Exchange Act. Pursuant to Rule 16a-1(f) under the Exchange Act, the officers subject to Section 16 (often referred to as "Section 16 officers") generally are the same as the company's executive officers, except that the principal accounting officer (or the controller, if there is no principal accounting officer) automatically is a Section 16 officer even if the company does not otherwise consider such person to be an executive officer.

SECTION 162(m) OFFICERS

Section 162(m) of the Internal Revenue Code, as revised by the Tax Cuts and Jobs Act of 2017 (TCJA), disallows a federal income tax deduction by a public company for "annual compensation" in excess of $1 million paid to its CEO, CFO and other three highest-paid officers. The officers whose compensation is subject to this limitation are referred to as "covered employees" in Section 162(m). Prior to the TCJA, because of a quirk of cross-referencing between the Internal Revenue Code and SEC rules, the CFO was not a "covered employee" in most cases.

C-LEVEL OFFICERS

The colloquial phrase "C-level officers" may refer to a company's chief executive officer, chief financial officer, chief operating officer, chief accounting officer and chief legal officer (and perhaps other chiefs). These terms are sometimes used—but not defined—in SEC rules. ■

WHO ARE THE EXECUTIVE OFFICERS?

The determination of the company's executive officers is often difficult. The CEO and CFO are always executive officers, but beyond that there typically is some subjectivity in applying the SEC's definition. The "policy-making" test, for example, can be challenging to apply if the company has one or two executives who control decision-making or a management structure that treats a large group of leaders as peers. Many companies find it helpful, in applying the relevant definitions, to focus on the universe of officers who report directly to the CEO or, if the company has multiple levels of vice president, on those at or above a specified level, such as executive vice president. SEC rules also require that "significant" employees be identified in the prospectus. Based on data from all US IPOs completed from 2007 through 2017, the number of executive officers identified by IPO companies ranged from a low of two to a high of 20, with a median of six; only 15% of those companies named any "significant" employees who were not also executive officers.

Selection of the executive officers can be a sensitive issue within the company. Some employees may feel slighted if omitted from the prospectus, while others are happy to avoid the consequences. The executive officers to be named in the prospectus should be determined early enough to manage any internal issues and to permit all necessary information to be collected from the required persons.

The Form S-1 for an IPO must include specified information about a company's directors, officers, 5% stockholders and any selling stockholders. Below is an overview of the principal disclosures that are required.

COMPENSATION

— The Form S-1 must include extensive compensation information for each of the company's *named executive officers* (NEOs).

— Compensation disclosures are for the fiscal year preceding the initial Form S-1 filing or submission plus subsequently completed fiscal years prior to effectiveness of the Form S-1.

— The Form S-1 must disclose *director* compensation (including consulting arrangements).

STOCK OWNERSHIP

— The Form S-1 must disclose the beneficial stock ownership of each *director, NEO, 5% stockholder and selling stockholder.* A person is considered to have beneficial ownership of all company securities over which the person has or shares voting or investment power (or has the right to acquire voting or investment power within 60 days).

— Post-IPO, each *director, officer and 10% stockholder* must report beneficial stock ownership as of the IPO and all changes in stock ownership under Section 16 by filing Forms 3, 4 and 5 with the SEC. For Section 16 reporting purposes, beneficial ownership is based on "pecuniary interest," defined as the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the securities. Solely for purposes of determining whether a person is a 10% stockholder, beneficial ownership is based on voting or investment power over the securities.

— Post-IPO, each *5% stockholder* must file separate beneficial stock ownership reports with the SEC on a Schedule 13D or 13G, with beneficial ownership based on voting or investment power over the securities.

RELATED PERSON TRANSACTIONS

— The Form S-1 must disclose all transactions in which the company was a participant, since the beginning of the company's third preceding full fiscal year, that involved an amount in excess of $120,000 and in which a *director or executive officer* (or any immediate family member of the foregoing) had or will have a direct or indirect material interest in the transaction.

— The Form S-1 must disclose all transactions in which the company was a participant, since the beginning of the company's third preceding full fiscal year, that occurred while a stockholder was a *5% stockholder* and involved an amount in excess of $120,000 if the 5% stockholder (or any immediate family member of the 5% stockholder) had or will have a direct or indirect material interest in the transaction.

BIOGRAPHICAL AND BACKGROUND INFORMATION

— The Form S-1 must include specified biographical and background information for each *director and executive officer.*

— The required information includes specified bankruptcy, criminal, injunction, securities violation and stock exchange matters that occurred during the past ten years and that are material to an evaluation of the ability or integrity of a *director or executive officer.*

SELLING STOCKHOLDERS

— The Form S-1 must disclose the name and beneficial stock ownership of each *selling stockholder*, state the number of shares to be sold by each selling stockholder, and indicate the nature of any position, office or other material relationship that any selling stockholder has had with the company or any of its predecessors or affiliates within the past three years.

— If a *selling stockholder* is not a natural person, the Form S-1 must also identify any persons (entities or natural persons) who control the selling stockholder and who have had a material relationship with the company or any of its predecessors or affiliates within the past three years, and describe the nature of any such relationships.

— An exception permits the company to make required beneficial ownership disclosures for selling stockholders on an unnamed group basis, as opposed to an individual basis, where the aggregate holding of the group is less than 1% of the company's outstanding shares prior to the IPO.

FINRA RELATIONSHIPS

In order to obtain approval of the IPO's underwriting arrangements from the Financial Industry Regulatory Authority (FINRA)—the self regulatory organization for securities firms in the United States—the managing underwriters must provide representations and disclosures to FINRA relating to specified arrangements, relationships and affiliations between the company or its stockholders and FINRA members. The information supplied by stockholders for this purpose is not publicly disclosed. However, the Form S-1 must disclose any relationship between the company and a FINRA member participating in the IPO that gives rise to a "conflict of interest" under FINRA rules. ■

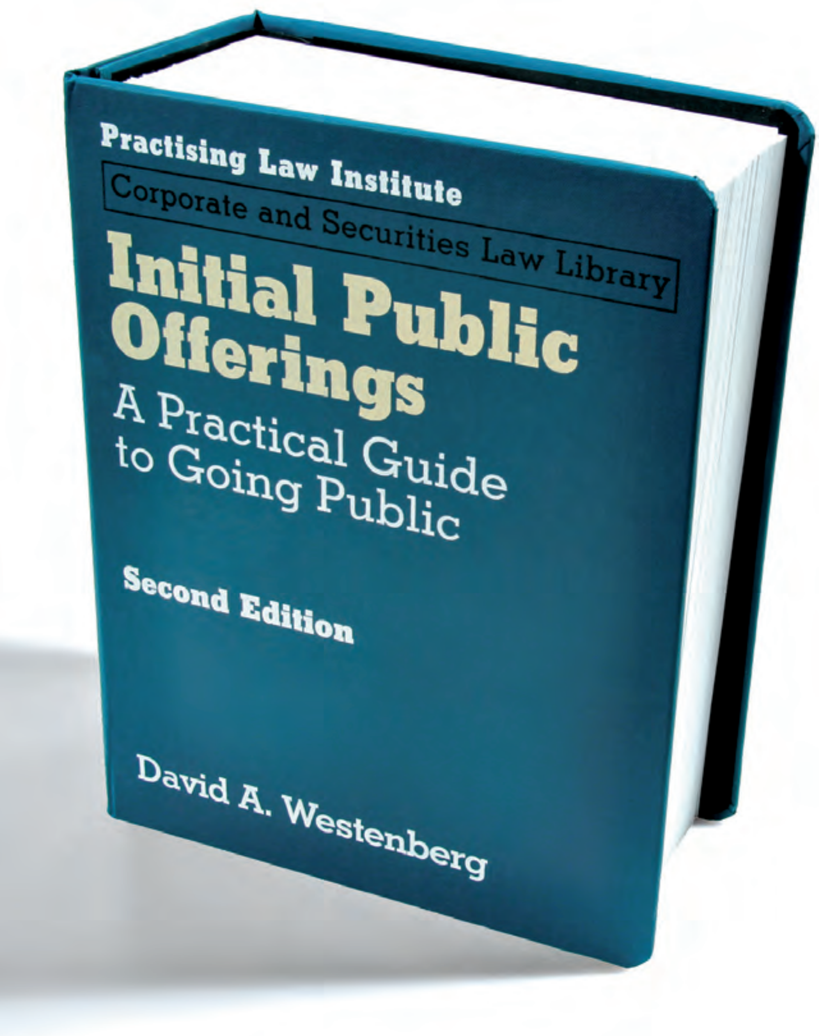
OBTAINING REQUIRED INFORMATION

Required information is elicited from the company's directors, officers and 5% stockholders through the use of a questionnaire (commonly called the "D&O questionnaire"). These same persons, along with the company and anyone else who acquired company securities (including options, restricted stock units or warrants) within the 180 days preceding the date of the initial Form S-1 filing or submission, complete a separate "FINRA questionnaire" to support the required representations and disclosures to be made by the managing underwriters to FINRA.

Questionnaires typically are timed so that they will be completed and returned shortly before the initial Form S-1 filing or submission, to avoid the need for immediate updates. If the offering includes selling stockholders, a separate questionnaire (eliciting required selling stockholder disclosures and FINRA affiliations) is utilized once the selling stockholders are identified. For confidentiality reasons, dissemination of the FINRA questionnaire beyond the recipients of the D&O questionnaire is usually deferred until after the initial public filing of the Form S-1.

We Wrote the Book on Going Public.

You can write the next chapter.



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Want to know more about the venture capital and M&A markets?

Our *2018 Venture Capital Report* offers an in-depth analysis of, and outlook for, the US venture capital market, including industry and regional breakdowns. The report examines the benefits and challenges of pre-IPO "crossover" financings; discusses the opportunity to defer income from private company equity grants under a new section of the federal tax code; and addresses important considerations in IPO planning by VC-backed companies. We also provide a roundup of trends in venture capital financing terms, convertible debt terms and VC-backed company M&A deal terms.

See our *2018 M&A Report* for a detailed global M&A market review and outlook. The report offers an update on takeover defenses, looks at factors companies should consider in M&A transactions that could be subject to "entire fairness" review, and discusses strategies to combat frivolous M&A lawsuits. We also examine the challenges specific to cross-border deals; assess the current CFIUS and FCPA climate; compare deal terms in public and private acquisitions; and survey key terms and issues in sales of VC-backed companies.

To request a copy of any of the reports described above, or to obtain additional copies of the *2018 IPO Report*, contact WilmerHale's Client Development Department at ClientDevelopment@wilmerhale.com or call +1 617 526 5600.

An electronic copy of this report can be found at wilmerhale.com/2018IPOreport.

Data Sources: WilmerHale compiled all data in this report unless otherwise indicated. Offerings by REITs, bank conversions, closed-end investment trusts, special purpose acquisition companies, oil & gas limited partnerships and unit trusts are excluded from IPO data. Offering proceeds generally exclude proceeds from exercise of underwriters' over-allotment options, if applicable. For law firm rankings, IPOs are included under the current name of each law firm. Venture capital data is sourced from SEC filings and Dow Jones VentureSource. Private equity–backed IPO data is sourced from SEC filings and Thomson Reuters.

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