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# BOOK REVIEW

## David Westenberg's *IPOs: A Practical Guide to Going Public*

reviewed by Stanley Keller  
and Matthew J. Gardella

Although it may seem paradoxical at this time when the initial public offering (IPO) window is virtually slammed shut, there may be no better time than the present for the publication of David Westenberg's superb book, *IPOs: A Practical Guide to Going Public*, to be published by Practising Law Institute in the Autumn of 2009. In 2008, we saw the worst year for US IPOs since 1975, with only 31 IPOs completed, and the trend has continued. During the first quarter of 2009, not a single venture capital-backed company went public. But we also are reminded recently of an earlier time of IPO plenty that may seem very far away from today's capital markets. In April 2009, some of Wall Street's leading investment banking firms agreed to pay \$586 million as part of the settlement of the long-running class action lawsuit relating to claims of "laddering" in the IPOs of technology companies during the Internet bubble of the late 1990s. Back then, there was a very different IPO market. In 1996, US annual IPO volume reached 866 IPOs. Often, a company with little operating history and minimal corporate infrastructure could decide to go public and, with the help of the right investment bank, prepare and complete an IPO in a matter of a few months. Those days are long gone, but history shows us that the IPO market invariably will rebound, although not necessarily with the same excesses. IPOs will start to occur at a more normalized rate (perhaps again reaching a stable range of about 200 deals a year, like we had before the credit meltdown in 2007).

The question is: Will you be ready when the IPO market "window" opens again?

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## A New Regulatory Environment

For all those who may be considering an IPO in their future, whether it be as a company founder, member of the management team, board member, venture capitalist, private equity sponsor, investment banker, lawyer or accountant, this book is a critical resource for your understanding of what it takes to conduct a successful IPO under current ground rules and to be ready for life as a public company. Since those heady days of the Internet bubble, not only has the marketplace demanded more from those seeking to go public, but also the regulatory reforms following the Sarbanes-Oxley Act of 2002 have raised standards greatly. Enhanced corporate governance, controls and procedures, and disclosure requirements have dramatically increased the level of preparation necessary to be ready for an IPO, such that today's IPO candidates often start plotting their course a full 12 months in advance. Heightened disclosure requirements and new accounting standards have added considerable complexity to the IPO registration statement; nearly doubling the average time it takes for a company to complete the SEC review process.

Further, offering practices and IPO marketing continue to evolve (and will keep doing so), hastened in part by new communication rules for securities offerings enacted in 2005 as part of the Securities and Exchange Commission's Securities Offering Reform and the ever-changing influence of the Internet and new media. Now more than ever, IPOs must be led by people who have an intense knowledge of the issues that arise and how a deal gets done, and this book shares some of the most useful information on that topic that we have seen.

## A Comprehensive Guide

For decades, David Westenberg and WilmerHale have been major participants in the IPO market and the world of venture capital. In addition to representing many companies and underwriters in IPOs,

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they have for years devoted significant resources to staying abreast of US IPO activity and market trends generally through the publication of their annual *IPO Report*. Now all that accumulated experience is brought to bear in *IPOs: A Practical Guide to Going Public*, resulting in a comprehensive, practical and highly readable guide to a successful IPO and life beyond as a public company.

The book is divided into three primary sections:

- Part I provides an introduction to the IPO market, discusses many of the key elements in building a startup company for an eventual IPO, and addresses specific advance planning for an IPO.
- Part II focuses on the IPO process itself.
- Part III addresses selected post-IPO topics, including public company obligations, investor relations, and future liquidity issues and fundraising.

The scope of the coverage is impressive, including, for example: the key attributes of successful IPO candidates; accounting preparations; the nature and sources of corporate governance requirements; how to navigate SEC review; demystifying the underwriting process; how offerings are marketed; and financial planning for executives of pre-IPO companies.

## Description of Selected Chapters

The following descriptions provide some additional flavor of selected content of this book.

The chapter entitled “*The Elements of Success: Building a Startup Company for an Eventual IPO*” thoughtfully discusses a number of issues that are core to the success of a startup company and can come to haunt it later at the time of an IPO if not dealt with properly at the outset. In particular, the sections on “*Building the Employee Team*” and “*Intellectual Property*” contain very useful information for non-specialists on topics such as minimizing exposure to employment liability, immigration issues and seeking talent overseas, using equity for employee compensation, and protecting intellectual property. While many of these topics do not have

the glamour usually associated with an IPO, any of them can surface on the way to an IPO (usually, in connection with a VC-round or immediately after the IPO registration statement is filed) to cause complications or worse.

The chapter entitled “*Accounting Preparation*” provides a very useful overview of important accounting rules and those accounting issues that have been shown over time to vex IPOs: availability of financial statements, acquisition accounting, revenue recognition, restatements, “cheap stock” issues, and other equity compensation matters. A discussion of internal controls over financial reporting and the eventual application of Section 404 of the Sarbanes-Oxley Act to a newly public company is cogently addressed in the chapter entitled “*Over-sight, Controls and Policies*.”

The chapter entitled “*Corporate Governance*” goes far beyond the usual recitation of the board and committee qualifications and independence standards of the stock exchanges, and thoughtfully describes the important roles of the board and its committees and corporate governance best practices. Also, the discussion of takeover defenses particularly is timely as stockholder activism over the years largely has dismantled these defenses at most publicly traded companies, leaving them vulnerable to the resurgence of hostile M&A activity that the current battered market conditions have encouraged.

The chapter entitled “*Preparing the Form S-1*” is a great heading-by-heading tour of the IPO registration statement, complete with an overview of the required disclosure in each major prospectus section and illustrative SEC comments.

## Other Subjects

The book also covers a number of important subjects that most other IPO guides do not generally address. For example, the chapter entitled “*Out of the Ordinary IPOs—Special Issues for Special Issuers*” describes some of the particular issues and dynamics present in certain types of IPOs, such as IPOs by venture capital-backed, life sciences, buy-out backed, spin-off, and post-bankruptcy

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companies. The thoughtful discussion of “dual track” IPOs and related issues seems very timely, given the current situation of M&A as the dominant “exit” for VC-backed companies. Appropriate attention also is focused on alternatives to the traditional IPO, including Special Purpose Acquisition Company IPOs, Rule 144A IPOs, and cross-border IPOs, reflecting the latest trends in the capital markets. Lastly, the chapter entitled “*Pre-IPO Acquisitions*” is a great guide to conducting M&A generally and effectively describes many of the issues that can arise when such transactions are proximate to an IPO.

## A Practical Approach

In addition to its comprehensive coverage, the greatest strength of this book may be its overall highly practical and readable approach to its subject. While the IPO process inherently is grounded in some of the most complicated statutes, rules, regulations, and SEC interpretations, the author never veers needlessly into the legalistic. The complicated regulatory features surrounding the IPO are distilled and explained in a way designed to promote understanding and enable readers to plan for a smooth IPO, make smart decisions along the way and to be ready to deal with topics that might otherwise create problems or disrupt the process. Throughout the book, “planning tips” and other helpful information are presented in a highly readable way, often through a formatting convention of text in shaded boxes. The book contains many battle-tested checklists, illustrative timetables, model policies, and other planning tools.

The real-world is further vividly infused in this book by the effective use of empirical data from the IPO market over the last several years to answer important questions, such as:

- Am I big enough to go public?
- What’s the average size of an IPO?
- About how long will the SEC review process take?
- What section of the IPO prospectus is likely to draw the most SEC comments?
- How common are selling stockholders in an IPO?
- What percentage of IPOs have directed share programs?
- Are companies still going public with a classified board of directors? What about adopting a Shareholder Rights Plan?
- Are employee stock purchase plans still being used?
- Do I have to use a “Big 4” accounting firm?

This type of statistical data provides answers that are far more insightful and authoritative than vague generalizations about what market practices might be.

## Conclusion

David Westenberg’s *IPOs: A Practical Guide to Going Public* is a highly pragmatic, knowledgeable and comprehensive account of the topic and will be an invaluable resource for all those who may be involved with a company considering the IPO journey.