

§ 10:5.7 SEC Rulemaking and Market Practices

The JOBS Act was created by combining various legislative proposals that had been under consideration by Congress over the preceding year or so, and was enacted quickly. The act calls for a substantial amount of SEC rulemaking and prescribes deadlines that the SEC has indicated are not achievable in light of the volume of rulemaking and the time required to draft new rules, prepare the accompanying economic analyses, permit proper review by the SEC, and afford opportunity for public input, as well as the backlog of uncompleted rulemaking mandated by the Dodd-Frank Act. Legal challenges to the upcoming rules are also possible, particularly in light of the successful effort to overturn the SEC's proxy access rule in July 2011 and the high judicial standards that must be satisfied for rules to be upheld. As a result, the timing of SEC rulemaking under the JOBS Act is uncertain.

In addition to the rulemaking required by the JOBS Act, the SEC staff has been issuing Frequently Asked Questions and providing other guidance on the JOBS Act. In doing so, the staff has indicated it is striving to implement Congress's intent in a pragmatic manner to make the act a success—for example, by finding solutions to technical glitches and filling in gaps in the act. Moreover, market practices with respect to the JOBS Act are only just beginning to emerge. The ultimate implications of the JOBS Act will become known over time as SEC rulemaking and interpretations continue and market practices develop.

§ 10:6 Sequence and Timing of Events in the IPO Process

The IPO process is not quick. In a typical IPO, the company spends six to twelve months in some level of preparations before holding the organizational meeting that launches the formal process. The Form S-1 usually is filed (or submitted by an emerging growth company for confidential SEC review, if applicable) one to two months later, and the offering typically is completed after another three to four months. Total elapsed time: twelve to eighteen months. Overall timing can vary widely, however, depending on numerous factors within and outside the company's control. It is, for example, often possible to compress the phase prior to the organizational meeting. It is unusual, however, to close an IPO in less than four or five months after the organizational meeting, or for a company not to devote at least two to three months to IPO preparations in advance of the organizational meeting.

Nor is the outcome of the IPO process certain. The reality is that the company must be ready for the market, and the market must be ready for the company. Without both, there can be no IPO, and the company controls only half the equation.

The length and uncertainty of the IPO process have several implications:

- It is difficult to achieve the optimal timing for the offering, as market conditions can change several times (negatively or positively) during the course of the IPO process.
- A substantial amount of management time and attention is diverted from normal business operations for an extended period of time.
- The company incurs significant legal and accounting expenses in advance of—and even in the absence of—receiving any IPO proceeds.

The first consequence listed above is unavoidable and simply means the company may need to delay an offering if market conditions become inhospitable or may have to push very hard to complete the IPO during a market window. The company should plan for the other two consequences by building a deep management team before embarking on the IPO process and by budgeting sufficient resources to pay offering expenses as incurred.

Figure 10-2 depicts the sequence of key events in an illustrative IPO timetable. As shown in the diagram, the overall IPO timetable is the same for emerging growth companies electing confidential SEC review and for companies undergoing a traditional filing and review process, and the steps in the IPO process are the same except that with a confidential submission part of the SEC review process occurs before any public filing has been made.

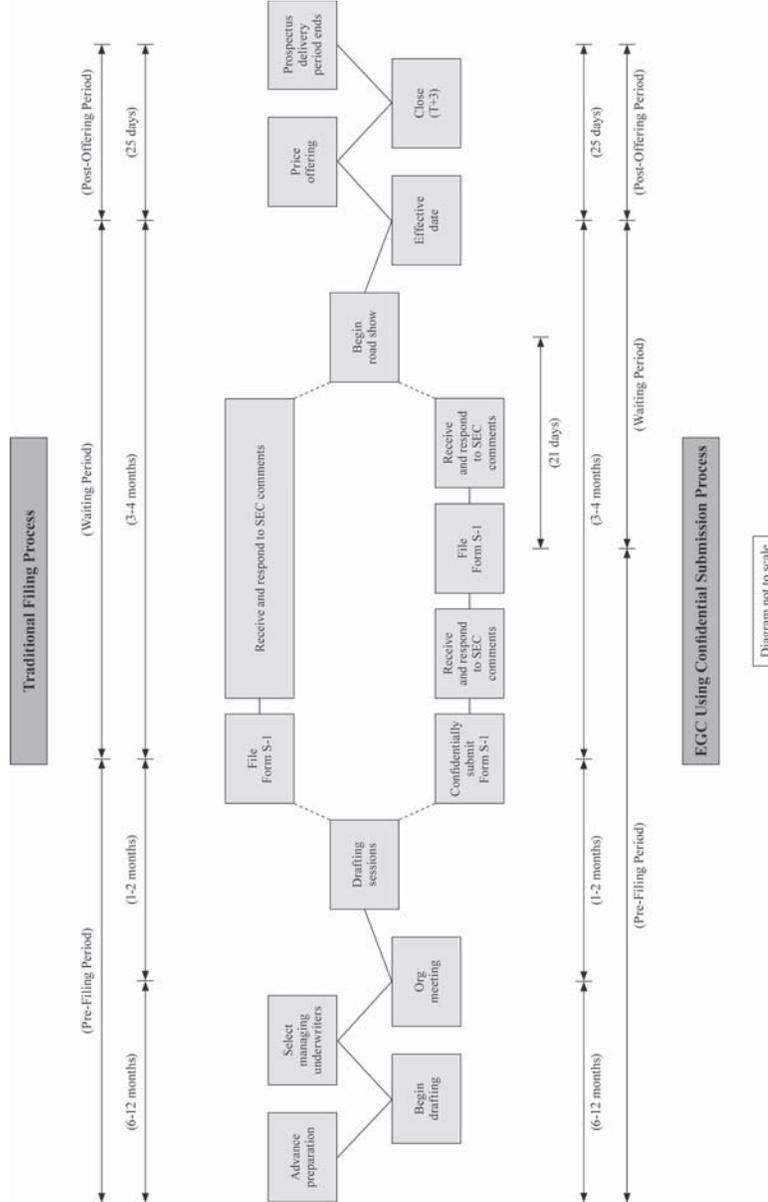
A high-level outline of what transpires during the IPO process follows. These topics are discussed in depth elsewhere in this book.

§ 10:6.1 Six to Twelve Months Before the Organizational Meeting

After selecting new (or confirming incumbent) company counsel and independent accountants, the company attends to longer-range items during this phase of the IPO process, including the need to:

- ensure the availability of all required financial statements;
- consider cheap stock issues;
- address any other accounting issues, including changes in accounting policies and practices that will need to be implemented in order to report as a public company;
- develop disclosure controls and procedures;
- begin to develop the internal control over financial reporting required by section 404 of the Sarbanes-Oxley Act;
- establish relationships with investment bankers and research analysts at targeted firms;

Figure 10-2
Illustrative IPO Timetable



- consider the composition of the board of directors and board committees, and recruit new directors if any are to be added prior to the IPO;
- assemble the IPO team, including internal staff and outside advisors;
- commence the corporate housekeeping process; and
- consider estate and tax planning needs of founders and executives.

§ 10:6.2 *Three to Six Months Before the Organizational Meeting*

This phase involves a mix of planning and implementation, as the level of IPO preparations picks up. During this time period, IPO activities do not yet dominate management's time, but the company—guided by counsel—should:

- begin to develop corporate governance policies and practices;
- educate management about public company responsibilities and restrictions;
- identify and address outstanding loans to executive officers or directors;
- consider the treatment of other related person transactions;
- review arrangements with officers (employment, change-in-control and severance agreements, and confirmation of offices and titles);
- evaluate the need for additional financing prior to the IPO closing and assess the availability of exemptions from registration; and
- if necessary, hold a pre-filing conference with the SEC to resolve any novel accounting or legal issues that might impede the IPO.

§ 10:6.3 *One to Three Months Before the Organizational Meeting*

In this phase, efforts intensify as IPO preparations begin to demand a substantial portion of management's time and attention. Company counsel will now be deeply involved, as the company needs to:

- begin drafting the Form S-1, particularly the business section;
- determine the aspects of the JOBS Act on which the company plans to rely (if qualifying as an emerging growth company under the JOBS Act);

- prepare for due diligence by the underwriters and underwriters' counsel;
- review prior stock issuances and option grants and remedy any deficiencies;
- identify required amendments or waivers under financing documents or other contracts;
- evaluate the company's registration rights and IPO participation obligations;
- determine material contracts that must be filed, ensure availability of electronic versions of those contracts, and identify the portions for which confidential treatment will be sought;
- establish an external communications policy and avoid gun-jumping issues;
- review and revise the company's website;
- consider takeover defenses;
- consider board and executive compensation matters, including stock plans;
- arrange for D&O insurance prior to closing and consider indemnification agreements;
- choose an exchange for common stock listing and reserve a trading symbol; and
- select the lead managers and co-managers.

§ 10:6.4 *The Organizational Meeting*

At an all-day organizational meeting, the IPO working group—management, company counsel, managing underwriters, underwriters' counsel, and the independent accountants—will:

- review the basic IPO terms, including the anticipated size and composition of the offering and over-allotment option, and the desired mix of institutional/retail and domestic/international investors;
- discuss the proposed timeline and timing considerations;
- review quiet period restrictions and the company's publicity plans;
- discuss due diligence arrangements;
- hear in-depth presentations from management regarding the company and its business; and
- discuss the business section of the draft Form S-1, if available.

§ 10:6.5 *One to Two Months After the Organizational Meeting*

This is the busiest phase of the IPO process for the entire working group and a period of intense activity for management and company counsel as they:

- participate in drafting sessions;
- with the working group's input, continue drafting the Form S-1 and prepare the prospectus cover artwork;
- circulate questionnaires to directors, officers, 5% stockholders, and selling stockholders to elicit required information;
- obtain signed lockup agreements;
- respond to due diligence requests from the underwriters and underwriters' counsel;
- continue public company preparations;
- negotiate the underwriting agreement;
- review the Form S-1 with the board and obtain board approval;
- file the Form S-1 with the SEC (or, in the case of an emerging growth company electing confidential SEC review, submit the draft Form S-1 to the SEC);
- file any confidential treatment request with the SEC (this process is unrelated to status as an emerging growth company); and
- submit a listing application to the selected stock exchange.

§ 10:6.6 *One to Three Months After the Initial Form S-1 Filing/Confidential Submission*

After a lull of roughly thirty days, during which the company awaits the SEC's initial comments, management, and company counsel:

- with the working group's input, revise the Form S-1 in response to SEC comments (typically three to five cycles over approximately two months);
- respond to additional due diligence requests and update responses to the original requests;
- finalize the underwriting agreement;
- finalize arrangements with any selling stockholders; and
- continue public company preparations.

An emerging growth company that submits a draft Form S-1 for confidential SEC review must publicly file the Form S-1 (including the initial submission and all amendments) on the SEC's EDGAR system no later than twenty-one days before the road show commences. Based on historical timelines, conversion of the confidential submission into a public filing is likely to occur approximately two months after the initial Form S-1 submission. When the company converts its confidential submission to a public filing, it also must publicly file its prior confidential submissions.

Also during this period, management prepares for the road show (with assistance from the lead managers); the co-managers are selected (if not chosen before the initial Form S-1 filing or confidential submission); and the lead managers organize the underwriting syndicate and selling group, prepare internal sales memoranda describing the company and its investment highlights, and educate the sales forces of the managing underwriters concerning the offering.

§ 10:6.7 *Three to Four Months After the Initial Form S-1 Filing/Confidential Submission*

In this final phase of the IPO process, the following occur:

- SEC comments are cleared;
- preliminary prospectuses are printed;
- the road show is conducted, with a typical process consisting of fifty to 100 presentations in ten to fifteen cities in the United States and Europe over a period of about two weeks;
- any remaining due diligence requests from the underwriters and underwriters' counsel are addressed;
- public company preparations are concluded;
- FINRA clearance of the underwriting arrangements is obtained;
- a registration statement on Form 8-A is filed with the SEC to register the common stock under the Exchange Act;
- acceleration requests are filed with the SEC, the SEC declares the Form S-1 effective, and the Form 8-A concurrently becomes effective;
- the offering is priced, the underwriting agreement is signed, the comfort letter is delivered and the common stock begins trading; and
- the closing is held three business days after trading begins.