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LIFE WILL FIND A WAY

– John Hammond, *Jurassic Park* (1997)

It's amazing how many important ideas can be gleaned from a Hollywood blockbuster. "Life will find a way" — or stated differently, you have to do what you have to do in order to survive, grow, and prosper — is just one of them. For technology and life sciences companies intent on finding the most reliable source of attractively priced equity capital to grow and prosper, an initial public offering is often the best choice.

Although 2016 to date has been lackluster thus far, 2014 and 2015 were among the most receptive years for IPOs in the last ten years, particularly for tech and life sciences IPOs, but that doesn't mean that the capital markets always have been — or always will be — receptive to IPOs. In fact, market windows of opportunity tend to open and close with little advance notice and with considerable frequency. But the fact is that year in and year out, for several decades, IPOs have been the financing gold standard for companies that aspire to grow.

Over time, alternatives to IPOs have arisen and many companies have elected to stay private longer, often with the assistance of venture capital and private equity firms and the growth of private secondary markets. M&A opportunities also can look very attractive to companies that cannot go public and either have outgrown — or worn out their welcome with — their existing financing sources. Despite the existence of alternatives, many companies will, when opportunity knocks, elect to go public, an option made more attractive by the 2012 Jumpstart Our Business Startups Act (JOBS Act). So even if the knock is occasionally inaudible, it's worth thinking about how best to prepare for an IPO.

THE EMERGING GROWTH COMPANY

The JOBS Act created a new class of issuer: the emerging growth company (EGC). An EGC is defined as an issuer with total annual gross revenue of less than $1 billion during the most recent fiscal year. Most companies considering or preparing for an IPO will qualify for EGC status, which will allow them to take advantage of a number of benefits, both during the offering period and once public. An EGC can have as long as five years to take advantage of such status.

THE OFFERING PROCESS

The public offering process is divided into three periods. **The pre-filing period** between determining to proceed with a public offering and the actual SEC filing of the registration statement is the "quiet period" and subject to potential limits on public disclosure relating to the offering. **The waiting or pre-effective period** between the SEC filing date and the effective date of the registration statement is when the company may make oral offers, but may not enter into binding agreements to sell the offered security. The final period is **the post-effective period** between effectiveness and completion of the offering.

The Registration Statement

A registration statement contains the prospectus, which is the primary selling document, as well as other required information, written undertakings of the issuer, and the signatures of the issuer and the majority of the issuer's directors. It also contains exhibits, including basic corporate documents and material contracts. U.S. companies generally file a registration statement on Form S-1. Most non-Canadian foreign private issuers use a registration statement on Form F-1, although other forms may be available. There are special forms available to certain Canadian companies.

The Prospectus

The prospectus describes the offering terms, the anticipated use of proceeds, the company, its industry, business, management, and ownership, and its results of operations and financial condition. Although it is principally a disclosure document, the prospectus also is crucial to the selling process. A good prospectus sets forth the "investment proposition."

As a disclosure document, the prospectus functions as an "insurance policy" of sorts in that it is intended to limit the issuer's and underwriters' potential liability to IPO purchasers. If the prospectus contains all SEC-required information, includes robust risk factors that explain the risks that the

170 U.S. IPOs completed in 2015 accounting for $30 billion in aggregate gross proceeds, and 43 U.S. IPOs completed in 2016 through June, accounting for $7.4 billion in aggregate gross proceeds.

HAVE A LOOK-SEE AT AN UP-C

In a structure commonly referred to as an "up-C," an existing limited liability company or other entity treated as a partnership for tax purposes (referred to here for convenience as an "LLC") undertakes an IPO through a newly formed C corporation. Private companies owned principally by individuals or by private equity sponsors are frequently organized as LLCs, which are not taxed at the entity level. Traditionally, if the owners of an LLC wanted to undertake an IPO, the owners would re-organize the LLC as a C corporation and offer and sell that C corporation's common stock to the public in the IPO. Owners of LLCs, however, are increasingly using the up-C structure as an alternative because it allows an LLC to undertake an IPO while maintaining the partnership status of the LLC. The up-C structure also is attractive to private equity-backed companies because it offers an ongoing exit strategy and enables the sponsors to preserve some control over the business.

In the up-C structure, the owners of an operating business organized as an LLC form a C corporation, with shares of Class A and Class B common stock, which becomes the managing member of the existing operating LLC. The newly formed C corporation then offers shares of Class A common stock to the public in an IPO. The shares of Class B common stock are issued to the historic owners and entitle the Class B holders to voting rights, but not economic rights (such as dividends or liquidation rights) in the new C corporation. Following the IPO, the C corporation will effectively be a holding company with the LLC as its subsidiary, where the principal assets and operations of the business remain.

See our "Practice Pointers on the Up-C Structure," available here.

company faces, and has no material misstatements or omissions, investors will not be able to recover their losses in a lawsuit if the price of the stock drops following the IPO. A prospectus should not include "puffery" or overly optimistic or unsupported statements about the company's future performance. Rather, it should contain a balanced discussion of the company's business, along with a detailed discussion of risks and operating and financial trends that may affect the company's results of operations and prospects.

SEC rules set forth a substantial number of specific disclosures required to be made in the prospectus. In addition, federal securities laws, particularly Rule 10b-5 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), require that documents used to sell a security contain all the information material to an investment decision and do not omit any information necessary to avoid misleading potential investors. Federal securities laws do not define materiality; the basic standard for determining whether information is material is whether a reasonable investor would consider the particular information important in making an investment decision. That simple statement is often difficult to apply in practice.

Although the JOBS Act provides for certain reduced disclosure requirements for EGCs, an issuer should still be prepared for a time-consuming drafting process, during which the issuer, investment bankers, and their respective counsel work together to craft the prospectus disclosure.

The Pre-Filing Period

The pre-filing period begins when the company and the underwriters agree to proceed with a public offering. During this period, key management personnel will generally make a series of presentations covering the company's business and industry, market opportunities, and financial matters. The underwriters will use these presentations as an opportunity to ask questions and establish a basis for their "due diligence" defense.

From the first all-hands meeting forward, all statements concerning the company should be reviewed by the company's counsel to ensure compliance with applicable rules. Communications by an issuer more than 30 days prior to filing a registration statement are permitted as long as they do not reference the securities offering. A statement made within 30 days of filing a registration statement that could be considered an attempt to pre-sell the public offering may be considered an illegal prospectus, creating a "gun-jumping" violation. This might result in the SEC's delaying the public offering or requiring prospectus disclosures of these potential securities law violations. Press interviews, participation in investment banker-sponsored conferences, and new advertising campaigns are generally discouraged during this period.

Under the JOBS Act, however, an EGC (or its designated representatives) may engage in "test-the-waters" communications with certain investors (known as Qualified Institutional Buyers, or QIBs, and Institutional Accredited Investors) to gauge interest in the offering during both the pre-filing period and after filing. The company should consult with its counsel and the underwriters before engaging in any "test-the-waters" communications. The SEC will also ask to review copies of any written materials used for this purpose.

In general, at least four to six weeks will pass between the distribution of a first draft of the registration statement and its filing with or confidential submission to the SEC. To a large extent, the length of the pre-filing period will be determined by the amount of time necessary to obtain the required financial statements.

Confidential Submission

The JOBS Act allows an EGC to submit drafts of the registration statement to the SEC for its review on a confidential basis. This allows the company to work through the SEC comment process (discussed below) without the glare of publicity and without competitors becoming aware of the proposed offering. The confidentially submitted registration statement should be a materially complete submission, as the SEC might decide not to review an incomplete registration statement, slowing down the offering process. Furthermore, the company must publicly file the confidentially submitted registration statement, along with all amendments, at least 15 days before the start of any "road show."

> In 2015, financial, healthcare and consumer companies represented the three largest IPO sectors by number (financial, capital goods & services and business services companies represented the three largest IPO sectors by dollar sign).

NYSE VS. NASDAQ GLOBAL MARKET PRINCIPAL QUANTITATIVE LISTING REQUIREMENTS

The following table summarizes the principal quantitative listing requirements; there are also qualitative requirements.

SELECTED LISTING REQUIREMENT	NYSE	NASDAQ GLOBAL MARKET
Minimum Number of Shareholders	400 round lot holders for U.S. companies and 5,000 round lot holders for non-U.S. companies.[1, 3]	Same.[2]
Minimum Number of Publicly Held Shares	1,100,000 for U.S. companies and 2,500,000 for non-U.S. companies.[1, 3]	Same, with similar exclusions.
Minimum Aggregate Market Value of Publicly Held Shares	$40 million for U.S. companies and $100 million for non-U.S. companies ($60 million if the non-U.S. company has a parent or affiliate that is a listed company and retains control of the company or is under common control with the company).[1, 3]	**Any of:** • $8 million under the Income Standard; • $18 million under the Equity Standard; *or* • $20 million under the Market Value Standard[4] or the Total Assets/Total Revenue Standard.[5]
Minimum per Price Share	At least $4.00 at initial listing.	Same.[6]
Minimum Number of Market Makers	N/A	Four; unless company qualifies for listing under the Income or Equity Standards, which each require three.[7]
Minimum Financial Standards	**For U.S. companies, one of the following:**[9] • **Earnings Test:** Adjusted pre-tax earnings from continuing operations must total (1) $10 million for the last three fiscal years,[10] including a minimum of $2 million in each of the two most recent fiscal years and positive amounts in all three years, or (2) if there is a loss in the third fiscal year, $12 million for the last three fiscal years, including a minimum of $5 million in the most recent fiscal year and $2 million in the next most recent fiscal year;[11] *or* • **Global Market Capitalization Test:** $200 million in global market capitalization (existing public companies must meet the minimum global market capitalization for a minimum of 90 consecutive trading days prior to listing on the NYSE). **For non-U.S. companies, one of the following:** • **Earnings Test:** Adjusted pre-tax earnings from continuing operations must total $100 million for the last three fiscal years (two years if company is an EGC), including a minimum of $25 million in each of the two most recent fiscal years; *or* • **Valuation/Revenue with Cash Flow Test:** (1) $500 million in global market capitalization; (2) $100 million in revenues during the most recent 12-month period; and (3) $100 million aggregate adjusted cash flows for the last three fiscal years with at least $25 million in each of the two most recent fiscal years; *or* • **Pure Valuation/Revenue Test:** (1) $750 million in global market capitalization; and (2) $75 million in revenues during most recent fiscal year; *or* • **Affiliated Company Test:** (1) $500 million in global market capitalization; (2) parent or affiliated company is a listed company in good standing; (3) parent or affiliated company retains control of, or is under common control with, the entity; and (4) operating history of 12 months.	**One of the following:**[8] • **Income Standard:** (1) $1 million in annual pre-tax income from continuing operations in most recently completed fiscal year or in two of the three most recently completed fiscal years; and (2) stockholders' equity of $15 million; *or* • **Equity Standard:** (1) stockholders' equity of $30 million; and (2) two-year operating history; *or* • **Market Value Standard:** N/A for IPO; *or* • **Total Assets/Total Revenue Standard:** Total assets + total revenue of $75 million each for the most recently completed fiscal year or two of the three most recently completed fiscal years.

1 A foreign private issuer (FPI) may also avail itself of the requirement applicable to U.S. companies.
2 For the Nasdaq Global Select Market, at least 550 total holders and an average monthly trading volume over the prior 12 months of at least 1,100,000 shares; or at least 2,200 total holders; or a minimum of 450 round lot holders. For the Nasdaq Capital Market, a minimum of 300 round lot holders.
3 The number of shareholders includes shareholders of record and beneficial holders of shares held in street name. Shares held by directors, officers, or immediate families and other concentrated holdings of 10% or more are excluded. When considering a listing application from a company organized under the laws of Canada, Mexico or the United States ("North America"), the NYSE will include all North American holders in applying the minimum shareholder requirement. When listing a company from outside North America, the NYSE may, in its discretion, include holders in the company's home country or primary trading market outside the United States in applying the minimum shareholder requirement, provided that such market is a regulated stock exchange. In exercising this discretion, the NYSE will consider all relevant factors including: (i) whether the information is derived from a reliable source, preferably either a government-regulated securities market or a transfer agent that is subject to governmental regulation; (ii) whether there exist efficient mechanisms for the transfer of securities between the company's non-U.S. trading market and the United States; and (iii) the number of shareholders and the extent of trading in the company's securities in the United States prior to the listing.
4 Market Value Standard is not applicable to IPOs.
5 For the Nasdaq Global Select Market, $45 million. For the Nasdaq Capital Market, $15 million under the Equity or the Market Value of Listed Securities Standards and $5 million under the Net Income Standard.
6 For the Nasdaq Capital Market, $4 bid price or $3 or $2 closing price under certain conditions.
7 For the Nasdaq Capital Market, three.
8 The other tiers (Nasdaq Global Select Market and Nasdaq Capital Market) have different requirements.
9 Real estate investment companies (REITs), closed-end management investment companies and business development companies (BDCs) have different requirements.
10 Under certain circumstances, a company may qualify with $10 million in aggregate for two years and nine months.
11 A company that qualifies as an EGC and avails itself of the provisions of the Securities Act of 1933, as amended (the "Securities Act"), and the Exchange Act permitting EGCs to report only two years of audited financial statements can qualify under the Earnings Test by meeting the following requirements: adjusted pre-tax earnings from continuing operations must total at least $10 million in the aggregate for the last two fiscal years together with a minimum of $2 million in both years.

Foreigners Welcome!

Foreign private issuers benefit from less onerous securities law requirements. A "foreign private issuer" (FPI) is a foreign issuer, other than a foreign government, that meets these conditions:

- No more than 50% of its outstanding voting securities are directly/indirectly owned of record by U.S. residents.
- Less than a majority of its executive officers or directors are U.S. citizens or residents.
- No more than 50% of its assets are located in the United States.
- Its business is administered principally outside the United States.

FPIs receive certain accommodations, including:

- Interim (rather than quarterly) reporting based on home country and stock exchange practice.
- Exemption from proxy rules and from Section 16 insider reporting and short swing profit recovery provisions.
- Aggregate (rather than individual) executive compensation disclosure, if permitted by home country.
- Offering document financial statements updated semi-annually (not quarterly).
- No obligation to apply U.S. GAAP, although reconciliation of significant variations may be required.
- Form 6-K filings furnished not filed; no Forms 8-K.
- No CEO/CFO certifications of interim financial information.
- Certain corporate governance requirements are satisfied by home country requirements.
- Pre-marketing IPO SEC filings may be made confidentially.

An FPI can also be an EGC. In 2015, FPIs represented 16% of all EGC IPO registration statements filed, and in the first half of 2016, FPIs represented 11% of all EGC IPO registration statements filed.

Like U.S. companies, FPIs are subject to the Sarbanes-Oxley Act requirements governing internal control over financial reporting.

The Waiting Period

Responding to SEC Comments on the Registration Statement

The SEC targets 30 calendar days from the registration statement filing or confidential submission date to respond with comments. It is not unusual for the first SEC comment letter to contain a significant number of comments that the issuer must respond to both in a letter and by amending the registration statement. After the SEC has provided its initial set of comments, it is much easier to determine when the registration process is likely to be completed and when the offering can be made. In most cases, the underwriters prefer to delay the offering process and to avoid distributing a preliminary prospectus until the SEC has reviewed at least the first filing and all material changes suggested by the SEC Staff have been addressed.

Preparing the Underwriting Agreement, the Comfort Letter, and Other Documents

During the waiting period, the company, the underwriters and their counsel, and the company's independent auditor will negotiate a number of agreements and other documents, particularly the underwriting agreement and the auditor's "comfort letter."

Pursuant to the underwriting agreement the company agrees to sell, and the underwriters agree to buy, the shares and then sell them to the public; until this agreement is signed, the underwriters do not have an enforceable obligation to acquire the offered shares. The underwriting agreement is not signed until the offering is priced. In the typical IPO, the underwriters will have a "firm commitment" to buy the shares once they sign the underwriting agreement.

Underwriters' counsel will submit the underwriting agreement, the registration statement, and other offering documents for review to the Financial Industry Regulatory Authority (FINRA), which is responsible for reviewing the terms of the offering to ensure that they comply with FINRA requirements. An IPO cannot proceed until the underwriting arrangement terms have been approved by FINRA.

In the "comfort letter," the auditor affirms (1) its independence from the issuer and (2) the compliance of the financial statements with applicable accounting requirements and SEC regulations. The auditor also will note period-to-period changes in certain financial items. These statements follow prescribed forms and are usually not the subject of significant negotiation. The underwriters will also usually require that the auditor undertake certain "agreed-upon" procedures, which can be subject to significant negotiation, in which it compares financial information in the prospectus (outside of the financial statements) to the issuer's accounting records to confirm its accuracy.

Marketing the Offering

During the waiting period, marketing begins. The only written sales materials that may be distributed during this period are the preliminary prospectus, additional materials known as "free writing prospectuses," which must satisfy specific SEC requirements, and any "test-the-waters" communications described above. While binding commitments cannot be made during this period, the underwriters will receive indications of interest from potential investors, indicating the price they would be willing to pay and the number of shares they would purchase. Once SEC comments are resolved, or it is clear that there are no material open issues, the issuer and underwriters will undertake a two- to three-week "road show," during which company management will meet with prospective investors. As noted above, the company must publicly file the confidentially submitted registration statement, along with any amendments, at least 15 days before the beginning of the road show.

Once SEC comments are cleared and the underwriters have assembled indications of interest for the offered securities, the company and its counsel will request that the SEC declare the registration statement "effective" at a certain date and time, usually after the close of business of the U.S. securities markets on the date scheduled for pricing the offering.

The Post-Effective Period

Once the registration statement has been declared effective and the offering has been priced, the issuer and the managing underwriters execute the underwriting agreement and the auditor delivers the final comfort letter. This occurs after pricing and before the opening of trading on the following day. The company then files a final prospectus with the SEC that contains the final offering information.

On the third or fourth business day following pricing, the closing occurs, the shares are issued, and the issuer receives the proceeds. The closing completes the offering process. Then, for the following 25 days, aftermarket sales of shares by dealers must be accompanied by the final prospectus or a notice with respect to its availability. If during this period there is a material change that would make the prospectus misleading, the company must file an amended prospectus.

THE PRIVATE IPO BEFORE THE IPO

As privately held companies remain private longer and defer their IPOs, these companies are increasingly reliant on raising capital in successive private placements. New

81% of EGC IPOs have made confidential submissions since enactment of the JOBS Act, through the first half of 2016.

HAVE A DUAL-TRACK MIND

Issuers sometimes will pursue an IPO concurrently with an M&A sale transaction, or a "dual-track process." A dual-track process can be very useful during periods of heightened market volatility in which the IPO market is uncertain. There are several advantages to a dual-track process, including oftentimes better pricing for both transactions, less dependence on market conditions, better leverage for the M&A sale transaction, creation of a higher degree of urgency for the M&A sale transaction, and efficiencies between the legal and process requirements for both transactions. However, there are a few disadvantages to a dual-track process, including public disclosure requirements, a negative perception that there is a lack of strategic direction or limited acquisition interest, diversion of management resources, and market risk exposure.

Timeline and Structure

The dual-track approach often depends on which option is more promising. If the IPO is more promising, then the company should submit the IPO registration statement to the SEC and work through one or more rounds of SEC comments before starting the M&A sale process. The M&A sale transaction can be used as a backstop if the IPO does not live up to expectations. If neither track is more promising, then the company should submit the IPO registration statement with the SEC at about the same time as it initiates the M&A sale transaction and solicits interest from potential buyers. If the M&A sale transaction is more promising, then the company should start the M&A sale process and delay the submission or filing of the IPO registration statement for as long as possible, but prepare a complete IPO registration statement and the existence of the IPO registration statement (which might never be filed) can be used to inform potential buyers that the company has an alternative.

Other Considerations

The following are other considerations:

- Confidentiality. Confidentiality of information disclosed in the sale process is absolutely crucial if the IPO process is not to be compromised. Particular attention should be paid to putting in place and enforcing

comprehensive confidentiality agreements with prospective buyers. A limited auction/ sale process to a select few prospective purchasers is well suited to a dual-track process.

- Complying with securities laws communication restrictions. Although an IPO registration statement filed by a domestic U.S. company will be publicly available on the SEC's website and can (and invariably will) be viewed by any potential buyer, there are limitations on the ability to use the IPO registration statement prior to the effective date.
- Other disclosure issues. Absent a leak, the M&A sale process usually does not need to be publicly disclosed prior to an acquisition announcement, but disclosure may be required in certain circumstances.
- M&A sale terms. If an acceptable acquisition offer emerges from the dual-track process, the company may seek to style the definitive agreement as if the transaction were a "public-public" merger, with limited representations and no indemnities or escrows following the closing, or may try to make the disclosure in the IPO registration statement an exception to the representations and warranties in a private sale agreement, permitting the company to prepare shorter disclosure schedules.
- Unwinding the IPO process. Assuming an acquisition agreement is signed after the IPO registration statement has been filed, the IPO registration statement will need to be withdrawn prior to closing the sale. However, it is usually advisable to keep the IPO registration statement and the exchange listing application on file until shortly before the closing to mitigate disruption if the M&A deal does not close.
- Valuation impact. A dual-track process can create tricky valuation issues, if the company pursues an IPO after receiving one or more acquisition offers. The company must consider the impact of acquisition offers on its determinations of fair market value for option grants made prior to the IPO.

categories of investors, including cross-over funds, sovereign wealth funds, and family offices, have become significant participants in late-stage (or mezzanine) private placements, along with insiders (i.e., directors, officers, and significant holders). Depending on the sector, a late-stage private placement may be an important step for a company. For example, a late-stage private placement may provide needed capital to allow the company to defer its IPO until the IPO market becomes more hospitable. A transaction involving the sale of securities held by existing holders may provide liquidity to friends and family, angel and other early investors in the company. In the tech sector, many market participants have observed that late stage private placements have become the "new IPOs." Given that private capital has been readily available, especially for promising privately held companies, and private capital has been available at attractive valuations, many "unicorns" have chosen to raise larger late-stage private rounds. Investors in private rounds may be benefitting from the value creation that would have been experienced in the years immediately following a company's IPO.

See our infographic here.

A Case Study

In certain sectors, the late-stage private placement serves some other important functions. For companies in certain sectors, such as life sciences, a late-stage private placement made to known and well-regarded life science investors may serve to validate the company's product, drug or technology. Often, investors will express an interest in participating in a subsequent IPO and this may be important to the IPO's ultimate success. Life science IPOs represented approximately 33% of the IPOs for 2015 and approximately 43% of the IPOs for the first half of 2016. Set forth below are a few key trends regarding insider participation in (1) late-stage private placements that preceded life sciences IPOs undertaken in 2015 and in 2016 (through June 30) and (2) the related IPOs.

- Approximately 85% of the companies had insider participation in their last private placement shortly prior to the IPO.
- Of those companies that had insider participation in their last private placement, the amount invested by insiders relative to the gross proceeds of the last private placement was on average approximately 62%.
- Approximately 70% of the IPOs had insider participation. Insiders participating in the IPOs generally were 10% beneficial holders.
- Approximately 11% of the IPOs had a concurrent private

The Big Four accounting firms continue to be the most active accounting firms involved in IPOs.

placement. Of those companies with a concurrent private placement, eight also had insiders indicating an interest in participating in the IPO.

See our survey "Late Stage Private Placements: A Life Sciences Sector Survey," available here.

ADVANCE PLANNING

Most companies must make legal and operational changes before proceeding with an IPO. A company cannot wait to see if its IPO is likely to be successful prior to implementing most of these changes. Many corporate governance matters and federal securities law requirements (including Sarbanes-Oxley), as well as applicable securities exchange requirements, must be met when the IPO registration statement is filed, or the issuer must commit to satisfy them within a set time period.

A company proposing to list securities on an exchange should review the governance requirements of each exchange, as well as their respective financial listing requirements, before determining which exchange to choose. An issuer must also address other corporate governance matters, including board structure, committees and member criteria, related party transactions, and director and officer liability insurance. The company should undertake a thorough review of its compensation scheme for its directors and officers as well, particularly its use of equity compensation.

Primary and Secondary Offerings

An IPO may consist of the sale of newly issued shares by the company (a "primary" offering), or a sale of already issued shares owned by shareholders (a "secondary" offering), or a combination of these. Underwriters may prefer a primary offering because the company will retain all of the proceeds to advance its business. However, many IPOs include secondary shares, either in the initial part of the offering or as part of the 15% over-allotment option granted to underwriters. Venture capital and private equity shareholders view a secondary offering as their principal realization event. A company must also consider whether any of its shareholders have registration rights that could require it to register shareholder shares for sale in the IPO.

Cheap Stock

"Cheap stock" describes options granted to employees of a pre-IPO company during the 18-24 months prior to the IPO where the exercise price is deemed (in hindsight) to be considerably lower than the fair market value of the shares at grant date. If the SEC determines (during the comment process) that the company has issued cheap stock, the company must incur a compensation expense that will have a negative impact on earnings. The earnings impact may result in a significant one-time charge at the time of the IPO as well as going-forward expenses incurred over the option vesting period. In addition, absent certain limitations on exercisability, an option granted with an exercise price that is less than 100% of the fair market value of the underlying stock on the grant date will subject the option holder to an additional 20% tax pursuant to Section 409A of the Internal Revenue Code of 1986, as amended.

In 2015, 82.2% of IPOs had a 180-day lock-up period, and in the first half of 2016, 84.1% of IPOs had a 180-day lock-up period.

AN OUNCE OF PREVENTION

Underwriters and their counsel will focus on your company's intellectual property portfolio. Prepare in advance for the IPO IP diligence process. Speak with your IP counsel. Underwriters generally have a few areas of potential concern:

Strength of Patent Position

Do your patents cover your commercial products? Are your patent claims easy to design around? Are your patents invalid or otherwise defective? And do you have a sufficient period of exclusivity?

Third-Party Infringement Risks

Are there any third-party patents or other IP that pose potential infringement risks, and if so, what is your strategy for mitigating those risks?

Ownership Issues

Does your company own or have all rights to license and use its patents, software, and other IP? Do any inventors have an obligation to assign to another entity or company? And is IP ownership generally clean?

Advance preparation will not only demonstrate a level of sophistication and commitment to the IPO process, but will also help you avoid potential pitfalls along the way. Ask at the outset about the type of IP opinion that will be requested at closing.

The dilemma that a private company faces is that it is unable to predict with certainty the eventual IPO price. A good-faith pre-IPO fair market value analysis can yield different conclusions when compared to a fair market value analysis conducted by the SEC in hindsight based on a known IPO price. There is some industry confusion as to the acceptable method for calculating the fair market value of non-publicly traded shares and how much deviation from this value is permitted by the SEC. Companies often address this "cheap stock" concern by retaining an independent appraiser to value their stock options. However, it now appears that most companies are using one of the safe-harbor methods for valuing shares prescribed in the Section 409A regulations.

Governance and Board Members

A company must comply with significant corporate governance requirements imposed by the federal securities laws and regulations and the regulations of the applicable exchanges, including with regard to the oversight responsibilities of the board of directors and its committees. A critical matter is the composition of the board itself. All exchanges require that, except under limited circumstances, a majority of the directors be "independent" as defined by both the federal securities laws and regulations and exchange regulations. In addition, boards should include individuals with appropriate financial expertise and industry experience, as well as an understanding of risk management issues and public company experience. A company should begin its search for suitable directors early in the IPO process even if it will not appoint the directors until after the IPO is completed. The company can turn to its large investors as well as its counsel and underwriters for references regarding potential directors.

THE UNDERWRITER'S ROLE

A company will identify one or more lead underwriters that will be responsible for the IPO. A company chooses an underwriter based on its industry expertise, including the knowledge and following of its research analysts, the breadth of its distribution capacity, and its overall reputation. A company should consider the underwriter's commitment to the sector and its distribution strengths. For example, does the investment bank have a particularly strong research distribution network, or is it focused on institutional distribution? Is its strength domestic, or does it have foreign distribution capacity? The company may want to include a number of co-managers in order to balance the underwriters' respective strengths and weaknesses.

A company should keep in mind that underwriters have at least two conflicting responsibilities: to sell the IPO shares on behalf of the company and to recommend to potential investors that the purchase of the IPO shares is a suitable and a worthy investment. In order to better understand the company — and to provide a defense in case the underwriters are sued in connection with the IPO — the underwriters and their counsel are likely to spend a substantial amount of time performing business, financial, and legal due diligence in connection with the IPO, and making sure

D&O INSURANCE

Directors' and officers' (D&O) insurance protects directors and officers from losses resulting from their service to a company. Typically, a D&O insurance policy maintained by a private company will not provide coverage for securities offerings, such as an IPO, and will not contain the coverage or provisions applicable to public companies.

A company that is going public should review its existing D&O coverage and seek additional coverage. A public company's D&O insurance program generally contains three types of coverage in one policy:

Side A
covers D&Os' costs and expenses for defense and payouts under settlements and judgments where indemnification may not otherwise be available, for example, due to state law limitations.

Side B
provides reimbursement to the company if it has indemnified D&Os in connection with a claim. Side B coverage is the most commonly invoked portion of a D&O policy.

Side C
known as "entity coverage," covers the company itself. For public companies, coverage usually includes only claims resulting from alleged securities law violations.

Most D&O insurance policies have complicated applications and impose compliance obligations upon the company. False statements in the application or failure to comply with these obligations can result in the loss of coverage if any substantial liabilities arise. As a result, a company will want to be certain that it has one or more employees who have appropriate experience preparing the application and who will assume compliance responsibilities once the policy is effective.

the prospectus and any other offering materials are consistent with the information provided. The underwriters will market the IPO shares, set the price (in consultation with the company) at which the shares will be offered to the public, and, in a "firm commitment" underwriting, purchase the shares from the company and then re-sell them to investors. In order to ensure an orderly market for the IPO shares, after the shares are priced and sold, the underwriters are permitted in many circumstances to engage in certain stabilizing transactions to support the stock.

FINANCIAL REPORTING AND ACCOUNTING

The JOBS Act significantly reduced the extent of financial reporting required in an IPO registration statement. An EGC must include audited financial statements for the last two fiscal years (three years for a non-EGC); financial statements for the most recent fiscal interim period, comparative with interim financial information for the corresponding prior fiscal period (which may or may not be audited depending on the circumstances); and income statement and condensed balance sheet information for the last two years (five years for a non-EGC) and interim periods presented.

Additionally, an EGC may omit financial information for historical periods that otherwise would be required at the time of filing or submission, provided that the omitted financial information will not be required to be included in the registration statement at the time of the consummation of the offering, and that, prior to distribution of a preliminary prospectus to investors, the registration statement includes all required financial statements.

Early on, the company should identify any problems associated with providing the required financial statements in order to seek necessary accommodation from the SEC. For a domestic company, these statements must be prepared in accordance with U.S. GAAP, as they will be the source of information for "Management's Discussion and Analysis of Financial Condition and Results of Operations" (MD&A). The SEC will review and comment on the financial statements and the MD&A. The SEC's areas of particular concern are:

- revenue recognition
- business combinations
- segment reporting
- financial instruments
- impairments of all kinds
- deferred tax valuation allowances
- compliance with debt covenants
- fair value
- loan losses
- non-GAAP financial measures

Recently, the SEC Staff has focused on the use of non-GAAP financial measures by registrants in their SEC filings. In May 2016, the SEC Staff issued updated Compliance and Disclosure Interpretations (C&DIs) on the use of non-GAAP financial

In September 2014, Alibaba, a China-based, online and mobile marketplace, raised $21.8 billion, the largest IPO ever.

SARBANES-OXLEY ACT OF 2002

The Sarbanes-Oxley Act of 2002 requires publicly traded companies to implement corporate governance policies and procedures that are intended to provide minimum structural safeguards to investors. Certain of these requirements are phased in after the IPO, and some requirements have been made less burdensome for EGCs under the JOBS Act.

Key provisions include:

- Requirements related to the company's internal control over financial reporting, including (1) management's assessment and report on the effectiveness of the company's internal controls on an annual basis, with additional quarterly review obligations, and (2) audit of the company's internal controls by its independent registered public accounting firm. However, a company will not need to comply with the auditor attestation requirement as long as it qualifies as an EGC.
- Prohibition of most loans to directors and executive officers (and equivalents thereof).
- Certification by the CEO and CFO of a public company of each SEC periodic report containing financial statements.
- Adoption of a code of business conduct and ethics for directors and senior executive officers.
- Required "real time" reporting of certain material events relating to the company's financial condition or operations.
- Disclosure of whether the company has an "audit committee financial expert" serving on its audit committee.

- Disclosure of material off-balance sheet arrangements and contractual obligations.
- Approval by audit committee of any services provided to the company by its audit firm, with certain exceptions for *de minimis* services.
- Whistleblower protections for employees who come forward with information relating to federal securities law violations.
- Compensation disgorgement provisions applicable to the CEO and CFO upon a restatement of financial results attributable to misconduct.

The exchanges' listing requirements contain related substantive corporate governance requirements regarding independent directors; audit, nomination, and compensation committees; and other matters.

Controlling Your Shares

To provide for an orderly market and to prevent existing shareholders from dumping their shares into the market immediately after the IPO, underwriters will require the issuer as well as directors, executive officers, and large shareholders (and sometimes all pre-IPO shareholders) to agree not to sell their shares of common stock, except under limited circumstances, for a period of up to 180 days following the IPO, effectively **"locking up" such shares.** Exceptions to the lock-up include issuances of shares in acquisitions and in compensation-based grants. Shareholders may be permitted to exercise existing options (but not sell the underlying shares), transfer shares to family trusts, and sometimes to make specified private sales, provided that the acquiror also agrees to be bound by the lock-up restrictions. These lock-up exceptions will be highly negotiated.

In connection with an IPO, the issuer may want the option to "direct" shares to directors, officers, employees and their relatives, or specific other designated people, such as vendors or strategic partners. **Directed share (or "family and friends")** programs, or DSPs, set aside stock for this purpose, usually 5-10% of the total shares offered in the IPO. Participants pay the initial public offering price and generally receive freely tradable securities although they may be subject to the underwriter's lock-up. The DSP is not a separate offering by the company but is part of the plan of distribution of the IPO shares and must be sold pursuant to the IPO prospectus.

measures, which provide further guidance on Regulation G under the Securities Act and Item 10(e) of Regulation S-K under the Securities Act, the two principal rules that address the use of non-GAAP financial measures. The updated C&DIs address four main issues: potentially misleading non-GAAP financial measures; the prominence given to non-GAAP measures; non-GAAP financial measures of liquidity that are presented on a per share basis; and other C&DIs relating to funds from operations ("FFO") and income tax effects of adjustments. SEC comment letters on the use of non-GAAP financial measures since the issuance of the updated C&DIs address the following:

- Reconciliation to the most directly comparable GAAP financial measure;
- Use of non-recurring, infrequent or unusual items;
- The need to give equal or greater prominence to GAAP financial measures;
- Disclosure regarding the usefulness to investors of non-GAAP financial measures;
- The use of titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, GAAP financial measures;
- The use of liquidity versus performance measures;
- The presentation or adjustment of FFO; and
- Disclosure of income tax effects.

DODD-FRANK

The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted in 2010, created sweeping changes to financial regulation. Also included were new corporate governance and executive compensation requirements, including the so-called "Say on Pay," applicable to public companies. Many of these requirements do not apply to a company that qualifies as an EGC.

EGC ACCOMMODATIONS

The JOBS Act provided important accommodations for EGCs, which make completing an IPO easier. Among the most important are:

- Only two years of audited financial statements and selected financial data are required in the registration statement;
- No compensation discussion and analysis is required in registration statement;
- Availability of confidential review of draft registration statement and amendments;
- Ability to test-the-waters before and after filing a registration statement by engaging in oral and written communications with qualified institutional buyers and institutional accredited investors;
- Ability to opt out of compliance with new or amended financial accounting standards;
- Transition period of up to five years for compliance with auditor attestation on internal controls requirement; and
- A broker-dealer may publish research reports about a company currently in registration even if it is participating in the offering.

To learn more about the use of non-GAAP financial measures, see our "Practice Pointers on Non-GAAP Financial Measures," available here.

An issuer will not be required to include either a management's report on its internal control over financial reporting or an auditor's report on such internal control until the second annual report following its IPO.

SEC COMMENTS

An integral part of the IPO process is the SEC's review of the registration statement. Once the registration statement is filed or confidentially submitted, a team of SEC staff members is assigned to review the filing. The team consists of accountants and lawyers, including examiners and supervisors. The SEC's objective is to assess the company's compliance with its registration and disclosure rules. The SEC review process should not be viewed as a "black box" where filings go in and comments come out; rather, as with much of the IPO process, the relationship with the SEC is a collaborative process.

The Process

The SEC's principal focus during the review process is on disclosure. In addition to assessing compliance with applicable requirements, the SEC considers the disclosures through the eyes of an investor in order to determine the type of information that would be considered material. The SEC's review is not limited to just the registration statement. The staff will closely review websites, databases, and magazine and newspaper articles, looking in particular for information that the staff thinks should be in the prospectus or that contradicts information included in the prospectus.

The review process is time-consuming. While there was a time when the review process could be completed in roughly two months, now, given the length of the prospectus and the complexity of the disclosure, it can take three to five months. This depends on the complexity of the company's business and the nature of the issues raised in the review process.

Initial comments on a registration statement are provided in about 30 days; depending on the SEC's workload and the complexity of the filing, the receipt of first-round comments may be sooner or later. The initial letter typically contains about 20 to 30 comments, with a majority of the comments addressing accounting issues. The company and counsel will prepare a complete and thorough response. In some instances, the company may not agree with the SEC staff's comment, and may choose to schedule calls to discuss the matter with the staff. The company will file or confidentially submit an amendment revising the prospectus and provide the

Smallest U.S. IPO – an EGC provider of financial technology services raised $7.2 million.

response letter along with any additional information. The SEC staff generally tries to address response letters and amendments within 10 days, but timing varies considerably.

Frequent Areas of Comment

It is easy to anticipate many of the matters that the SEC will raise in the comment process. The SEC makes the comment letters and responses from prior reviews available on the SEC's website, so it is possible to determine the most typical comments raised during the IPO process.

Overall, the SEC staff looks for a balanced, clear presentation of the information required in the registration statement. Some of the most frequent comments raised by the SEC staff on disclosure, other than the financial statements, include:

- **Front cover and gatefold**: On the theory that "a picture is worth a thousand words," does the artwork present a balanced presentation of the company's business, products, or customers?
- **Prospectus summary**: Is the presentation balanced?
- **Risk factors**: Are the risks specific to the company and devoid of mitigating language?
- **Use of proceeds**: Is there a specific allocation of the proceeds among identified uses, and if funding acquisitions is a designated use, are acquisition plans identified?
- **Selected financial data**: Does the presentation of non-GAAP financial measures comply with SEC rules?
- **MD&A**: Does the discussion address known trends, events, commitments, demands, or uncertainties, including the impact of the economy, trends with respect to liquidity, and critical accounting estimates and policies?
- **Business**: Does the company provide support for statements about market position and other industry or comparative data? Is the disclosure free of, or does it explain, business jargon? Are the relationships with customers and suppliers, including concentration risk, clearly described?

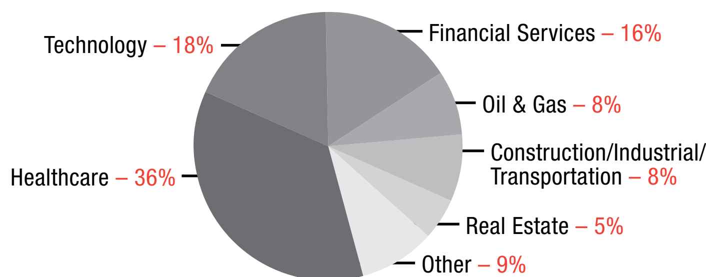
EGC TRENDS

The EGC provisions of the JOBS Act have now been available for more than three years. Each EGC will decide which of the scaled disclosure and other benefits to accept, and there has been significant variation in acceptance levels. From April 2012 through June 2016:

- **81%** of EGC IPOs have taken advantage of the confidential review process. However, an EGC should consider that in 2015 the average number of days from initial confidential submission to IPO date was 104 days versus 173 days for non-EGCs, and 97 days for EGCs who do not submit confidentially.
- **55%** of EGC registration statements included only two years of audited financial statements, MD&A, and selected financial data (not including EGCs that are also smaller reporting companies or that do not have two years of reporting history).
- **71%** of EGC registration statements excluded a compensation discussion and analysis (not including EGCs that are also smaller reporting companies or foreign private issuers). From July 2015 through June 2016, 100% of EGC registration statements excluded a compensation discussion and analysis, or C&DA (not including EGCs that also are smaller reporting companies or foreign private issuers).

Broker-dealers are still generally not publishing research reports during the registration process or during the customary 25-day post-closing "quiet period." In addition, 77% of EGCs are opting to comply with new or amended financial accounting standards. Investment bankers and counsel to EGCs may be advising them to consider whether the benefit of reduced compliance obligations may adversely affect market perception and industry comparability.

From April 2012 through June 2016, EGCs conducting an initial public offering have come from many industry sectors:



Source: PWC, 2015 Annual US Capital Markets Watch; IPO Vital Signs.

For more information regarding corporate governance and other offering related trends, see our survey "Getting the Measure of EGC Corporate Governance Practices: A survey and related resources," available here.

REACHING OUT TO LOYAL CUSTOMERS: "DIRECT-TO-CONSUMER" OFFERINGS

"Direct-to-consumer" offerings enable companies to raise capital directly from their customers, with or without the use of underwriters or other financial intermediaries. Direct-to-consumer offerings have garnered attention recently given the ability to conduct offerings using a "crowdfunded" approach. However, companies, have been conducting direct-to-consumer offerings for years and in both registered and unregistered formats. Direct-to-consumer offerings initially emerged during the dot.com bubble as web-based companies sought creative means of generating consumer interest. In the late 1990s, the SEC Staff indicated that free stock offerings, which provide consumers with equity in exchange for a distinct marketing purpose, were subject to the same registration requirements under Section 5 of the Securities Act as traditional equity offerings.

Many recent direct-to-consumer offerings have been conducted as directed share programs that are part of IPOs, including offerings by Square, Blue Buffalo, Dave & Buster's, and T-Mobile. Some consumer offerings have relied on the services of a broker-dealer, sometimes participating in the IPO as a co-manager, to assist with establishing and administering the directed share programs. Consumers are usually informed of the directed share program through a direct email from the company (with a copy filed with the SEC as a free writing prospectus). Consumers can typically purchase shares at the public offering price and invest in amounts ranging from $100 to $2,500. The directed share programs are also typically disclosed on the front cover of the IPO prospectus and described in more detail in the prospectus summary and underwriting sections of the IPO prospectus. In addition, the following information is usually provided: (1) the number of shares and purchase price for the consumer distribution; (2) the manner in which the shares can be purchased; (3) whether shares will be available for purchase by consumers after the IPO through the same broker-dealer; (4) where additional information can be found regarding the offering; and (5) any parties who cannot purchase shares through the distribution platform.

Registered direct-to-consumer offerings offer a number of advantages, including, but not limited to: (1) providing consumers a unique opportunity to access an IPO market that historically has been reserved for wealthy and institutional investors; (2) providing a way for companies to help build consumer loyalty and expand their investor base; (3) spreading out ownership over a larger pool of investors to help companies retain control of their operations; and (4) if well subscribed and successful, providing companies with a consistent and efficient source of capital. However, while registered direct-to-consumer offerings have attracted considerable interest recently, there are a number of risks, including, but not limited to: (1) enhanced costs to companies relating to the administration of directed share programs and the execution of thousands of individual trades in order to deliver shares to consumers; (2) the relatively short track record of distribution platforms in administering direct-to-consumer offerings; (3) the risk that companies lose both consumers and existing investor bases in a down economy; (4) novice consumers lacking prior investment experience to make sound investment decisions; and (5) enhanced regulatory risk due to increased media exposure on direct-to-consumer offerings.

For more information regarding direct-to-consumer offerings, see our alert here.

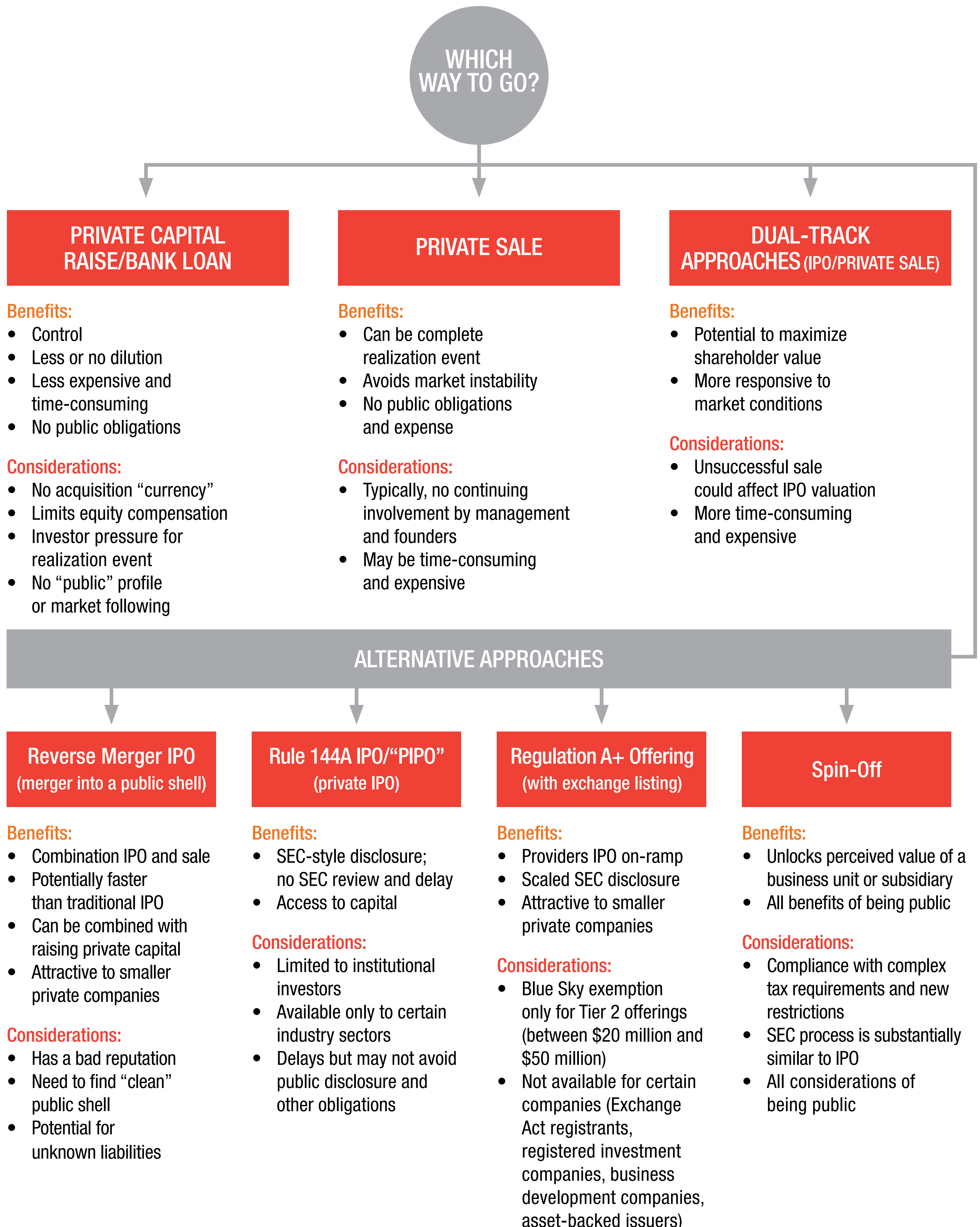
- **Management**: Is the executive compensation disclosure, particularly the compensation discussion and analysis, clear?
  Does it include discussion of performance targets, benchmarking, and individual performance?
- **Underwriting**: Is there sufficient disclosure about stabilization activities (including naked short selling), as well as factors considered in early termination of lock-ups and any material relationships with the underwriters?
- **Exhibits**: Do any other contracts need to be filed based on disclosure in the prospectus?

A FINAL THOUGHT

While windows open and close, and emerging growth companies may have different views concerning the right moment to commence active and intense preparation for an IPO, it is rarely too early to undertake the advance planning described above. Much of this preparatory work is neither time-consuming nor expensive. Yet it will enhance greatly the opportunity to get into the market quickly, when the market is there. And even if an IPO does not turn out to be the option of choice, this preparatory work should prove valuable in facilitating other funding opportunities or even acquisition by an existing public company.

LIKELY ALTERNATIVES

A growing company has a number of financing alternatives in addition to a traditional firm commitment, underwritten IPO.



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The Jumpstart Our Business Startups (JOBS) Act is sure to jumpstart capital-raising for emerging companies, as well as facilitate capital formation for existing public companies of all sizes. Given our longstanding commitment to serve emerging companies and the breadth of our capital markets and corporate practices, we supplemented our JOBS Act page (www.mofo.com/jumpstart) with the Jumpstarter blog. Visit our blog (www.mofojumpstarter.com) for up-to-the-minute news and commentary.

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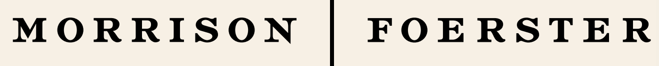

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