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Initial Public Offerings

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Foreword

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Introduction*

Equity markets are the public face of finance and often seen as a barometer of the overall health of the economy. In that sense, a thriving market for new issues of publicly offered equity securities, or the Initial Public Offering (IPO) market, is perhaps the most direct and tangible evidence of an economy where new businesses have confidence in their future prospects. Businesses most often seek to access a larger pool of public capital to allow for the next stage of growth, and ideally, job creation follows. It is therefore quite reasonable to question how an economy can continue to expand without evidence of new companies seeking to access capital. Over the past three years, the number of IPOs has steadily declined with 189, 116 and 84 deals in 2014, 2015, and 2016 respectively. IPO dollars raised has similarly declined with $46 billion, $23 billion, and $19 billion raised during the same respective periods.[1] Notwithstanding the recent decline in IPO activity, history has shown that equity markets have played a central role during periods of significant economic expansion in the U.S.

The benefits of seeking public capital date back in history as far as 1602, if not further, when the Dutch East India Company founded as a shareholder company. This diversified investor structure allowed the risks of trade voyages between Europe and Asia to be distributed across multiple mercantile organizations.[2] Historians do not readily agree on when the first securities market began in the U.S.; however, according to at least one historian, securities transactions took place as early as 1725 in New York.[3] At the time, securities transactions were intermediated by auctioneers who conducted auctions for commodities that flowed through the ports of New York. While this form of intermediation was far less structured in the early days, a more formalized process began to emerge with the Buttonwood Agreement in 1792 where 24 stockbrokers agreed on dealing terms. This organization is understood to have been the foundation of what would become the New York Stock and Exchange Board, or New York Stock Exchange as we know it today.[4] These arrangements provided an orderly mechanism to support the economic expansion that took hold in the U.S. during the 1800s. Tremendous investment in infrastructure and transportation led the way, while the New York Stock Exchange permitted the formation and growth of dozens of companies that became integral to the economy.

Emerging regulatory framework

Despite its growing significance, structural government oversight of the New York Stock Exchange did not come until the 1930s, even with open criticism in the early 1900s for failure to adopt more stringent self-regulation. The 1907 financial crisis instead drew the greatest focus on the banking system since the inception of the U.S. markets, and culminated with the introduction of the Federal Reserve Act of 1912, which created the central banking system in the U.S.[5] The market continued to innovate with minimal government oversight, and in 1924 the Massachusetts Investor Trust created what is believed to be the first modern-day mutual fund with an open-end capitalization structure.[6] Like the Dutch East India Company before it, the structure spread financial risks amongst a diversified pool of investors and for the first time provided smaller investors access to the securities markets. However, it was the 1929 stock market crash and the beginning of the Great Depression that would eventually spur an investigation and substantive review of the securities markets as well as the role of the New York Stock Exchange. The subsequent passage of the Securities Act of 1933 and the Securities Exchange Act of 1934 would then create the foundation of the regulatory structure that we know today. Importantly, as the U.S. later experienced a post-war boom with the growth and development of new industries, this more fortified exchange structure saw greater public participation in the market and reinforced the advantages of going public, as well as access to a growing investor base.

Capital formation focus

History has clearly associated a strong market for IPOs with a robust economic climate. Given relatively low economic growth following the 2007–2011 financial crisis, it is not surprising that many have questioned whether our regulatory structure properly supports capital formation by providing efficient access to capital while upholding investor protections. The last sweeping effort to modernize primary market regulation came with Securities Offering Reform in 2005[7] which significantly reduced the burdens of the registration, communications, and offering processes for companies. Given the significant structural changes that have occurred in the market since, one could argue that further reforms are still necessary. Certainly, the drumbeat of the new Trump administration has emphasized the need to again modernize and update regulation to ensure the ongoing competitiveness of our markets.[8] Statistics seem to tell a daunting story. The number of publicly listed companies in the United States has declined dramatically over the last 10 years, from 7,322 in 1996 to 3,671 in 2016.[9] Similarly, the number of new IPOs has also significantly decreased in that period, from 491 in 1996 to 84 in 2016.[10]

In the face of these declines, a more intense focus on capital formation began in March 2011 when the U.S. Department of the Treasury convened the Access to Capital Conference, which brought together policymakers, academics and market participants to discuss ways to restore access to capital – especially for small and emerging companies. Following the conference, an IPO Task Force was organized and consisted of a diverse group of professionals with the purpose of providing specific recommendations for restoring effective access to the public markets. The IPO Task Force largely concluded that our regulatory structure is inordinately focused on the risks presented by the largest companies and suggested that a tiering of regulatory obligations would "Rebuild the IPO On-Ramp to Put Emerging Companies and the Job Market Back on the Road to Growth".[11] The IPO Task Force also recognized that regulation should support efficient access to capital at each stage of a company's growth cycle, from start-up to IPO as well as across both private and public markets.

JOBS Act and beyond

The JOBS Act was signed into law by President Barack Obama on April 5, 2012 and sought to implement many of the IPO Task Force's recommendations. The JOBS Act provided reduced regulatory burdens for so-called "Emerging Growth Companies", an enhanced Regulation A for small public offerings, and created a regulatory structure for crowdfunding.[12] While the true impact of the JOBS Act has been debated, the calls continue for a further evaluation of how well our regulatory structure balances the goals of ensuring reasonable investor protections and promoting capital formation for companies of all sizes. More recent capital formation discussions seek to build upon the JOBS Act efforts, and many bills were introduced in the House of Representatives over the last few sessions of Congress but were mostly unable to find support in the Senate. However, several bills were included as part of the larger negotiations for a transportation funding package known as the Fixing America's Surface Transportation Act (FAST Act) that passed Congress in December 2015.[13]

The spring of 2017 has brought renewed attention to capital formation, and a desire to establish an incremental set of priorities and recommendations. Many companies continue to stay private longer and increasingly rely on raising substantial late stage funding. Market participants and policymakers continue to look for ways to unlock hidden potential and permit capital to more readily flow to the best ideas, innovations, and ventures. The SEC's Advisory Committee on Small and Emerging Companies already devotes considerable attention to these issues and, more recently, the Senate Banking Committee issued a request for proposals to foster economic growth.[14] The incoming SEC Chairman has also publicly called for scaling regulation to encourage IPOs, stating that: "We have to reduce the burdens of becoming a public company so that it's more attractive."[15] Accordingly, market participants express increasing optimism that the coming years will bring meaningful changes to securities regulation that will improve small and medium-sized companies' ability to raise capital and grow.

While capital formation discussions tend to focus on the primary markets and the requirements placed on issuers, there continues to be significant debate on ways to improve the secondary market structure to address changes in technology, investor behavior, and a host of other factors. Liquid secondary markets support robust primary markets and remain vitally important in fostering a market structure that underpins a competitive and healthy economy. The U.S. equity market is the largest by market capitalization and arguably envied for its dominance, but a rapidly changing environment necessitates thoughtful consideration and more proactive policies.

Secondary market regulation

In many cases, it is common for regulation to be reactionary in nature, responding to practices identified as causing market disruptions, regulatory exams or enforcement actions. Many of the new or proposed secondary market regulations in recent years were proposed and implemented for just these reasons. For example, significant intraday market swings caused a review of limit-up and limit-down boundaries and market-open procedures. The Consolidated Audit Trail (CAT) project was designed to give regulators greater access to uniform cross-market data to better surveil markets.[16] New transparency requirements for Automated Trading Systems (ATS) were developed in light of the greater use of dark pools and potential conflicts around order-routing protocols.[17] The SEC also designed new rules to address co-location practices that permitted third parties to locate their servers in close proximity to a given exchange's Securities Information Processor (SIP) and thus gain faster access to market data.

Regulatory policy priorities have also been dictated by the need to respond to specific business innovation that requires a policy determination. This was the case with The

Investors' Exchange (IEX) application to operate an exchange with a 350-microsecond communication buffer between the IEX Matching Engine and all IEX market participants. Approval of the IEX application required the SEC to make a key interpretation that the term "immediate" under Rule 600(b)(3) of Regulation National Market System (Reg NMS) precludes any coding of automated systems or other type of intentional action that would delay access to a security price beyond a *de minimis* amount of time.[18] Similarly, regulators have had to address the new Exchange Traded Fund (ETF) product offerings and determine the level of disclosure and reporting which is required for active ETFs and other structures. The proliferation of order types also repeatedly challenges regulators to apply rules or policy principles in a consistent fashion.

Market participants have identified several areas for review and discussion, including Reg NMS and order priority to consider how the rules should apply to block trades. For example, one topic of discussion is whether a minimum market share threshold should limit an exchange's ability to determine the National Best Bid and Offer (NBBO) for a particular security. Questions have also been raised around the appropriateness of each exchange's SRO (Self-Regulatory Organization) status given that they are profit-driven businesses. Historical discussions around exchange access fees and data feed fees further underpin the inherent conflicts of interest between the SRO's regulatory functions and its members, market operations, issuers and shareholders. As Commissioner Luis A. Aguilar previously stated: "The advent of new competitive challenges and continued conflicts of interest require, among other things, a closer working relationship between SROs and the SEC, and for the Commission to re-evaluate how it can best provide appropriate oversight over SROs."[19]

Looking forward

It would be reasonable to conclude that securities markets will continue to be challenged to modernize given rapidly improving technology, the changing roles of intermediaries and increasing globalization generally. In that regard, a number of market trends and their potential impacts also bear consideration. The rise of passive investing and lower-cost options for investing continue unabated. At the same time, activist investing is again on the rise and dual class shares structure have emerged to allow founders to retain voting rights. Social issues are becoming a routine part of investment decisions while greater attention to governance and the power and role of the proxy vote is increasingly impacting decisions by the board of directors, management, as well as the social and environmental direction of companies.

As the new administration in the U.S. is fully deployed, a pro-growth agenda necessitates an evaluation of securities regulation for both primary and secondary markets to create a market structure that can better support capital formation both now and in the years ahead. In that regard, regulators and policymakers should consider how to best direct their resources to anticipate the needs of a changing economy through proactive modernization.

* * *

Endnotes

1. Dealogic as of Apr. 5, 2017. Includes SEC Registered IPOs > $25 million. Excludes BDCs, SPACs, MLPs, CLEFs, REITs. (1) Excludes Alibaba IPO ($25 billion).
2. European Heritage, *The Dutch East India Company* (http://european-heritage.org/netherlands/alkmaar/dutch-east-india-company#-2).

3. George L. Leffler, *The Stock Market* (New York: The Ronald Press Co., 1951) Print.
4. U.S. Department of the Interior. National Park Service. *National Register of Historic Places Inventory Nomination Form: New York Stock Exchange* (1965) (https://npgallery.nps.gov/pdfhost/docs/NHLS/Text/78001877.pdf).
5. Federal Reserve History, *Federal Reserve Act Signed by President Wilson* (November 22, 2013) (https://www.federalreservehistory.org/essays/federal_reserve_act_signed).
6. The Investment Funds Institute of Canada, *The History of Mutual Funds* (2017) (https://www.ific.ca/en/articles/who-we-are-history-of-mutual-funds/).
7. U.S. Securities and Exchange Commission, *Securities Offering Reform of 2005* (July 19, 2005) (https://www.sec.gov/rules/final/33-8591.pdf).
8. The White House Office of the Press Secretary, *Presidential Executive Order on Core Principles for Regulating the United States Financial System* (Feb. 3, 2017) (https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states).
9. Credit Suisse Global Financial Strategies, *The Incredible Shrinking Universe of Stocks* (March 22, 2017) (https://research-doc.credit-suisse.com/docView? language=ENG&format=PDF&sourceid=em&document_id=1072753661&serialid =h%2B%2FwLdU%2FTIaitAx1rnamfYsPRAuTFRGdTSF4HZIvTkA%3D).
10. SIFMA, *Rebalancing the Financial Regulatory Landscape* (May 1, 2017) (http://www.sifma.org/workarea/downloadasset.aspx?id=8589966117).
11. IPO Task Force, *Rebuilding the IPO On-Ramp: Putting Emerging Companies and the Job Market Back on the Road to Growth* (October 20, 2011) (https://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf).
12. JOBS Act, Pub. L. No. 112-106 (2012) (https://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf).
13. FAST Act, Pub. L. No. 114-94 (2015) (https://www.congress.gov/114/bills/hr22/BILLS-114hr22enr.pdf).
14. U.S. Senate Committee on Banking, Housing, & Urban Affairs, *Crapo, Brown Request Proposals to Foster Economic Growth* (March 20, 2017) (https://www.banking.senate.gov/public/index.cfm/republican-press-releases?ID=00BA7965-1713-4E65-AC3C-8C0CB5A374FE).
15. The Wall Street Journal, *SEC Chairman Nominee Jay Clayton Calls for Scaling Back Regulations to Encourage IPOs* (March 23, 2017) (https://www.wsj.com/articles/sec-chairman-nominee-jay-clayton-says-past-wall-street-work-is-a-strength-1490281093).
16. U.S. Securities and Exchange Commission, *National Market System Plan Governing the Consolidated Audit Trail* (November 15, 2016) (https://www.sec.gov/rules/sro/nms/2016/34-79318.pdf).
17. U.S. Securities and Exchange Commission, *Regulation of Exchanges and Alternative Trading Systems* (Dec. 8, 1998) (https://www.sec.gov/rules/final/34-40760.txt).
18. U.S. Securities and Exchange Commission, *SEC Approves IEX Proposal to Launch National Exchange, Issues Interpretation on Automated Securities Prices* (June 17, 2016) (https://www.sec.gov/news/pressrelease/2016-123.html).
19. Public Statement by Commissioner Luis A. Aguilar, *The Need for Robust SEC Oversight of SROs* (May 8, 2013) (https://www.sec.gov/news/public-statement/2013-spch050813laahtm#P32_3587).

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Paving the road for SMEs' access to public equity markets

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Improving SME listings in Europe

In 2017, AFME, together with a number of other major stakeholders, published a report examining the specific challenges associated with raising capital for small and mid-size high growth businesses in the European Union.

"*The Shortage of Risk Capital for Europe's High Growth Businesses*" was authored by AFME with the support of 12 other European organisations representing all the different stakeholders involved in pre-IPO finance. These include the European Investment Fund (EIF), seven other European trade associations representing business angels (Business Angels Europe, EBAN), venture capital (InvestEurope), accountants (AccountancyEurope) and crowdfunding (European Crowdfunding Network), as well as stock exchanges (Federation of European Securities Exchanges (FESE), Deutsche Börse, Euronext London Stock Exchange Group, and Nasdaq).

Major economic indicators in the European Union (EU) have improved in recent years, and as a result, the EU GDP in 2017 grew at the fastest rate in a decade. The EU also attained its highest level of employment ever.

The engine of this growth remains the 23 million SMEs in Europe. Over the past five years, they have created around 85% of new jobs and provided two-thirds of the total private sector employment in the EU.

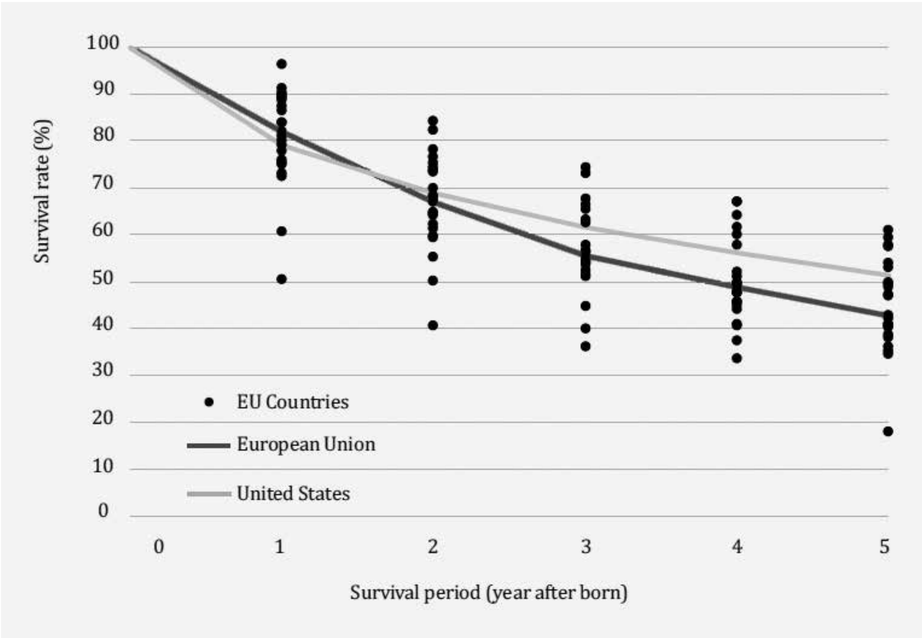
For EU growth to remain strong, we need to make sure that those SMEs continue to be created, to grow and to create jobs.

However, European SMEs have difficulties in growing, developing cross-border and raising finance throughout their various stages of development.

For instance, 60% of start-ups that survive their first three years in business create 42% of all new jobs in the UK, according to Nesta. In Belgium, young companies represent only 17% of total employment but 41% of new jobs.

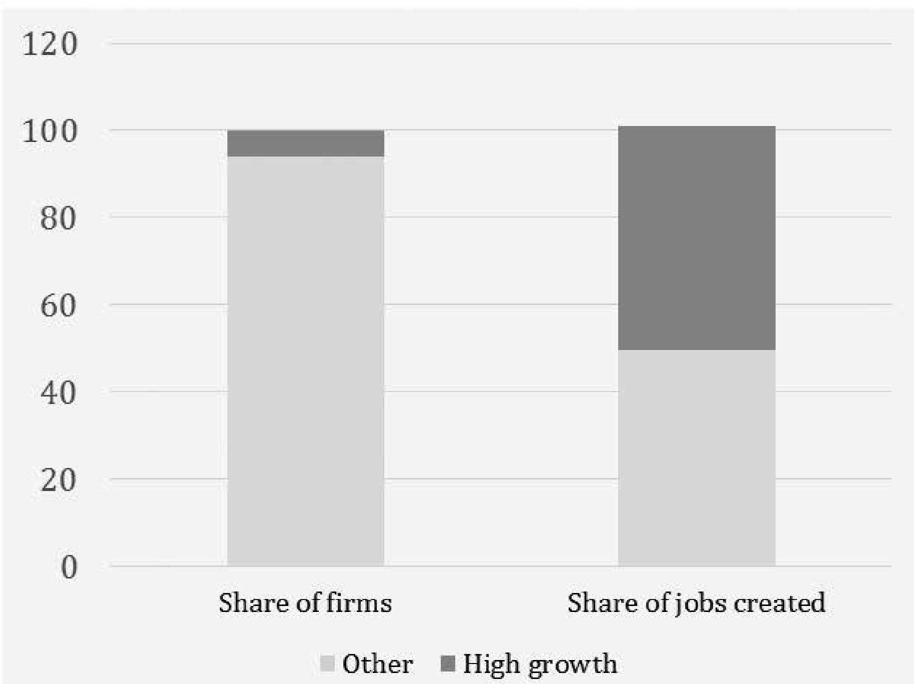
* * *

Figure 1: Business survival rates in the European Union and United States



Source: Eurostat and US Bureau of Labor Statistics

Figure 2: Concentration of job creation (UK)



Source: Nesta, 2009

The European landscape of SME listings

"Junior" exchanges are stock markets where companies sell new shares to institutional investors, and sometimes to the public, to raise equity capital.

"Junior" exchanges are usually in the form of multilateral trading facilities (MTFs) and usually have less onerous obligations in terms of financial costs and disclosures, both at admission to trading and throughout the company's public life.

Across France, Germany, Spain, Italy, Sweden and the UK, among others, over 1,500 companies are listed on junior exchanges, representing nearly £98bn in market capitalisation.

The depth of the European junior markets varies across jurisdictions. The UK is the most active junior market, accumulating a total of 656 IPOs since 2007 (out of 1,802 IPOs in total) and representing a total of €21.4bn in fresh capital raised from the public (i.e. 75% of the EU total). We also note that First North, covering Sweden and other Nordic and Baltic countries, has in recent years added numerous companies to its list of 46 in 2014 and 61 in 2015, representing 10% of total EU IPOs in value. Companies in Deutsche Börse and Euronext markets raised 6% and 3%, respectively, of total EU equity raised, by value.

The typical amount raised on junior markets ranges from €4m on the Stockholm First North market to €15m on the UK London Stock Exchange's AIM, with capital raisings as low as €100,000 on AIM and in Spain's Mercado alternative Bursatil.

However, these typical amounts hide a wide variation in the amounts raised within stock exchanges (Nasdaq First North capital raisings in 2016 have varied from €1m to €98m) and between exchanges (an IPO on AIM would raise an average of €33m in the past 10 years, compared to €3m in Spain's BME or €6.2m in the Alternext markets).

From 2007 to H1 2016, a total of €28.4bn in equity was raised by companies through IPOs on junior markets and €52.8bn in subsequent transactions in the secondary markets (follow-ons).

However, origination activity has remained subdued since the 2007 crisis. For example, from 2005–2007, an average of €11bn was raised annually through about 300 IPOs per year. Since then, the annual average has fallen to €2.8bn from 2008 to 2015, across 161 IPOs per year. In 2015, more than €2bn was raised through 192 transactions in European "junior" exchanges.

The amount of capital raised and the size of issuing firms has varied in recent years. As market volatility, price spreads and investor appetite fluctuates, so too does the window of opportunity for companies raising finance.

From a long-term perspective, the typical size of listed companies has grown since 1999 with a median size (before capital raising) during the last 10 years of about €20m–€30m, and capital raisings of between 20%–30% of the post-IPO value of the listed company.

The barriers to SME listings in Europe

The listing of shares from a business will depend on how well the companies did from the start of their journey and going through the various stages of development and financing pre-IPO.

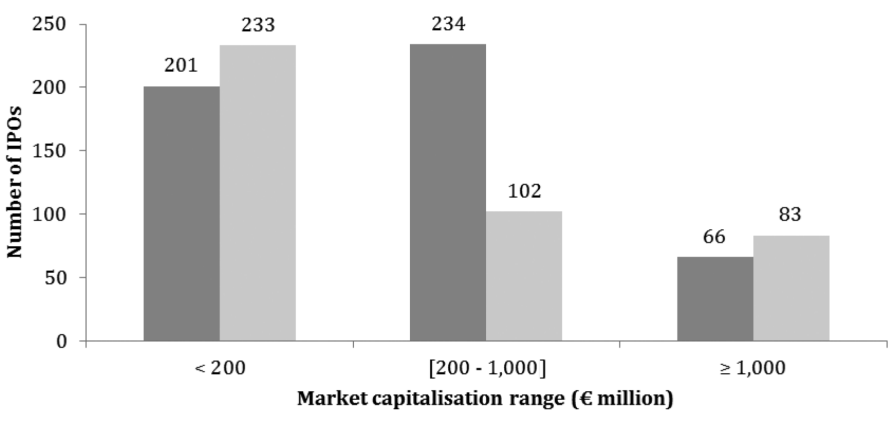
In order to boost the development of SME listing markets, it is essential that pre-IPO markets are enhanced. This includes boosting business angel and venture capital finance. Stronger pre-IPO markets will allow SMEs to reach a critical size to follow a listing route, improve liquidity and investors' involvement.

Only small national institutional investors invest into SME primary or secondary offerings. The size of the companies going public in junior markets (with averages of between €4m and €15m depending on the Member State) is usually too low to attract the largest institutional investors. They will usually have a minimum size of investment ticket (typically €50m), a minimum average daily value traded of a share and a maximum share of the total shares being offered (usually a very minority share). Also, investors can be restricted from investing outside regulated markets by mandates or regulation (e.g. Solvency II). Therefore, investing in a small market capitalisation would be possible if the issuer is listed on a regulated market, whereas investing in large companies listed outside the regulated market, such as the "junior market" MTFs or an SME Growth Market may not be possible.

The smaller national investors may also face important barriers in accessing small companies on public markets. Compared to larger and more visible issuers, the low market capitalisation of listed SMEs in Europe calls for enhanced engagement from issuers through, for instance, additional financial communication and entering into liquidity contracts.

Therefore, it is important that businesses can reach a certain size in order to attract large institutional investors in the public markets. However, only 23% of European IPOs had market capitalisations of between €200m and €1bn at the date of their IPO, compared to 48% in the US, 52% in Shanghai and Shenzhen and 36% in Hong Kong.

Figure 3: Number of IPOs in European main markets and MTFs and from US EGCs, 2013–2015



Source: AFME, Dealogic

Therefore, to enhance the number of SMEs going public, it is important to make sure that those companies can:

1. access a true single market with standard rules across the EU Member States to enable businesses to scale-up cross border;
2. get better business structures and governance from the start to increase their chance of raising initial and subsequent rounds of financing from professional investors;
3. access pan-European developed markets of private investors from crowdfunders and business angels;
4. access additional funding from European venture capital funds. The average European VC-backed company receives five times less than their US peers with only €1.3m

(€356,000 at seed stages), compared to €6.4m in the US (€2.9m at seed stages). Removing barriers to pension and insurers investments in small listed and unlisted companies will provide a useful flow of investments;
5. access a developed venture debt markets; and
6. access institutional investors. Market capitalisation in Europe is half the US. European pension funds are four times smaller and provide €11 trillion less than US pension funds. This is also reflected in the pension funds' equity allocation which is at 37% in Europe compared to 53% in the US.

Enabling SMEs access to equity finance: building a stronger Capital Markets Union

Appropriately, European policy-makers have launched many constructive initiatives to increase the access of European SMEs to finance, as highlighted in the European Commission's Capital Markets Union (CMU) Action Plan.

The European Commission notes that "*European start-up and scale-up firms need more risk finance to invest in innovation and growth. There is a need to develop and strengthen new forms of emerging risk capital alongside bank credit*".

The "SME Growth Market" framework was introduced through the MiFID II regulation, applicable since January 2018. This framework intends to build a new type of MTF markets for SMEs with possibly fewer administrative burdens and incentives for SMEs and investors. For such MTFs to benefit from this framework, at least 50% of the issuers whose financial instruments are traded on a SME Growth Market should have an average market capitalisation of €200m for the previous three calendar years.

In assessing whether this €200m criteria is reasonable, the Commission may want to review the merits of the introduction of the Jumpstart Our Business Startups Act (JOBS Act) enacted in 2012 in the US, which gave private companies greater access to capital and made it easier for companies to go public. The JOBS act established a new class of companies referred as Emerging Growth Companies (EGC) which are issuers with total gross revenues of less than $1 billion during the most recent fiscal year. The issuer can retain the EGC status for up to five years following the completion of its IPO, but loses its status if its annual gross revenues become more than $1bn or if the issuer has, during the previous three-year period, issued more than $1bn in non-convertible debt. The EGCs gain certain benefits, including:
- EGCs only have to supply the SEC with two years of audited statements as opposed to the current three-year requirement.
- EGCs are allowed to submit a draft of an IPO registration statement for confidential review by the SEC prior to making public filing.
- EGCs and their representatives are authorised to communicate with Qualified Institutional Buyers (QIBs), before or after the filing of a registration statement, to determine whether investors have an interest in the placing.

The JOBS Act is estimated to have led to an increase of 25% in IPOs annually. Notably, this growth in small firm IPOs has resulted in the post-JOBS Act period having the highest percentage of low-revenue IPO issuers since 2000. Approximately 45% of issuers conducting IPOs between April 2013 and March 2014 had below $50m in revenues, compared to an average of 28% between 2001 and 2012. About 82,000 jobs have been added by the companies that completed initial public offerings under the JOBS Act, an increase of roughly 30% from their pre-IPO head counts [*Wall Street Journal*].

The EGC status has also attracted European companies which benefited from the related provisions. In the period of 2012–15, no less than 25 European companies, representing

€18.6bn in market capitalisation, decided to list in the US, raising €4.5bn. Of these 25 companies, 20 had market capitalisation at IPO of less than €1bn.

The creation of further incentives to investors is also vital to the success of the SME Growth Markets throughout Europe. As a matter of fact, MiFID Recital 132 states that "*[a]ttention should be focused on how future regulation should further foster and promote the use of that market so as to make it attractive for investors, and provide a lessening of administrative burdens and further incentives for SMEs to access capital markets through SME growth markets*".

Although MiFID II contains provisions which are aimed at encouraging the development of SME growth markets, these provisions contain no added benefit or incentivisation to set up these markets, such that, as currently proposed, SME Growth Markets enjoy no secondary trading benefits over and above ordinary MTFs. The ability of SME Growth Markets to help investors provide fresh capital to new issuers will be highly dependent on the liquidity of the secondary markets.

Investors seek to use pre-transparency waivers in shares to avoid market impact, which is particularly important at the lower end of the liquidity spectrum. Without these the incentive to first invest at issuance is much reduced. Data on usage of these waivers is yet to be published and the impact of the double volume caps on less liquid shares is uncertain at this stage. Taking this into account, the Commission may want to look at how further exemptions from the MiFID II/MiFIR pre-trade transparency requirement could benefit SME equities Growth Markets.

Furthermore, in some countries, institutional investors are met with regulatory requirements that make investments in small, unrated and illiquid assets unattractive. This can, for instance, be requirements for institutional investors to only hold equities and/or bonds listed on a regulated stock exchange (not recognising assets listed on alternative venues). Since SMEs are often too small to get listed on a regulated market, this means they are often cut-off from institutional funding.

The Commission is now consulting on the specificities of such SME Growth Market where the above considerations may be reviewed. In 2019, the Commission is also expected to consult on the impact of MiFID II on the production of SME investment research.

In the context of the Capital Markets Union, the European Commission also launched the Insolvency Directive and introduced the pan-European Venture Capital Fund of Funds. Both are good news for businesses looking to grow in Europe.

The Investment Plan for Europe and its European Fund for Strategic Investments have contributed to Europe's growth and we welcome its recent extension to €500bn. The implementation of both the SME and Infrastructure Windows are well on track.

We also welcome the vast and swift work done by the European Parliament in the vital agenda of reforming EU's capital markets with CMU, access to finance to SMEs, the Investment Plan for Europe and many more initiatives. For instance, all the work from the Commission and the European Parliament succeeded in a swift delivery of Level 1 of the Prospectus Regulation.

Further flagship initiatives to support risk capital – covering various investment stages and sectors – will be necessary.

Making sure that these companies are able to finance themselves in a coherent single market should be a core objective of EU, individual Member State policymakers and industry, and should be a priority for the ongoing mid-term review of the CMU.

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Going public in the USA: An overview of the regulatory framework and capital markets process for IPOs

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Introduction

U.S. and foreign companies from a wide variety of industries choose to list on a U.S. exchange and sell shares to the public in the United States, seeking to capitalize on the large and varied investor base and liquidity of its capital markets. The first initial public offering (IPO) in the United States took place in 1783; the New York Stock Exchange (NYSE) has existed for more than 225 years; and the NYSE and the NASDAQ Stock Market (NASDAQ) are the largest and second-largest exchanges in the world by market capitalization. Since 1960, more than 15,000 IPOs have been conducted in the United States. Companies seek to go public in the United States for a number of reasons, including: improved access to capital; broader investor base; ability to issue publicly tradable shares as acquisition currency; potential for higher company valuation with the elimination of illiquidity discounts; strong corporate governance standards; greater flexibility to offer employee equity incentives; and enhanced company prestige.

The U.S. IPO process is regulated by the U.S. Securities and Exchange Commission (SEC). The adoption of securities offering reform in 2005 and, more recently, the passage of the Jumpstart Our Business Startups Act (JOBS Act) in 2012 signal a continuing desire on the part of legislators and regulators to encourage capital formation in the United States by streamlining and modernizing the registration and offering process. Pursuant to the JOBS Act, "emerging growth companies" (EGCs), defined as any company with total annual gross revenues of less than $1.07 billion (periodically adjusted for inflation) during its most recently completed fiscal year, have particularly benefited from this trend. The U.S. Congress is currently debating certain bipartisan bills to further facilitate securities offerings, including: (i) the Financial CHOICE Act, which would further ease capital formation, particularly for small businesses, by amending or repealing certain public disclosure and corporate governance requirements as well as the scope of the SEC's authority; (ii) the Encouraging Public Offerings Act, which would expand certain JOBS Act provisions by allowing non-EGCs to undertake communications with institutional investors prior to the public filing of a registration statement and codify the SEC staff's earlier expansion of confidential submission of registration statements by non-EGCs as discussed below in "The IPO process: steps, timing, parties and market practices – Key tasks from filing to closing"; and (iii) the Fair Investment Opportunities for Processional Experts Act, which would amend the definition of "accredited investor" to expand the number of individuals eligible for participation in private placements.

The U.S. IPO market is cyclical in nature and activity is influenced by many factors, including economic conditions, investor sentiment, market volatility and the political and regulatory climate. Following the passage of the JOBS Act, the IPO market experienced strong activity in 2013 and 2014, but faced a significant slowdown in 2015 and 2016. 2017 IPO market activity has, however, returned to pre-2015 levels with more than 50% increase in volume and 80% increase in value compared to 2016. EGCs have been the predominant companies in U.S. IPOs since 2012, with healthcare and technology companies making up the majority of offerings. In addition, private equity firms, commonly known as financial sponsors, have been, and continue to be, important players in the U.S. IPO market. Financial sponsor-backed companies continued to comprise a considerable number of U.S. IPOs in 2017 and the proceeds therefrom, although to a lesser extent than in past years. In addition, special purpose acquisition companies (SPACs), which are blank check companies with no operations, have been active in the IPO market in recent years. SPACs raise capital from public investors with the intention of acquiring a company with the IPO proceeds within a certain timeframe, typically two years. Social Capital Hedosophia Holdings Corp., a SPAC that went public in 2017, has promoted itself as IPO 2.0. Social Capital's stated investment goal is to enable technology companies with large valuations to avoid the onerous IPO process by going public via an acquisition by Social Capital. If this approach is successful, it could encourage large technology companies to forego the traditional IPO process.

The 2018 IPO market has had a strong start, with one of the most anticipated offerings of the year, Spotify Technology S.A., using an uncommon method to go public by directly listing its shares on the NYSE. As described below in "The IPO process: steps, timing, parties and market practices – The key parties", a company typically engages investment banks to guide it through the IPO process and assist in determining the initial price of its stock. If the Spotify IPO is successful, other large companies with exceptional brand recognition may consider a direct listing in *lieu* of the traditional IPO, although it is too early to tell if this trend will become more prevalent.

This chapter provides a broad overview of going public in the United States, the current regulatory framework and public company responsibilities. It also covers certain prevailing practices and identifies potential liabilities and common risks. Many nuances, exceptions and technicalities have been omitted in favor of a concise presentation within the framework of this publication.

The IPO process: steps, timing, parties and market practices

All offers and sales of securities in interstate commerce must be registered with the SEC unless an exemption from registration is available. The registration is made through the filing of a registration statement on Form S-1 (Form F-1 for foreign private issuers (FPI)) with the SEC. An IPO can consist of a primary offering – the company registers and sells its own shares, and/or a secondary offering – shares of the company that are owned by current shareholders are registered and sold by such shareholders.

The U.S. IPO process, including drafting of the registration statement and readying the company for life as a public company, involves several parties and requires careful planning and preparation. Although the timeframe for going public varies from company to company, it typically takes three to four months following the organizational meeting, the formal start of the process, to complete the IPO. Moreover, depending on the company's level of public company readiness, the IPO planning process could take an additional 12 to 18 months prior to the IPO kick-off meeting. During this planning stage, companies may review and optimize their corporate governance and capital structure, consider takeover defenses, implement communications guidelines, address whether the IPO will require any waivers by, or confer any rights on, third parties under existing agreements, obtain liability insurance for the company's directors and officers and make preliminary decisions about executive compensation matters.

Key parties

Every company pursuing an IPO must assemble a working group consisting of internal employees, including members of management and accounting staff, the board of directors and outside professionals, typically including underwriters (investment banks that act as a bridge between the company and the investing public by purchasing the IPO shares from the company and reselling them to the public), company counsel, underwriters' counsel, independent auditors, a transfer agent, a financial printer and other advisors such as IPO advisory firms. The outside advisors will preferably have well-established IPO and industry experience.

IPOs in the United States are typically underwritten by investment banks and the selection of underwriters is a key decision point in the offering process. The company selects lead bookrunners, typically in consultation with its counsel and IPO advisory firms, to manage the process and marketing efforts for the IPO. In addition, there is a larger syndicate of additional underwriters. The lead underwriters help draft the registration statement and the prospectus, market the IPO to potential investors, support trading in the company's shares after the IPO, and may continue to work with the company on future transactions. Although independent from the underwriting teams that are working on the IPO, some of the underwriters' research teams will also typically initiate ongoing research coverage of the company following a "blackout" period immediately after the IPO when such activities are prohibited. Underwriters are compensated through a spread. To create this spread, the company or selling shareholders sell the IPO shares to the underwriters at a discount to the public IPO price at which the underwriters will resell the shares. This is memorialized in an underwriting agreement as described later in this chapter.

As described above, an alternative to the typical underwritten IPO process is the direct listing of shares on a stock exchange. In a direct listing, there are no underwriters that would engage in a book-building process. Although investment banks may be involved in the process, their role would typically include acting as a financial advisor to the company and not an underwriter earning the underwriting spread. This approach has the potential to be cheaper in terms of underwriting fees, decrease the time spent on book-building and the roadshow process and eliminate certain considerations such as lock-up periods, listing prices, new share issuance and resulting dilution. In addition, a direct listing is intended to allow more participation by smaller investors in IPOs. However, without a marketing or roadshow process or stabilization by investment banks, shares that are directly listed could be subject to more volatility than in an underwritten IPO, as there will have been no pre-trading price discovery through a book-building process.

The selection of experienced company and underwriters' counsel is also very important as those attorneys will be primarily responsible for drafting the registration statement and the prospectus and shepherding it through the complex SEC review process on the company's behalf.

The time and expense associated with auditing the financial statements required to be presented in the registration statement can be substantial, although less so if the company has an established relationship with the selected independent auditors prior to the IPO. The company may decide to change auditors prior to the IPO in the event its current auditor lacks the relevant IPO experience or name recognition with the underwriters or IPO investors.

Key tasks from filing to closing

Drafting the registration statement is a joint effort by the working group. The working group will produce several drafts of the registration statement before its initial filing with the SEC. In 2017, the SEC staff expanded the non-public review process for draft registration statements for IPOs to all issuers, including non-EGCs. Companies that have confidentially submitted registration statements are required to eventually file such registration statements publicly at least 15 days prior to the commencement of the roadshow. A FPI may also submit a registration statement for confidential review without the 15-day pre-roadshow waiting period if the FPI is already listed (or is concurrently listing its securities) on a non-U.S. securities exchange or if the FPI can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction. Registration statements that are not submitted on a confidential basis become publicly available on the SEC's website immediately after filing. See "Regulatory architecture: overview of the regulators and key regulations" below for more information.

The SEC's purpose in reviewing registration statements is to ensure adequate disclosure, not to determine whether the IPO shares are a worthwhile investment. Approximately 30 days after the initial filing or confidential submission, the SEC will provide the company with a comment letter on the registration statement, which comments can cover a wide variety of disclosure topics including comments on the description of the business, risk factors, financial statements, "cheap stock" disclosures and other topics. The working group will prepare and file an amendment to the registration statement to address the SEC comments, and the SEC will in turn provide additional comments upon further review. This process repeats itself until the SEC has no further comments, which typically requires at least two to three amendments over approximately two months, but can take significantly longer if the SEC has extensive or complicated comments to resolve. Comments regarding accounting issues or otherwise relating to financial information usually take the longest time to address. During the SEC comment process, the company will also typically apply to list the IPO shares on either the NYSE or NASDAQ.

As described below in "The registration process and publicity – Pre-filing period", EGCs are permitted to engage in "testing the waters" (TTW) communications with qualified institutional buyers and institutional accredited investors prior to or after confidentially submitting or publicly filing a registration statement. During TTW meetings, an EGC and its underwriters may seek non-binding indications of interest from potential investors to assist in the determination of the appropriate price, volume and market demand for the offering. However, an EGC and its underwriters are not permitted to take any orders or solicit offers for, or promise allocation of, any securities. The TTW meetings should be informational in nature and limited only to information that is contained in, or can be derived from, disclosure in the registration statement.

Once all SEC comments are cleared, the preliminary prospectus, which includes a price range for the IPO shares based on the company's valuation and the desired deal size, taking into account anticipated investor demand and stock performance following the IPO, is printed and used by the underwriters and the company to commence the roadshow and market the IPO to potential investors. During the roadshow, which typically lasts seven business days, the underwriters will note indications of interest from investors in a process referred to as book-building. The book-building essentially gauges how much demand exists for the offering, and, at the conclusion of the roadshow, the underwriters, the company and any selling shareholders agree on the price at which the underwriters will sell the IPO shares to the public. Prior to pricing the IPO, the company and lead underwriters request the SEC to declare the registration statement effective, and after the registration statement has been declared effective, the IPO is priced, the underwriting agreement is executed and a pricing press release is issued to the market. The IPO shares begin trading on the selected exchange the day after pricing on a when-issued basis. At this point, the working group prepares and files a final prospectus with the final offering price and distributes it to investors.

Upon closing of the IPO, the company transfers the shares to the underwriters and the underwriters deliver the net proceeds to the company and any selling shareholders. The SEC recently amended its rules to shorten the standard settlement cycles for most broker-dealer securities transactions from three trading days to two trading days following the first day of trading beginning in September 2017, unless otherwise expressly agreed to by the parties at the time of the transaction. Firm commitment underwritten IPOs are not required to settle on this two-day cycle; however, all underwriters in the U.S. have adopted the two-day IPO closing settlement cycle.

Regulatory architecture: overview of the regulators and key regulations

Key regulations overview

The key statutes that govern the IPO process and U.S. securities markets generally are the Securities Act of 1933, as amended (Securities Act) and the Securities Exchange Act of 1934, as amended (Exchange Act). The Securities Act regulates the securities offering process, including IPOs, and requires the registration of offers and sales of securities with the SEC, unless an exemption from registration is available. The Exchange Act regulates the secondary trading market and requires companies with securities listed on a U.S. exchange to comply with ongoing SEC reporting obligations. Public companies are also subject to the requirements of the Sarbanes-Oxley Act of 2002 (SOX), including, among other things, prohibition on loans from the company to executives and directors, independent audit committees, heightened independence standards for outside auditors, and rules on internal control over financial reporting.

The JOBS Act eased restrictions and disclosure requirements for companies that qualify as EGCs. A company loses EGC status on the earlier of: (i) the last day of the fiscal year during which it had total annual gross revenues more than $1.07 billion; (ii) the last day of the fiscal year following the fifth anniversary of its IPO; (iii) the date on which it issued more than $1 billion in non-convertible debt in the previous three-year period; or (iv) the date on which it is deemed to be a "large accelerated filer" (essentially an issuer with a free float of $700 million as of the end of its fiscal year). The advantages of EGC status include, among other things, scaled disclosure requirements and permitted TTW communications, as described in more detail below. As noted above, the SEC staff expanded non-public review of draft registration statements for IPOs to all companies. In addition, the FAST Act and SEC staff guidance permit the company to omit from draft registration statements annual and interim financial statements and related information, including management's discussion and analysis disclosure, that the company reasonably believes will not be required to be included at the time of the contemplated offering (because they will have been superseded by more recent information).

Key regulators and listing authorities in IPO process

The chief regulator involved in the IPO process in the United States is the SEC, which is charged with safeguarding market integrity, protecting investors and promoting capital formation. The Securities Act requires that before any shares are sold to investors, there must be an effective SEC registration statement. The SEC staff reviews and comments on the disclosures included in the IPO registration statement filed by the company before declaring it effective.

FINRA is a not-for-profit self-regulatory organization that regulates member broker-dealers. FINRA's Corporate Financing Rules require member firms that participate in public offerings of securities to file the offering documents, including the registration statement and underwriting agreement, and certain other agreements between the underwriters and the company, with FINRA for review. This filing must take place no later than one business day after filing or confidential submission of the registration statement with the SEC. In the case of an IPO, the company will be required to pay a non-refundable fee to FINRA that is based on the offering size of the IPO listed in the registration statement. FINRA will review the underwriting arrangements and documentation to ensure that there are no unfair terms and that the underwriting compensation paid to the banks is not excessive. In addition, if one of the managing underwriters for the IPO has a conflict of interest, FINRA requires a bank that does not have a conflict to participate in the offering as a qualified independent underwriter and specific disclosure to be included in the registration statement regarding the nature of the conflict of interest and other information. The underwriters must have received a FINRA "no objections" letter before the SEC will declare the registration statement effective and the IPO can be priced.

In addition to SEC and FINRA review, companies must also complete a separate exchange application process in order to list their securities on a U.S. exchange. The two major exchanges in the United States for common stock listings are the NYSE and the NASDAQ, which have similar though not identical listing standards. Companies in certain industries more frequently opt to list on one over the other. The listing standards include both quantitative requirements, such as minimum thresholds for number of publicly traded shares, stock price, number of shareholders, net income and other financial metrics, and qualitative requirements, such as compliance with the exchange's continued corporate governance standards. Typically, the listing process takes between four to six weeks and the company must pay an application fee.

Key documentation

Registration statement and prospectus

The most important document in the IPO process is the registration statement, of which the prospectus – the primary disclosure and marketing document investors will see in connection with IPO marketing – constitutes the main body. The prospectus describes, among other things, the company's business, financial statements and condition, risk factors, management, capital stock and the offering. SEC rules require the prospectus to be written in "plain" English to facilitate investors' ability to make an informed investment decision. In addition, as noted above, issuers may submit their IPO registration statements to the SEC for confidential review before filing them publicly, but the public filing must occur no later than 15 days prior to the commencement of the roadshow. At such time, all previously submitted drafts will be made public.

Submitting the registration statement with the SEC confidentially may be beneficial to the company and the underwriters as there may be many reasons why the company would decide to wait for the registration statement to be made public. For example, the company may want to delay as long as possible from disclosing to the public and competitors the description of its business, other commercially sensitive information or the fact the company is preparing to go public. The ability to delay public knowledge that the company is preparing an IPO generally allows for greater flexibility to complete the offering when the company is ready and market conditions are optimal. There is also less risk of potentially detrimental scrutiny by investors or media should the offering be postponed or the registration statement withdrawn while under confidential review.

The prospectus begins with a summary of the business, including its competitive strengths and strategies (i.e., "the equity story"), the offering and summary financial information, which may include measures that are not required, but may be helpful in marketing, such as non-GAAP numbers or operating statistics. Another key section of the prospectus is the risk factor section, which describes the major risks of investing in the company, the offering and the company's shares. These risks may include those related to having a limited operating history, operating in a highly competitive or regulated industry or being dependent on a few key employees or a limited number of suppliers or customers. This section serves as the best means to avoid potential liability by ensuring that investors are aware of potential material risks.

The prospectus must also present audited financial statements (covering three years of income statements and two years of balance sheets) and unaudited financial statements for any interim periods, or a shorter period depending on the company's operating history. EGCs enjoy reduced disclosure requirements, including being required to include two years of audited financial statements instead of three. A related section presents management's discussion and analysis of the company's financial condition and result of operations, focusing on business trends and year-to-year and interim comparisons of operating results, liquidity and capital resources, cash flows and contractual and debt obligations, among other items. The prospectus must also disclose comprehensive information about the compensation of the company's chief executive officer, chief financial officer and the company's next three most highly paid executive officers, the pay ratio between the chief executive officer and the median compensation of all employees other than the chief executive officer, grants of stock options and stock appreciation rights, long-term incentive plan awards and pension plans, and employment contracts and related arrangements. EGCs are subject to less onerous disclosure requirements for executive compensation, including no requirement for a compensation discussion and analysis section.

The prospectus must also disclose: the company's capital structure; intended use of the proceeds from the IPO; anticipated dividend policy; certain transactions with related parties; current shareholdings of directors, officers and significant shareholders; a description of the rights and restrictions of the shares being offered, for example voting rights and transfer restrictions; and a description of the underwriting arrangements and lock-up agreements. Finally, the company must file certain documents as exhibits to the registration statement, including its certificate of incorporation and bylaws, the underwriting agreement and material contracts. The exhibit list must include hyperlinks to the exhibits.

Form 8-A

The company must also file a Form 8-A which registers the IPO shares under the Exchange Act and enables the company to list the securities on a U.S. exchange. This is a very short form that generally incorporates information from the IPO registration statement.

Underwriting agreement and lock-up agreements

The underwriting agreement memorializes the underwriters' commitment to purchase the IPO shares, the price the underwriters will pay the company and/or the selling shareholders for the shares and the price at which they will resell them to the public. The underwriting agreement also customarily includes extensive representations and warranties by the company and the selling shareholders, if any. The representations are similar to those that would be included in a merger agreement or stock purchase agreement for the sale of the company, subject to the appropriate materiality exceptions. The agreement also includes covenants, including a lock-up, indemnification provisions and closing conditions. Through the company's lock-up in the underwriting agreement and individual lock-up agreements with directors, officers and shareholders, the company and those other parties agree with the underwriters that they will not issue or sell any shares during a set period, typically 180 days, following the pricing of the offering. The lock-up agreements include customary exceptions, and sometimes additional exceptions are negotiated by the parties. The underwriters will generally require the lock-up agreements to be executed prior to the filing or the confidential submission of the registration statement with the SEC and no later than the launch of the roadshow to help market the IPO by addressing the investor concern that a large supply of shares could be sold on the market shortly after the IPO and potentially depress the trading price of the shares bought in the IPO.

Comfort letter and opinions

The underwriters will also request the company's outside auditors to provide a "comfort" letter containing certain assurances about the accuracy of the financial information in the registration statement. Moreover, company counsel and underwriters' counsel issue opinion letters to the underwriters expressing legal conclusions about the company, the IPO and the securities. Opinions from in-house counsel, regulatory counsel, intellectual property or other specialized or local counsel may also be needed depending on the particular circumstances of the transaction.

<u>The registration process and publicity</u>

A core tenet of U.S. securities law and the registration process is that the offer and sale of securities should be made pursuant to a statutory compliant prospectus that is filed with the SEC as part of the registration statement, often referred to as a "Section 10(a) prospectus". There are different rules and limitations on publicity and communications depending on the stage of the registration process. Section 5 of the Securities Act provides the framework for publicity restrictions and the registration process generally, which falls into three periods:

- *pre-filing or "quiet" period*: begins at the time the decision is made to proceed with the IPO until the public filing of the registration statement with the SEC;
- *post-filing or "waiting" period*: after the public filing of the registration statement but before the registration statement has been declared effective by the SEC; and
- *post-effective period*: immediately following the SEC's declaration of effectiveness of the registration statement and ending 25 days thereafter.

Pre-filing period

The Securities Act prohibits companies from "conditioning the market" by creating investor interest in a security prior to the filing of the related registration statement with the SEC. Specifically, Section 5(c) of the Securities Act makes it unlawful for any person "to offer to sell" a security unless a registration statement has been filed. A confidential submission is not considered a filing of a registration statement for purposes of Section 5(c). The concept of "offer to sell" is interpreted very broadly by the SEC and includes any type of communication that may condition the market for the securities, even if the specific security is not mentioned in the communication. Both oral and written communications (including through print, film, video and the internet) fall into the definition of "offer" and include, among other items, press releases, media interviews and public speeches, employee newsletters and media campaigns. For this reason, it is imperative that senior management, directors and employees of the company who are expected to be in contact with the press be educated on the company's publicity restrictions and guidelines.

During the pre-filing period, each communication should be analyzed to determine whether it would be seen as an attempt to condition the market or whether there is an exception to the publicity restrictions that would apply. There are three primary exceptions to the publicity prohibitions in the pre-filing period: (i) a 30-day bright line safe harbor under Rule 163A of the Securities Act for non-offering related communications made more than 30 days prior to the public filing of the registration statement; (ii) a safe harbor under Rule 169 of the Securities Act for the regular release of factual business information that is of a type the company has released or disseminated previously and is materially consistent in timing, manner and form with such past releases or disseminations and is intended for use by customers or suppliers, or other individuals, but not in their capacities as investors or potential investors; and (iii) a safe harbor for a pre-filing announcement by the company that contains limited information as set forth in Rule 135 of the Securities Act (e.g., name of the company; title, amount and basic terms of the securities; anticipated timing, etc., but not including the names of the underwriters).

There are also additional exceptions for any preliminary negotiations with the underwriters and responding to unsolicited factual inquiries from the news media and other third parties. The JOBS Act introduced a "testing the waters" exception to the "gun jumping" communication restrictions of Section 5 of the Securities Act. This exception allows communications by EGCs to "test the waters" by communicating with qualified institutional buyers and institutional accredited investors about the IPO prior to or after confidentially submitting or publicly filing a registration statement. The SEC typically reviews any TTW materials, and the information included in such materials is subject to anti-fraud liability. Accordingly, counsel should review such materials to ensure consistency with the registration statement.

Post-filing period

After the company publicly files the registration statement, the post-filing, or "waiting", period commences and continues until the registration statement is declared effective by the SEC. During this time, oral communications are permitted but no written communications other than a statutorily compliant prospectus from the registration statement may be used to offer the IPO securities. In limited circumstances, other written materials may also be used if they are filed with the SEC, but this rarely happens in practice. The prohibition of written communication also extends to broadcast communications, including radio or television as well as to advertisements, notices and letters. It also covers communications via modern technology, such as social media posts, Twitter, text messages and email. Oral communications are permitted during the post-filing period, but should be consistent with the information included in the statutory prospectus given such communications are subject to the anti-fraud provisions of the U.S. securities laws. Rule 134 of the Securities Act provides a safe harbor for notices that contain limited information on the company and the offering, such as the name of the company and managing underwriters, a schedule of the offering and use of proceeds, and must contain the legend set forth in the rule. Rule 134 notices typically take the form of a press release announcing the filing of the registration statement and should be reviewed by both company and underwriters' counsel prior to release to ensure compliance.

Post-effectiveness period

After the registration statement is declared effective by the SEC, the distribution of written materials is generally permitted as long as the final prospectus accompanies or precedes delivery of such materials. In addition, dealers are required to deliver a prospectus in any securities transactions that take place within 25 days after the effective date of the registration statement and therefore companies typically limit communications during this period to avoid any inconsistencies with the prospectus.

Risks and sanctions

The SEC takes the Section 5 publicity restrictions very seriously, and violations can have significant consequences, including having to delay the offering, providing investors with potential rescission rights under Section 12 of the Securities Act (described in more detail below under "Potential risks, liabilities and pitfalls") and being subjected to civil and criminal sanctions. The SEC may require a "cooling off" period if it believes that an impermissible communication, such as a media interview, has conditioned the market for the securities. There have also been cases where the SEC has required a company to amend its registration statement or prospectus to include (and thus assume registration statement liability for) additional information from public communications that went beyond the information in the registration statement. Companies should exercise caution especially with respect to forward-looking information, forecasts and overly optimistic predictions in their public statements.

Public company responsibilities

This section outlines certain significant obligations imposed on listed U.S. domestic companies, and their officers, directors and certain of their shareholders, which do not apply to private companies. FPIs are also subject to Exchange Act reporting obligations, but such requirements are less extensive compared to those for domestic companies and, with respect to certain requirements, FPIs are instead permitted to comply with their home country rules.

<u>Periodic and current reporting obligations</u>

Once a company becomes subject to the Exchange Act reporting requirements, it must file annual and quarterly reports with the SEC after the end of the respective fiscal period. The information required to be disclosed in these periodic reports is substantially similar to that required to be disclosed when the company's shares are registered for an IPO. Independent auditors must audit the annual financial statements and review the quarterly financial statements. The SEC periodically reviews the company's filed reports and may also compare their disclosure to statements made in earnings releases and other publicly available information issued by the company, including information posted on its website.

In addition to the periodic reports, a public company must file current reports within a few days of the occurrence of certain material events, including when it enters into or terminates a material agreement, issues an earnings release, changes directors or officers, acquires or disposes of businesses or assets, amends its certificate of incorporation or bylaws or changes in outside auditors. Public companies must also file copies of their material contracts.

Public companies must be constantly aware of the potential for insider trading based on material information that has not been made available to the general public. If a company discloses material non-public information (MNPI) to, for example, select groups of investors, it is also required under Regulation FD to disclose that information to the public. Such public disclosure must be made simultaneously with the selective disclosure if the disclosure of MNPI was intentional, or promptly if it was unintentional, unless the select recipients have expressly agreed to maintain confidentiality until the MNPI is public. In instances where confidentiality agreements have not been obtained prior to selective disclosure, companies customarily satisfy this disclosure obligation by issuing a press release and filing a current report to make the information public.

FPIs are required to file an annual report on Form 20-F and reports on Form 6-K regarding material information otherwise released in the home jurisdiction; however, they are not required to file quarterly reports, although they may, and often do, voluntarily provide similar types of information as U.S. domestic companies. NYSE listing rules also require that FPIs file a Form 6-K containing semi-annual unaudited financial information no later than six months following the end of the company's second fiscal quarter.

Certifications of chief executive officer and chief financial officer

Since the passing of SOX in 2002, the annual and quarterly reports filed with the SEC must include certifications by the principal executive officer and principal financial officer certifying that: (i) the information contained in the periodic report fairly presents, in all material respects, the company's financial condition and results of operations; and (ii) the company's internal controls over financial reporting (ICFR) is effective based on management's assessment thereof. The company's independent auditors must also audit and attest to the effectiveness of the company's ICFR. Any officer who provides a false certification is, depending on the type of certification, subject to SEC and private actions, a monetary fine of up to $1 million and a prison term of up to 10 years (up to $5 million and 20 years for willful violations). The amount of time and effort necessary to support the ICFR certification and auditor attestation regime entails substantial compliance costs for public companies. Newly public companies may, however, wait until their second annual report to file ICFR certifications and auditor attestations and EGCs in particular are exempted from the auditor attestation requirement for up to five years from going public as long as they qualify as EGCs.

Proxy solicitation obligations

Public companies must also comply with rules regulating how proxies are solicited from shareholders in *lieu* of their physical attendance at shareholders' meetings. Proxy statements must be filed with the SEC and delivered to shareholders within specified time periods before the meetings are held, provide detailed information about the meetings and matters to be voted upon and disclose certain information related to corporate governance, executive compensation and share ownership by directors, officers and significant shareholders.

Public companies must provide their shareholders the opportunity to vote, on a non-binding advisory basis, on the company's executive officers' compensation and whether such say-on-pay voting will take place every one, two or three years. Shareholder approval rates in say-on-pay votes have traditionally been very high since the requirement was implemented. A public company must also include a shareholder proposal in its proxy statement if it satisfies certain conditions.

FPIs are not subject to the proxy rules.

Share ownership reporting obligations

Under Section 16(a) of the Securities Act, a public company's directors, officers and shareholders beneficially owning more than 10% of any class of registered equity securities of the company (collectively referred to as "insiders"), must file publicly available reports with the SEC disclosing their holdings of, and transactions and changes in, the company's shares. Although the forms are the responsibility of each individual filer, many are in practice filed on their behalf by the company or its counsel. In addition, under Section 16(b), every insider must pay to the company any profit realized from a purchase and sale (whether the sale precedes the purchase or *vice versa*) of the company's stock within any period of less than six months, with certain exemptions for such transactions made pursuant to employee benefit plans.

Corporate governance requirements

Public companies are subject to various corporate governance requirements imposed under state and federal law as well as the U.S. exchange on which the company's shares are listed. NYSE and NASDAQ each require that a majority of the directors on a public company's board of directors be "independent". An independent director is one who does not have a material relationship with the company, either directly or as an officer, partner or shareholder of a company that has such a relationship with the company. The company must also have an audit committee comprised entirely of independent directors that are financially literate and a compensation committee and a nominating and corporate governance committee that are each comprised entirely of independent directors. Further, public companies are required to adopt a code of business conduct and ethics and, depending on which U.S. exchange they are listed on, a set of corporate governance guidelines that further delineates corporate governance responsibilities. The exchanges also require listed companies to obtain shareholder approval prior to issuing 20% or more of their outstanding common stock or voting power, unless such issuance is made in a widely distributed public offering registered with the SEC.

NYSE and NASDAQ rules do permit a company to gradually phase in the number of independent directors on the board of directors and its committees during the first year after its IPO. Moreover, controlled companies, defined as those in which more than 50% of the voting power for the election of directors is held by a single person, entity or group, are permitted to opt out of compliance with some of the above-mentioned governance standards. FPIs are generally permitted to comply with their home country practices in *lieu* of the NYSE or NASDAQ corporate governance requirements, except for the audit committee composition.

Potential risks, liabilities and pitfalls

Diligence process and procedures

One of the most important and time-consuming elements in an IPO is the due diligence process in which the underwriters and counsel undertake a comprehensive review of the company's legal, business and accounting affairs for the past several years, as well as evaluate the company's future prospects and identify any significant risks to the company or the offering. The overarching purpose of due diligence from the company's and the underwriters' perspective is to reasonably assure themselves that the registration statement, the prospectus and related marketing materials appropriately describe the company's business, financial condition and various risks relating to the company and the offering as required by the SEC rules and do not contain any material misstatements or omissions. For the underwriters, this forms the basis of the "due diligence" defense described below.

The due diligence process generally kicks off with a detailed management presentation about the business and financial condition and continues over several months until closing of the IPO. Counsel will conduct documentary review of diligence materials, organize several question-and-answer style diligence calls with company management and the outside auditors and ask the company to provide support for factual assertions made in the registration statement. In addition, the company's outside auditors will provide the underwriters a "comfort" letter containing certain assurances about the accuracy of the financial information in the registration statement.

The scope and areas of focus of the diligence must be tailored to suit the particular circumstances of the company. Depending on the industry of the company, specialists, such as intellectual property, environmental or regulatory, may be required to conduct a thorough diligence investigation. Of particular note, major investment banks in the United States require extensive IPO diligence with respect to the company's compliance with anti-corruption, anti-bribery, anti-money laundering and sanctions-related matters. It is also customary for the underwriters to order background checks on the company's directors and senior executives for legal and reputational purposes.

Potential legal liabilities and penalties

There is significant potential liability for violations of the federal securities laws and material misstatements and omissions in the registration statement under Sections 11, 12(a) and 17 of the Securities Act and Sections 10(b) and 18 of the Exchange Act. There is no statutory definition of "materiality", and whether a particular statement or omission is material will depend on the total mix of information available to investors and the facts and circumstances surrounding the event or transaction. Both quantitative and qualitative factors must be considered in making a materiality determination. Generally, information is deemed to be material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision regarding the company's securities. Examples of potentially material information include, among other things: financial results, prospects or trends; mergers, acquisitions or other strategic transactions; risks related to the company; developments relating to the company's major customers or suppliers; legal proceedings, government investigations or regulatory matters; changes in controlling shareholders, directors or management; and changes in the company's indebtedness or financial position, among others.

Registration statements: Section 11 of the Securities Act

Section 11 of the Securities establishes liability for material misstatements or omissions in a registration statement. A person who has acquired securities pursuant to a registration statement (or whose securities are traceable to the distribution that occurred pursuant to a registration statement), has a claim under Section 11 if the registration statement contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading. That person may sue, among others: (i) the company; (ii) directors of the company (even if they have not signed the registration statement); (iii) persons named in the registration statement as director nominees of the company; (iv) each person who has signed the registration statement, including the principal executive officer, principal financial officer and principal accounting officer; (v) the company's auditors with respect to the audited financial statements; and (vi) any underwriter.

The company is strictly liable for any material misstatement in, or material omission from, a registration statement and no proof of fraud, intent or negligence on the part of the company is required to be shown, nor is a due diligence defense available to the company. However, persons other than the company, such as directors, officers and underwriters, can assert a "due diligence" defense. This defense is available if they can show that, after reasonable investigation, they had reasonable ground to believe, and did in fact believe, that the statements in the registration statement were true and that there was no omission of material fact. The remedy under Section 11 is damages equal to the difference between the purchase price of the securities and (i) their actual value at the time the lawsuit was commenced, (ii) the price at which the plaintiff sold the securities if the sale occurred prior to commencement of the lawsuit, or (iii) the price at which the securities were sold after the lawsuit was commenced but before judgment is rendered. The total amount of damages cannot exceed the price at which the security was offered to the public and each underwriter's liability is capped at the total value of the securities that particular underwriter had underwritten in the offering. If the defendant can prove that a portion of the loss incurred by the plaintiff was due to something other than the material misstatement or omission, any damages will be reduced accordingly.

Gun-jumping violations: Section 12(a)(1) of the Securities Act

Section 12(a)(1) of the Securities Act creates a private right of action for violations of the registration requirements and publicity restrictions of Section 5 of the Securities Act. A person that purchases securities sold in violation of those restrictions has rescission remedy against the seller. The plaintiff returns the security to the defendant in exchange for the purchase price (with interest calculated at an equitable rate determined by the court). In the event the particular securities have been sold by the plaintiff, the remedy is damages.

All offering communications: Section 12(a)(2) of the Securities Act

Section 12(a)(2) of the Securities Act establishes liability for material misstatements or omissions in a prospectus or oral communication. Liability is subject to a due diligence defense if the defendant can show that he or she did not know, and could not in the exercise of reasonable care have known, of the misstatement or omission. Unlike Section 11, this includes liability for statements made in slide presentations or orally during the roadshow. The plaintiff under a Section 12(a)(2) claim has the same rescission remedy as under a Section 12(a)(1) claim discussed above.

Section 10(b) and Rule 10b-5 under the Exchange Act

Section 10(b) and Rule 10b-5 of the Exchange Act provide a broad fraud-based remedy for material misstatements and omissions in connection with the purchase or sale of securities, whereby the defendant must be shown to have had "*scienter*" – acted intentionally or at least recklessly – in making the misstatement or omission. This is a private right of action claim that is commonly used in securities litigation matters and requires plaintiffs to show that the defendant made a false statement or omission of a material fact with *scienter*, in connection with the purchase or sale of a security, upon which the plaintiff justifiably relied and which proximately caused the plaintiff's economic loss. Remedies include injunctive relief, estoppel, disgorgement of profits and rescission.

Control Person Liability

Under Section 15 of the Securities Act, a plaintiff can bring an action against a control person for a primary violation of Section 11 or Section 12 of the Securities Act, and such control person is jointly and severally liable with the controlled person subject to certain affirmative defenses including lack of knowledge. Control persons typically include directors, officers and principal or controlling shareholders that have the power to direct management and the entity's policies. Section 20 of the Exchange Act provides for control person liability for primary violations of Section 10(b) or Rule 10b-5 under the Exchange Act and such control person is jointly and severally liable with the controlled person but can assert the defense that the "controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action".

Conclusion

Going public in the United States is complex and requires skilled advisors and counsel to help navigate the potential pitfalls, liability risks and nuances of the process. This chapter is an attempt to provide a broad overview of going public in the United States, the current regulatory framework and public company responsibilities as well as potential pitfalls, liabilities and common risks. As the U.S. IPO process evolves, the SEC will continue to adopt rules to encourage capital formation, modernize disclosure regulations and improve overall disclosure effectiveness. Technology will no doubt have a strong influence and impact as well.

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An overview of structuring and governance considerations for Initial Public Offerings in the USA

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Introduction

With the increasing availability of privately raised capital and secondary trading platforms as well as the accessibility of social media as a method of fostering brand recognition, private issuers may no longer see the initial public offering as a natural and inevitable next step for a growing business. As a result, issuers that do decide to enter the U.S. public markets for the first time often seek tailored solutions, investigating the full menu of structuring and governance considerations to ensure that the benefits from an initial public offering are maximised. The role of legal counsel remains of critical importance in this process as the fundamental decisions issuers make when first entering the public domain have lasting effects, and they are often difficult to reverse once made. These initial choices are informed by a variety of sometimes competing interests, which can range from existing owners hesitant to relinquish control of a company they have built up over decades to private equity investors who are eager to maximise the returns on their investment as quickly as possible. As practitioners, we often find ourselves balancing the voices of a variety of different constituencies, all the while seeking practical solutions that will not jeopardise execution. This chapter provides a brief overview of certain structuring and governance considerations – both those that have become increasingly prevalent in recent years and those that are just beginning to gain traction and remain up for debate – each of which may be worth examining during this essential phase of a company's life cycle.

Organisational structure

Answering questions as to the identity of the issuer, where and what type of securities will be issued, and how existing owners will be treated following the offering, can be simple or exceedingly complex. The traditional model, consisting of a straightforward corporate structure with one class of shares, continues to be the structure of choice for many issuers. This choice is often based on the perceived value of reducing the amount of "noise" accompanying a private company's initial entry into the public markets. To that end, it is true that the traditional corporate model will likely put to rest most questions of market acceptance and recognition. However, in recent years, an increasing number of issuers have elected to utilise more complex structures designed to take advantage of certain tax, economic and governance benefits. This is particularly evident when sophisticated private equity sponsors drive the IPO process and seek organisational structures that can accommodate their specific needs without having an adverse impact on execution or pricing. It is no longer unusual for counsel representing both the issuer and the underwriters to spend weeks or even months painstakingly working through every step of the pre-IPO organisational process before even commencing the drafting of the IPO registration statement. While it is true that structures utilised by IPO issuers still exhibit far more uniformity than their debt or equity product counterparts, as more complex variations find success in the market, issuers should expect a growing menu of options from which to choose.

Up-C structure

One of the most frequently used structures in recent years has been the umbrella partnership C-corporation structure, commonly referred to as the "Up-C" structure. Named after the similar UPREIT structure that was historically limited only to real estate investment trusts, Up-C structures have continued to gain traction over the past few years, particularly for private equity sponsor-backed issuers. The typical Up-C structure consists of an operating company, which is treated as a partnership for tax purposes, with a managing member that is organised as a corporation. In its basic form, the corporation adopts a dual-class share structure, with one class of shares offered to the public in the IPO and the other class of shares providing voting rights, but not economic rights, to existing owners who own their economic interests directly in the operating company. Those interests, typically held as units, are then exchangeable, along with the non-voting shares, for the publicly listed shares.

Tax considerations, both for the issuer and for legacy owners, are a primary driver of the Up-C structure. For legacy owners, continued investment in the operating company allows them to benefit from a single level of taxation as well as realise other tax benefits, such as a deferral of gain recognition and, potentially, sharing in issuer tax savings through a tax receivables or similar agreement. The issuer, in turn, can benefit from a step-up in the tax basis of its share of partnership assets, which in most cases can be allocated to depreciable fixed assets or intangible assets. As noted above, many transactions also feature a tax receivables agreement pursuant to which legacy owners receive a percentage (typically 75–85 percent) of the tax benefits realised by the issuer.

In 2016, the U.S. Securities and Exchange Commission provided no-action relief under Rule 144 with respect to the ability of exchanging holders in Up-C structures to "tack" the holding period of the units owned in the operating company to the public shares received upon exchange. Prior to the issuance of the guidance, exchanging holders of operating company units were subject to a new holding period with respect to the public shares issued to them, regardless of the length of time such holders may have held the underlying units. As a result, the holders were either required to register such shares or hold them for at least six months (the minimum Rule 144 holding period) before being able to freely trade such shares in the public market. Since holders in Up-C structures generally do not elect to exchange their units unless they are able to sell the underlying public shares, registration rights became an integral part of the Up-C structure – holders would typically not be willing to exchange unless a registration statement was available to register the issuance or resale of the public shares to be received. Perhaps reflective of the increasing popularity of the Up-C structure, the guidance substantially altered the liquidity characteristics of the structure, in that so long as certain conditions are satisfied – including that the operating company units being exchanged have been fully paid for and subject to the same economic risk as the underlying public shares – registration rights can often now be significantly scaled back or even eliminated altogether, depending on the specific facts of the transaction. In the short period since no-action relief was granted, we have already seen many holders of operating company units utilise the benefits of this change, particularly in cases where a registration statement would have been subject to SEC review, which is often the case for recently public companies. We have also seen holders begin to explore other liquidity benefits that historically have not been available to them, such as pledging units as collateral for loans or derivative transactions, to the extent that the applicable counterparties are comfortable that the holding period will have been satisfied upon a default by the pledgor.

As Up-C structures have become more commonplace, issuers have become increasingly inquisitive as to the ancillary benefits of these structures, with a renewed focus on not only realising the associated tax benefits but also taking advantage of the opportunities the structure provides in terms of organised exit strategies and the maintenance of sponsor control in the absence of a substantial economic interest in the entity. Further variations of the traditional structure that layer in other complexities include: (1) adopting incentive distribution rights and sponsor subordination provisions; (2) substituting limited liability companies or limited partnerships for the corporate issuer in order to utilise the ability under state law to disclaim fiduciary obligations of directors and officers and provide limited governance rights to public investors; and (3) implementing high-vote or golden-share-sponsor voting rights to allow sponsors to maintain control while monetising their economic interests. A common theme in these variations is that they are not unfamiliar to the public markets – incentive-distribution rights, sponsor-subordination provisions and limited governance rights for public investors are common in master limited partnerships; disclaimers of fiduciary duties are common in the financial services industry and examples of dual-class voting structures, as described in more detail below, are sprinkled across a wide range of sectors. This may illustrate the willingness of underwriters to go to market with tailored solutions for a particular issuer as long as it is not the "first time", which could potentially allow new issuers to pick and choose from a broad range of options that historically may have been avoided by underwriters as unworkable in a specific industry.

Recent examples of the willingness of issuers and underwriters to explore the boundaries of the IPO structure can be found in the numerous "yieldco" IPOs in 2014 and 2015. While the initial yieldco IPOs followed the traditional Up-C model, the market's widespread, albeit short-lived, support of yieldcos emboldened issuers to layer in other features, such that many of the yieldcos in existence today include varying combinations of the sponsor-favourable provisions described above. As noted in the discussion below on dual-class structures, however, there are often negative implications to moving away from the *status quo*, and issuers and underwriters may not be able to accurately assess the market impact of their decisions until after the shares begin trading. While the structures put in place in yieldco IPOs are unlikely to have been a substantial factor in the financial difficulties experienced by many yieldcos over the past few years, such difficulties have exposed those structures to significant public scrutiny and criticism, in particular due to the perceived lack of control afforded to public investors. Currently, the future of yieldcos remains in question as regulatory uncertainties and a volatile renewable energy market have discouraged new entrants, although the market has seen some stabilisation over the past year, including with sponsorship changes to yieldcos such as TerraForm Power and a prospective sponsor change for 8point3. Whether this stabilisation will lead to a reopening of the yieldco market is unclear, and even if it does, underwriters will likely look to take a more conservative approach to structuring yieldco IPOs in the future.

<u>Dual-class structures</u>

While U.S. stock exchanges limit the ability of already public companies to take actions that impair the voting rights of public shareholders, there are no such limits on the voting rights structure implemented at the time of an issuer's IPO. As a result, and to the continuing protest of shareholder advocacy groups, dual-class or multiple-class structures, where certain classes possess superior voting rights, are still a feature in many IPOs.

The debate with respect to dual-class structures is deeply rooted in corporate history, with wide-ranging views on both sides of the aisle. Proponents of such structures point to benefits such as the ability of companies to execute their business strategy without being influenced by activist shareholders, many of whom have short-term profits in mind. Such structures can act as strong defensive measures as well as provide benefits to issuers that are required to satisfy ownership requirements imposed by regulators. On the other hand, shareholder advocacy groups will argue that dual-class structures eliminate the fundamental ability and right of public shareholders to hold management accountable through the exercise of their voting rights, and that a system where economic rights are not proportional to voting rights is inherently flawed. In large part due to the increased prominence of technology companies in the past decade, including issuers such as Google, Facebook and Alibaba, this debate continues to gain prominence. For such companies, innovation and long-term growth are key selling points, and in some cases, the perceived talents of specific founders or sponsors may lead investors to conclude that the dual-class structure is preferable in that it will allow those founders or sponsors to achieve their long-term vision without shareholder interruption.

From the perspective of issuers seeking to enter the public markets and the underwriters advising them, this debate may be most relevant in terms of the potential impact on the anticipated share price. High-profile and popular issuers may find it a simple task to convince investors to place trust in an entrenched management team, whereas others may face intense opposition, and in turn, tepid price discovery, when attempting to implement such a structure. Over the past year, criticism of these structures has been widespread, not only from shareholder advocacy groups but from mainstream media outlets as well, which may be evidence that a resolution of this debate is finally on the horizon.

In August 2017, the S&P Dow Jones Indices, which includes the S&P 500, stated that newly public issuers with dual-class structures would not be permitted to list on its indices. This followed FTSE Russell's announcement in July 2017 that it would not permit issuers with low or non-voting shares in its indices, which include the Russell 3000. Recent speeches by SEC Commissioners Robert J. Jackson Jr. and Kara M. Stein also noted ongoing concerns regarding dual-class structures. Commissioner Jackson stated that special share classes should be subject to sunset provisions so that regular investors are not permanently at a disadvantage to "corporate royalty" and Commissioner Stein expressed her concerns regarding the "undemocratic" nature of dual-class structures and the potential for such structures to be used as "a means to evade management and board accountability". It remains to be seen whether the SEC or other regulators will take more formal action, and despite these various criticisms, nearly 20 percent of issuers that went public in 2017 have dual-share classes with unequal voting rights, according to the Council of Institutional Investors. Exchanges in London and Singapore have each proposed plans to loosen current eligibility requirements to accommodate dual-class structures and in February 2018, Hong Kong's exchange issued a Consultation Paper including draft rules to, among other things, permit listings of companies with dual-class shares, illustrating a competitive landscape among exchanges that is trending toward further enabling these structures rather than discouraging them.

Corporate governance considerations

Both the Up-C and dual-class structures described above are examples of methods through which IPO issuers may stray from the traditional IPO model to achieve specific economic, liquidity or control objectives. In any structure, the analysis of the broader corporate governance structure plays a vital role and requires the same careful consideration by issuers desiring to strike the proper balance between operating their businesses efficiently and effectively and implementing a corporate governance structure that allows them to become a trusted and well-respected public actor. While the categories listed below are by no means exhaustive, they are intended to highlight certain areas of discussion that frequently arise in the course of the IPO process, with particular relevance where sponsor interests may conflict with corporate governance best practices.

<u>Board of directors</u>

One of the most significant corporate governance transitions for a newly public company relates to its board of directors and the need to appoint directors who are "independent" under applicable stock exchange and SEC criteria. Public issuers are generally required to, within specified transition periods, have a majority of independent directors as well as fully independent audit, compensation and nominating committees. Where voting power is concentrated in the hands of a majority shareholder or group of shareholders, however, issuers often take advantage of the "controlled company" exemption under stock exchange rules, which permits such issuers to maintain a board of directors that does not have a majority of independent directors or fully independent compensation or nominating committees. (The audit committee is still required to be fully independent.) Because the ability to use the exemption is based on voting, not economic, interests, if combined with a dual-class structure, this can be another method through which legacy owners can retain significant influence over the management of the issuer even if their economic interests decrease.

It is also not uncommon for sponsors to retain board and board committee nomination rights for so long as they hold a significant stake in the issuer. Particularly in situations where a full exit may not be quickly achievable or desired, maintaining representation on the board and on critical committees can be a way to ensure that sponsors continue to have a strong voice at the highest level of management and with respect to important decisions relating to the appointment and compensation of management. Taking it one step further, many public issuers also utilise classified boards, although the popularity of this structure has decreased in recent years, in large part due to opposition from shareholder advocacy groups coupled with declassification shareholder proposals submitted to numerous issuers. The same is true of the decision to implement plurality voting rather than majority voting systems for the election of directors. Whereas plurality voting was once the traditional method of electing directors, shareholder activism has led to a substantial shift in the last decade toward most issuers implementing some type of majority voting system. What these cases illustrate are increasingly negative perceptions in the market – associated with decisions made by IPO issuers that are perceived as reducing director accountability – as well as a heightened sensitivity to shareholder activism facing many issuers today.

Finally, sponsors will often seek to include a waiver of the corporate opportunity doctrine in the charter provisions of an IPO issuer. The corporate opportunity doctrine is a component of the fiduciary duty of loyalty and is generally intended to prohibit officers and directors from personally benefiting from opportunities that could otherwise benefit the corporation. The ability to waive the doctrine is dependent on the relevant state law provisions, but to the extent it is permitted, such waiver may decrease litigation risks where sponsors have competing investments but desire to retain representatives on the board and/or senior management. Consideration should be given to whether such a waiver is desirable in light of other offering considerations, and to the extent one is included, determining which activities and opportunities should be excluded is an important point of discussion.

Takeover defences

It has become increasingly uncommon for IPO issuers to deploy specific defensive measures such as shareholder rights plans or "golden parachute" provisions, although most issuers continue to include "blank cheque" preferred stock in their corporate charters which, in addition to giving a board of directors broad discretion to determine the terms of preferred stock that may be issued for financing purposes, also permits a variety of defensive measures to be implemented in the future without shareholder approval. Most issuers also include other customary defensive protections such as requiring a super-majority vote for amendments to organisational documents or prohibiting the ability of shareholders to call a special meeting or take action by written consent. Again, sponsors who retain majority voting control may look to relax these or other protections in order to facilitate their ability to take unilateral actions without seeking approval from other shareholders. To the extent that management is concerned that an issuer would become vulnerable upon an impending sponsor exit, consideration should be given at the time of the IPO as to whether certain defensive protections should be retained or, alternatively, come into effect once a sponsor's ownership is reduced below a certain threshold.

Anti-takeover statutes

State anti-takeover statutes are typically designed to limit or prohibit a potential bidder's ability to make an offer directly to shareholders without board approval. For example, Section 203 of the Delaware General Corporation Law generally prohibits corporations from engaging in a business combination with any person who acquires 15 percent of such corporation's common stock without prior board approval. This prohibition lasts for a period of three years after acquisition of 15 percent ownership and can significantly limit a sponsor's ability to monetise its investment in the issuer if the transaction does not have the support of the board. Sponsors will generally seek to opt out of a state's anti-takeover statute to the extent possible, but as with the other takeover defences described above, building a mechanism to opt back into the statute once a sponsor exits may be a prudent approach, as supporters of such statutes would argue that it is a protective measure that promotes issuer stability and allows boards to negotiate maximum value for all shareholders.

Veto rights

While uncommon even in sponsor-backed IPOs, sponsors with an uncertain exit horizon may desire to retain veto rights with respect to certain actions taken by the issuer following the IPO. The scope of these rights will often be narrowed to a handful of matters that would be expected to substantially impact the sponsor, such as changes of control, major acquisitions or liquidation proceedings. However, where sponsors wish to be more intimately involved in the operations of the issuer, these rights may be expanded to include the hiring or termination of senior employees, the incurrence of indebtedness or other corporate transactions that typically would fall solely within the purview of the board of directors. Given the high visibility of veto rights in the IPO context, underwriters may be wary of the potentially negative marketing impact and attempt to guide sponsors toward more customary methods through which they can retain measures of control over an issuer, including those described elsewhere in this chapter.

Management arrangements

Sponsors often enter into management arrangements with IPO issuers where they receive a fee for providing employees and other services to the issuer on an ongoing basis. Because the issuers in these cases typically do not have their own employees, there remains uncertainty as to whether disclosures on executive compensation required by the SEC are applicable. As a result, in many instances there will be substantial resistance by sponsors to providing disclosures regarding the compensation of its own employees that are managing the public issuer. Historically, omitting such disclosures was common for many externally managed real estate investment trusts as well as sponsor-managed issuers in the financial services industry. In recent years, criticism by shareholder advocacy groups regarding the alleged lack of transparency and requests for regulators to intervene have caused some issuers to revisit this practice, although it remains prevalent.

Liquidity considerations

For many legacy shareholders and sponsors, the IPO is the first step toward swiftly realising a substantial gain on their initial investment. For others, the IPO is a mechanism through which to effect the long-term growth potential of the issuer, and exit considerations are of less importance. As a result, the importance of liquidity to existing owners can vary considerably, but nonetheless it is often one of the most discussed topics during the IPO process and in the months that follow. Particularly in the sponsor-backed context, developing strategies to maximise returns on the investment of the sponsor can often obscure focus on the IPO process itself and will often impact the proposed size of the IPO, the identity and extent of participation by secondary sellers, the nature and length of lock-up arrangements and the overall timing of the offering relative to expected future performance.

Virtually all IPOs where existing owners retain a significant stake feature registration rights agreements in some form. Most registration rights agreements provide for piggyback rights, allowing holders to participate in registrations by the issuer of its own shares, subject to cutbacks in certain circumstances. In sponsor-backed IPOs, it is also not uncommon to find demand rights, which are sometimes unlimited, providing sponsors with the ability to require the issuer to file a registration statement and sell the sponsor's shares through an underwritten offering. These rights are generally designed to allow existing owners to take advantage of limited market windows in which to sell all or a portion of their shares, and can be burdensome to newly public issuers, particularly during the period in which they are not permitted to utilise the short-form registration process afforded to more seasoned issuers.

Even with such rights, however, the volatility of a newly trading security, and of the market generally, often requires sponsors to take a tempered approach to an exit to avoid an adverse market reaction to a sudden increase in the public float, or the perception that there are circumstances unknown to the public that are prompting a sudden exit. Share prices also often reflect the market's expectation of a sponsor's continued ownership of the issuer, whether due to the sponsor's perceived expertise or ability to provide credit support should the issuer fail to perform as expected. In many cases, sponsors or founders enter into extended lock-up agreements with IPO underwriters. Whereas the customary IPO lock-up agreement restricts directors, employees and significant shareholders for a 180-day period, sponsors are sometimes asked to lock up for extended periods, sometimes several years, to assist the marketability of the offering by evidencing an alignment of their long-term interests with public shareholders.

Notwithstanding the market-based considerations described above, existing owners may also face legal impediments to a prompt disposition of their investment. For example, the issuer's debt agreements may contain change-of-control or other provisions that require the repurchase or redemption of the underlying debt if a sponsor no longer controls the issuer. The issuer may also be party to commercial agreements that contain similar provisions that can result in terminations or other adverse consequences, or that contain credit support requirements that, absent a sponsor, can be prohibitively expensive for the issuer. Obtaining waivers or amendments of these agreements can be a costly process and cause extensive delays, and the IPO due diligence process should include a careful review of such agreements and consideration of post-IPO implications.

Sponsors who retain significant influence over an issuer through director or officer representation are also typically privy to material non-public information. Because trades cannot be made until such information is publicly disclosed or no longer deemed material, a sponsor's ability to take advantage of favourable market windows may be severely limited by factors outside of the sponsor's control. In addition, since most sponsors will be deemed affiliates of the issuer, their ability to sell large blocks of shares will be highly dependent on the issuer's ability to register such shares with the SEC – as noted above, since newly public companies cannot use short-form registration statements within the first year of going public, this will introduce a time-consuming SEC review process to a sponsor's exit aspirations.

Direct listings

While the vast majority of private issuers seeking to list their securities publicly do so via an underwritten offering, a rarely utilised alternative is a direct listing, whereby an issuer can list its shares directly on an exchange without concurrently conducting an offering. Historically, this alternative has been used only by small and relatively unknown issuers; however with Spotify recently pursuing a direct listing, including through filing a registration statement with the SEC, new questions have arisen as to whether direct listings could become a realistic alternative to the traditional IPO process. The most significant advantages of the traditional underwritten IPO include the substantial marketing and "book-building" process led by the underwriters, designed to build demand for an issuer's securities, create a balanced institutional shareholder group and maximise trading value, as well as the post-IPO support from the underwriters to reduce volatility in secondary trading and provide ongoing research coverage. Issuers seeking to conduct an IPO often also have a need to raise a substantial amount of capital, and simply gaining liquidity for existing shareholders is not a viable option. For the increasing number of highly recognisable issuers, predominantly in the technology space, that boast high private valuations and significant cash reserves, the traditional IPO considerations may not be compelling enough to offset the additional burdens associated with an underwritten offering, including the substantial underwriters' fees and dilution to existing holders. In June 2017, the New York Stock Exchange proposed an amendment to its direct listing requirements that, among other things, was designed to accommodate issuers that did not have shares actively trading in private placement markets. Previously, a private issuer could list on the exchange without conducting an IPO at the discretion of the NYSE only if the value of its publicly held shares was at least $100 million based on a combination of an independent third-party valuation and trading prices in a private placement market. The amended proposal, approved by the SEC in February 2018, eliminates the requirement to have a private placement market trading price if there is a valuation from an independent third party of at least $250 million in market value of publicly held shares, a threshold easily met by Spotify and many other currently private issuers. While this amendment seemingly clears a path for issuers with high private valuations such as Spotify to effect a direct listing, whether other issuers follow Spotify's lead will likely be heavily influenced by the success of its direct listing, which many expect to occur in the near future.

Conclusion

Most practitioners would agree that the experience of guiding a company into the public markets is as rewarding as it is challenging. Perhaps part of what makes it so is that counsel is uniquely situated to explore considerations that, more often than not, extend beyond traditional legal advice. While the scope of this chapter is limited to an overview of a select few of those considerations, it also provides an indication of the continuously evolving nature of IPO structuring techniques and the need for counsel to evolve in tandem.

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Trends shaping an evolving IPO market

Pippa Bond, Daniel Forman & Lily Desmond
Proskauer Rose LLP

Proskauer's IPO Study

In 2014, Proskauer published its first IPO Study analysing 100 IPOs that priced during 2013. In the years since, Proskauer's IPO Study has grown and been developed into a searchable proprietary database that includes detailed information on 462 IPOs that priced from 2013 to 2017. Over the course of the year, Proskauer capital markets attorneys and corporate finance analysts compile, review and analyse a significant proportion of the IPOs meeting the study's criteria as they come to market. In order to be included in the survey population, an IPO must be listed on a U.S. exchange and have a minimum initial base deal size of $50 million presented in its initial preliminary prospectus filed with the SEC. Proskauer's study excludes "blank check" companies (BCCs), special-purposes acquisition companies (SPACs), trusts, real estate investment trusts (REITs) and business development companies (BDCs). Data is compiled from publicly available materials on the SEC's EDGAR website. In addition, market, sector, financial sponsor and stock performance information is sourced from Dealogic. Proskauer's IPO Study is now utilised and relied upon by a variety of market participants, including issuers, investment banks, private equity sponsors, venture capital investors and the financial press.

Recent trends

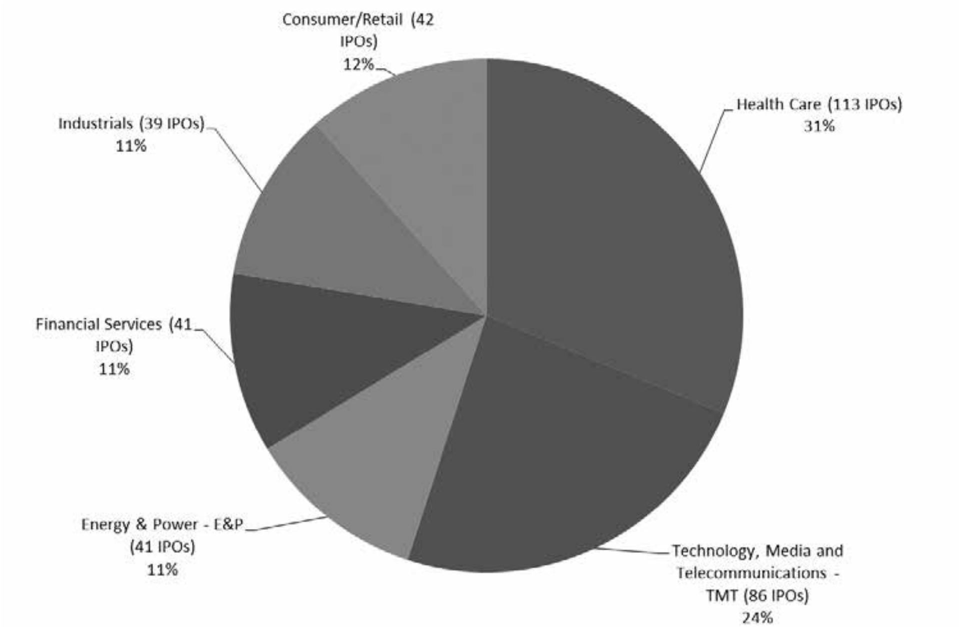
Profile of an IPO issuer

Much attention has been drawn to the dramatic decline in IPO activity over the last 20 years. According to the SEC Staff, the number of IPOs annually peaked in 1996 at 821 and fell to 119 by 2016. The Jump-start Our Business Startups Act (JOBS Act) was enacted in 2012 to facilitate capital formation and business startups. Our study reveals some interesting trends regarding the profile of companies that have since been accessing the public capital equity markets through IPOs.

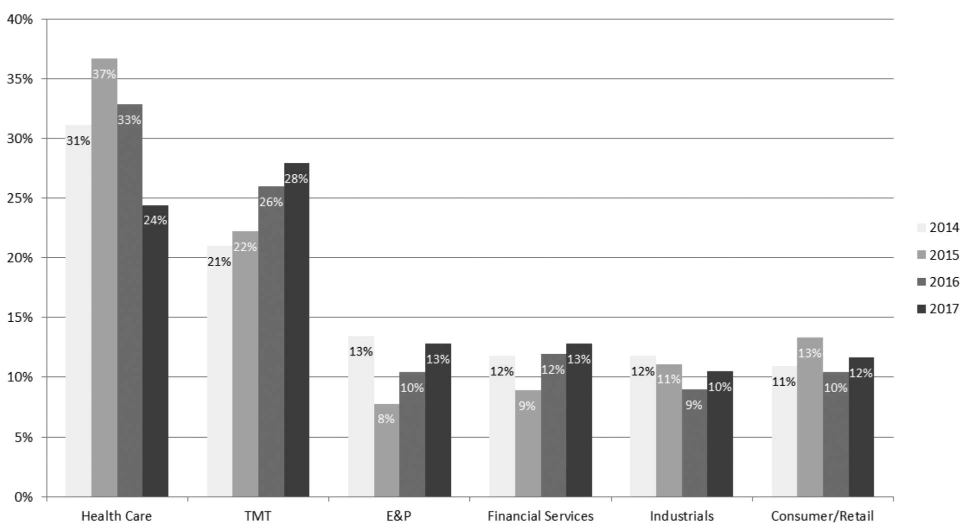
Over the last four years, health care companies (mostly biotech/biopharm companies) have made up the largest percentage (31%) of companies going public. From 2013 through 2016, the health care sector had the highest percentage of issuers constituting the IPO market. In 2017, TMT issuers constituted 28% of the IPO market, surpassing the 24% that health care issuers constituted. Other sectors that we surveyed each hovered around the 10% to 15% levels over the course of the four-year period.

* * *

Sectors by deal count (as a % of total IPOs from 2014–2017)

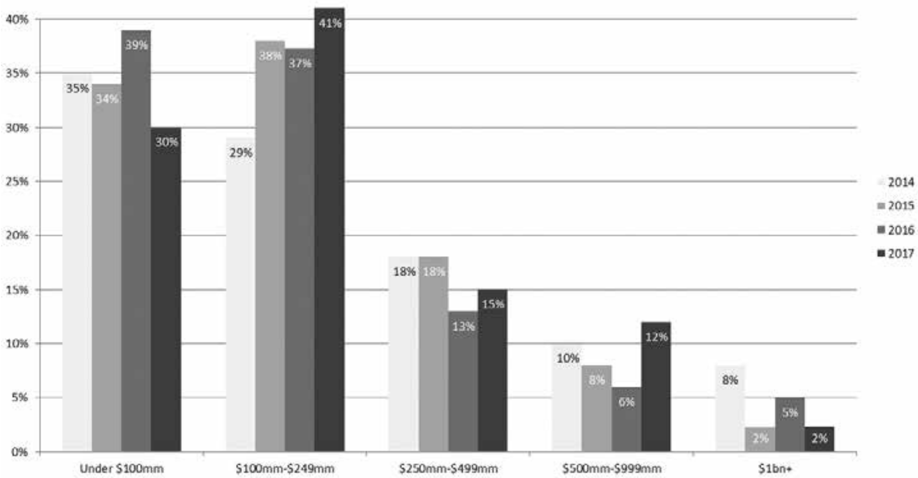


Sectors by deal count (as a % of IPOs)

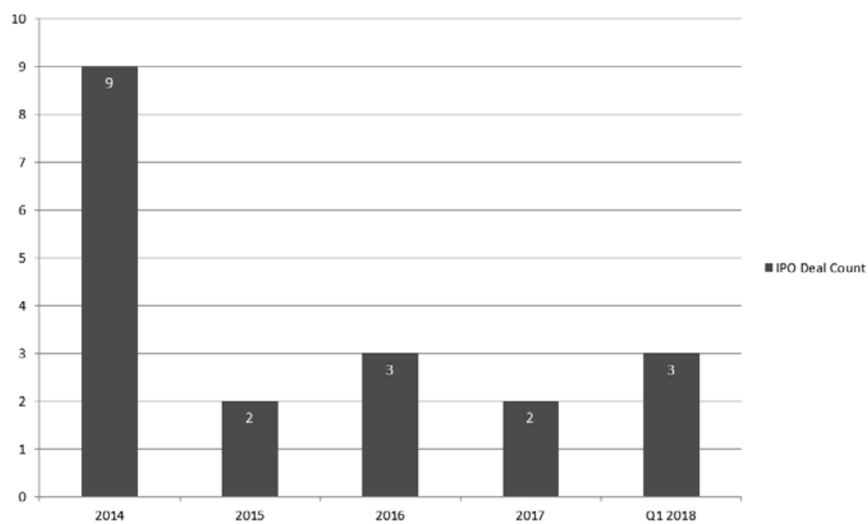


With respect to deal value, over the last four years, the significant majority of deals have had a value of between $50 million and $250 million. While base deal value declined year-over-year in both 2016 and 2015, there was an increase in average and median deal values in 2017 over prior years to $285.1 million and $141.4 million, respectively. Mega IPOs, which we define as having base deal values of greater than $1.0 billion, constituted 8% of the IPOs that we studied in 2014. In the ensuing years, there has been a much smaller percentage of Mega IPOs in the market. There was speculation that the SNAP IPO which priced in early 2017 would pave the way for an uptick in Mega IPOs, but they constituted just 2% of the 2017 IPO market and 8% of the IPO market through the first quarter of 2018.

Percentage of IPOs by deal value



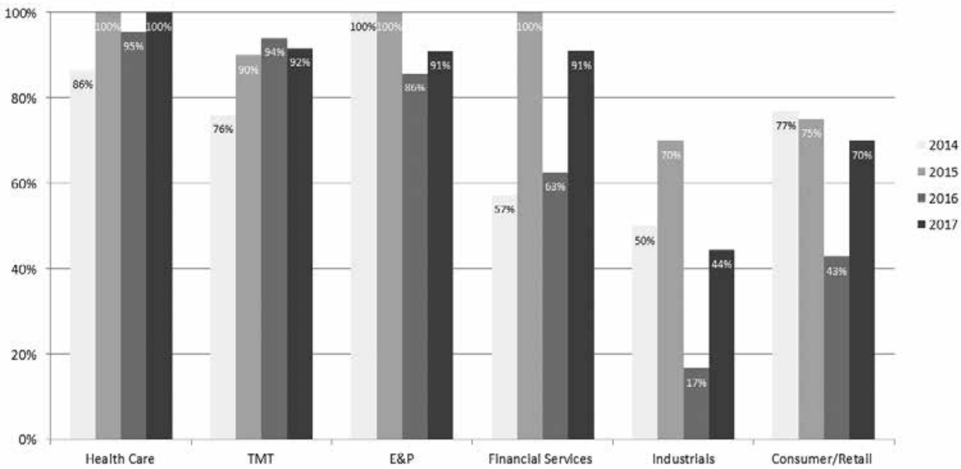
Mega IPO deal count by year



<u>Impact of JOBS Act and confidential submission</u>

Signed into law in April 2012, the JOBS Act created a new class of issuers called Emerging Growth Companies (EGCs) and provided flexibility for EGCs pursuing IPOs. EGCs are issuers with less than $1.07 billion of annual gross revenue during their most recent completed fiscal year. In 2017, approximately 86% of issuers were EGCs. Over the last four years, issuers in the health care and TMT sectors have overwhelmingly been EGCs, while the industrials and consumer/retail sectors have had a relatively lower percentage of EGCs.

Percentage of IPOs that are EGCs by sector



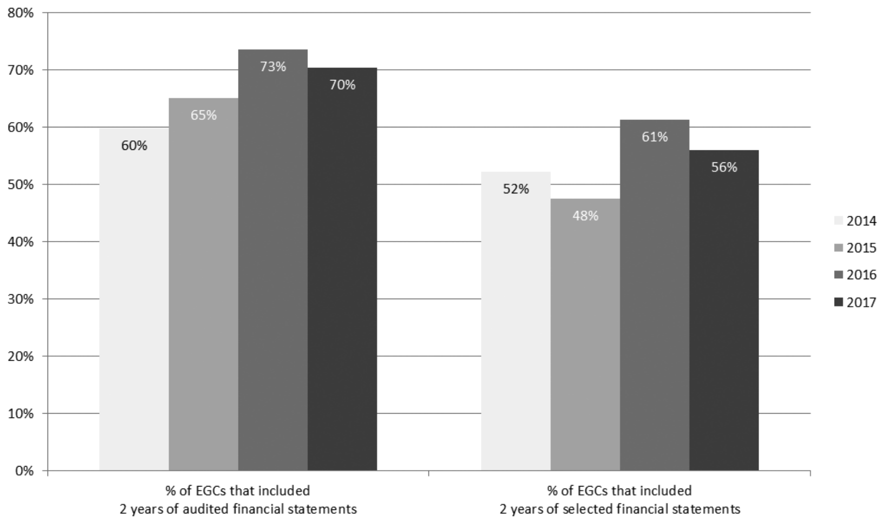
When the JOBs Act was introduced, one of the key benefits of being an EGC was the ability to submit an IPO registration statement to the SEC for confidential review. In 2017, 99% of EGCs elected to submit confidentially. The confidential review process permits issuers to make significant progress through the IPO review process with regulators, including the SEC, FINRA and applicable stock exchange, without disclosing material information to the public or competitors. If the issuer chooses not to proceed with an IPO, then the draft registration statement submitted to the SEC and the fact that the issuer contemplated an IPO remains confidential. It has been observed that the confidential review process has been particularly helpful to companies with high proprietary disclosure costs, such as those in the biotech/biopharm sector. Confidential review also permits a company to more efficiently explore an IPO simultaneously with an M&A transaction as part of a dual-track process without otherwise tipping its hand to suitors. Given its success, the SEC extended the confidential review accommodation to all companies filing for an IPO, effective July 10, 2017. We expect that in the coming years substantially all issuers will take advantage of the confidential review accommodation.

Financial information

Historically, all IPO issuers were required to include three years of audited financial statements and five years of selected financial data. A benefit bestowed upon EGCs by the JOBS Act was to permit scaled financial disclosure, requiring only two years of audited financial statements and two years of selected financial data in the IPO registration statement. When first announced in 2012, there was some doubt in the investment community as to whether IPO issuers would be able to take advantage of the scaled financial disclosure exemption. Despite the potentially significant time and cost savings to the issuer, it was expected that the buy-side would not give up the additional financial information that issuers had historically provided in their IPO prospectuses. In fact, issuers were somewhat cautious early on in adopting the scaled financial disclosure, but in 2017 approximately 70% of EGCs included only two years of audited financial statements and 56% included two years of selected financial data.

* * *

Greater market acceptance of less financial information



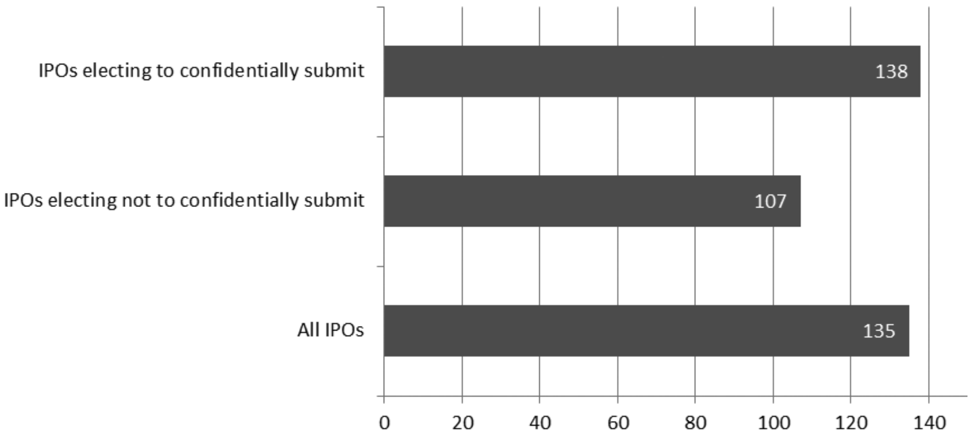
Initially, the scaled financial disclosures were more quickly adopted in the biotech/biopharm sectors where an investment thesis would more likely be centered on prospects for growth rather than past performance. However, in 2015, the scaled financial disclosures became rather commonplace for EGC issuers across all sectors.

In December 2015, the Fixing America's Surface Transportation Act (FAST Act) was signed into law and, despite its transportation-focused name, provided for an extension of the scaled financial disclosure benefits for EGCs under the JOBS Act. The FAST Act permitted an EGC to omit from its confidential submission or filed registration statement any financial statements otherwise required if the EGC reasonably believed that the omitted financial statements would not be required to be included in the registration statement "at the time of the contemplated offering", as long as the preliminary prospectus used by the EGC on its road show contained all financial information required by Regulation S-X. For example, an EGC may submit a registration statement with one year of audited financial statements if it expects the second year of audited financial statements to be included in a submission or filing prior to its road show. In August 2017, the SEC provided updated guidance on this relief and significantly clarified and expanded its meaning and scope. One change resulting from the updated guidance is that now non-EGCs may benefit from the omission of certain financial statements in draft registration statements. Though we observed in our study that reliance on this accommodation was off to a slow start by EGCs in 2016, and became somewhat more commonplace in 2017, we expect that (due, in part, to the updated guidance) more issuers will begin to take greater advantage of this benefit in 2018.

<u>Time to pricing</u>

Over the last four years, the IPO timeline has become more accelerated. For a variety of reasons, including market volatility, political uncertainty and increased deal expenses, getting an IPO to market in short order is as important as ever. Missing a market window could mean hundreds of millions of dollars in lost value or the loss of a potential exit opportunity by a private equity sponsor or venture capital investor. Outside of 2014, IPOs in 2017 had the fastest time from the first confidential submission or filing with the SEC to pricing; the average number of days to pricing was 135 and the median was 103.

Average number of days from first submission/filing to pricing (2017)



IPOs in 2016 had the longest period from first submission or filing to pricing in the four-year period, as the year was characterised by political uncertainty relating to Brexit and the U.S. presidential elections and extreme market volatility. Assessing the year's data in context, it does not appear that it necessarily took longer for IPO issuers to complete the regulatory process of SEC clearance in 2016, but rather that the limited market windows during the year had issuers following a "wait-and-see" approach.

SEC comments

Contributing to the faster timeline for IPOs is the expediency and efficiency of the SEC's staff in issuing and resolving comments as part of its review process. Anecdotally, capital markets attorneys have observed a collaborative approach from the SEC's staff in resolving outstanding comments relating to an issuer's IPO registration statement. Our data over the last four years also supports the case that the SEC review process has become more efficient. Over the last four years we have seen a 41% decrease in the average number of comments and 37% decrease in the median number of comments, in each case in connection with the first round of SEC comments on an issuer's IPO registration statement. While part of the decrease can be attributed to issuers receiving fewer boilerplate comments relating to general process requirements, these make up a relatively small number of the comments received by issuers.

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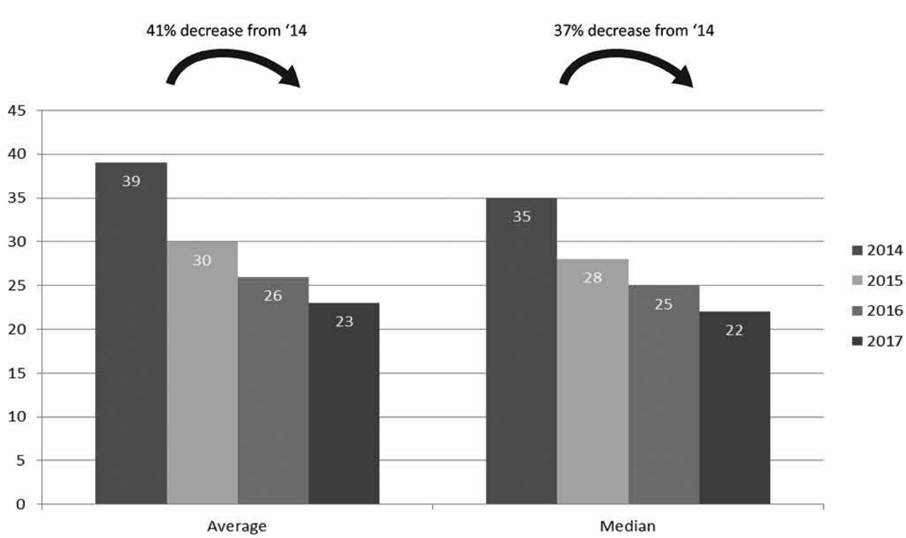
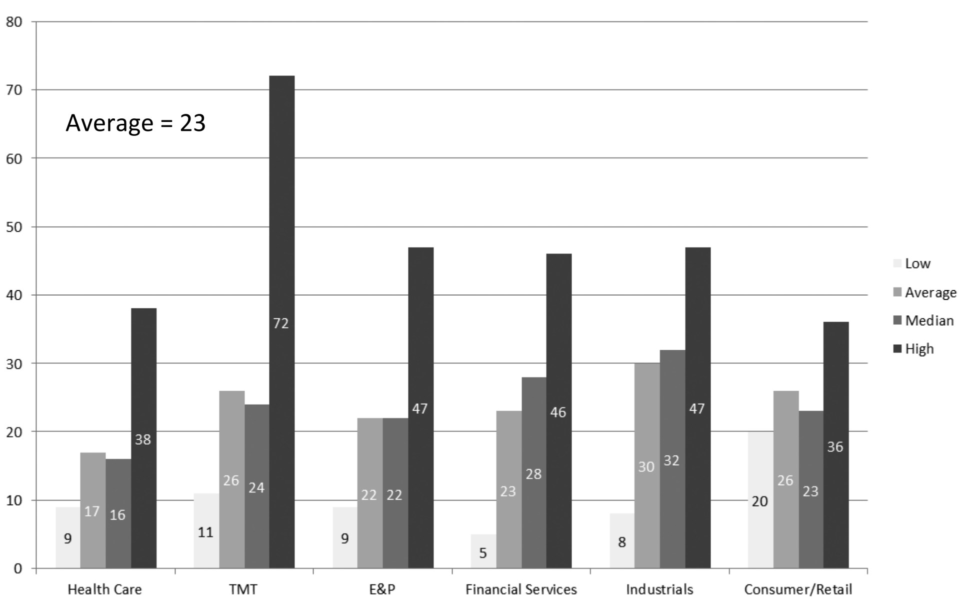
Number of first round SEC comments



We have also observed that the number and substance of SEC comments differ by sector. Over the past few years, health care issuers have received the fewest first round SEC comments as compared to industrials issuers that have generally received the most first round SEC comments. This difference can likely be attributed to the relative simplicity of financial disclosures for health care IPO issuers, many of which have been pre-revenue biotech/biopharm companies. Industrials issuers, on the other hand, are more likely to have a more complicated financial picture to paint, frequently involving operating segments, non-GAAP financial measures and *pro forma* financial information.

First round SEC comments by sector (2017)

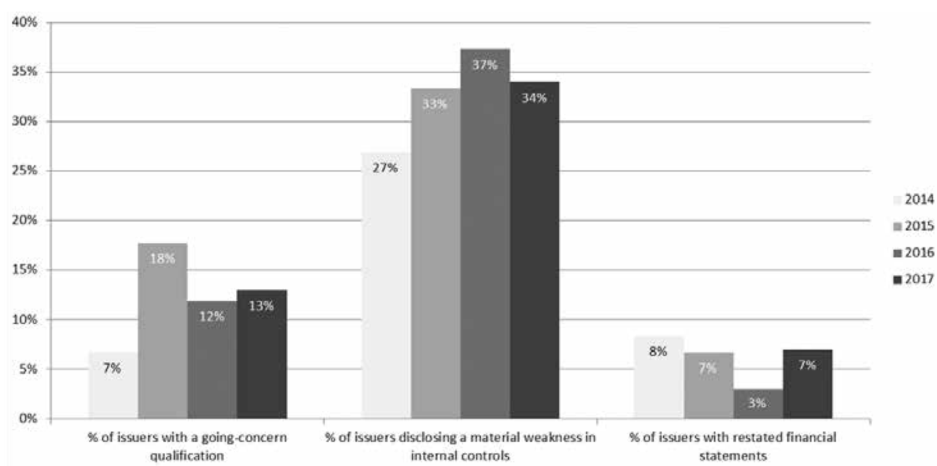


Certain types of comments have become SEC staff "hot buttons" for different sectors. For example, from 2014 to 2017, 71% of health care issuers received a cheap stock comment, 80% of TMT issuers received a revenue recognition comment, and, from 2014 to 2017, 72% and 68% of TMT and E&P issuers, respectively, received a back-up support request comment. In the health care sector, cheap stock comments are likely more common given the significant use of equity as a compensation tool and the continuous fundraising activity in which biotech/biopharm issuers are engaged. In the TMT sector, revenue recognition comments reflect the complex accounting issues raised by contractual arrangements typical for many TMT issuers that sell a mix of products and services. Further we suspect that industrial and consumer issuers are more likely to receive operating segment comments given the potential for these issuers to have multiple discrete business and geographic units.

Accounting disclosures

From 2014 to 2016, we identified a trend of issuers increasingly disclosing a material weakness in their internal control over financial reporting. In 2014, 27% of issuers disclosed a material weakness. In each of 2015, 2016 and 2017, approximately one-third of issuers disclosed a material weakness. Notably, we have not seen a material effect on pricing or aftermarket performance for these IPOs.

Accounting/internal controls

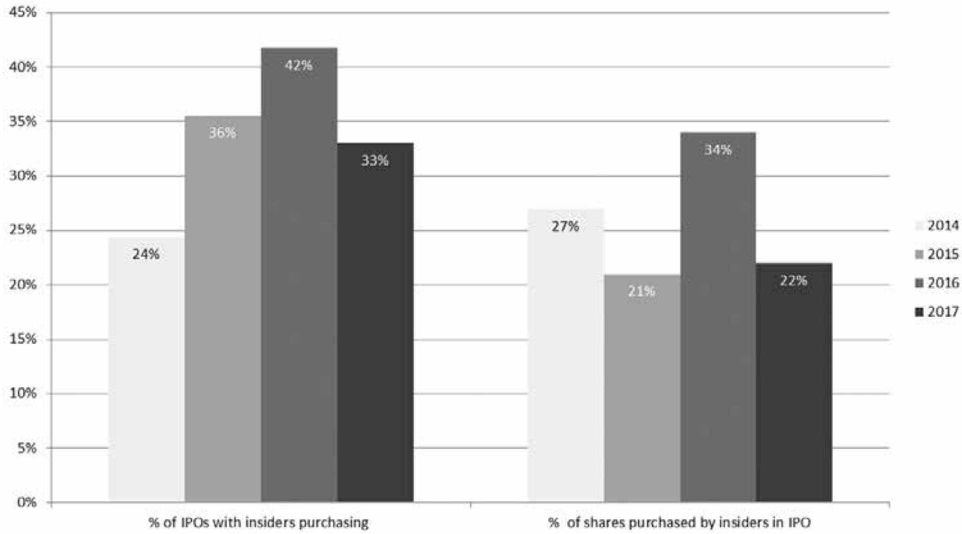


Another accounting disclosure that issuers and underwriters are sensitive to is the inclusion of a going-concern qualification in the audit opinion for the issuer's financial statements. Over the last four years, 12% of issuers had a going-concern qualification with the number up year-over-year in 2017 to 13%. A significant proportion of the issuers (40% over the last four years) were pre-revenue health care companies.

Insider purchasing

Over the past few years, there have been interesting trends in the levels and characteristics of insider purchasing in IPOs. From 2014 to 2017, we saw a significant increase in insider purchasing in IPOs from 24% in 2014 to 33% in 2017. The average portion of the overall deal purchased by insiders peaked in 2016 at 34% of shares sold in the IPO. In 2017, there was a slight reversal in the trend with 33% of IPOs including one or more insiders purchasing and, on average, 22% of shares sold in these IPOs being purchased by insiders.

Insider purchasing in IPOs



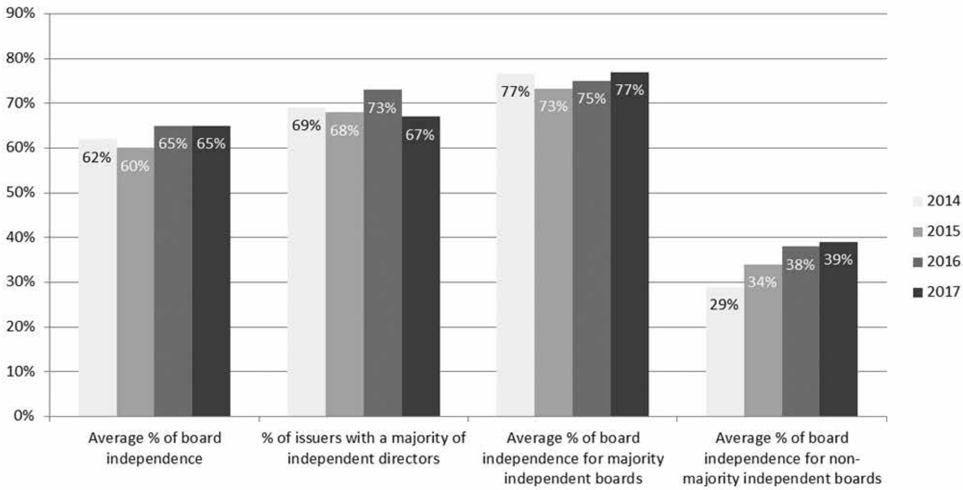
Insider purchasing was most prevalent in the health care sector. Over the past four years, 67% of health care deals included insider purchasing, peaking at 82% of health care IPOs in 2017. This compares to 16% over the last four years and 17% in 2017, respectively, for non-health care issuers. Given the significant increase in and widespread prevalence of insider purchasing in health care IPOs, we believe that investors are starting to expect insiders, particularly cross-over investors, to participate as buyers in an issuer's IPO. Insider participation is now frequently signalled to potential investors on the cover or elsewhere in the IPO prospectus as a positive characteristic of the offering, whereas it was previously considered as a last resort to save a floundering deal that could not generate enough demand from new investors.

Corporate governance

Trends in corporate governance have been remarkably consistent over the last four years. For example, board composition of IPO issuers with respect to the number of directors and the number and percentage of average independent directors has not significantly changed over the course of our study. One highlight to note is that from 2014 to 2017, we saw an increase in the average percentage of board independence for non-majority independent boards increase from 29% to 39%.

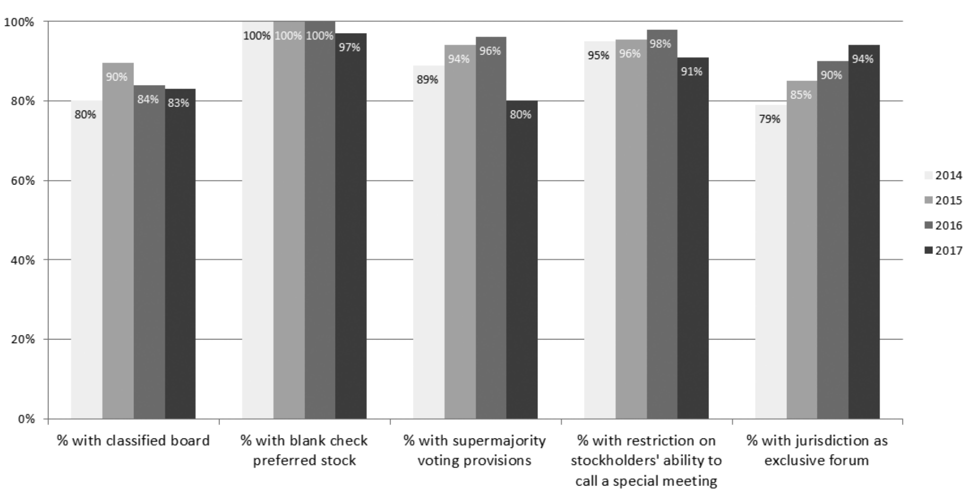
* * *

Percentage of board independence



With respect to anti-takeover measures, there has also been consistency in the overwhelming adoption of provisions in issuers' organisational documents providing for classified or staggered boards, blank check preferred stock, supermajority voting provisions and restrictions on stockholders' ability to call a special meeting. Over the course of the last four years we have seen a significant increase, from 79% in 2014 to 94% in 2017, in the adoption of an exclusive forum provision in issuers' organisational documents. While adoption of this provision by IPO issuers began before such time, after the Delaware General Corporation Law was amended in 2015 to expressly permit the provision, adoption quickly accelerated and became nearly universal.

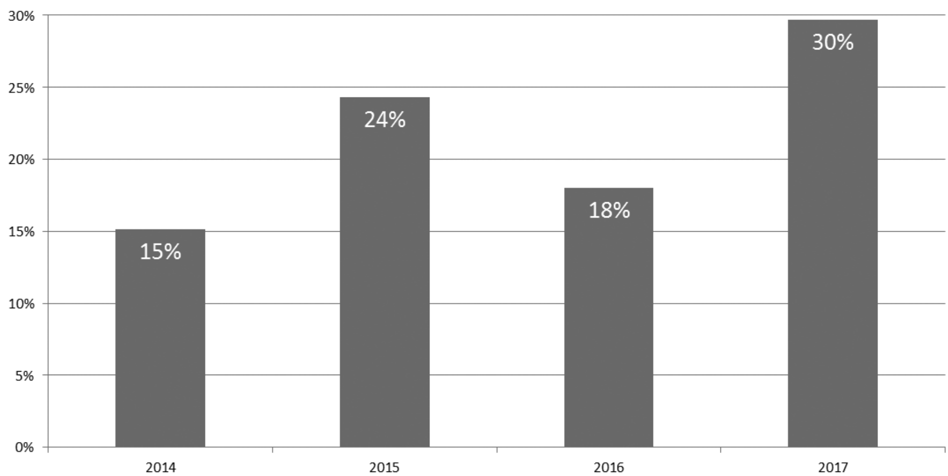
Percentage of IPOs with anti-takeover measures and exclusive forum



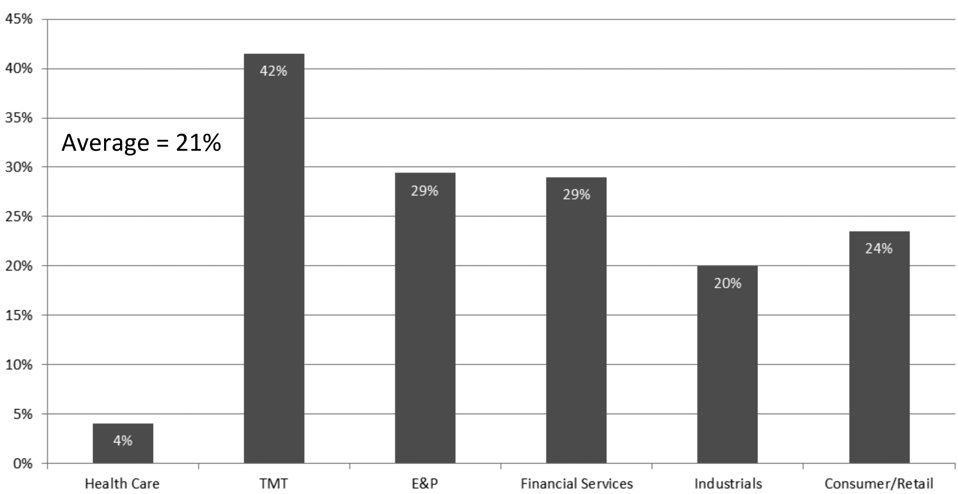
Multiple classes of stock

Historically, corporate issuers went public with a single class of common stock, as the market expected the capital structure of an issuer to be simplified to one class of common stock prior to the IPO. In the last decade there was a shift in this market expectation driven initially by the rise of the Up-C structure (tax-driven) and specific sectors (e.g. asset managers and energy companies). In the last three years, IPOs with multiple classes of stock are now found in all sectors. The TMT sector has been home to the greatest number of issuers going public with multiple classes of common stock, both in absolute numbers and as a percentage of an overall sector.

Percentage of IPOs with multiple classes of common stock



Percentage of IPOs with multiple classes of common stock by industry (2014–2017)

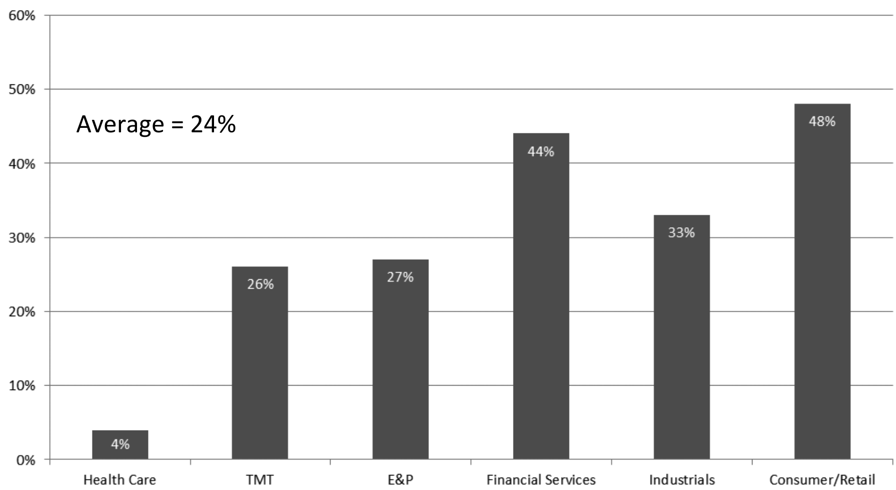


Many view Google's IPO in 2004 as the precedent that broke the mould and made it acceptable to trade governance rights for the chance at greater returns by letting founders exercise almost complete control over an issuer's operations and future. Although two of 2017's more high-profile multiple class IPOs (Snap and Blue Apron) have shown marginal performance to date, two highly anticipated TMT issuers coming to market in early 2018 (Spotify and Dropbox) have also chosen to go public with multiple-class share structures. We observed a 10:1 voting ratio as being the most common among IPOs with multiple-class share structures with unequal voting rights. Non-voting common stock became something of a new development in 2017, as two issuers in our study included this in their capital structures at time of IPO. There are continuing concerns relating to multiple-class share structures, including in the areas of corporate governance, management accountability and alignment of interest with public stockholders and also liquidity. However, in the last few years, markets appear to be relatively unfazed by the multiple class structure and in some cases, particularly in the TMT sector, quite welcoming.

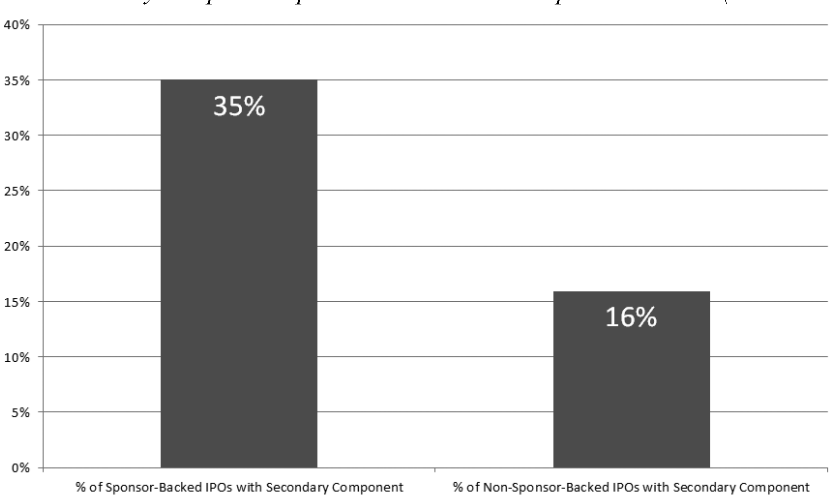
IPOs with secondary components

In 2017, approximately 26% of IPOs included a secondary component. This percentage has been relatively consistent since 2014 and in line with the four-year average of 24%. IPOs with secondary components were most prevalent in the financial services and consumer/retail sectors and far less prevalent in the health care sector. In addition, in each year since 2014, sponsor-backed IPOs were twice as likely to include a secondary component as compared to non-sponsor backed IPOs.

IPOs with secondary components by sector (2014–2017)

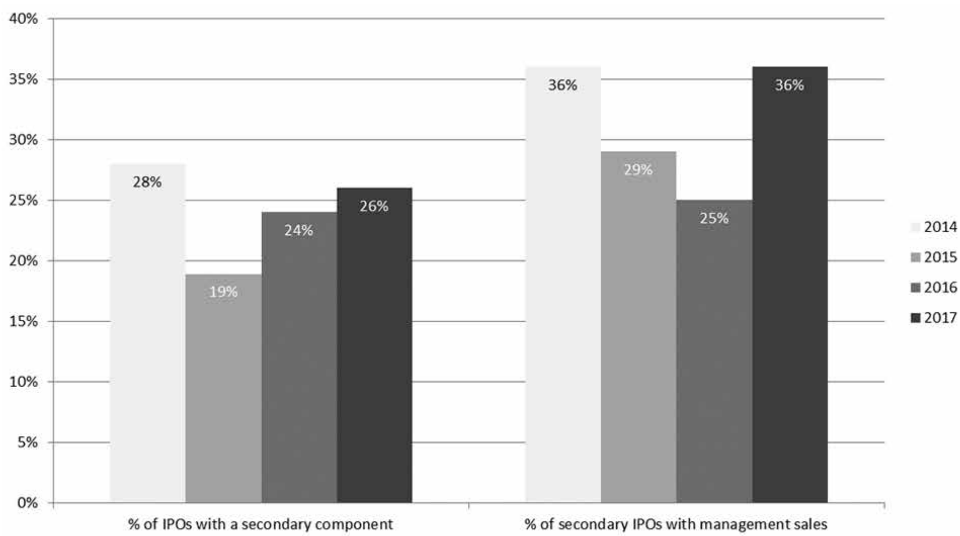


IPOs with secondary component sponsor-backed vs. non-sponsor-backed (2014–2017)



We also noted that there was a significant decrease in the percentage of IPOs with a secondary component that included sales by an issuer's management team from 36% in 2014 to 25% in 2016. In 2017, however, that percentage bounced back to 36% of IPOs. We found that in 2017, IPOs with a secondary component (including those IPOs that included sales by management) were more likely to price either in or above the range than IPOs without a secondary component. With respect to aftermarket performance of these IPOs in 2017, IPOs with a secondary component (including those IPOs that included management selling in the secondary) saw a greater first day increase, but over the longer term (180 days) did not perform as well as all-primary IPOs.

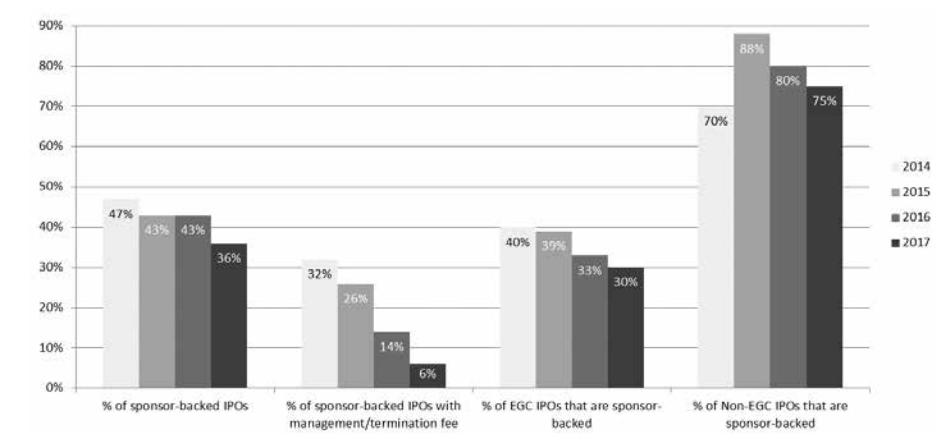
IPOs with secondary components and management sales



<u>Sponsor-backed IPOs</u>

From 2014 to 2016, sponsor-backed IPOs represented around 40% of the total IPO market. In 2017, there was a decline in the percentage of sponsor-backed IPOs to a little more than a third of the IPO market.

Sponsor-backed IPOs



Sponsor-backed IPOs continue to have unique characteristics that tilt their metrics as compared to non-sponsor-backed IPOs. For example, sponsor-backed IPOs continue to represent the majority of issuers in the industrials and consumer/retail sectors. They also represent the majority of non-EGC issuers.

Other notable comparisons of sponsor-backed and non-sponsor backed IPOs for 2017 include:

- Sponsor-backed IPOs had higher average market capitalisation at pricing as compared to non-sponsor-backed IPOs.
- Sponsor-backed IPOs were twice as likely to be eligible for the controlled company exemption as non-sponsor-backed IPOs.
- Sponsor-backed IPOs made their way from first submission/filing to pricing almost 25 days faster than non-sponsor-backed IPOs.

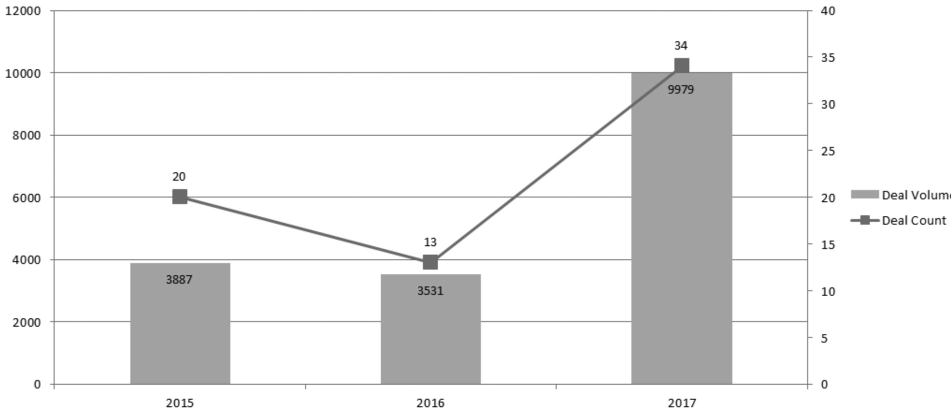
One feature of sponsor-backed IPOs tracked by our study is the payment of a management or termination fee to the sponsor upon consummation of the portfolio company's IPO. From 2014 through 2015, approximately 30% of sponsor-backed IPOs disclosed this payment. In 2016, we saw a significant decrease in the percentage of sponsor-backed IPOs with this feature and the percentage decreased significantly again in 2017. Another few years of examination will shed light on whether the payment of a management or termination fee is no longer a common practice. Sponsors continue to utilise other means of recovering and profiting from their investment in IPO issuers including through secondary sales and special dividends.

Resurgence of SPACs

Over the last three years, there has been a resurgence in special purpose acquisition company (SPAC) IPOs. These investment vehicles constituted such a significant part of the IPO market in 2007 and then fell out of favour for almost a decade. SPACs are publicly listed shell companies formed for the sole purpose of acquiring one or more unspecified targets. SPACs are typically formed by experienced management teams with a specific investment criteria or industry focus. Public investors buy into a SPAC in its IPO and provide the capital for the management team to acquire a target or targets to take public. If the SPAC does not consummate an acquisition or business combination within a specified period of time (usually 18 to 24 months), then the SPAC must return the capital to its IPO investors and dissolve. The SPAC vehicle provides downside protection through a guaranteed return of capital (including interest) and also significant upside in the event of a successful business combination through the inclusion of warrants (and potentially rights or other securities) as part of the IPO.

In 2017, there were 34 SPAC IPOs. In total, approximately $10 billion was raised in SPAC IPOs in 2017. The marked increase in SPACs may be driven in part by the backing these vehicles have received from respected private equity sponsors, as well as experienced SPAC management teams that are bringing new vehicles to market after completing successful business combinations. Last year's three largest SPAC IPOs were Silver Run Acquisition Corp II, Social Capital Hedosophia Holdings Corp, and TPG Pace Energy Holdings Corp. After a challenging last quarter of 2017, there has been a continued surge of SPAC IPOs in the first quarter of 2018 with 11 SPAC IPOs priced (as of March 31, 2018).

SPAC IPOS (2015–2017)



Conclusion

Proskauer will continue to build its database and provide detailed analysis on IPO disclosure, terms and pricing trends as deals come to market in 2018 and beyond. For a complete analysis of the IPO market from 2013 through 2017, please refer to Proskauer's 2018 IPO Study, available at https://www.proskauer.com/uploads/2018-ipo-study or contact one of our team members at IPOStudy@proskauer.com.

Source: Dealogic and Proskauer Analysis

Acknowledgment

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Australia

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Introduction

While there are a number of securities exchanges operating within Australia (including the National Stock Exchange of Australia, the Sydney Stock Exchange and Chi-X Australia), the Australian Securities Exchange (**ASX**) is the securities exchange of choice for entities undertaking an initial public offering (**IPO**) in Australia, as it is the highest-profile securities exchange in Australia and has the largest volume of capital.

ASX is a fully integrated securities exchange across multiple asset classes (e.g. equities, fixed income, derivatives and managed funds) and is a globally renowned equity market with an international reputation for conducting markets of integrity, providing investors with the confidence which is required for active securities trading.

With Australia having Asia's largest pool of investable funds and ASX consistently being ranked in the top five exchanges globally for raising capital, a listing on ASX offers access to capital in the world's fastest-growing region, within a robust regulatory environment, in a country that has recorded 25 years of uninterrupted economic growth.

The IPO process: steps, timing and parties and market practice

This section contains a high-level overview of the key steps involved in undertaking an IPO, the typical timing required to complete an IPO, and the parties involved in the IPO process.

<u>Key steps involved in undertaking an IPO</u>

The process of undertaking an IPO will typically involve the company undertaking the following key steps:

- **Establishment of a due diligence committee**: To ensure the prospectus being prepared in connection with the IPO complies with the content requirements imposed under the Australian *Corporations Act 2001* (Cth) (**Corporations Act**) or, if the prospectus is defective, those with potential liability have the ability to make use of the legal defences contained in the Corporations Act, it is usual for companies to undertake a formal due diligence process. The process also helps to:
    - ensure that the prospectus is not misleading or deceptive;
    - identify legal impediments to the IPO which can be dealt with prior to completion of the IPO; and
    - enhance market comfort by establishing the reputation of the company and showing quality corporate governance.

  In accordance with market practice, a due diligence committee (**DDC**) is typically established to manage and coordinate the due diligence process for the IPO, with a view to ensuring that the above objectives are met. The DDC will usually comprise representatives from the board and management of the company, any major selling security holder, the company's lawyers and tax advisers, the investment bank/stockbroker or underwriter of the IPO and the investigating accountant.

- **Undertaking legal due diligence enquiries**: The company and its advisers will need to carry out commercial, legal, accounting and tax due diligence enquiries on the company, its business and assets to determine material issues and identify any legal impediments to the IPO or associated transactions requiring resolution (e.g. a consent which is required to be obtained under a material contract).
- **Pre-IPO restructure**, **corporate and capital structures**: If recommended by legal, tax, accounting and/or commercial advice, the company may need to effect a pre-IPO restructure to implement optimal settings for corporate and capital structure, having regard to potential liabilities, operational and marketing matters. The company will also need to review (and revise as necessary) its governance arrangements having regard to the principles of good corporate governance and recommendations set by the ASX Corporate Governance Council.
- **Offer structure**: The company, together with its advisers, will need to determine the structure for the proposed IPO, including to whom offers will be made (institution/broker/retail split), where offers will be made (i.e., in what jurisdictions), how offers will be made (i.e., privately marketed through a front-end bookbuild or publicly marketed with a back-end bookbuild) and by whom offers will be made (sell-down/fresh raise or a combination of the two). Decisions will also need to be made in relation to the form of underwriting (if any) for the IPO (and an agreement negotiated), the composition of lead manager and broker syndicates, and the terms of escrow which may apply to existing and continuing shareholders.
- **Prospectus**: The company will need to prepare a prospectus which complies with content requirements of the Corporations Act. The outputs of the due diligence process undertaken in connection with the IPO will inform the content of the prospectus. As the Australian Securities and Investments Commission (**ASIC**) does not review a prospectus prior to lodgement and launch of the IPO (except in very limited circumstances), the onus is on directors, underwriters and others involved with the issue of the prospectus to ensure that it complies with the requirements of the Corporations Act. Substantial penalties can apply in the event that the prospectus contains misleading information or omits material information.
- **Verification of the prospectus**: Prior to lodgement of the prospectus with ASIC, a detailed verification process will be undertaken with respect to the prospectus. The verification process is usually coordinated by the company's lawyers and involves each material statement in a substantially final form of the prospectus being referenced back to a verifying source document to ensure its accuracy. Where there are statements of opinion, forecasts or expectations on, for example, future performance, growth or development of the business, the verification process will need to investigate the reasonableness of the assumptions on which these views are based.
- **ASX admission**: To obtain admission to the official list of ASX, the company will need to apply for admission to ASX by satisfying the admission criteria in Chapters 1 and 2 of the ASX Listing Rules (further detail of which is set out below). If any ASX or ASIC waivers are necessary in connection with the IPO, application will need to be made at an earlier stage.

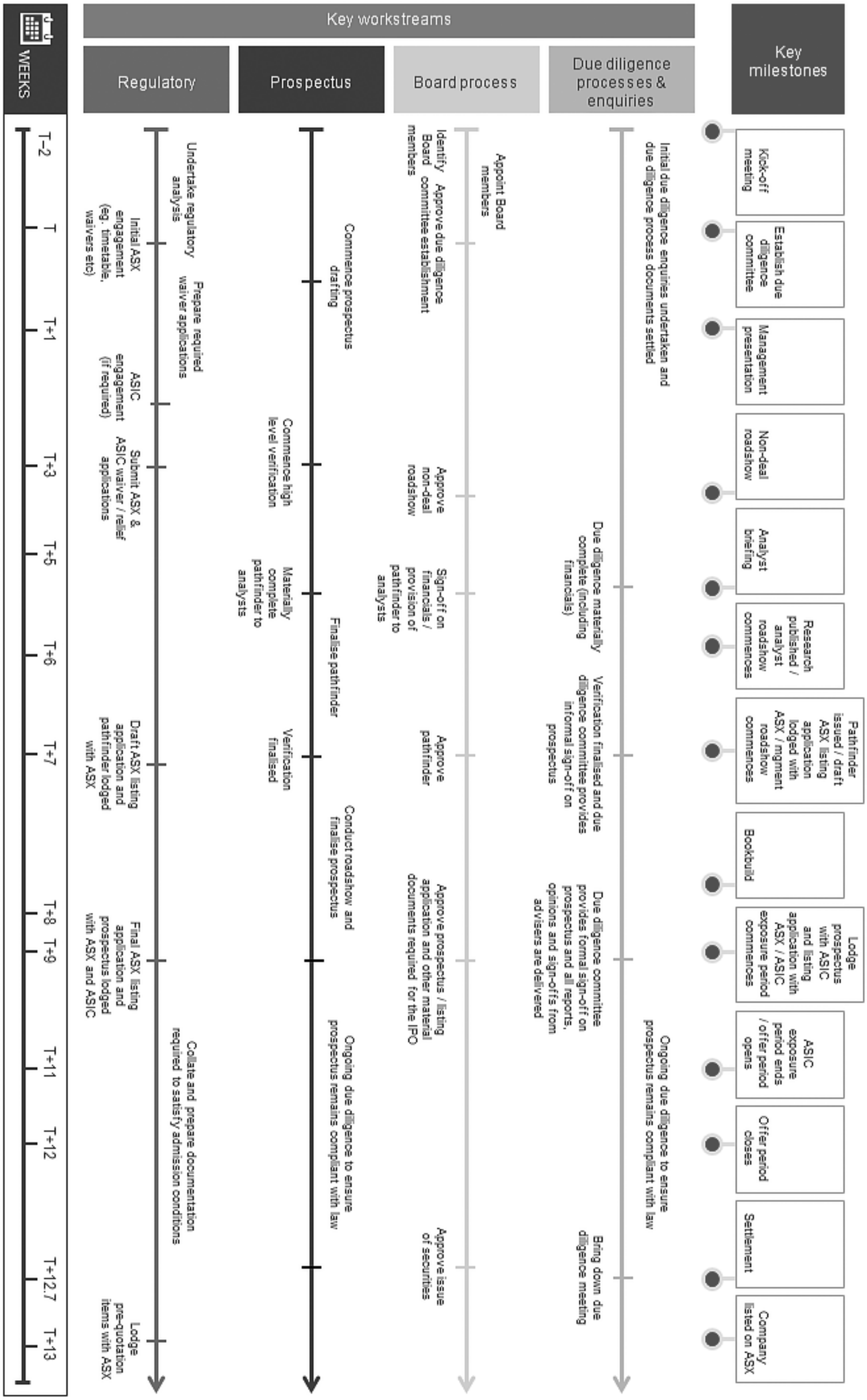

Fig. 1: Indicative timetable for IPOs in Australia

- **Allocation and completion**: The final stage in the IPO process is to allocate securities upon pricing of the IPO. The IPO will be completed by the company issuing securities and gaining admission to, and quotation of its securities on, ASX (after satisfying customary listing conditions).

Timing for completion of an IPO

Assuming a company is well prepared to undertake an IPO, an IPO can generally be completed in three to four months under the indicative timetable shown on the previous page.

Parties involved in the IPO process

A company should engage advisers who are familiar with IPOs and the listing process. The following advisers will usually make up the IPO team:

Investment bank/lead manager: The investment bank or lead manager will be the adviser who is primarily responsible for coordinating the IPO process and the company's other advisers. Its role may include advising on the structuring of the IPO including the size of the issue, timing and pricing of the IPO, and advising on and conducting marketing of the IPO including coordinating and running roadshows with the company. The investment bank will also be responsible for managing the offer so as to ensure that the IPO will be successful (including achieving the required security holder spread) and, if underwritten, to guarantee that the underwriter will acquire, or place, any securities not taken up by the public. In most circumstances, the underwriter will be appointed at the commencement of the IPO process by a mandate letter which contains the material terms of appointment. The underwriting agreement will then be negotiated in the period prior to lodgement of the prospectus, and is typically signed immediately prior to lodgement of the prospectus with ASIC.

Lawyers: The role of the lawyers is to advise companies on all legal aspects of preparing for listing, including matters such as converting to a public company, implementing any required pre-IPO reorganisation, appointing and removing directors, changing the company's constitution and directors' and managements' service contracts, tax-related issues and preparing corporate governance policies. The lawyers will also coordinate the due diligence process and conduct the legal aspects of due diligence, assist with the preparation and verification of the prospectus, and advise on underwriting or offer management arrangements.

Investigating accountant: The role of the investigating accountant is to prepare the materiality guidelines used to decide whether due diligence findings are material, to conduct financial and accounting due diligence, to assist with the preparation of the financial information disclosure in the prospectus, and to provide a 'review' level assurance report (for inclusion in the prospectus) on the company's historical and forecast financial information for inclusion in the prospectus.

Public relations consultant: The role of the public relations consultant will be to liaise with media to ensure that media coverage relating to the company and the IPO is appropriately managed, subject to the strict Corporations Act requirements relating to pre-prospectus publicity (described below in further detail). A public relations consultant may also assist in managing shareholder communications in connection with the IPO.

Other advisers: The company will also need to appoint tax advisers (note, this role can often be fulfilled by the company's lawyers or an investigating accountant) and may require experts to report on specific matters (e.g. Independent Geologist for resources companies; Patent-Attorney for biotech companies, etc.).

Regulatory architecture: overview of the regulators and key regulations

An IPO undertaken in Australia will principally be governed by the requirements set out in the Corporations Act (which governs the disclosures which are required to be included in the prospectus and is regulated by ASIC) and the listing rules of the ASX (which prescribe the requirements which must be satisfied to obtain a listing on ASX and is regulated by ASX).

Content requirements prescribed by the Corporations Act

If a company intends to offer securities to the public in connection with its IPO, it will ordinarily be required to prepare a prospectus. However, in certain circumstances where a company is not looking to raise capital at the time of seeking admission to the official list of ASX, ASX will permit a company to prepare an information memorandum, which can have marginally lower disclosure requirements and does not attract the statutory prospectus liability regime.

While the Corporations Act does not prescribe all matters that should be included in a prospectus, it does require that a prospectus contain all information that investors and their professional advisers would reasonably require to make an informed assessment of the rights and liabilities attaching to the securities offered and the assets and liabilities, financial position and performance, profit and losses and prospects of the company. The prospectus must include this information if it is known to the offeror, its directors and proposed directors, the underwriter and advisers, or if it could be reasonably found out by those people. The fact that certain information is confidential is a relevant consideration in what is reasonable for investors and their advisers to expect to see in the prospectus. However, the overriding rule is that if information is material to investors it cannot be omitted from the prospectus on the basis that it is confidential.

There is also certain prescribed information which must be included in a prospectus, such as the terms and conditions of the offer, disclosure of certain payments made to directors and advisers in connection with the IPO, information about the ASX listing, lodgement of the prospectus with ASX and ASIC, and the expiry date for the prospectus.

In addition to containing the prescribed content, the Corporations Act also requires that the prospectus be worded and presented in a 'clear, concise and effective' manner so that investors (in particular, retail investors) can understand the potential opportunities and risks associated with an investment in the company's securities.

A sample contents page for a prospectus is set out below:

CONTENTS		**Approx. no. of pages**
Important information and Chairman's letter Provision of statutory information, disclaimer, key dates for the IPO, IPO statistics and Chairman's letter.		
1.	**Investment overview** – Overview of the company, its business, financial information, purpose and use of funds, capital structure, dividend policy, risks associated with an investment in the company and the IPO.	12
2.	**Industry overview** – Overview of the industry in which the company operates.	9
3.	**The company's business** – Description of the company's business and business model.	20

CONTENTS		Approx. no. of pages
4.	**Financial information** – The past financial performance, forecast and *pro forma* financial information of the company as prepared by the directors.	20
5.	**Risk factors** – The main risk factors which apply to the company's business and an investment in the company's securities.	10
6.	**Board, management and corporate governance** – Overview of the directors and senior management of the company, directors and management's interests and benefits and the company's approach to corporate governance.	11
7.	**Details of the offer** – Structure of the IPO and how to apply for securities under the IPO.	9
8.	**Independent Accountant's Report** – Independent Accountant's Report on the historical and forecast financial information of the company.	9
9.	**Additional information** – Summary of material contracts and additional information about the company, its securities and the interests of various parties such as professional advisers.	10
10.	**Glossary** – Definitions of words, terms and abbreviations used in the prospectus.	3
Corporate director		1

It is important to note that forecasts should only be included in a prospectus where there are reasonable grounds for doing so. Having reasonable grounds for a statement means that there must be a sufficiently objective foundation for the statement. In the absence of contrary evidence, a forecast which extends beyond a two-year period may not have a reasonable basis. As a result, forecasts in prospectuses are typically for periods of between six and 18 months.

<u>Requirement to lodge prospectus with ASIC</u>

The company must lodge a copy of its prospectus with ASIC, as well as lodge its application for admission to the official list of ASX, with ASX, within seven days of lodging its prospectus with ASIC. The maximum life of a prospectus is 13 months.

Following lodgement with ASIC, the prospectus will be subject to an exposure period to allow any concerns about the prospectus to be raised by the market. During the exposure period, the company may receive (but must not process) applications, and the prospectus must be made generally available. The initial exposure period is seven clear days; however, ASIC may extend this period for a further seven days if it is concerned that there is a defect in the prospectus which is not resolved in the first seven days.

<u>Supplementary and replacement prospectuses</u>

If there is a significant change affecting any matter contained in the prospectus, or a significant new matter arises after lodgement of the prospectus with ASIC which renders the information provided in the prospectus false, misleading or deceptive, or a new circumstance arises which would have been required to be disclosed in the prospectus if it had been in existence at the date of the lodgement of the prospectus, this will need to be disclosed by way of a supplementary or replacement prospectus if the new information is materially adverse from the point of view of an investor.

If the prospectus deficiency is materially adverse to an investor, the company must either repay application moneys or give investors a one-month period during which they can choose to be repaid their application moneys.

ASX admission requirements

In addition to the requirements set out above, there are a number of ASX requirements which will need to be satisfied for a company to be admitted to the official list of ASX. Set out below are the main admission requirements:

Admission criteria	General requirements	
Number of shareholders	Minimum 300 non-affiliated shareholders holding at least A$2,000 worth of the main class of securities	
Company size (the company must satisfy either the 'profit' or 'assets' test)	**Profit test**	Must: • be a going concern; • have the same business activity for last three full financial years; • have A$1 million aggregated profit from continuing operations over the last three full financial years; and • A$500,000 consolidated profit from continuing operations for last 12 months to a date no more than two months before applying for admission to the official list of ASX.
	Assets test	Must: • at the time of admission have A$4 million NTA after deducting IPO costs or A$15 million market cap; • have working capital of at least A$1.5 million; and • include a statement in the prospectus that the company has enough working capital to carry out its stated objectives.
Minimum free float requirements	A company must have a 20% minimum 'free float' (being the percentage of the company's quoted securities which are not subject to escrow (either voluntary or ASX-imposed) and which are held by non-affiliated security holders) at the time of admission to the official list of ASX.	
Financial reporting	**Profit test**	• Audited accounts for the last three full financial years except where the company applies for admission to ASX less than 90 days after the end of its last financial year (unless the company has audited accounts for its latest full financial years), in which case the accounts may be for the three years to the end of the previous financial year but must also include audited or reviewed accounts for its most recent half-year. • Audited or reviewed accounts for the last half-year if the last full financial year ended more than six months and 75 days before making the application for admission to ASX. • *Pro forma* balance sheet reviewed by auditor (unless ASX agrees otherwise).

Admission criteria	General requirements	
Financial reporting	**Assets test**	• Audited accounts for two full financial years for the company seeking admission, as well as any entity or business that it acquired in the 12 months prior to applying for admission or that it proposes to acquire in connection with its listing. Where the company applies for admission to ASX less than 90 days after the end of its last financial year (unless the company has audited accounts for its latest full financial years) the accounts may be for the two years to the end of the previous financial year but must also include audited or reviewed accounts for its most recent half-year. • Audited or reviewed accounts for the last half-year if the last full financial year ended more than six months and 75 days before making the application for admission to ASX. This also applies to any entity or business that the company acquired in the 12 months prior to applying for admission or that it proposes to acquire in connection with its listing. • *Pro forma* balance sheet reviewed by auditor (unless ASX agrees otherwise). Under the assets test, less than half of the company's total tangible assets (including any IPO proceeds) must be cash or readily convertible to cash. If the company is not able to meet this test, it will be treated as a 'cash box', and must have commitments consistent with its stated business objectives to spend at least half of such assets. These objectives, together with an expenditure programme, must be set out in the prospectus.
Good fame and character of directors	Directors must obtain a national criminal history check and bankruptcy check for each country in which they have resided for the last 10 years as well as provide a statutory declaration affirming that they have not been the subject of disciplinary or enforcement actions by an exchange or regulator.	
Registration as a foreign company	A foreign entity seeking admission to the official list of ASX must be registered as a foreign company under the Corporations Act.	
Disclosure document	The company will be required to either: • prepare a prospectus which complies with the requirements of the Corporations Act; or • with ASX's consent and provided that no capital is being raised in connection with the listing, prepare an information memorandum which has prospectus-type disclosure.	
Corporate governance	The company must disclose the extent to which it will follow the Recommendations. If the company will be included in the S&P/ASX 300, it must have audit and remuneration committees, with the audit committee complying with the Recommendations.	

Publicity restrictions

The following provides a high-level overview of the regulatory regime which applies in respect of the marketing of an IPO in Australia:

Pre-prospectus publicity: The Corporations Act imposes strict restrictions on advertising an IPO before a prospectus is lodged with ASIC. Subject to certain limited exceptions, a company will be prohibited from advertising an IPO (including 'image advertising' which may induce applicants for securities) before a prospectus is lodged with ASIC. This prohibition is intended to stop the public applying for securities without first reading the prospectus.

Ordinary course advertising: The image advertising restrictions in the Corporations Act will not prohibit the company from continuing its normal business advertising, provided that such advertising relates only to the company's business (and not the IPO).

Roadshows: An IPO is generally marketed privately for a period of between one and two weeks before the prospectus is lodged with ASIC to ensure there is sufficient demand for the IPO. This process is called the roadshow. The underwriter/lead manager will need a near-final prospectus prior to undertaking a roadshow and will usually sign the underwriting agreement/offer management agreement and agree to lodgement of the prospectus with ASIC following a successful roadshow. A roadshow to Australian financial services licence-holders is an exemption to the prospectus publicity restriction.

Post-prospectus publicity: There is more flexibility in terms of advertising an IPO once a prospectus has been lodged with ASIC. However, the advertising must not be false, misleading or deceptive (including by omission) and should be consistent with the disclosures made in the prospectus. The advertisement must also include a statement that the securities are offered under the prospectus and that applicants must read the prospectus before applying for securities and must complete the application form in, or accompanying, the prospectus in order to apply for securities in the company.

Public company responsibilities

Once trading of the company's securities commences on ASX, and in the absence of any specific waivers being received from ASX, the company will need to comply with the detailed continuing obligations in the ASX Listing Rules. Key obligations are described below:

Continuous disclosure	The company must notify ASX immediately of any information concerning it that a reasonable person would expect to have a material effect on the price or value of its securities. Exceptions to this rule include information relating to confidential negotiations on an incomplete proposal, and information produced for internal management purposes (such as financial projections). In addition, there are specific disclosure requirements for matters such as changes to directors' interests, security issues, notifications of annual general meeting dates, changes of officers and auditors, dividends, release of securities from escrow, lodgement of a disclosure document with ASIC, prepared addresses delivered at a general meeting and results of voting at meetings, etc.
Financial reporting	ASX requires listed companies to publish prescribed financial reports on an annual, half-yearly and, in some cases, quarterly basis, generally within 60 days of the relevant reporting period (this is a much shorter period than applies under the Corporations Act).
Re-election of directors	Each director of a listed company (other than a managing director) must stand for re-election every three years.

Limitations on securities issues	Listed companies are generally limited to issuing new securities equal to no more than 15% of their issued capital (or 25% for SMEs) over a rolling 12-month period, unless shareholder approval is obtained or one of a number of specified exceptions apply.
Transactions with related parties	The ASX Listing Rules prescribe shareholder approval requirements for certain transactions between a company and its directors and other related parties.
Significant transactions	Shareholder approval requirements are prescribed for certain major acquisitions and disposals.
Corporate governance	ASX publishes best practice recommendations for the corporate governance of listed companies. There are only a small number of binding corporate governance requirements, while the majority of these guidelines are not mandatory. Instead, ASX applies an 'if not, why not' approach, requiring companies to explain in their annual report why they have not complied with any of the best practice recommendations.
Insider trading	The insider trading provisions of the Corporations Act prohibit a person from dealing in the company's securities if they are in possession of materially price-sensitive information which has not been made generally available to the market. Accordingly, the company will need to put in place procedures to limit the distribution of such information, as well as set out the times during which staff, management and directors can trade in the company's securities. The allowed trading windows are usually after the release of half-year and full-year results, and after the annual general meeting.

Generally, unless a foreign company has a foreign exempt listing, overseas companies are required to comply with the same continuing obligations as Australian companies. However, in certain circumstances, ASX will impose additional disclosure requirements, or may waive certain ASX Listing Rules, for foreign companies. For example:

As the Australian takeover and substantial shareholder provisions do not apply to companies incorporated outside Australia, ASX requires a statement of that fact to be included in each annual report, and requires an undertaking from the company to immediately inform the market on becoming aware of any person becoming or ceasing to be a 'substantial shareholder' (as defined in the Corporations Act), or a movement of at least 1% in the number of securities in which a 'substantial shareholder' has an interest.

ASX may permit foreign companies to report in the currency of their home jurisdiction and under the recognised accounting policies of that jurisdiction and will, in certain circumstances, waive its financial reporting requirements where it considers that the equivalent requirements of the company's primary exchange are sufficiently stringent to keep the market informed.

Potential risks, liabilities and pitfalls

The following provides an overview of when a prospectus is likely to be considered to be 'defective' (and therefore give rise to potential civil and criminal liability), who is exposed to liability for the defect, and to what extent defences to liability are available.

<u>Liability for a prospectus</u>

A person may be subject to civil and criminal liability under the Corporations Act in relation to an IPO if:

- the prospectus contains a false, misleading or deceptive statement or omits information which is required to be included under the Corporations Act; or

- after the prospectus was lodged, a new circumstance has arisen which would have been required to be disclosed in the prospectus if it had arisen before the prospectus was lodged with ASIC, and an amended supplementary or replacement prospectus has not been issued.

The company, its directors or a person responsible for statements in a prospectus, may also be liable at common law for a fraudulent or negligent misrepresentation in a prospectus.

In addition to the specific liability set out above, liability may also arise for other actions taken or statements made in connection with an IPO. For example, a person could potentially contravene the Corporations Act by making a false, misleading or deceptive statement during marketing activities undertaken as part of the IPO or by breaching the pre-prospectus advertising restrictions. Accordingly, directors and management should be very careful about any statements they make about the company or the IPO during the IPO process.

Who may be liable?

A number of parties involved in the preparation of the prospectus may be subject to criminal and civil liability including (amongst others) the offeror of securities (being the company and/or any selling shareholder), directors and proposed directors of the company, underwriters and persons who are involved in the contravention of the Corporations Act. The extent of the potential liability will differ depending on the person involved. In particular, in the event that the prospectus is defective the company, any selling shareholder, their respective directors and any underwriter will bear responsibility for the entire prospectus and will potentially be liable for any loss or damage suffered.

Defences to liability

There are a number of defences available to potential civil and criminal liability, some of which include that an appropriate due diligence process was undertaken (which requires reasonable enquiries and a reasonable belief that the relevant statement was not defective), reasonable reliance on others' defence (which requires reasonable reliance on a third party such as an adviser), withdrawal of consent (which requires the public withdrawal of consent to be named in the prospectus), and non-awareness of a new matter (which applies where the new matter has arisen since the prospectus was lodged).

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Bermuda

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Introduction

Bermuda has long served as a gateway to the US capital markets. As of the end of 2017, the combined market capitalisation of Bermuda companies listed on the NYSE and Nasdaq was approximately $240 billion. Elsewhere in the world, Bermuda remains a preferred jurisdiction for companies listed on the main board of the Hong Kong Stock Exchange, with approximately 25% of HKSE-listed companies being incorporated in Bermuda. In addition, Bermuda companies are to be found listed on many other major exchanges across the world including the London Stock Exchange, the Toronto Stock Exchange, the Oslo Børs and the Stock Exchange of Singapore.

Amongst the Bermuda companies accessing capital markets, there has traditionally been strong representation from both shipping companies and insurers, reflecting the underlying strength of Bermuda's ship registry and the island's status as a domicile of choice for the international insurance/reinsurance market. Recent years have seen a diversification of issuers opting for a Bermuda company as a listing vehicle including in the biotech (Axovant Sciences, Myovant Sciences), information technology (IHS Markit), financial services (Lazard and The Bank of N.T. Butterfield & Son) and telecommunications (Liberty Latin America) industries. In recent years, the number of Bermuda companies pursuing an IPO on the NYSE or Nasdaq has remained relatively stable, with between 5 and 10 Bermuda companies completing an IPO on those exchanges each year.

Many listed Bermuda companies are outward-facing in the sense that little, if any, of their business is conducted in the domestic Bermuda economy. Businesses using Bermuda companies as a listing entity often do so in order to leverage Bermuda's unique jurisdictional advantages. Organisations with multi-jurisdictional business find Bermuda's tax neutrality and deference to onshore regulation to be conducive to the establishment of a holding company vehicle that can be used as an efficient way to raise public capital for an entire corporate group without adding unnecessary fiscal or regulatory complexity to the group's operations. Bermuda law also permits public companies a degree of flexibility in structuring their corporate governance arrangements, as well as providing a suite of statutory tools under its company law, that may not be available in other jurisdictions. For example, Bermuda law permits companies to set their own criteria for the composition and proceedings of their boards of directors, to adopt varied takeover protections, and to formulate complex and novel capital structures.

Bermuda has served as a jurisdiction for establishing international companies longer than any other international financial centre, and has consistently demonstrated its commitment to meeting international standards of co-operation and transparency: since 2009, Bermuda has been on the Organization for Economic Cooperation and Development's "white list" of countries meeting tax transparency standards. The strength of the island's reputation and profile are repeatedly evidenced by onshore regulators' familiarity with the jurisdiction, as well as by the fact that a large majority of the Fortune 100 companies maintain some presence in Bermuda.

The IPO process: steps, timing and parties and market practice

A Bermuda IPO starts with the establishment of a Bermuda company. This can be done in several ways and will, in many cases, be dictated by what is most workable under the laws of the other jurisdictions in which the corporate group operates. Typical methods of establishing the Bermuda company include:

- Incorporation of a new Bermuda company and subsequent public offering of this new company's shares; if this new company is to serve as an interposed holding company for the entire group, its shares are often exchanged for the "old" holding company's shares.
- Incorporation of a new Bermuda company, and subsequent merger/amalgamation of this Bermuda company with an existing company (either in Bermuda or another jurisdiction), with the surviving or continuing company being a Bermuda company holding the assets of both companies and serving as the listing vehicle.
- "Continuation" (redomiciliation) of an existing company from another jurisdiction into Bermuda; this continuation has to be permitted under the laws of the original jurisdiction.

Incorporation of a new Bermuda company is a straightforward process and can be carried out quickly and largely online. Timing constraints for other methods of establishment can arise if, as part of the process, a merger/amalgamation/continuation from another jurisdiction requires the consent of a regulator in another jurisdiction, and/or consent from a large body of shareholders.

Almost all Bermuda public companies are established as "exempted" companies. The designation "exempted" under Bermuda law means that the company is not required to comply with a Bermuda legal requirement that the company be owned and controlled by Bermudians. As a consequence of being "exempted", the Bermuda public company is not, without special permission from the Bermuda authorities, permitted to carry on business in Bermuda, i.e. to compete with local businesses in the domestic economy. In practice, this creates few (if any) issues, given that there are no corresponding restrictions on the ability of the exempted company to carry on business with other entities outside of Bermuda (or even other exempted entities in Bermuda in furtherance of business carried on outside Bermuda). Exempted companies can maintain registered offices (including entering into leases for premises, although no physical presence of the company on the island is required) and bank accounts as well as procuring services in Bermuda without requiring any further government consents or permissions.

Once established, the Bermuda exempted company is not subject to any Bermuda income, profit, withholding or capital gains taxes, and is also entitled to apply for an assurance from the Bermuda government that no such taxes will be levied on the exempted company for a period lasting until 31 March 2035.

Much of the Bermuda IPO process can be run in parallel with the listing/approval on the proposed stock exchange, and indeed can be started prior to the actual establishment of the Bermuda public company. Since no prospectus is usually required to be filed in Bermuda (see further below), establishing the public company's corporate governance regime and capital structure is usually run in conjunction with any "onshore" legal process. Reflecting Bermuda's deference to onshore regulators and exchanges, the IPO process is usually led by an "onshore" firm with expertise in the regulations and practice of the exchange on which the Bermuda company's shares are to be listed, with Bermuda counsel providing specialised advice on matters of Bermuda company law. Beyond engaging Bermuda counsel, the key players in the IPO process are exactly the same as they would be for an IPO of, for example, a Delaware company.

Regulatory architecture: overview of the regulators and key regulations

Bermuda companies are regulated by the Bermuda Registrar of Companies (the "Registrar") and (to a lesser extent, except in the case of companies in certain regulated industries) the Bermuda Monetary Authority (the "BMA"). The Registrar is part of the Bermuda Government's Ministry of Economic Development, whereas the BMA is a quasi-autonomous non-governmental organisation, with an independent board of directors.

Bermuda public companies are subject to the Companies Act 1981 (as amended, the "Companies Act"), the principal Bermuda corporate legislation, and the Registrar has powers of inspection in relation to matters of statutory compliance. The Companies Act has good provenance, being based on UK corporate legislation, but has been adapted to allow companies great flexibility. Its requirements are not generally felt to be onerous for a company seeking to go public, and include:

- The requirement for a company to pay an annual Bermuda government fee and file a simple annual return with the Registrar.
- The requirement to hold an annual general meeting of shareholders (which may be waived by the shareholders).
- The requirement to produce audited financial statements and lay them before shareholders.
- The requirement to keep minutes of proceedings of shareholder and director meetings and to keep proper records of account.

Significantly, the Companies Act imposes no requirement on a company to produce and file a prospectus if the company is offering its shares to the public but has already filed a prospectus with either "an appointed stock exchange" (which includes most of the world's major exchanges) or a "competent regulatory authority" (which includes organisations such as the US Securities Exchange Commission, the UK's Financial Conduct Authority, the Ontario Securities Commission and the Securities and Futures Commission of Hong Kong). In addition, if the company is subject to the rules or regulations of such a stock exchange or regulatory authority and those rules or regulations do not require a prospectus, Bermuda law defers to the rules of the stock exchange or regulatory authority by also not requiring a prospectus. The net effect is that Bermuda companies with shares listed on an appointed stock exchange never need to file a prospectus in Bermuda, nor comply with any statutory disclosure requirements under Bermuda law. Furthermore, Bermuda law does not prescribe any particular method of presenting or auditing a company's financial statements, other than that the principles used must be recognised in another jurisdiction. This means Bermuda public companies are not constrained under Bermuda law in their choice of financial reporting principles and do not encounter the extra cost and complexity that is entailed when a company's jurisdiction of incorporation imposes reporting requirements different from those of the exchange upon which its shares are listed.

The Bermuda law approach to prospectus requirements and financial reporting reflects the historical co-operation of Bermuda's government and business community working to ensure that the integrity of the jurisdiction is preserved without the need for overly burdensome regulation. In most cases, the Bermuda government is receptive to the needs of the business community and is cognisant that Bermuda's reputation rests upon it being an open jurisdiction in which it is not unduly difficult to do business. The elimination of unnecessary, overlapping prospectus and accounting requirements is just one example of this dynamic.

Aside from those provisions where compliance is mandatory, many elements of the Companies Act emphasise flexibility by providing a basic company law framework and then permitting a company to refine or vary aspects of this framework through its bye-laws (the main constitutional document of a Bermuda company governing the rights, powers and obligations of a company's shareholders and directors). Examples include:

- Business combinations: the Companies Act lays down a statutory framework for mergers and amalgamations, but permits a company to make business combinations either easier or more difficult to effect than under the statutory provisions by permitting a company to either relax or enhance the statutory voting and quorum requirements.
- Significant corporate transactions: Bermuda companies are permitted to make certain specified transactions of their choosing subject to more onerous approvals from shareholders and/or the board of directors than would otherwise be the case under the default Companies Act position. For example, super majority approval can be required for business combinations (or other transactions) with a significant shareholder.
- Novel capital structures: the Companies Act requires that a company limited by shares has a share capital, but it is up to the company itself how this share capital is classified and the rights and other characteristics attaching to each class of shares (e.g. denominations of shares, voting rights of shares, special dividend rights). In addition, the Companies Act permits Bermuda companies to issue redeemable shares and redeemable preference shares, the latter of which may be established by the company's board (rather than its shareholders), making these instruments the equivalent of "blank cheque preferred shares" seen in the US market. The flexibility given to Bermuda companies in establishing their capital structures means a Bermuda company typically has a range of options when looking to raise capital either in conjunction with, or outside of, the IPO process. It is even possible for shares of Bermuda companies to be held either by the company itself as treasury, or to be held by one of its subsidiaries. This latter option has been used somewhat controversially in a few instances to enable two companies to hold voting control of each other, creating a circular ownership structure that is very difficult for a hostile bidder to break up or acquire.
- Board stability: Bermuda companies have the option under the Companies Act of having directors elected each year at a company's annual general meeting, or of being elected or appointed in such other manner as the company's bye-laws may provide. The latter option means it is possible to make only a portion of directors subject to annual re-election (thereby allowing staggered boards) or even to give the right to elect directors to only a certain class of shares, thereby allowing enhanced control mechanisms for key shareholders, or alternatively providing a safeguard for a class of minority shareholders.
- "Poison pills": the Bermuda court has held that shareholder rights plans (sometimes known as "poison pills") commonly found in the US market (entitling shareholders, other than an acquiring shareholder, to acquire shares at a significant discount once

the acquiring shareholder reaches a specified level of ownership, thereby diluting the acquiring shareholder) can be a proper and constitutional exercise of the powers of a Bermuda company's board. As a result, Bermuda public companies have the option to adopt this form of takeover protection, or to prepare a rights plan to sit on the "shelf" (i.e. to be approved and implemented following the emergence of a hostile bidder).

- Indemnification of directors and officers: under Bermuda law, a company may indemnify its directors and officers against all liability except in cases where such liability arises from their fraud or dishonesty. In addition, the bye-laws of the Bermuda company can provide that the shareholders waive all claims or rights of action that they might have, individually or in right of the company (that is, by derivative action), against any of the company's directors or officers, except in respect of the director's or officer's fraud or dishonesty. Such protections can provide significant comfort for directors and officers honestly carrying on a company's business.

Many of the above aspects are negotiated on a case-by-case basis to suit the investor profile and market risk associated with a particular issuer. Despite the Companies Act deriving from UK legislation originally, many of the provisions often appearing in Bermuda public company bye-laws have a distinct US flavour, reflecting the influence of US market practice on Bermuda company listings.

Apart from the Companies Act and the supervisory function exercised by the Registrar, ownership of Bermuda companies may also be regulated by the BMA. One of the BMA's primary responsibilities is to regulate the beneficial ownership of securities issued by Bermuda companies. However, in the case of shares listed on an appointed stock exchange (i.e. most of the world's major exchanges), this regulation – which would be unworkable for a public company – is eliminated by the BMA's standing permission for the issuance and free transferability of all securities of a Bermuda company listed on an appointed stock exchange. This standing permission is based on Bermuda's recognition of the regulation inherent in such listings.

Public company responsibilities

Bermuda law does not impose any "special" or extra requirements on public companies that are not imposed on private companies. Even the requirement under Bermuda law for a company to produce a prospectus if its shares are offered to the public which applies to all companies is not generally applicable for companies listed on most internationally recognised exchanges.

Potential risks, liabilities and pitfalls

The rights of holders of a Bermuda public company's shares are governed by Bermuda law and the company's constitutional documents. These rights can differ from those that investors may be familiar with in connection with companies incorporated in other jurisdictions. It is also doubtful whether a Bermuda court would enforce a judgment or entertain a suit against a Bermuda company obtained or pursued on the basis of the securities laws of other jurisdictions.

Furthermore, if a need arose to restructure the financial obligations or capital structure of a Bermuda public company, the form of restructuring protections and the types of legal tools available to effectuate a restructuring of the Bermuda public company may be unfamiliar to investors. Although Bermuda courts have a history of adopting a commercial, pragmatic approach to implementing restructurings, Bermuda insolvency law is largely derived from historic English law and statute. As a consequence, there is no strict equivalent to debtor-in-possession proceedings offered under US Bankruptcy Code; nor is there the equivalent of administration proceedings under the UK Insolvency Act 1986. Therefore to give effect to protections afforded to debtor companies under other jurisdictions' bankruptcy regimes (such as the automatic stay in US Chapter 11 proceedings), it is often necessary to couple any "onshore" process with a local Bermuda process. Historically, the tools available under Bermuda law have proved capable of replicating the required protections for a debtor to successfully restructure, but care must be taken in each particular case to develop a workable "local" solution, given discrepancies between the insolvency laws of Bermuda and those of other jurisdictions in which the company's shares may be listed.

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Introduction

After a number of years with fewer than two IPOs per year – the last period with a relevant number of offerings was 2013, when 10 companies went public on the São Paulo stock exchange B3 S.A. – Brasil, Bolsa, Balcão ("B3") – 2017 finished with 20 equity public offerings, out of which nine were IPOs on B3. 2018 has already started with good prospects, with at least eight IPOs in progress up until April.

The amendments introduced to Law No. 6.404/76 ("Brazilian Corporate Law") in the reform of 2001 aimed at enhancing the rights and protections of minority shareholders, reinforced the importance of corporate governance standards such as disclosure, equitable treatment, compliance and accountability. In addition to that, the creation in 2000 by B3 of its special listing segment *Novo Mercado* (New Market), with corporate governance requirements more stringent than those established by the Brazilian Corporate Law and the rules enacted by the Brazilian Securities Commission (*Comissão de Valores Mobiliários* or "CVM"), came to foster the Brazilian capital markets and bring incentives to the greater participation of investors, especially foreign investors, in the equity of Brazilian companies. At the end of 2017, the rules of the special listing segment *Novo Mercado* (New Market) were changed in order to introduce even more globally modern concepts of high corporate governance standards.

From 2003 to 2011, more than 100 companies (Brazilian and foreign companies) went public and listed their shares in Brazil. Since then we have seen a number of years of lower activity in terms of equity public offerings, but a healthy deal flow of equity capital markets transactions, especially IPOs, has grown since last year on expectations that the Brazilian economy is heading for recovery and is financially healthy, and solid companies that were already prepared and only waiting for better market conditions to go public are taking advantage of their positions and of this positive trend.

The IPO process: steps, timing and parties and market practice

To launch an IPO in Brazil, the company must: (i) be a corporation (*sociedade por ações*); (ii) obtain its registration as a publicly traded company with CVM; (iii) obtain registration of the public offering of shares with CVM; and (iv) obtain registration as a listed company with B3. These procedures are normally carried out simultaneously, even though it is possible to obtain the publicly held registration first and then proceed with the IPO.

If the procedures are carried out simultaneously: (i) upon the first filing of the required documents, CVM has 20 business days to review the documents and make the required improvements to them; (ii) then the issuer has up to 40 business days to address such requirements, but because in an IPO timing is of essence, it is customary to answer in just a couple of days; (iii) upon this second filing, CVM has 10 business days to make a new revision – usually, the IPO is launched (with the disclosure of a notice to the market with the offering terms and conditions) on the day of the second filing (here the roadshow presentations initiate); (iv) if the requirements are not fulfilled, the issuer has three business days or the outstanding term of item (ii) to fulfil them; and (v) finally, CVM grants the publicly held and IPO registrations.

It is important to point out that B3 has five special listing segments, known as *Bovespa Mais*, *Bovespa Mais Nível 2*, *Nível 1*, *Nível 2* and the *Novo Mercado* (New Market). These special listing segments were designed for the trading of shares issued by companies voluntarily undertaking to abide by corporate governance practices and disclosure requirements more stringent than those mandated by the Brazilian Corporate Law and by regulation. Since the creation of the special listing segments, the great majority of companies making their IPOs in Brazil have listed their shares in one of these segments (not only as a response to increased demand in the market for good practice in terms of corporate governance, but also because being listed in those segments tends to result in increased value for the companies), especially the *Novo Mercado*, which is the segment with the highest corporate governance requirements, or the *Nível 2*, which has similar requirements to the *Novo Mercado* but allows the listed company to also issue preferred non-voting shares.

A public offering of shares in Brazil, including an IPO, is carried out under the terms of *Instrução* CVM 400 ("Regulation 400"). It requires a prospectus, which primarily includes information about the issuer, the offeror, the offering, the securities offered, and risk factors. The information regarding the issuer, its activities and financial situation, is mainly included in the Reference Form (*Formulário de Referência*), which will be an attachment to the prospectus. A prospectus must meet the content requirements provided in detail by Regulation 400 and by the Regulatory and Best Practices Code for Public Offerings by the Brazilian Association of Financial and Capital Markets (ANBIMA).

The application for registration of a public offering under the terms of Regulation 400 must be jointly submitted to CVM by the offeror (whether an issuer or a selling shareholder) and the lead underwriter and must be accompanied by supporting documents, including drafts of the offering documents.

Nearly all qualified Brazilian investment banks have agreed to comply with ANBIMA's Best Practice Code and have agreed to sanctions in the event of non-compliance with its terms and conditions. Accordingly, the underwriting agreement will typically require issuers to conform with the standards of such Code.

After the offeror has submitted to CVM an application for registration of the public offering distributed under the terms of Regulation 400, it may proceed to print a preliminary prospectus and initiate its book-building activities and roadshow presentations. In practice, the offeror and the lead underwriter may prefer to wait for an indication from CVM that no major issues are anticipated in relation to the proposed public offering. No sales may be completed until CVM has granted registration for the public offering distributed under the terms of Regulation 400. Upon granting of registration of the public offering distributed under the terms of Regulation 400, the final prospectus must be made available on websites of the issuer, the offeror, the underwriters, CVM and the relevant stock exchange.

Regulatory architecture: overview of the regulators and key regulations

The companies registered with CVM, and especially those listed in B3, are subject to a significant number of ongoing obligations under the Brazilian Corporate Law.

The main law establishing the rights and obligations of Brazilian companies and their shareholders is the Brazilian Corporate Law. In addition to that, CVM is the regulatory agency responsible for enacting and making the enforcement of the rules applicable to public companies. The regulations issued by CVM include rules applicable to mandatory financial reporting, timely disclosure of material information to the market, insider trading, restrictions on trading with its own securities, among others, which are not applicable to closely held companies.

In its turn, B3 as a self-regulatory entity is responsible for issuing the rules applicable to each of its listing segments and for the enforcement of such rules. The rules issued by B3 for its listing segments require the companies, especially in relation to the special listing segments, to comply with rules applicable to minimum free float thresholds, independent directors, non-accumulation of positions of CEO and CFO, lock-up of shares of controlling shareholders and managers after the IPO, among others.

Companies that intend to go public in Brazil must be mindful of the several obligations that they need to comply with after the conclusion of the offering. A failure to comply with such obligations may lead to the imposition of administrative penalties by CVM on the company's management and controlling shareholders, ranging from formal warnings to substantial fines and prohibition of holding offices in public companies in Brazil, in addition to civil liability towards minority shareholders.

Public company responsibilities

Below are the main corporate bodies of Brazilian listed companies, as well as their main reporting duties and other specific features.

(a) *Shareholders*

According to the Brazilian Corporate Law, the shareholders assembled in a meeting are competent to resolve on the following matters:

- any amendment to the by-laws of the company;
- any election or dismissal of the members of the Board of Directors and auditors at any time;
- review and approval of the financial statements prepared by the management;
- any issuance of debentures pursuant to the conditions set out in the Brazilian Corporate Law;
- any suspension of rights of any shareholders;
- any appraisal of assets contributed as capital by shareholders;
- any transformation, merger, consolidation, spin-off of the company;
- any dissolution or liquidation, and the election and dismissal of trustees; and
- any authorisation to the officers in connection with filings for bankruptcy or protection from creditors.

CVM Rule No. 481, dated as of December 17, 2009, and the Brazilian Corporate Law establish several rules for holding a shareholders' meeting, setting forth the information regarding the matters to be decided in the meeting in order to allow shareholders to examine the matters in advance.

(b) *Board of Directors*

Pursuant to the Brazilian Corporate Law, the Board of Directors is competent to take the following decisions:

- to establish the general strategy for the business;

- to elect and dismiss the executive officers of the company and provide their duties in accordance with the relevant provisions in the by-laws;
- to supervise the performance of the executive officers, examine the books and records of the company at any time, request information on contracts signed or about to be signed, and take all other necessary actions;
- to call a shareholders' meeting whenever it is deemed advisable, or an ordinary shareholders' meeting;
- to render its opinion on the reports of the management and on the accounts of the board of executive officers;
- to render its opinion on transactions or contracts, if required by the by-laws of the company;
- to decide whether to issue shares or warranties, if duly authorised by the by-laws;
- to authorise the transfer of fixed assets, the creation of charges and guarantees for liabilities of third parties, unless otherwise provided for in the by-laws; and
- to elect and dismiss the independent auditors.

Notwithstanding the above, the by-laws of the company may set out additional matters to be resolved by the Board of Directors, provided that they are matters exclusively for resolution by the shareholders' meeting.

(c) *Fiscal Council (Conselho Fiscal)*

The Fiscal Council is an optional management body of the company, created to supervise the actions of the other management bodies. For such purposes, the Fiscal Council may issue opinions, request documents and information, review financial reports and even call general meetings, if the Board of Directors fails to do so.

The Fiscal Council may be a permanent body of the company or may be temporarily established by a decision of the shareholders. The Fiscal Council is composed of three to five members, with the same number of alternates. Such members: (i) must be individuals resident in Brazil; (ii) must have a university degree; and/or (iii) must have served for at least three years as a manager of a company or member of the Fiscal Council of a company. The members of the Fiscal Council are elected, dismissed and have their remuneration determined by the shareholders of the company, in a shareholders' meeting.

The Fiscal Council differs in nature from an audit committee, as set out by U.S. corporate governance rules. Usually, the audit committee is a subset of members of the Board of Directors, including financial experts. In its turn, the Fiscal Council is formed by members that do not hold a board seat. Nevertheless, Brazilian companies subject to Sarbanes-Oxley usually set up a Fiscal Council to perform the functions and assume the responsibilities of the audit committee.

(d) *Investor Relations Officer – DRI*

Observing specific corporate governance practices rules, the companies must have a Board of Directors in place and appoint the DRI, who is responsible for ensuring compliance with the CVM regulation mainly related to communications of the company with the general public and with shareholders. Officers appointed as the DRI may also perform other duties at the company. There are several examples of officers who accumulate the DRI and CFO functions within Brazilian listed companies.

The company must also have an Investor Relation Department, which is a communication channel between the company, CVM, B3, their shareholders, managers and the market. Such department must be updated on any events related to the company, will analyse all the information received, and is responsible for the disclosure of material information to the general public. DRI is also responsible for monitoring compliance with other requirements to be met by company, such as the disclosure of trading of shares by the managers of the company and the disclosure of the periodic and non-periodic information to the general public, as further explained below.

(e) *Mandatory disclosures of periodic information (Informações Periódicas)*

- Enrolment Form (*Formulário Cadastral*). The Enrolment Form shall contain information concerning: (i) identification of the issuer; (ii) securities admitted into negotiation in regulated markets; (iii) auditors; (iv) book-entry share services provider; (v) investors relations officer or similar person; and (vi) shareholders' department, and must be submitted to CVM and B3, or validated, by the end of the fifth month of each year.
- Reference Form (*Formulário de Referência*). The Reference Form, similar to a Form 10-K for a US Domestic company or a Form 20-F for a foreign private issuer registered with the SEC, is an extensive and the most relevant document for a company that intends to list its shares and launch a public offering. The Reference Form contains the relevant information on the company, such as: description of the company's businesses; description of the risk factors associated with investment in its securities; management analysis and discussion of its financial conditions and result of operations; information on relevant agreements; discussion of legal matters, pending litigation and relevant contingencies; description of corporate structure and principal shareholders; and description of transactions with related parties, among other relevant information.

  The Reference Form is a living, dynamic document and must be submitted or updated, as the case may be: (i) annually, until the end of the fifth month of each year; (ii) at the date of filing for public registration of the public offering of securities; and (iii) up to seven business days from the date of any change in certain relevant information contained in the Reference Form (only as regards the changed information).
- Financial Statements (*Demonstrações Financeiras*). The Financial Statements must be prepared in accordance with Brazilian accounting standards (Brazilian Corporate Law and CVM rules) and audited by an independent auditor registered with CVM. They must be submitted to CVM on the same date of their publication, which is expected to occur within three (3) months after the closing of the company's fiscal year or within one (1) month before the Annual Shareholders' Meeting[1] ("AGO") and shall be submitted together with several documents, as established by the applicable regulation. In addition to the financial statements, the management's proposal to the AGO will include names of Board members for election and a comprehensive financial review analysis (similar to an MD&A), among others.
- Quarterly Financial Reports (*Formulário de Informações Trimestrais – ITR*). The company shall also submit within (forty-five) 45 days after the end of each quarter of the fiscal year, except for the last quarter, Quarterly Financial Reports, together with a special review report issued by an independent auditor registered with CVM.
- Other periodic information. Additionally, the company must periodically file the following information to CVM:

Document/information	Deadline for delivery
Call notice to the Annual Shareholders' Meeting (waived if the totality of the shareholders are present at the meeting).	Until fifteen (15) days before the date set for holding the Annual Shareholders' Meeting or the same day of its first publication, whichever occurs first.

Document/information	Deadline for delivery
All necessary documents for the voting rights exercise at the Annual Shareholders' Meeting.	Conditions set by specific rule.
Summary of decisions taken at the Annual Shareholders' Meeting (waived if the minutes of the meeting were delivered on the same day it occurs) and the voting map (demonstrating how many votes were in favour, against or abstained from voting on each matter).	On the same day that the meeting occurs.
Minutes of the Annual Shareholders' Meeting.	Up to seven (7) business days after the meeting occurs.
Report issued by the trustee (*agente fiduciário*) of any issuance of debentures, when applicable.	Up to four (4) months from the end of the fiscal year or on the same day of its release by the trustee, whichever occurs first.

(f) *Mandatory disclosure of non-periodic information (Informações Eventuais)*

When applicable, the company must file with CVM, through the IPE System, the following documents and information:

Document/information	Deadline for delivery
Call notices of Extraordinary Shareholders' Meetings, special and debenture holders' meetings (waived if the totality of the shareholders are present at the meeting).	On the same day of its publication, which shall occur within fifteen (15) days before the Extraordinary Shareholders' Meetings.
All necessary documents for the voting rights exercised at the Extraordinary Shareholders' Meetings and special and debenture holders' meetings.	Terms and stated period, defined on specific rules regarding the subject.
Summary of decisions taken at the Extraordinary Shareholders' Meetings and special and debenture holders' meetings (waived if the minutes of the meeting are delivered on the same day it occurs) and the voting map (demonstrating how many votes were in favour, against or abstained from voting on each matter).	On the same day that the meeting occurs.
Minutes of Extraordinary Shareholders' Meetings and special and debenture holders' meetings.	Up to seven (7) business days after the meeting occurs.
Minutes of Board of Directors' meetings (with negotiations that need to be effective towards third parties).	Up to seven (7) business days after the meeting occurs.
Minutes of meetings of Fiscal Council, in which members have approved opinions on certain corporate matters.	Up to seven (7) business days from the date of publication of the act or fact of the opinion object occur.
Valuation reports required by the Brazilian Corporate Law and regulations issued by CVM.	Deadlines set out on various specific rules regarding the subject.
Any amendment or restatement of the by-laws.	Up to seven (7) business days from the date of the meeting that approves the amendment or restates the by-laws.
Material presented at meetings with research analysts and general public.	On the same day of the meeting or presentation.
Risk rating agencies' reports hired by the issuer and its updates, if any.	At the time of its disclosure.

Document/information	Deadline for delivery
Calendar of corporate events, indicating the dates of release of pending information (such as Financial Statements, DFP, ITR) or of certain corporate activities (such as shareholders' meetings, directors' meetings, etc.).	Up to December 10 of each year (or the following business day), in relation to the events of the next year.
Policy for trading of securities and disclosure of material information.	By the time of its approval by the Board of Directors.
Securitisation instruments.	Within seven (7) business days of its execution date.
Debenture indentures and amendments.	Within seven (7) business days of its execution date.
Annual meeting with analysts.	At least once a year, on the date indicated in the calendar of corporate events.
Shareholder agreements and other corporate agreements filed at the company's head offices.	Within seven (7) business days of their filing.
Information of shareholders' agreements at the level of the controlling shareholder, concerning the exercise of voting rights in the company or the transfer of securities of the company.	There is no deadline, but disclosure is advisable as soon as the company is aware of the signature of such documents.
Documents related to any filing for protection against creditors or bankruptcy filing, or court or administrative liquidation.	At the time of the filing or knowledge by the company.

Disclosure of notices and material facts[2]

The company must disclose to the general public any material acts or facts. Material acts or facts are defined by CVM regulation as any acts or facts of a political, administrative, technical, business or financial nature related to the relevant company that may significantly affect:

- the trading price of the securities issued by the company or related thereto;
- the decision of investors to purchase, sell or hold those securities; or
- the decision of investors to exercise any rights related to the ownership of securities issued by the company or related thereto (*e.g.* right of first refusal on capital increases).

For the release of notices of material facts, the company shall observe the following procedures:

Procedure	Notes
Occurrence of the material facts.	The controlling shareholders, managers, board members, Fiscal Council and any company's administrative committee with technical or advisory functions, created by the by-laws, shall report any notice or material facts of which they have knowledge to the Investor Relations Officer, who will be responsible for disclosing the information.
Publication of notices of material facts in major newspapers in which the company makes its official disclosures.	The publication can be made briefly indicating the internet address in which complete information regarding the notice or material fact is available to investors.

Procedure	Notes
Release a copy of the notices of material facts on the previous day or on the same day of their publication in the press, to CVM and B3, using the IPE System.	The disclosure of notices of material facts should occur, whenever possible, before or after the close of trading of the B3.

The Investor Relations Officer has the duty to immediately disclose any material facts to CVM and to the market. If the controlling shareholders, members of management or any administrative committee with technical or advisory functions, created by the by-laws, have personal knowledge of the notice or material fact and realise the omission of the Investor Relations Officer in fulfilling his/her duty of communication and disclosure, such shareholders, officers, directors and professionals will only be exempt from liability if they immediately communicate the notice or the material fact to CVM.

CVM may determine disclosure, correction, amendment or republication of information about any notice or material fact, as well as require that additional information about the communication and disclosure be communicated to the Investor Relations Officer.

The notices of material facts may not be immediately disclosed, in particular and extraordinary circumstances, if the controlling shareholders or members of the management of the company conclude that the disclosure threatens a company's legitimate interests.

In case the confidentiality of the information becomes unmanageable, or if there is an atypical fluctuation of trading price volumes of the company's shares or securities related thereto, the notice of material fact must be released immediately.

Potential risks, liabilities and pitfalls

During the course of a public offering of securities in Brazil, including an IPO, several important rules are applicable and must be strictly observed to ensure the success of the offering.

Quiet Period

One very important rule is the one comprising the publicity restrictions and establishing the so-called "Quiet Period". Issuers, selling shareholders and underwriters must treat any proposed offering under the terms of Regulation 400 as material, non-public information until an application for the registration of the public offering is filed with CVM. Use or disclosure of material, non-public information may constitute insider trading or a breach of fiduciary duties, depending on the circumstances, and may lead to civil, administrative or criminal penalties.

CVM's Regulation 400 does not specifically prohibit underwriters from producing offering materials in addition to the prospectus, which includes the reference form. Such materials, including any roadshow presentations, must be consistent with the prospectus and must be filed with CVM in order to preserve a documentary record.

In addition, marketing materials intended for broad dissemination must be approved by CVM if the offering is being distributed under the terms of Regulation 400. Marketing materials must include a legend referring the investors to the prospectus and to the risk factors provided for in the company's reference form. An exception is available for investor education materials, which may be made available even prior to the submission of an application to CVM.

Investors in a public offering distributed under the terms of Regulation 400 must receive a prospectus. The delivery may be made electronically. If any other materials or information are used in connection with a sale of securities in the public offering, the issuer will be, and the offeror and the lead underwriter may be, liable for any material misstatement or omission in the offering documents.

Additionally, until the public offering is disclosed to the market, the issuer, the offeror, the bookrunners and everyone involved with the offering must: (i) limit the disclosure of information relating to the offering to what is necessary for the purposes of the offering, warning recipients of the reserved and confidential nature of the information transmitted; and (ii) restrict the use of reserved and confidential information strictly for the purposes related to the preparation of the offering. From the moment the offering becomes public, all the information related to the offeror and the offering must comply with the principles of quality, transparency and equal access to information. Thus, all parties involved in the proposed public offering under the terms of Regulation 400 must abstain from discussing or mentioning the proposed offering and the issuer in the broader news and business media until the completion of the public offering. Failure to comply with such Quiet Period rules may result in the suspension of the offering for a cooling-off period and this may jeopardise the ability of the offeror and underwriters to conclude the offering within the expected timeframe.

Liabilities

The primary bases of liability in a securities transaction are also regulated by Regulation 400, which establishes the liability of the issuer, the selling shareholders, the underwriters and their respective managers for material misstatements and omissions in the offering documents. The lead underwriter is primarily liable, among the underwriters, for any damage caused to investors as a result of material misstatements and omissions. A lead underwriter may only be held accountable by an investor for lack of diligence in performing its obligation to ensure that the offering documents are free of material misstatements and omissions. The issuer and any selling shareholders that are controlling persons, however, are fully liable for any material misstatements and omissions. A non-controlling selling shareholder is only liable if it fails to act diligently to ensure that the offering documents are free of material misstatements and omissions.

Issuers, selling shareholders and underwriters may also suffer administrative sanctions. CVM may initiate disciplinary proceedings and impose sanctions, ranging from warnings to fines to permanent disqualification from public capital markets. CVM enforces compliance with the Brazilian Corporate Law, the Brazilian Capital Markets Law and its own regulations. During the course of the offering, CVM may also suspend the offering if it determines that the offering is being conducted in a manner inconsistent with its purpose, is illegal, fraudulent or violates CVM regulations.

CVM usually does not deny registration to an offering and will not take a position regarding the accuracy of any disclosure documents. In most cases, it will demand amendment to the prospectus, the reference form and other documents until it is satisfied that its concerns have been addressed.

Liability for material misstatements and omissions must be determined by a court. Investors must initiate legal action to seek damages for losses suffered as a result of a fraudulent public offering. Legal proceedings afford plaintiff investors and defendants a fair opportunity to produce evidence and build a compelling case, although a final resolution may take a significant period of time.

Investors often attempt to enhance their negotiating leverage with a recalcitrant issuer or underwriter by instigating a disciplinary proceeding with CVM. In these proceedings, CVM may encourage a settlement in *lieu* of a fine.

* * *

Endnotes

1. Pursuant to the Brazilian Corporate Law, all corporations must hold an Annual Shareholders' Meeting during the first four months following the end of each fiscal year in order: (i) to receive the accounts rendered by the company officers and to examine, discuss and approve the financial statements; and (ii) to approve the allocation of net income in profit reserves, investment and/or the distribution of dividends.
2. The following are examples of material facts that are potentially relevant: (i) entering into any agreements for the transfer of a controlling stake in the corporation; (ii) execution, amendment or termination of any shareholders' agreement involving the corporation (as party or as intervening and consenting party), or registered in the corporation's books and records; (iii) entry or exit of any shareholder or investor that has any contractual or any operational, financial, technological or administrative relationship with the corporation; (iv) consolidation, merger or spin-off involving the corporation itself or linked companies; (v) transformation or dissolution of the corporation; (vi) approval of stock option plans; (vii) changes of the rights and privileges of the securities issued by the corporation; (viii) splits, reverse splits or the issue of share dividends; (ix) acquisition of its own shares by the company to be cancelled or held in treasury, and the subsequent sale of shares held in treasury; (x) entering or termination of material contracts, or failure to close a deal, when the expectation for such is of public knowledge; (xi) financial restructuring, bankruptcy, or any other filing any lawsuit that affects the Corporation's financial condition; (xii) changes in the corporation's assets; (xiii) changes in accounting criteria; (xiv) restructuring of indebtedness debts; (xv) any profits or losses recorded and the related distribution of dividends; (xvi) any approval, alteration or suspension of any project, as well as any significant delay in its execution; (xvii) any launching or discontinuance of new products or services; (xviii) discoveries, changes or developments regarding technology or corporation's resources; and (xix) changes in projections or guidance previously disclosed by the corporation.

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British Virgin Islands

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Maples and Calder

Introduction

In this chapter we will focus on the popularity of British Virgin Islands ("**BVI**") companies as listing vehicles on international stock exchanges, including the Hong Kong Stock Exchange, the London Stock Exchange and the New York Stock Exchange ("**NYSE**"). The British Virgin Islands does not have a stock exchange but since the 1990s, the British Virgin Islands has been a popular jurisdiction for the incorporation of issuers to be listed on international stock exchanges. As the British Virgin Islands continues to develop its legal and regulatory regime to remain at the forefront of international standards, we anticipate that the use of British Virgin Islands companies as internationally listed companies will continue to grow. Reasons for the use of British Virgin Islands companies include:

- A stable political system, recognised as a world-class offshore financial centre.
- The laws of the British Virgin Islands are substantially based upon English common law, and a number of "key" English statutes. This gives the British Virgin Islands' law and legal system a common origin with those of many of the jurisdictions of its users, including the United Kingdom and the United States. It also means that a company incorporated in the British Virgin Islands and its shares are well recognised and accepted around the world, and particularly in Hong Kong, London and New York.
- The speed with which companies can be established, usually within one business day, and without the need for any prior governmental approvals.
- The British Virgin Islands has a modern and flexible statutory regime for companies, providing a non-intrusive regime on dividends, redemptions/repurchases and financial assistance for the acquisition of shares, and minimal ongoing filing requirements.
- The British Virgin Islands' status as a tax-neutral jurisdiction. A British Virgin Islands business company with no employees or property interests in the British Virgin Islands will be exempt from all forms of British Virgin Islands taxation.
- The British Virgin Islands is recognised by the Organization for Economic Cooperation and Development (OECD), the International Monetary Fund (IMF) and other international bodies for its transparency and standards consistent with those of other major developed countries.
- There are no exchange control restrictions or regulations in the British Virgin Islands (unlike many other jurisdictions). This means that funds can be freely transferred in and out of the British Virgin Islands in unlimited amounts.
- There is no requirement that a company incorporated in the British Virgin Islands should have any local directors or officers. Nor is there any requirement for local service providers (other than a British Virgin Islands registered office). Except in the case of certain regulated entities, there is no requirement to appoint a local auditor.

The British Virgin Islands business company limited by shares is the British Virgin Islands vehicle used for the purpose of acting as the listed vehicle in an international IPO. The key features of a business company include:

- Same-day incorporation.
- Low government fees on registration and annually.
- It is not necessary that any of the shareholders, directors or officers be resident in the British Virgin Islands.
- The board of directors can be comprised of such number of persons as may be desired. Typically, the board would consist of at least two persons. No officers are required by law, although it is sometimes convenient for a company secretary to be appointed.
- There is no requirement that any meetings of the board of directors be held in the British Virgin Islands.

We regularly act for issuers completing initial public offerings on the large international stock exchanges including:

- Hong Kong Stock Exchange – Main Board and Growth Enterprise Market;
- London Stock Exchange – Main Market and Alternative Investment Market ("**AIM**");
- NASDAQ Stock Market ("**NASDAQ**");
- NYSE; and
- Toronto Stock Exchange.

Our work has included:

- acting for the BVI special purpose acquisition company, Justice Holdings Limited, which was listed on the London Stock Exchange and which closed its business combination agreement with Burger King Worldwide Holdings, Inc., the world's second largest fast food hamburger restaurant chain, under the terms of which 3G Capital, a global investment firm and Burger King Worldwide's principal shareholder, received approximately US$1.4 billion in cash and continued as the majority shareholder;
- acting for the BVI special purpose acquisition company Ocelot Partners Limited which was listed on the London Stock Exchange and formed in order to undertake an acquisition raising gross proceeds of US$418 million in the initial public offering;
- acting for Tianhe Chemicals Group Limited, a manufacturer of speciality chemicals, on its US$1 billion initial public offering on the Hong Kong Stock Exchange;
- acting for Feishang Anthracite Resources Limited in connection with its listing by way of introduction on the Hong Kong Stock Exchange. Feishang Anthracite operates the anthracite coal exploration and mining business of its former parent China Natural Resources, Inc.;
- acting for Duoyuan Global Water Inc. which is based in China and is a leading supplier of domestic water treatment equipment on its listing on the NYSE, raising US$88 million;
- acting for the BVI company, Biohaven Pharmaceutical Holding Company Ltd which was listed on the NYSE raising in the region of US$195 million;
- acting for a key investor in respect of the listing of Despegar.com, Corp which was listed on the NYSE raising US$382 million; and
- acting for the BVI company, Arcos Dorados Holdings Limited, the largest operator of McDonald's restaurants in Latin America and the Caribbean, and the world's largest McDonald's franchisee, on the listing of its shares on the NYSE as well as on its issuance of bonds including bonds listed on the Luxembourg Stock Exchange.

To provide an indication of the popularity of the British Virgin Islands company as a listing vehicle of choice:

- as at 5 March 2018, there were 25 British Virgin Islands companies listed on AIM and 10 British Virgin Islands companies listed on the Main Market of the London Stock Exchange;
- as at 5 March 2018, there were nine British Virgin Islands companies listed on the Hong Kong Stock Exchange; and
- as at 5 March 2018, there were a total of 38 British Virgin Islands companies listed on NASDAQ (29) and NYSE (nine).

The IPO process: steps, timing and parties and market practice

Listing on an international exchange

The precise steps and timetable for an IPO on an international stock exchange are largely dictated by the requirements of the relevant exchange, and any related share offering timetable.

British Virgin Islands counsel works closely with the lead counsel for the IPO in the relevant jurisdiction. The input typically required from a British Virgin Islands perspective includes:

- advising in respect of the incorporation of the company;
- drafting the constitutional documents of the company, including any provisions required to comply with applicable listing rules or securities laws – British Virgin Islands law is flexible in this regard and can generally accommodate the broader constitutional provisions and shareholder protections required by the listing rules of the international stock exchanges;
- providing input on the British Virgin Islands aspects of the listing document, including the descriptions of the listed securities and the applicable corporate laws, and British Virgin Islands tax considerations;
- preparing any formal legal opinions required by regulators, stock exchanges, depositories, registrar and transfer agents and/or brokers/underwriters;
- preparing necessary corporate approvals for the IPO; and
- generally advising on British Virgin Islands corporate law.

A British Virgin Islands issuer can be incorporated on a same-day basis where necessary. There are no pre-incorporation publishing requirements and registration will be effective on the date of filing. Incorporation is effected by filing the memorandum and articles of association of the company, which set forth the objects and powers (which can be unlimited) and the internal governance requirements of the company.

Regulatory architecture: overview of the regulators and key regulations

The key sources of regulation of British Virgin Islands companies are the BVI Business Companies Act (as amended) and common law. There are no specific statutes or government regulations concerning the conduct of IPOs or M&A transactions.

The Companies Act includes provisions permitting mergers and consolidations between one or more companies, provided that at least one constituent company is incorporated under the Companies Act. This provides a flexible regime for common public company transactions including take-privates.

Listing on an international exchange

The key legal documents applicable to an international IPO process from a British Virgin Islands perspective are the listing document, the memorandum and articles of association of the company, and requisite corporate approvals. Applicable underwriting agreements and depository or custody agreements should also be reviewed by British Virgin Islands counsel, notwithstanding they are not likely to be British Virgin Islands law-governed.

Typically, British Virgin Islands counsel would help prepare the necessary disclosures for inclusion in the listing document to describe British Virgin Islands companies and the corporate law framework of the British Virgin Islands. Such disclosure often includes a comparison of British Virgin Islands law with the equivalent law governing companies incorporated in the IPO jurisdiction – in order that potential investors are able to assess the impact of the use of a British Virgin Islands company as the listing vehicle as compared to a vehicle formed in the IPO jurisdiction.

The memorandum and articles of association of the company will need to follow a form which meets the requirements of the applicable stock exchange upon which the company is to be listed, as well as the legal requirements of the British Virgin Islands. British Virgin Islands counsel work with the lead counsel on the IPO to determine the requirements of the relevant stock exchange, and then draft the constitutional documents accordingly to ensure they are in compliance with such rules.

British Virgin Islands companies intending to list on the main US exchanges may be able to take advantage of "foreign private issuer" status, which provides certain advantages, including: (i) reduced reporting requirements; (ii) reduced disclosure requirements; (iii) certain exemptions from US proxy rules; (iv) ability to apply accounting standards other than US GAAP; (v) flexibility in choice of reporting currency; and (vi) ability to apply certain "home country" standards in respect of corporate governance practices, publication of interim and annual reports, and the composition, election and classification of directors.

Many British Virgin Islands companies listing on NYSE or NASDAQ choose to list American Depositary Receipts ("**ADRs**") rather than making a direct equity listing, which allows the company's equity to continue to be denominated in a currency other than US dollars, whilst permitting the listed security to be US dollar-denominated and to clear through US settlement systems. Each ADR is a negotiable certificate that evidences an ownership interest in American Depositary Shares ("**ADSs**") which, in turn, represent an interest in the shares of the issuer, which are held by the applicable depository.

British Virgin Islands issuers listed on the London Stock Exchange (whether on the Main Market or on AIM) are not automatically subject to the United Kingdom Takeover Code and the jurisdiction of the Panel on Takeovers and Mergers of the United Kingdom. The Takeover Code regulates takeovers of, among others, public companies listed on the London Stock Exchange with a registered office in the United Kingdom, the Channel Islands and the Isle of Man. The Takeover Code is designed to ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover, and that shareholders in the offeree company of the same class are afforded equivalent treatment by an offeror. It also provides an orderly framework within which takeovers are conducted. As British Virgin Islands issuers are not subject to the Takeover Code, where a British Virgin Islands issuer is listing in London, it is common for the issuer's articles of association to include provisions that seek to provide shareholders with some or all of the protections that they would have under the Takeover Code. We work closely with the lead IPO counsel for the listing to ensure the appropriate protections required by investors are incorporated.

The British Virgin Islands is specifically approved by the Hong Kong Stock Exchange as a jurisdiction of incorporation for listed companies. A form of memorandum and articles of association for such listed companies and other relevant documentation has been agreed between the Hong Kong Stock Exchange and BVI legal practitioners, which facilitates the listing process. Many pre-IPO companies in mainland China are incorporated in the British Virgin Islands and there is no longer any requirement for such companies to restructure to other jurisdictions (with consequent cost and potential onshore tax exposure) in order to list on the Hong Kong Stock Exchange.

Under recently enacted legislation, certain British Virgin Islands companies are required to maintain a beneficial ownership register that records details of the individuals who ultimately own or control 25% or more of the shares or voting rights or who otherwise exercise control over the management of the company, together with details of certain intermediate holding companies through which such interests are held. However, companies listed on the main international stock exchanges (including the NYSE, NASDAQ, London Stock Exchange and Hong Kong Stock Exchange) are exempt from this regime.

Public company responsibilities

The listing of a British Virgin Islands company on an international stock exchange does not result in the imposition of any additional British Virgin Islands obligations for the company to satisfy.

Potential risks, liabilities and pitfalls

Under British Virgin Islands law, subscribers for shares in an IPO offering could potentially bring certain claims against the company and other parties, such as its directors, its auditors and its advisers. The following considers only the position which would apply in respect of proceedings before a British Virgin Islands court applying British Virgin Islands law. With respect to British Virgin Islands companies with equity listed on international exchanges, it is perhaps more likely that proceedings will be brought in another jurisdiction, such as the jurisdiction from which an applicant subscribed for shares and in which a copy of the listing document was made available to them.

Also, while proceedings might be brought before a British Virgin Islands court, the court may be asked to apply, in accordance with British Virgin Islands conflicts of law rules, the laws of some other jurisdiction as the appropriate system of law to the relevant action.

The types of claims that could potentially be brought include:

Negligent misstatement

There may be civil liability in tort (under what is usually termed the rule in *Hedley Byrne v Heller*) for misstatements in a listing document. The terms of the listing document place a duty of care on the company, and may be argued to place a duty of care on the directors, the promoters and even professional advisers named or referred to in the listing document (or otherwise responsible for its contents), in favour of persons who subscribe or apply for shares in the company on the faith of the contents of the listing document. Breach of this duty would give rise to a claim against such persons for any loss attributable to statements in those parts of the listing document for which responsibility was expressly or impliedly accepted by such person. Reliance on the listing document would have to be proved by the relevant subscriber.

Fraudulent misrepresentation

Civil liability in tort may also arise in respect of a fraudulent misstatement of fact (although not a promise, forecast or expression of opinion). "Fraudulent" in this context is widely interpreted to mean made either with knowledge that the statement was false, or not caring whether the statement is true or false.

Action for deceit

An aggrieved investor may, by bringing an action for deceit (a civil claim in tort rather than contract), obtain damages for deceit if it can be shown that:

(i) a material misstatement was made fraudulently; and
(ii) they were induced to subscribe for shares as a result of such a misstatement.

"Fraudulently" again means made either with knowledge that the statement was false, or not caring whether the statement was true or false. It is not necessary to show either an intent to defraud or that the fraudulent statement was the sole cause which induced the investor to take up the shares.

Contractual liability

The listing document will also form the basis of a contract between the company and the successful applicants for shares. If it is inaccurate or misleading, applicants may be able to rescind the contract and/or sue the company and/or the promoters and/or the directors for damages.

Again, as a general matter, since the relevant contract is with the company itself, the relevant person against whom the subscriber would claim would be the company, although the company might be able in turn to claim against its directors, promoters or advisers.

So far as British Virgin Islands conflicts of law aspects are concerned, these questions would be determined according to the governing law of the contract for subscription. Where there is an express choice of British Virgin Islands law as the governing law, this is likely to be conclusive to determine the governing law. Where the documentation makes no express choice of governing law at all, it is likely that a British Virgin Islands court would still consider British Virgin Islands law as the governing law, since the offeror is incorporated in the British Virgin Islands and the subject matter of the contract is shares or an interest in shares, if ADRs are issued, in a British Virgin Islands company.

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Matthew Gilbert is a Partner in the London office of Maples and Calder. He is the head of the firm's British Virgin Islands team in London and advises on corporate, finance and banking law matters involving British Virgin Islands companies and partnerships, including: public and private mergers and acquisitions; partnerships and joint ventures; debt and equity financings; and project, real estate and asset financing. Matthew specialises in the listing of British Virgin Islands companies on international Stock Exchanges, including the London Stock Exchange/AIM, Tel Aviv Stock Exchange, NASDAQ and Toronto Stock Exchange. Matthew also advises on British Virgin Islands insurance and regulatory law. Matthew is ranked as a leader in his field in *Chambers UK* and is recommended in *The Legal 500* and *Chambers Global*.

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Greg Knowles is the head of the Corporate team in Maples and Calder's Hong Kong office. Greg's expertise covers all types of corporate transactions, including IPOs, mergers and acquisitions, private equity investments, joint ventures and securities issues, as well as investment fund formation. He has spent the majority of his career in Asia and is a regular visitor to Beijing, Shanghai, Tokyo, Singapore and other major Asian business centres. Greg has been recommended in various directories including *The Legal 500* and *Chambers and Partners Asia Pacific*. Greg is also named as a leading practitioner by Legal Media Group's *Expert Guide to the World's Leading Investment Funds Lawyers* and ranked as a Market Leader in *IFLR1000*.

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Richard May is Managing Partner and head of the Corporate and Finance groups in Maples and Calder's British Virgin Islands office. He advises on a variety of corporate transactions, including mergers and acquisitions, joint ventures, Stock Exchange listings and corporate reorganisations. He also advises investment managers and private equity houses on the structuring, formation and financing of investment funds and private equity funds. Richard is a member of a focus group advising the Financial Services Commission on regulatory legislation in the British Virgin Islands.

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Cayman Islands

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Introduction

The Cayman Islands Stock Exchange ("CSX") was founded in 1996. The CSX has listed more than 4,000 securities and maintains a market capitalisation of more than US$190 billion. However, as the CSX generally specialises in the listing of corporate and specialist debt securities and investment funds, rather than traditional equity listings (equity listings account for only five of the listings on the CSX), in this chapter we primarily focus on the popularity of Cayman Islands companies as listing vehicles on international stock exchanges including the New York Stock Exchange, the London Stock Exchange and the Hong Kong Stock Exchange.

Since the 1990s, the Cayman Islands has been a popular jurisdiction for the incorporation of issuers to be listed on international stock exchanges. As the Cayman Islands continues to develop its legal and regulatory regime to be at the forefront of international standards, we anticipate that the use of Cayman Islands companies as internationally listed companies will continue to grow. Reasons for the use of Cayman Islands companies include:

- A stable political system, recognised as a world-class offshore financial centre.
- The laws of the Cayman Islands are substantially based upon English common law, and a number of "key" English statutes. This gives Cayman Islands law and its legal system a common origin with those of many of the jurisdictions of its users, including the United States. It also means that a company incorporated in the Cayman Islands and its shares are well recognised and accepted around the world, and particularly in New York, London and Hong Kong.
- The speed with which companies can be established, usually within one business day, and without the need for any prior governmental approvals.
- The Cayman Islands has a modern and flexible statutory regime for companies, providing a non-intrusive regime on dividends, redemptions/repurchases and financial assistance for the acquisition of shares, and few ongoing filing requirements.
- The Cayman Islands' status as a tax-neutral jurisdiction: the Cayman Islands has no direct taxes of any kind. There are no income, corporation, capital gains, withholding taxes or death duties.
- The Cayman Islands is recognised by the Organization for Economic Cooperation and Development (OECD), the International Monetary Fund (IMF) and other international bodies for its transparency and standards consistent with those of other major developed countries.
- There are no exchange control restrictions or regulations in the Cayman Islands (unlike many other jurisdictions). This means that funds can be freely transferred in and out of the Cayman Islands in unlimited amounts.

- There is no requirement that a company incorporated in the Cayman Islands should have any local directors or officers. Nor is there any requirement for local service providers (other than a Cayman Islands registered office). Except in the case of entities regulated by the Cayman Islands Monetary Authority, there is no requirement to appoint a local auditor.

The Cayman Islands exempted company is the Cayman Islands vehicle used for the purpose of acting as the listed vehicle in an international IPO. The key features of an exempted company include:

- Same-day incorporation.
- Low government fees on registration and annually.
- It may register with and apply to the government of the Cayman Islands for a written undertaking that, should any applicable taxation ever be introduced in the Cayman Islands, will not be subject to various descriptions of direct taxation, for a minimum period of 20 years (and such certificate can be renewed at the end of that period).
- It is not necessary that any of the shareholders, directors or officers be resident in the Cayman Islands.
- The board of directors can be comprised of such number of persons as may be desired. Typically the Board would consist of at least two persons. No officers are required by law, although it is sometimes convenient for a company secretary to be appointed.
- There is no requirement that any meetings of the board of directors be held in the Cayman Islands.

We regularly act for issuers completing initial public offerings on the large international stock exchanges including:

- New York Stock Exchange.
- NASDAQ Stock Market.
- London Stock Exchange – Main Market and Alternative Investment Market ("AIM").
- Hong Kong Stock Exchange – Main Board and Growth Enterprise Market.
- Toronto Stock Exchange.
- Taiwan Stock Exchange.

Our work has included acting on the New York Stock Exchange listing of Cayman Islands exempted company Alibaba Group Holding Limited, the largest initial public offering of all time as at the date of its listing.

To provide an indication of the popularity of the Cayman Islands exempted company as a listing vehicle of choice:

- during 2015, 151 Cayman Islands companies either completed their stock market listing or announced plans to go public;[1]
- during 2017, six of the top 20 special purpose acquisition vehicles listed in the US were Cayman Islands companies;
- at the beginning of 2018, there were 20 Cayman Islands companies listed on AIM and nine Cayman Islands companies listed on the Main Market of the London Stock Exchange;
- as of the end of 2017, 1,064 of the 2,015 companies listed on the Main Board of the Hong Kong Stock Exchange were Cayman Islands exempted companies: an increase of 336 since the end of 2015; and
- according to historical statistics published by the United States Securities Exchange Commissions, at the end of 2015 there were 700 "foreign companies" (i.e. non-United States issuers) listed on the New York Stock Exchange and NASDAQ, of which 103 were Cayman Islands issuers, far ahead of any other traditional "offshore" jurisdiction. Only Canada had more companies traded on the main US public markets than the

Cayman Islands. As at June 2017, there were 60 Cayman Islands companies listed on NASDAQ and 52 Cayman Islands companies listed on the NYSE.

The IPO process: steps, timing and parties and Market Practice

Listing on the CSX

Listing equity securities on the CSX first requires the approval of the CSX's Listing Committee, and the preparation and approval of a listing document compliant with the CSX's Listing Rules. The listing document must contain all information necessary for an investor to make an informed assessment of the issuer's activities, management, prospects and financial position, and the rights, powers, privileges and obligations attaching to the equity securities to be listed.

The information required to be included in the listing document includes: (i) a summary of the particulars of the issuer, its listing agent and underwriters, other advisers including legal counsel and auditors, and the securities to be issued; (ii) a summary of the provisions of the issuer's constitutional documents relating to, *inter alia*, voting rights of directors, director remuneration, changes in capital and arrangements for the transfer of securities; (iii) a summary of material risk relating to the investment in the applicable equity securities; (iv) a summary of the issuance and distribution of the offered securities, including the total number offered, the offer price of each security and its nominal value; (v) a summary of the issuer's capital structure and issuer group's activities; (vi) consolidated financial information regarding the issuer group (vii) a brief overview of the management of the issuer group; (viii) a list of the parties to and dates of any material contracts (being those entered into not in the ordinary course of business); and (ix) particulars of any litigation or material claims against the issuer group.

A draft of the listing document must be provided to the CSX in reasonable time for comment and amendment prior to the proposed publication date, and the final document is subject to approval by the Listing Committee.

Listing on an international exchange

The precise steps and timetable for an IPO on an international stock exchange are largely dictated by the requirements of the relevant exchange, and any related share offering timetable.

Cayman Islands counsel works closely with the lead counsel for the IPO in the relevant jurisdiction. The input typically required from a Cayman Islands perspective includes:

- advising in respect of the incorporation of the company;
- drafting the constitutional documents of the company, including any required provisions to comply with applicable listing rules or securities laws – Cayman Islands law is flexible in this regard and can generally accommodate the broader constitutional provisions and shareholder protections required by the listing rules of exchanges such as the Hong Kong Stock Exchange and the Toronto Stock Exchange;
- providing input on the Cayman Islands aspects of the listing document, including the descriptions of the listed securities and the applicable corporate laws, and Cayman Islands tax considerations;
- preparing any formal legal opinions required by regulators, stock exchanges, depositories, registrar and transfer agents and/or brokers/underwriters;
- preparing necessary corporate approvals for the IPO; and
- generally advising on Cayman Islands corporate law.

A Cayman Islands issuer can be incorporated on a same-day basis where necessary. There are no pre-incorporation publishing requirements and registration will be effective on the date of filing. Incorporation is effected by filing a signed memorandum and articles of association of the company, which set forth the objects and powers (which can be unlimited) and the internal governance requirements of the company, along with a statutory declaration that the company will not carry on local business in the Cayman Islands.

Regulatory architecture: overview of the regulators and key regulations

The key sources of regulation of Cayman Islands companies are the Companies Law (2016 Revision) and common law. There are no specific statutes or government regulations concerning the conduct of IPOs on non-Cayman exchanges, or M&A transactions in the Cayman Islands.

The Companies Law includes provisions permitting mergers and consolidations between one or more companies, provided that at least one constituent company is incorporated under the Companies Law. This provides a flexible regime for common public company transactions including take-privates.

Listing on the CSX

The CSX was established pursuant to the Cayman Islands Stock Exchange Law (1996) and has self-regulatory powers, although it is subject to the supervision and regulation of the Stock Exchange Authority. The CSX's council, comprising six senior professionals appointed by the Authority, and the CEO of the CSX, is responsible for the day-to-day operations of the CSX, a number of which have been delegated to the Listing Committee.

The CSX has developed (and continues to refine) rules, policies and procedures for listing (the "Listing Rules"), and such Listing Rules are subject to the written approval of the Authority.

Chapter 6 of the Listing Rules sets out the requirements for the listing of equity securities. To be eligible for admission to listing on the CSX, there must be a sufficiently liquid market for the equity securities to be listed, which the CSX considers requires:

- an expected initial market capitalisation for all the securities to be listed of at least US$5,000,000; and
- the minimum percentage of equity securities in public hands to at all times be at least 25% of the class of shares listed, with a minimum of 50 shareholders.

In addition, issuers must generally have: (i) an adequate trading record under substantially the same management (normally at least three financial years); (ii) a board of at least three directors, the majority of whom must be independent; (iii) published audited financial statements which cover the three financial years preceding the application for listing; and (iv) an independent auditor acceptable to the CSX. The equity securities to be listed must be freely transferrable (unless otherwise approved by the CSX), and the listing must apply to the entire class of the applicable securities. Convertible securities will be admitted to listing only if the CSX is satisfied that investors will be able to obtain the information necessary to form a reasonable opinion as to the value of the securities into which they are convertible. To be admitted to listing on the CSX, securities must have an ISIN and be eligible for deposit in an acceptable electronic clearing and settlement system including Clearstream, Euroclear or DTC. The issuer must maintain a share transfer agent or registrar and paying agent in a financial centre acceptable to the CSX. The issuer itself may perform these functions if it can demonstrate to the CSX that it is capable of doing so.

The issuer's constitutional documents must include the governance provisions prescribed by the Listing Rules in relation to capital structure, voting rights of the listed securities and appointment of and voting by the directors of the issuer.

Listing on an international exchange

The key legal documents applicable to an international IPO process from a Cayman Islands perspective are the listing document, the memorandum and articles of association of the company and requisite corporate approvals. Applicable underwriting agreements and depository or custody agreements should also be reviewed by Cayman Islands counsel, notwithstanding they are not likely to be Cayman Islands law-governed.

Typically, Cayman Islands counsel would assist with preparing the necessary disclosures for inclusion in the listing document to describe Cayman Islands companies and the corporate law framework of the Cayman Islands. Such disclosure often includes a comparison of Cayman Islands law with the equivalent law governing companies incorporated in the IPO jurisdiction – in order that potential investors are able to assess the impact of the use of a Cayman Islands company as the listing vehicle as compared to a vehicle formed in the IPO jurisdiction.

The memorandum and articles of association of the company will need to follow a form which meets the requirements of the applicable stock exchange upon which the company is to be listed, as well as the legal requirements of the Cayman Islands. Cayman Islands counsel work with the lead counsel on the IPO to determine the requirements of the relevant stock exchange, and then draft the constitutional documents accordingly to ensure they are in compliance with such rules.

Cayman Islands companies intending to list on the main US exchanges may be able to take advantage of "foreign private issuer" status, which provides certain advantages, including: (i) reduced reporting requirements; (ii) reduced disclosure requirements; (iii) certain exemptions from US proxy rules; (iv) the ability to apply accounting standards other than US GAAP; (v) flexibility in choice of reporting currency; and (vi) the ability to apply certain "home country" standards in respect of corporate governance practices, publication of interim and annual reports, and the composition, election and classification of directors.

Many Cayman Islands companies listing on NYSE or NASDAQ choose to list American Depositary Receipts ("ADRs") rather than making a direct equity listing, which allows the company's equity to continue to be denominated in a currency other than US dollars, whilst permitting the listed security to be US dollar-denominated and to clear through US settlement systems. Each ADR is a negotiable certificate that evidences an ownership interest in American Depositary Shares ("ADSs") which, in turn, represent an interest in the shares of the issuer, which are held by the applicable depository.

Cayman Islands issuers listed on the London Stock Exchange (whether on the Main Market or the London Stock Exchange's junior market AIM) are not automatically subject to the United Kingdom Takeover Code and the jurisdiction of the Panel on Takeovers and Mergers of the United Kingdom. The Takeover Code regulates takeovers of, among others, public companies listed on the London Stock Exchange with a registered office in the United Kingdom, the Channel Islands and the Isle of Man. The Takeover Code is designed to ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders in the offeree company of the same class are afforded equivalent treatment by an offeror. It also provides an orderly framework within which takeovers are conducted. As Cayman Islands issuers are not subject to the Takeover Code, where a Cayman Islands issuer is listing in London, it is common for the issuer's articles of association to include provisions that seek to provide shareholders with some or all of the protections that they would have under the Takeover Code. We work closely with the lead IPO counsel for the listing to ensure the appropriate protections required by investors are incorporated.

Under legislation enacted in July 2017, certain Cayman Islands companies (and Cayman Islands limited liability companies) are required to maintain a beneficial ownership register that records details of the individuals who ultimately own or control more than 25% of the equity interests, voting rights or have rights to appoint or remove a majority of the company directors, or LLC managers, together with details of certain intermediate holding companies through which such interests are held. However, companies listed on the Cayman Islands Stock Exchange or the main international stock exchanges (including the New York Stock Exchange, NASDAQ, London Stock Exchange and Hong Kong Stock Exchange) are exempt from this regime.

Public company responsibilities

The listing of a Cayman Islands company on an international stock exchange does not result in the imposition of any additional Cayman Islands obligations for the company to satisfy.

Companies with equity securities listed on the CSX are subject to the usual ongoing disclosure and compliance obligations, key aspects of which are summarised below.

Listing of equity securities on the CSX requires that the issuer prepare and make available to every member annual financial statements in accordance with International Accounting Standards or such other standards as may be acceptable to the CSX. The issuer must include with its annual financial statements a report by the directors on the operations of the issuer and such directors' report must include, *inter alia*: (i) a description of the principal activities of the group; (ii) a geographical analysis of consolidated turnover; (iii) the name of every subsidiary, its principal country of operation, its country of incorporation and its main business, and (subject to certain exceptions) particulars of the issued share capital and debt securities of every subsidiary; (iv) a statement as at the end of the relevant financial year showing the interests of each director of the issuer in the equity or debt securities of the group and details of any right to subscribe for equity or debt securities of the group granted to any director of the issuer, and of the exercise of any such right; (v) statement as at the end of the financial year showing a summary of bank loans, overdrafts and other borrowings of the group; (vi) particulars of material contracts between the issuer and any interested party (including directors or associates of directors and controlling shareholders of subsidiaries); and (vii) a summary, in the form of a comparative table, of the results and of the assets and liabilities of the group, for the last five financial years or since establishment, if later.

The issuer must also prepare and issue to members (and to the CSX) an interim financial report with respect to the first six months of its financial year, and in addition, as soon as practicable after its approval by or on behalf of the directors, and in any event within two months of the end of the period to which it relates, the issuer must deliver a preliminary announcement of the six-month interim results to the CSX, for dissemination by the CSX. The issuer must also notify the CSX, for release, of any new developments or changes which are not public knowledge, which may reasonably be expected to materially affect the market activity in, or the price of, the listed securities. In addition, an issuer must notify the CSX of certain other matters, including transactions constituting a fundamental change in the issuer's business, certain transactions with related parties, any changes in the composition of the board of directors or significant changes to the senior management personnel of the issuer, changes in the issuer's constitutional documents, its capital structure, auditor, and changes in the rights of any class of listed securities.

The issuer must also notify the CSX of any significant changes in the holdings or identity of those holders of equity securities holding in aggregate more than 5% of the issuer's shares, so far as the directors are aware, and of any decision to call, repurchase, draw, redeem or offer to buy any of the issuer's securities.

Potential risks, liabilities and pitfalls

Under Cayman Islands law, subscribers for shares in an IPO offering could potentially bring certain claims against the company and other parties, such as its directors, its auditors and its advisers. The following considers only the position which would apply in respect of proceedings before a Cayman Islands court applying Cayman Islands law. With respect to Cayman Islands companies with equity listed on international exchanges, it is perhaps more likely that proceedings will be brought in another jurisdiction, such as the jurisdiction from which an applicant subscribed for shares and in which a copy of the listing document was made available to them.

Also, while proceedings might be brought before a Cayman Islands court, the court may be asked to apply, in accordance with Cayman Islands conflicts of laws rules, the laws of some other jurisdiction as the appropriate system of law to the relevant action. These conflicts of laws aspects are particularly important in the case of exempted companies, because they are prohibited from offering their shares to the public in the Cayman Islands, unless such company is listed on the CSX.

The types of claims that could potentially be brought include:

- *Negligent misstatement*
  There may be civil liability in tort (under what is usually termed the rule in *Hedley Byrne v Heller*) for misstatements in a listing document. The terms of the listing document place a duty of care on the company, and may be argued to place a duty of care on the directors, the promoters and even professional advisers named or referred to in the listing document (or otherwise responsible for its contents), in favour of persons who subscribe or apply for shares in the company on the faith of the contents of the listing document. Breach of this duty would give rise to a claim against such persons for any loss attributable to statements in those parts of the listing document for which responsibility was expressly or impliedly accepted by such person. Reliance on the listing document would have to be proved by the relevant subscriber.
- *Fraudulent misrepresentation*
  Civil liability in tort may also arise in respect of a fraudulent misstatement of fact (although not a promise, forecast or expression of opinion). "Fraudulent" in this context is widely interpreted to mean made either with knowledge that the statement was false or not caring whether the statement is true or false.
- *Contracts Law (1996 Revision)*
  Damages may be recovered for any pre-contractual misrepresentation if liability would have arisen had the representation been fraudulently made, unless the person making the representation proved that they had reasonable grounds to believe, and did believe up to the time the contract itself was made, that the facts represented were true. In general terms this section gives a statutory right to damages in respect of negligent misstatements. The court is permitted to award damages in *lieu* of rescission where a misrepresentation has been made.
  As a general matter, since the relevant contract is with the company itself, the relevant person against whom the subscriber would claim would be the company, although the company might be able in turn to claim against its directors, promoters or advisers.

- *Action for deceit*
  An aggrieved investor may, by bringing an action for deceit (a civil claim in tort rather than contract), obtain damages for deceit if it can be shown that:
  (i) a material misstatement was made fraudulently; and
  (ii) they were induced to subscribe for shares as a result of such a misstatement.
  "Fraudulently" again means made either with knowledge that the statement was false or not caring whether the statement was true or false. It is not necessary to show either an intent to defraud or that the fraudulent statement was the sole cause which induced the investor to take up the shares.
- *Contractual liability*
  The listing document will also form the basis of a contract between the company and the successful applicants for shares. If it is inaccurate or misleading, applicants may be able to rescind the contract and/or sue the company and/or the promoters and/or the directors for damages.
  Again, as a general matter, since the relevant contract is with the company itself, the relevant person against whom the subscriber would claim would be the company, although the company might be able in turn to claim against its directors, promoters or advisers.
  So far as Cayman Islands conflicts of laws aspects are concerned, these questions would be determined according to the governing law of the contract for subscription. Where there is an express choice of Cayman Islands law as the governing law this is likely to be conclusive to determine the governing law. Where the documentation makes no express choice of governing law at all, it is likely that a Cayman Islands court would still consider Cayman Islands law as the governing law, since the offeror is incorporated in the Cayman Islands and the subject matter of the contract is shares in a Cayman Islands company.

There may also be a risk of criminal liability:

7.1 Section 257 of the Penal Code (2013 Revision)

An officer of a company (or person purporting to act as such) with intent to deceive members or creditors (which may include subscribers) of the company about its affairs, who publishes or concurs in publishing a written statement or account which to their knowledge is or may be misleading, false or deceptive in a material particular, is guilty of an offence and is liable to, on conviction, imprisonment for seven years.

Any person who by any deception dishonestly obtains for themselves or another any pecuniary advantage is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

Any person who dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an offence and is liable on conviction to imprisonment for 10 years. For these purposes a person is treated as obtaining property if they obtain ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or retain.

For the purposes of Section 257, "deception" means any deception (whether reckless or deliberate) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.

* * *

Endnote

1. *Cayman Compass*, 19 January 2016.

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China

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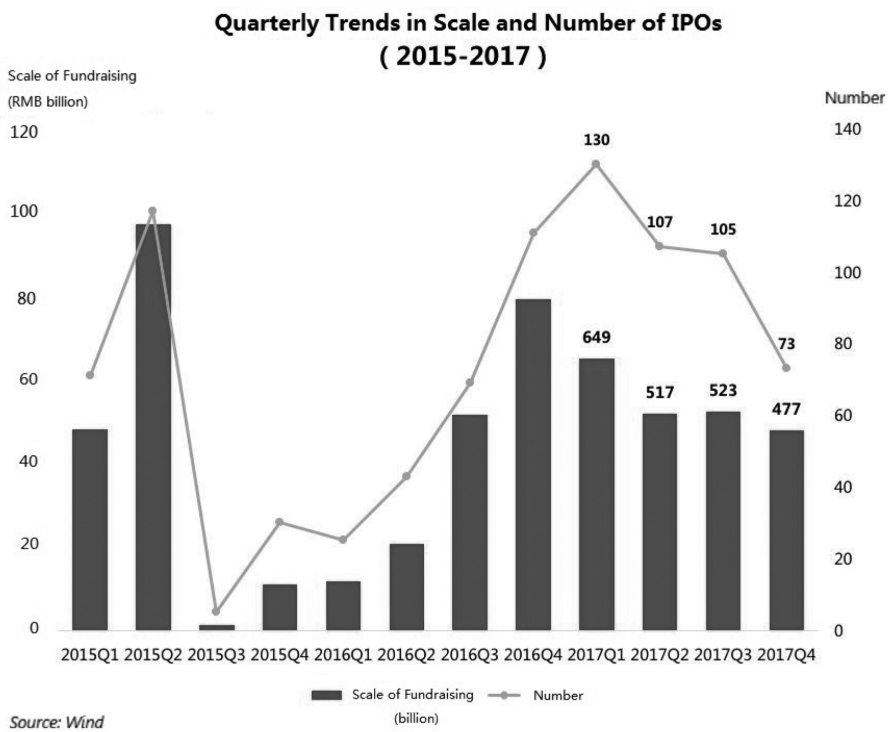
Introduction

Since the Shanghai Stock Exchange was inaugurated on December 19, 1990, the securities market in mainland China has been up and running for 27 years. In 2017, for the first time ever, the number of IPOs in mainland China (hereinafter also referred to as "A-share IPO(s)") broke through 400 and stood at a record high of 415, marking a 67% surge since 2016; the funds raised added up to RMB 216.7 billion, representing a 33% increase compared to 2016. So far, there are as many as 3,485 listed companies in mainland China.



Mainland China has two stock exchanges – the Shanghai Stock Exchange (Main Board) and the Shenzhen Stock Exchange (Main Board, SME Board, and ChiNext). The Main Boards serve blue-chip companies, the SME Board is for heavyweights in industry segments, and the ChiNext aims at innovative and fast-growing companies.[1] The requirements for listing on a Main Board and on the SME Board are basically the same. The choice of which exchange to go public on largely depends on the scale of its issued capital. The Main Boards and SME Board are suitable for established companies with solid performance, while the ChiNext is more for high-growth small and medium-sized high-tech companies. The requirements for listing on the ChiNext are less stringent than those on the Main Board or SME Board.

It is generally believed that listing on the Shanghai Stock Exchange (the "**SSE**") or the Shenzhen Stock Exchange (the "**SZSE**") has the following superiorities over an IPO in an overseas market such as Hong Kong or the U.S.:

1. less pressure on issuance of stocks and a better chance of success in listing;
2. much higher valuation and IPO and post-IPO P/E ratios;
3. lower initial cost and subsequent maintenance expenses;
4. more options offered by the Main Boards, SME Board and ChiNext to meet fundraising demands of companies of different sizes; and
5. continuous efforts of the regulator to optimise corporate governance of listed companies.

In addition, Article 51 of China's *Securities Law* provides that "China encourages companies that conform to the industrial policy and meet listing requirements to have their shares listed and publicly traded". The regulator encourages and supports eligible tech companies or companies based in impoverished regions to go public. In practice, the China Securities Regulatory Commission (the "**CSRC**"), the main regulator of the securities industry in mainland China, tends to greenlight IPO applications of companies doing business in the high-tech sector, and offers favourable policy of "immediate review upon application and prompt issuance upon approval" to companies located in underdeveloped regions in mainland China.

China has witnessed the normalisation of IPOs in recent years, evidenced by an increasing number of IPOs and a sped-up review of piled-up applications. This is especially true for the short period after the formation on 30 September 2017 of the 17th IPO Review Committee under the CSRC (the "**17th Committee**"), which streamlined the review process and slashed the average time for an applicant to get its IPO reviewed, a remarkable step-up from a couple of years ago. In 2017, there were a total of 488 IPO applications submitted and 380 of them were given the go-ahead, representing an approval rate of 77.87%. However, the approval rate after the 17th Committee took office on 17 October 2017 until the end of 2017 was 56%, a three-year low and a sharp drop from 81% before the 17th Committee assumed office and an even further decline from 90.6% for the whole of 2016. The main reason behind the steep fall is that, with the regular launch of IPOs, the securities regulator has raised its vetting threshold for IPO applications by giving more weight to compliant operations of applicants and authenticity of their financial data. Although this rigorous scrutiny may somewhat impair the approval rate of IPO applications, it is conducive to a high quality of listed companies and a more stable and sustainable capital market.

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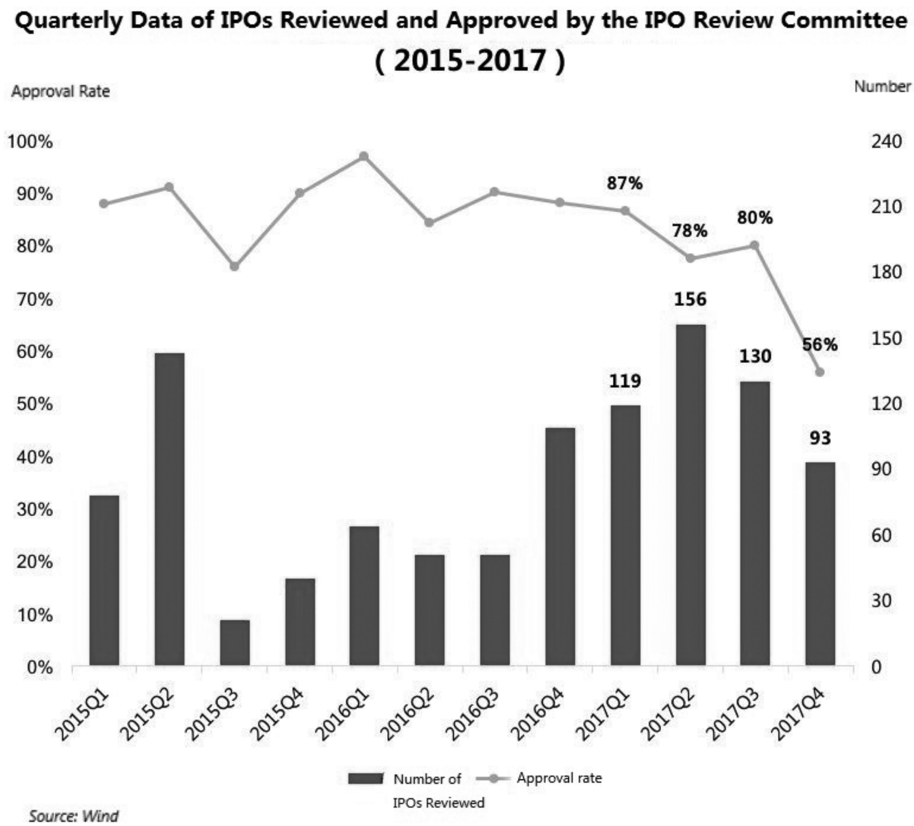

Meanwhile, with the lowering of A-share IPO approval rate as a result of stricter regulatory scrutiny, pre-IPO private equity investment, earlier rounds of venture capital investment and even angel investment may face added pressure of exiting through A-share IPOs, compelling investors to have second thought when they plan to invest in A-share IPO aspirants. This makes investment via M&A or (red-chip) offshore IPO regain the spotlight as favourable options.

The IPO process: steps, timing and parties and market practice

Under the current review and approval framework, a company seeking to go public must go through restructuring, training, application and review, issuance and listing of shares, and continued monitoring in order to achieve its IPO and listing. The details are as follows:

1. Restructuring: The sponsor, accounting firm, law firm, asset appraiser and other advisors/ service providers working on the IPO project conduct due diligence investigations to gain a comprehensive insight into the operations of and risks facing the company, prepare a scheme for restructuring the company into a joint stock limited liability company, and audit and appraise it for restructuring purposes; and the company holds a founding meeting to elect its directors and supervisors and appoint its management, signs its internal rules, sets up an internal organisational structure, and registers the change of it into a joint-stock limited liability company with the relevant authority in charge of industry and commerce (the "**AIC**").

2. Training: The sponsor gives systematic training to the directors, supervisors, senior officers, major shareholders and actual controllers of the company with a view to equip them with a comprehensive understanding of the laws, rules and regulations concerning IPOs, listing and compliant operations; the advisors/service providers carry out further due diligence investigations into the business and financial status of the company and assist it in rectifying problems identified; the advisors/service providers help the company plan and decide on projects to be invested in with funds to be raised through IPO, further clarify its business goals, and prepare IPO application documents; and the local CSRC branch carries out an assessment on the training results.
3. Application and review: After the advisors/service providers complete their preparation of the application documents, the sponsor conducts an internal review of the company's IPO application as required by the CSRC and gives its professional opinion before the application is submitted to the regulator; after accepting the application, the CSRC pre-discloses the company's information on the CSRC's official website,[2] preliminarily reviews the application documents and gives feedback based on the review; the company and the advisors/service providers reply to the feedback and issue a verification opinion; and the preliminary review division of the CSRC comes up with a preliminary report and submits it to the IPO Review Committee for vetting.[3]
4. Issuance and listing of shares and continued monitoring: After passing the vetting of the IPO Review Committee, the IPO application is tabled before the CSRC for approval; the company discloses information as required before the IPO; the lead underwriter and the company conduct a roadshow to promote the IPO and inquire issue price from prospective investors, and determine an issue price based on the inquiry or at their own discretion; the company issues shares to the public at the determined price and in a manner specified in the offering announcement; when the funds raised through the IPO are in place, the company has its capital verified and its changes registered with the AIC; the company applies to the stock exchange for listing, and put its shares under custody and has the shares registered; after the stock exchange approves the application for listing, the shares in the company are listed for trading; and the sponsor continues monitoring the company in accordance with applicable laws and regulations after the listing.

It usually takes about one year for a company to go from restructuring to listing, including six months or so from restructuring planning to the formation of a joint stock limited liability company, or shorter in case of a restructuring from a typical limited liability company; approximately three to four months for sponsor and other advisors/service providers to conduct due diligence investigations and prepare application documents; and around three to four months between the CSRC's acceptance of application for listing and the company's completion of the listing.

Consistent with the capital markets practice of many developed countries, there are three advisors/service providers that play a crucial part in an IPO process in mainland China. They are a securities company acting as sponsor and underwriter, an accounting firm and a law firm.

Regulatory architecture: overview of the regulators and key regulations

Founded in 1992, the CSRC is tasked with regulating IPOs in mainland China. The CSRC is a ministerial-level institution directly under the State Council and performs a unified regulatory function of supervising and regulating China's securities market. As to capital markets, the CSRC has released a series of rules regarding IPOs, M&A restructuring, corporate governance of listed companies, information disclosure, supervision of securities companies and securities service providers, funds and futures, among other things.[4]

The SSE and SZSE are two major securities exchanges in mainland China. Their main functions include providing premises and facilities for trading securities, formulating exchange rules, reviewing applications and arranging schedules for listing of securities, coordinating and monitoring securities trades, supervising their members and listed companies, and managing and releasing market information.[5] According to Article 48 of the *Securities Law*, a company that intends to have its securities listed and publicly traded shall apply to a stock exchange and obtain approval pursuant to law, and enter into a listing agreement with the stock exchange.

The Company Law and the *Securities Law* are the fundamental laws that companies must abide by to go public. In addition, the *Measures for the Administration of Initial Public Offerings and Listings* is another key regulation that IPOs in mainland China should comply with, and it applies to listings on a Main Board or the SME Board. In case of ChiNext hopefuls, the go-to regulatory guidance is the *Measures for the Administration of Initial Public Offerings and Listings on the ChiNext*. More detailed rules and procedures have been formulated by the SSE and SZSE regarding issuance, information disclosure, review and other matters with respect to IPOs.

In mainland China, the key instruments involved in an IPO are a prospectus and a legal opinion. A prospectus provides the basis on which potential investors make their decisions about investment. The CSRC has set up strict rules regarding the form and contents of prospectus and made it the minimum requirement as regards information disclosure by each issuer.[6] A prospectus is prepared by an issuer with the help of its sponsor and other advisors/service providers, and is signed by the issuer and all of its directors, supervisors and senior officers to testify to the truthfulness, accuracy and completeness of its contents. The sponsor and its representative in charge of sponsor matters are required to review the prospectus and give comments on it. The lawyer of the issuer is responsible to give comments and issue a legal opinion on all legal matters relating to the issuer's intended IPO. Aside from the prospectus and legal opinion, the sponsor also needs to give its recommendation opinion and issue a sponsor's letter regarding the IPO. Moreover, the sponsor and the lawyer should prepare a sponsor's work report and a lawyer's work report, respectively, for the offering.

Guidelines released by the CSRC on contents and forms of prospectuses set out the minimum requirements for information disclosure regarding IPOs. All information that would have a material impact on investors' investment decisions should be disclosed, no matter whether it is explicitly provided in the guidelines or not. Each issuer is required to pre-disclose its preliminary prospectus on the website of the CSRC after the CSRC accepts its application documents and before the IPO Review Committee reviews the same. Once the CSRC approves the application, the issuer may proceed to publish its preliminary prospectus and conduct IPO promotion and price inquiry together with the lead underwriter. Before shares are subscribed to, the issuer should post its complete prospectus that contains an issue price and an IPO and listing announcement on the websites designated by the CSRC and the stock exchange where it is to be listed. In addition, the *Securities Law* makes it clear that an issuer must make public its financial and accounting reports if it intends to offer new shares to the public pursuant to law.

As provided for in the *Securities Law*, no one who possesses information concerning issuance of securities may leak the information before the same is known to the public.[7] An insider who knows or a person who unlawfully accesses any insider information of a company

company (that is, undisclosed information involved in securities trading and concerning the business operations or financial affairs of a company or having a material impact on the market price of its securities) will be held liable under the law if he/she purchases or sells the securities of the company, divulges such information, or advises any other persons to purchase or sell such securities before the publication of any important information.[8] Moreover, in order to prevent insiders from disclosing unpublicised information, which, if so disclosed, would adversely affect the normal issuance and listing of shares, the *Securities Law* and other laws and regulations set restrictions on purchase and sale of shares by issuers, securities service providers, securities regulator and relevant personnel of any of the foregoing (see "*Potential risks, liabilities and pitfalls*" below for details).

Public company responsibilities

According to the *Securities Law*, the *Measures for the Administration of Information Disclosure by Listed Companies* and other relevant regulations, documents that a listed company is obliged to disclose include regular reports and *ad hoc* reports. Regular reports include annual reports, interim reports and quarterly reports.

A listed company shall, within four months following the end of each fiscal year, submit to the CSRC and the stock exchange where it is listed and make public its annual report containing the following information: an overview of the company; its financial and accounting reports and business situation; a brief introduction of its directors, supervisors and senior officers and their respective shareholdings; shares and corporate bonds issued, including a list of its top 10 shareholders; its *de facto* controller; and such other information as prescribed by the CSRC.[9]

A listed company shall, within two months following the end of the first half of each fiscal year, submit to the CSRC and the stock exchange where it is listed and make public its interim report containing the following information: its financial and accounting reports and business situation; any material litigation in which it is involved; any changes in shares or corporate bonds issued; important matters brought before the general meeting of its shareholders; and such other information as prescribed by the CSRC.[10]

Quarterly reports need to be prepared and disclosed within one month following the end of the third month and the ninth month, respectively, of each fiscal year, provided that the quarterly report for the first quarter may not be disclosed earlier than the disclosure of the annual report for the preceding year. A quarterly report is required to specify the following information: general information of the company; its main accounting data and financial indices; and other information prescribed by the CSRC. In case of a major event which is likely to cause a material impact on the trading price of the securities issued by a listed company but is not yet known to its investors, the listed company is obligated to promptly report to the CSRC and the stock exchange concerned, and disclose to the public.[11]

Potential risks, liabilities and pitfalls

In mainland China, both waiting time and odds of success of an intended IPO are largely affected by regulatory policies and the regulator's decisions. In the history of A-share IPO, the CSRC has on several occasions suspended IPO review for various reasons, such as impact on the secondary market and reform of an IPO mechanism. The most recent IPO suspension lasted from July to November 2015. Although issuance of new shares in China's capital market is becoming regular, and there is a slim chance that an IPO suspension will take place again as far as can be foreseen, pending problems arising from the piling up of IPO applications will still cause long waits for IPO applicants. An IPO applicant with no preferential policy support will probably have to wait for more than 300 days from the date when the CSRC accepts its IPO application to the time when the CSRC starts its final examination of the application. During the long waiting period, the applicant has to maintain a strong and sustained profitability[12] and a stable and clear ownership structure and ensure that its information disclosure is at all times in compliance with relevant laws, rules and regulations; otherwise, it is very likely that the applicant will fail the CSRC's examination. Also, in due diligence investigations, special attention needs to be given to whether there is any financial fraud, unreasonable or unfair related party transactions, and shareholders that may affect a stable ownership structure of the applicant, to name just a few.

In relation to a company's IPO, if there are any false records, misleading statements or major omissions in its prospectus, documents prepared by advisors/service providers or other documents for information disclosure, the company and its directors, supervisors, senior officers and other persons directly responsible for the above misconduct, as well as the sponsor, underwriter, law firm, accounting firm and other related advisors/service providers working for the company and their respective personnel responsible for the above misconduct will be held civilly, administratively or even criminally liable according to the *Securities Law*, the *Criminal Law* and other applicable laws and regulations.[13]

After its successful IPO, a company needs to take note of laws and regulations regarding restrictions on shareholders in terms of a lock-up period, reduction of number of shares held and short-swing trading, prohibition of insider trading, sensitive period, etc.

For instance, the *Company Law*, the *Securities Law*, the regulations of the CSRC and the business rules of stock exchanges all put restrictions on share transfer by shareholders of companies prior to an IPO.[14] Take the SSE as an example: its *Listing Rules* provide that shares issued by an issuer before its IPO may not be transferred within one year after its shares are listed; when an issuer applies to go public, its controlling shareholder and *de facto* controller should undertake that they will not, within 36 months upon listing of the issuer's shares, transfer or appoint others to trade the issuer's shares held by them and issued before the issuer's IPO; a director, supervisor or senior officer of an issuer may not, in each year during his term of office, transfer more than 25% of his total shares in the company, nor may he, within six months after leaving office, transfer any shares held by it in the company.

According to Article 47 of the *Securities Law*, if a director, supervisor or senior officer of a listed company, or a shareholder who holds 5% or more of the shares in the listed company sells any of his/its shares within six months after purchasing the same, or repurchases any shares within six months after selling them, the proceeds obtained therefrom belong to the company and should be taken back by the board of directors of the company.

If anyone buys or sells any shares in a listed company before or after any sensitive information that could have a material impact on the stock price of the company is released, he could be suspected of having conducted insider trading. Given that it is often difficult to find sufficient evidence to prove and punish such suspected act, the rules of stock exchanges prohibit buying and selling shares by certain persons who have access to sensitive information. For example, the *Guide to Standardised Operation of Companies Listed on the Small and Middle-sized Enterprises Board* bans directors, supervisors, senior officers, representatives in charge of securities affairs and spouses of any of the foregoing, as well as the controlling shareholder and *de facto* controller or deemed controlling shareholder and deemed *de facto* controller, of a company from buying or selling any shares or derivatives thereof in the company before or after the company issues an annual report or performance announcement or discloses a major event.[15]

* * *

Endnotes

1. See the "About Us" page on the official website of the Shenzhen Stock Exchange at http://www.szse.cn/main/aboutus/bsjs/bsjj/index.shtml, last visited on January 8, 2018.
2. See Article 21 of the *Securities Law* and Article 46 of the *Measures for the Administration of Initial Public Offerings and Listings*.
3. See Article 22 of the *Securities Law*.
4. See the "Introduction of the CSRC" page (http://www.csrc.gov.cn/pub/newsite/zjhjs/zjhjj/) on its official website for more information about its nature, organisational structure and functions. The website was last visited on January 11, 2018.
5. See the "Brief Intro" page on the official website of the SSE at http://www.sse.com.cn/aboutus/sseintroduction/introduction/, last visited on January 11, 2018; and see the "SZSE Overview" page on the official website of the SZSE at http://www.szse.cn/main/aboutus/bsjs/bsjj/index.shtml, last visited on January 11, 2018.
6. See Article 41 of the *Measures for the Administration of Initial Public Offerings and Listings*.
7. See paragraph 2 of Article 41 of the *Securities Law*.
8. See Article 202 of the *Securities Law*.
9. See Article 66 of the *Securities Law*, Article 21 of the *Measures for the Administration of Information Disclosure by Listed Companies*.
10. See Article 65 of the *Securities Law*, and Article 22 of the *Measures for the Administration of Information Disclosure by Listed Companies*.
11. See Article 73 through 76 of the *Securities Law*, and Article 4 of the *Measures for the Administration of Information Disclosure by Listed Companies*.
12. See Article 13 of the *Securities Law*, Articles 26 and 30 of the *Measures for the Administration of Initial Public Offerings and Listings*, and Article 11 of the *Measures for the Administration of Initial Public Offerings and Listings on the ChiNext*.
13. See Articles 69, 173, 192 and 193 of the *Securities Law*, and Article 160 of the *Criminal Law* and other relevant laws and regulations.
14. See Article 141 of the *Company Law*, Articles 5.1.4 and 5.1.5 of the *Stock Listing Rules* of the Shanghai Stock Exchange, Articles 5.1.5 and 5.1.6 of the *Stock Listing Rules* of the Shenzhen Stock Exchange, Article 2(1)(i) of the *Opinions of the China Securities Regulatory Commission on Further Advancing Initial Public Offering Reform*, Article 4 and Article 5 of the *Rules for the Administration of Shares Held by Directors, Supervisors and Senior Officers of Listed Companies and Changes in Their Share Holdings*, Article 3.8.3 of the *Guide of the Shenzhen Stock Exchange to Standardized Operation of Companies Listed on the Small and Middle Sized Enterprises Board*, Article 3 of the *Circular on Further Regulating Trading by Directors, Supervisors and Senior Officers of Companies Listed on the ChiNext of Shares in Their Respective Companies*, and the *Several Provisions on Reduction of Shareholdings by Shareholders and Director of Listed Companies*.
15. See Article 3.8.17, Article 4.2.21, and Article 4.2.32 of the *Guide to Standardized Operation of Companies Listed on the Small and Middle Sized Enterprises Board (Revised in 2015)*.

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Mr. Zhang's principal area of focus is capital markets. Since he began his legal career in private practice in 1999, he has advised the primary international investment banks/funds and quite a number of PRC-related private and State-owned enterprises in hundreds of deals related to capital markets, in the full spectrum of emerging and traditional sectors, from internet, telecom, media and technology ("TMT") to real estate, infrastructure, medicine, energy, natural resources, banking, finance, manufacture, commerce and consumption, etc. In these deals, his responsibilities have covered structuring, opining, due diligence, negotiation, documentation, compliance and approval application. Such abundant experiences, combined with reliable professional skills, allow Mr. Zhang to successfully accommodate clients' commercial needs with Chinese laws and the regulatory framework.

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Denmark

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Introduction

An IPO is an attractive way for companies to raise capital. Further, it provides for a great branding opportunity for private companies and, thus, an opportunity to be more publicly known which can perhaps help the company to further expand and grow. For the existing shareholders, an IPO can constitute an exit.

IPOs in Denmark are not limited to one or a few industries but cover a broad range of sectors and industries. A significant part of the IPOs have involved private equity exits but the Danish IPO market has also offered growth companies to seek capital investments and allowed for spin-offs of well-established Danish companies or privatisation processes.

Following the financial crisis in 2008, very few companies initiated IPOs in Denmark. However, from 2010 and onwards, the IPO window reopened and very significant amounts of capital have been raised in connection with Danish IPOs. The vast majority of capital raised in Danish IPOs in the last decade has been IPOs of larger companies on Nasdaq Copenhagen A/S's ("Nasdaq Copenhagen") regulated main market. Examples hereof include the IPO of the state-controlled company DONG Energy A/S (now Ørsted A/S) (energy company) in 2016 with an offering size of approx. EUR 2.6 billion and the IPO of Nets A/S (payment services) in 2016 with an offering size of approx. EUR 2.1 billion. As such, two of the largest IPOs worldwide in 2016 were on Nasdaq Copenhagen. Further, IPOs in the past decade with an offering size between approx. EUR 400 million and approx. EUR 1.6 billion include, *inter alia*, Scandinavian Tobacco Group A/S (tobacco company), NNIT A/S (IT), ISS A/S (facility services), Matas A/S (beauty, health and personal care), Pandora A/S (jewellery) and Chr. Hansen Holding A/S (food ingredients).

Generally, only a few Danish IPOs have been in the small and mid-cap segments in the past decade. However, it is the expectation that the pipeline for more small and medium-size companies is looking better with Orphazymes A/S (biotech) and TCM Group A/S (kitchen supplier) being successfully admitted on Nasdaq Copenhagen in the second half of 2017.

Nasdaq Copenhagen also offers an option for companies to have its shares admitted for trading on First North Denmark, a multilateral trading facility which is aimed at smaller and newer companies to consider because of the less restrictive requirements. In 2017, the Danish IPO market saw a new attempt at making First North more popular for smaller companies with market caps below EUR 50 million, in particular following the IPOs of a handful of smaller companies including GreenMobility A/S (electric shared city cars). It is expected that the focus on Firth North listing in Copenhagen will continue in 2018.

Companies initiating a public offering in Denmark get a lot of media attention. In recent years, there has been an increased public focus on small and medium-sized companies' possibilities to initiate an IPO in Denmark, which has further strengthened after a number of Danish companies elected for listings in Sweden, Norway or USA.

The legal framework of a Danish IPO process is primarily based on EU regulation as well as the Nasdaq Copenhagen issuers' rules. To ease the process for smaller companies to raise capital through a capital markets transaction, the national prospectus requirement in connection with offerings between EUR 1 to 5 million was abolished as of January 2018 if there is no listing on a regulated market, i.e. Nasdaq Copenhagen. The Danish Financial Supervisory Authority has indicated that this threshold is expected to increase to EUR 8 million from July 2018.

Another aspect is the tax burden on returns on shares which does not favour private individuals. Returns above approx. EUR 7,000 on shares are imposed with a tax of 42% excluding tax on dividends, and with 27% below that threshold. To incentivise retail investors, the Danish government has recently introduced a share savings account inspired by the Swedish model, which will be introduced as of 1 January 2019. It will allow persons to place listed shares in the share savings account, which will be taxed lower than the ordinary taxation on returns on shares. However, there will be a limit on how much a person may place in the account. Initially, the limit will be approx. EUR 6,700 and when the scheme is fully implemented in 2022, the limit will be approx. EUR 26,850.

Another important factor for a successful IPO is to attract institutional investors in smaller offerings as well. Again, the Danish IPO market has found inspiration in Sweden and a number of the most recent IPOs applied the so-called cornerstone investor process, whereby selected institutional investors commit to subscribe for shares at the full price range prior to the publication of the prospectus.

It will be interesting to see in the coming years if a number of initiatives from various stakeholders will further fuel the Danish IPO market.

The IPO process: steps, timing and parties and market practice

An IPO process in Denmark will usually last six to nine months, but can both be done quicker or take longer depending very much on the specific circumstances of the issuer in question. The IPO process can be divided into the following overall steps which will often run in parallel to some extent:

Internal organisation

The issuer's management will be involved in an IPO process along with key employees of the issuer's departments with responsibility for strategy, business, accounting, finance, legal, communication and HR. It will also be relevant to establish an investor relations function.

Setting the advisor team

When an issuer decides to initiate a public offering, it needs to appoint the external parties to assist in the IPO process. The parties to a Danish IPO process are typically a bank or a consortium of banks (often referred to as the underwriters or the managers), potentially an independent IPO advisor, legal advisor(s) to the company, legal advisor(s) to the bank(s), an auditor and a communication advisor.

The banks assist with the issuer's equity story and lead the dialogue with or communication to institutional and retail investors. Often the banks will lead the IPO process. Further, the banks assist the company in several areas such as choosing a suitable offering structure, providing recommendations for an appropriate market cap and offer price level and volume, and advising the company on allocation and pricing of the shares.

The company's legal advisors have several roles in connection with the IPO readiness phase, the preparations and execution phase as well as in matters related to the period after being listed. In addition to the IPO-specific work such as prospectus drafting and due diligence, the company's lawyers will often assist with changes to the corporate structure and establishment of the new governance structures. They typically also handle the contact with the Danish FSA and Nasdaq Copenhagen in respect of the prospectus approval process.

The banks are usually also assisted by their own legal advisors. They will typically take the lead on the IPO-related agreements, especially the underwriting agreement and comfort documentation, and the legal due diligence process, including the verification process.

The issuer's elected auditors assist the issuer with accounting and financial reporting matters. Further, the auditor will often provide a so-called comfort package, which consists of both public statements on the historical and prospective financial information included in the prospectus as well as private comfort letters issued to the bank syndicate and the issuer.

It may also be relevant to involve a communication advisor in the IPO process. In general, the communication advisor's role is to advise on and handle the media-focused part of the communication regarding the upcoming IPO and to provide assistance with setting up an investor relations website for the issuer.

IPO readiness

This includes making the company ready for the stock exchange. Depending on the company, this may include acquisitions or divestments of sale of certain parts of the business, implementing changes to the company's capital structure or the company's board of directors or executive management or rolling up old incentive/participation programmes. The company will typically also need to adjust the accounting standards to the international financial reporting standards (IFRS) and consider its reporting segments and need to prepare *pro forma* accounts. It will also be relevant to identify any material contracts which are subject to change of control provisions which are triggered in an IPO.

The preparatory work

The preparatory work covers a broad range of tasks and matters including, *inter alia*: (i) due diligence; (ii) transaction documents; (iii) equity story; (iv) analyst presentation; (v) prospectus; (vii) corporate resolutions; (viii) corporate governance documentation; (ix) company announcements; (x) IPO and post-IPO incentive programme(s); and (xi) roadshow presentation.

Investor and analyst process

It is customary that the banks have a dialogue with selected institutional investors in order to assess the interest in the company, which can serve as a basis for a valuation of the company. It should also be considered whether cornerstone investors will be relevant.

Analysts connected with the banks will prepare independent research reports that contain the analysts' valuation of the issuer and such research reports will be published and distributed to professional investors as well as certain high network individuals following the announcement of the intention to float.

Process with the Danish FSA and Nasdaq Copenhagen

The process with obtaining the approval of the prospectus usually lasts eight to 10 weeks. Typically, the Danish FSA receives four to five confidential filings of the prospectus prior to the final filing of a price range prospectus. Comments received from the Danish FSA after each filing are to be answered with the subsequent filing.

The prospectus is also subject to review and comments by Nasdaq Copenhagen, although they do not provide an approval hereof. Nasdaq Copenhagen instead requires a statement from the issuer demonstrating that it is suitable for listing and satisfies the listing rules. These include, *inter alia*, a sufficient operating history, sufficient working capital, expected distribution of the shares (generally sufficient if the free float is above 25%), management of the company and ability to disclose information to the market. In addition, Nasdaq Copenhagen will require a formal application letter as well as a statement confirming the issuer and its pre-IPO shareholders are acting in compliance with sanctions imposed by the EU (e.g. against Russia).

Due diligence and verification process

The due diligence process in connection with an IPO is an extensive process which includes review of data room documentation, management presentation, due diligence calls on various matters, log of back-up documentation, fact checks and a Danish-style verification process with subsequent bring-down calls. The purpose of the due diligence process is to ensure that the information in the prospectus is true and accurate in all material respects and not misleading.

The verification process is a Danish element in the due diligence process. In general, the process is a spot test of the prospectus' factual accuracy for the purpose of verifying that the important information in relation to the issuer is true and accurate by way of written questions and answers which are discussed at a verification meeting with participants from all parties in the process. The verification is carried out by the bank's legal Danish advisor. In a Supreme Court Judgment from 2013, the Danish Supreme Court found that the company was liable for incorrect information in a prospectus and the Supreme Court emphasised in that regard that the verification of the prospectus had been waived. Even though it is not a formal requirement under Danish law to carry out a verification process, many issuers and banks are thus reluctant to take on the risk of potential liability by waiving the verification.

Publication of the company announcement of the intention to float

An issuer will often publish an intention to float (ITF) announcement approximately two weeks prior to the publication of the prospectus, but it is not a requirement under Danish law. With the intention to float announcement, the company only communicates that is intends to go public soon. Shortly after the publication of this announcement, research reports will typically be published.

Publication of the approved prospectus and application to the stock exchange

Publication of the approved prospectus marks the beginning of the offer period as no public offer may be made in Denmark before the prospectus is published following an approval by the Danish FSA. For Danish IPOs, it is rather standard to use a price range prospectus with the final price being set following the book-building process. A public offer may only be carried out in Denmark and any other EEA jurisdictions into which the prospectus has been passported, although passporting in connection with IPOs is less common. Many IPOs of Danish companies will also involve private placements to institutional investors in and outside the EU, including the US and Canada, having regard to relevant exemptions to prospectus rules and registration requirements.

Offering period of typically one to two weeks

During the offering period, the bank syndicate and the issuer's management will travel on a roadshow and conduct the so-called book building. Prior to this period, some professional investors may already have agreed or indicated their interests to the banks to purchase shares. A public retail marketing campaign will typically also be rolled out and coordinated with a private Danish shareholders' association.

Pricing and admission to Nasdaq Copenhagen or First North

After the end of the offer period, the issuer will publish a company announcement with a pricing statement.

In Denmark, admission to trading and official listing most often takes place on Nasdaq Copenhagen the morning of announcing the offer price and on the day of the allocation of the shares, which is normally two trading days prior to the settlement date. This practice relies on the banks' soft underwriting obligation providing certainty of settlement of the shares admitted for trading. To the extent the underwriting agreement allows for termination by the issuer or the banks after admission, Nasdaq Copenhagen will make the admission for trading conditional and require the issuer to publish a company announcement when termination can no longer occur.

Potential stabilisation period

In connection with a Danish IPO, it is possible to have a 30-day stabilisation period under the safe harbour provisions of the EU Regulation on the conditions applicable to buy-back programmes and stabilisation measures. In this period, a stabilisation agent may have an option to purchase shares in order to stabilise the stock market price of the shares. The stabilisation mechanism is typically combined with an overallotment option of 15% of the total offering and a share lending arrangement, which allows the stabilising agent, being one of the syndicate banks, to redeliver any shares acquired as part of the stabilisation arrangement.

Regulatory architecture: overview of the regulators and key regulations

The financial governmental body in Denmark is the Danish Financial Supervisory Authority (the DFSA). It is a governmental agency under the Ministry of Industry, Business and Financial Affairs.

Further, Nasdaq Copenhagen supervises the companies on the stock exchange and may impose sanctions on the companies listed on Nasdaq Copenhagen for violations of the rules issued by Nasdaq Copenhagen (Nasdaq Copenhagen's Rules for Issuers of Shares).

The key regulation applicable to the IPO process is primarily based on EU regulation and the EU Prospectus Directive and the EU Prospectus Regulation. The primary legislation regarding Danish IPOs is the Capital Markets Act which, *inter alia*, regulates public offerings of securities. The act came into force on 3 January 2018, and replaced the previous Danish Securities Trading Act. The Capital Markets Act is supplemented by the Executive Order no. 1176 of 31 October 2017 on Prospectuses.

The new Prospectus Regulation introduced by the EU in June 2017 and replacing the Prospective Directive will become a key part of the IPO regulation in Denmark when it becomes effective in July 2019. Already listed companies may at this stage rely on the exemption under the Prospectus Regulation to issue shares less than 20% of the share capital in a 12-month period without having to publish a prospectus. Previously, the limit was less than 10%. Also, pursuant to the new EU Prospectus Regulation's scope, Member States may from July 2018 increase the threshold to EUR 8 million before a prospectus is required. The Danish FSA has informed that it is expected that Denmark will increase the threshold as of 21 July 2018.

In addition to the regulation framework mentioned above, the IPO process is regulated by several executive orders and ESMA guidelines and ESMA Recommendations.

The key documents in an IPO process are:

Prospectus

Under Danish law implementing the EU regulation on public offerings and prospectuses, an issuer is required to publish a prospectus if it admits to trading and listing on a regulated market, i.e. Nasdaq Copenhagen, or if it is a public offering over EUR 5 million. The national prospectus requirement regarding public offerings between EUR 1 million and EUR 5 million has been eliminated as of 3 January 2018 following the new Danish Capital Markets Act.

Under Danish law, including the EU Prospectus Regulation, a prospectus consists of three parts: (i) a summary; (ii) a registration document; and (iii) a securities note. As a general disclosure rule, a prospectus must contain all relevant investor information which is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities.

Generally, larger IPOs typically follow a more international standard format for prospectuses, whereas medium-size or smaller IPOs with only a Danish or Nordic bank syndicate is more likely to follow the structure of the EU Prospectus Regulation.

Companies may consider passporting a Danish prospectus to another jurisdiction within EEA under the Prospectus Regulation. It is a simple and easy way to offer shares to potential investors in other Member States although not too common in a Danish IPO context.

The key content to be disclosed in a prospectus is outlined below; however, note that the list is not comprehensive: a responsibility statement; a review of the key risk factors relating to the issuer; historical financials and financial forecasts/guidance; the company's strengths and its strategy, including a business description of the company and the industry; information on the board of directors, executive management and key employees; dividends and dividend policy; and a description of shares and share capital, the offering, selling restrictions and transfer restrictions, etc.

Disclosure of financial forecasts/guidance including relevant assumptions regarding the current year is common in Denmark even though it is considered optional. If it is included in the prospectus, the issuer's auditor is required to issue a statement on this matter in the prospectus. Further, issuers' may choose to provide medium-term targets regarding a period of three to five years.

A few types of companies are subject to specific requirements because of the nature of the companies. They include property companies, mineral companies, shipping companies, start-up companies with less than three years of operation and scientific research-based companies. The ESMA Recommendations set out the requirements.

In practice, the Danish FSA focuses on ensuring that all formal requirements to a prospectus are met, including compliance with the ESMA Recommendations.

Underwriting or placement agreement

The underwriting or placement agreement is the key IPO agreement under which the company and/or the selling shareholders, if any, proposes to sell a fixed number of shares to investors procured by the underwriter/bank. A pricing agreement may be entered into by the parties following the book-building once allocation and the final offer price have been determined. The basis of the engagement is often agreed with the bank/underwriter upfront. The terms of underwriting or placement agreement are subject to negotiation and the agreement is usually entered into in connection with launch of the prospectus, but there are also recent examples of the underwriting agreement not being entered into until the time of pricing, which is more in line with international standards. The underwriting agreement will most often also provide for an overallotment option combined with a share lending arrangement which facilitates the stabilisation arrangement.

Lock-up agreements

In Danish IPO processes, it is customary with lock-up arrangements that serve the purpose to ensure new potential investors that existing shareholders will not sell their remaining shares shortly after the IPO. Further, there will typically be lock-up agreements with the board of directors, executive management and key employees in the company following an IPO.

It is customary that the selling shareholders, the company, the management and key employees are restricted under lock-up obligations for a period of between six and 12 months after completion of the IPO.

Verification document

The verification document is a comprehensive document with questions and answers from the verification meeting in writing. It is signed by the company's management, the company's legal advisors, the bank's legal advisors, the company's auditor, and the selling shareholder, if any. Subsequent to the signing of the verification document, the parties in the IPO process will typically hold "bring-down calls". The function of the "bring-down calls" is to make sure that any material changes in the company since the verification meeting are flagged. Bring-down questions will typically be answered at launch, pricing, closing and exercise of overallotment.

Comfort package

A comfort package is prepared in relation to a Danish IPO. It consists of comfort letters, officer certificates, and legal opinions provided by the company's management, the company's auditor, the selling shareholders, if any, and the legal advisors.

Corporate governance package

In a Danish IPO process, many of the companies going public are required to update their articles of association and decide to which extent they wish to follow the Danish Corporate Governance Recommendations. The company is required to ensure that their articles of association are in compliance with the regulation regarding listed companies. For example, the requirements for the convening of general meetings are different than for private companies. Further, the shares of the company must be freely negotiable.

The Danish Corporate Governance Recommendations are published by the Danish Corporate Governance Committee. The latest edition of the recommendations was published in November 2017 and came into force in January 2018. They are soft law, and listed companies are required to take them into consideration under the "comply or explain" approach. It is a requirement under the Financial Statements Act and in the Nasdaq Copenhagen's Rules for Issuers of Shares that listed companies take them into consideration and publish their approach to the recommendations.

The recommendations include: communication and interaction by the company with its investors and other stakeholders; tasks and responsibilities of the board of directors, including the composition of the board of directors; and remuneration of the management; and guidelines on financial reporting, risk management and audit.

Companies going public will have rules of procedures and charters and produce several policies and internal rules in order to be in compliance with the law governing capital markets, Nasdaq Copenhagen's Rules for Issuers of Shares, and the Corporate Governance Recommendations. Examples of such documents are listed below.

- Remuneration Policy on principles for payment of remuneration and the statutory incentive guidelines for the board of directors and executive management.
- Internal Rules and Information Policy is recommended by Nasdaq Copenhagen and is market standard. The internal rules relate to: (i) handling of inside information and trading in the company's shares etc.; and (ii) compliance with its disclosure obligations.
- Investor Relations Policy which sets out the framework for the company's communication with the investors, analysts and other stakeholders in the capital market.
- Diversity Policy on gender composition that targets percentages to be set for underrepresented genders among members of the board of directors elected by the general meeting. Specific targets are no longer included in the Corporate Governance Recommendations.
- Takeover Response Manual, which includes guidelines for key procedures which are to be initiated by the company and the board of directors in the event of a takeover scenario.

Marketing material

These include analyst and investor presentations, including a brochure for retail investors. It is important to note that the content in the presentations and retail brochure must be reflected in the prospectus.

Public company responsibility

Public companies are subject to several obligations and responsibilities that private companies are not. Two of the core areas are the disclosure obligations imposed on public companies and the regulation regarding market manipulation.

Those requirements are primarily regulated by the EU Market Abuse Regulation and rules issued by Nasdaq Copenhagen. Under the Market Abuse Regulation, public companies have an ongoing obligation to disclose inside information. They shall inform the public as soon as possible of inside information which directly concerns the company. If certain conditions are met, a company may delay the disclosure of inside information.

In addition to the ongoing obligation to disclose inside information, the companies are required to disclose annual and half-yearly reports. The companies are required to disclose a financial calendar which specifies when the reports are disclosed. Listed companies are not required to disclose quarterly reports, but it is still customary that they do. The Corporate Governance Recommendations also recommend that companies disclose quarterly reports for transparency purposes.

The Nasdaq Copenhagen's Rules for Issuers of Shares list a number of specific disclosure obligations that go beyond the requirements in the Market Abuse Regulation, i.e. information that must be disclosed even if it is not inside information. This is, *inter alia*, information on changes in board of directors, other management and auditors and new share-based incentive programmes.

The Market Abuse Regulation contains a number of specific disclosure and reporting obligations regarding the board of directors, the executive management, key employees and major shareholders' trade with the company's shares. Further, the Market Abuse Regulation prohibits insider dealing and unlawful disclosure of inside information.

Potential risks, liability and pitfalls

An IPO is often considered a highlight for a private company going public. The company and other parties involved in the process must, however, take risks and potential liability into consideration which follows as a consequence of the increased public attention towards the company and the disclosure obligations.

It is customary for the company to have separate insurance in place to cover any prospectus liability up to a certain amount in addition to the normal D&O insurance. Several prospectus liability cases are currently pending following the bankruptcy of oil bunkering company OW Bunker A/S in November 2014 just seven months after being admitted to trading and listing on Nasdaq Copenhagen. The outcome of the cases may have influence on Danish court practice concerning prospectus liability going forward.

The responsibility statement on behalf of the issuer in the prospectus is signed by the board of directors and the executive management declaring that they have taken all reasonable care to ensure that, to the best of their knowledge and belief, the information contained in the prospectus is in accordance with the facts and does not omit anything likely to affect the import of its contents.

In the last 30 years, only a handful of cases regarding prospectus liability or liability in relation to prospectus-related communication have been pending before the Danish courts. Only a few of such cases have led to the defendants being found liable.

In addition, the issuer must take precautions to ensure that they do not violate the offering and registration regulation in foreign countries, including but not limited to Australia, Canada, Japan and the USA. It is market practice in a Danish IPO process to set up a "click-through webpage" in order to ensure that potential investors accessing the prospectus are informed where and which potential investors the public offering is addressed to. Further, disclaimers are incorporated in the prospectus and other investor-related documents prepared in relation to an IPO.

Public companies are subject to fines and administrative sanctions, if they violate Danish rules and regulation on capital markets, although ultimately, Nasdaq Copenhagen may require a company to be delisted. This includes, *inter alia*, the Market Abuse Regulation, the Danish Capital Markets Act and Nasdaq Copenhagen's Rules for Issuers of Shares.

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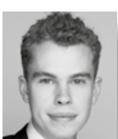

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Finland

Tarja Wist, Maria Pajuniemi & Emilia Saloranta
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Introduction

After the turn of the millennium, the burst of the technology bubble and the sharp decline of the previously booming technology sector drove the Nordic IPO market to a halt. The impact on the Finnish market was particularly brutal and long-lasting, listings were few and far between, and in the falling market the regulator's focus turned to cases of prospectus liability and market abuse.

Since 2015, however, the IPO activity in Finland has picked up again. This follows the Nordic trend – IPO activity has been trending upwards in all Nordic countries, resulting in the busiest Nordic IPO year on record last year. In Finland, listings are increasingly ubiquitous, both statistically and in terms of media coverage. In 2017, there were 13 listings in total: seven companies were listed on the regulated market of Nasdaq Helsinki; whereas six companies applied for trading on the alternative First North market, also maintained by Nasdaq.

There are several reasons for the drastic increase in IPOs. The improved economic situation in Finland and the new wave of start-ups and innovations, together with the strongly performing stock market have clearly offered attractive opportunities to entrepreneurs and private equity investors seeking new capital or exit. At the same time, the tighter rules for bank financing have imposed balance sheet requirements and encouraged companies to seek more equity as opposed to debt for financing their growth. The implementation of the Transparency Directive in 2015 decreased the administrative burden of listed companies, as the previous domestic requirement for quarterly reporting was replaced by the requirement to publish one semi-annual report only.

Somewhat of a current trend has been the increased popularity of First North, which was initially introduced to the Finnish market already in 2007. First North is a multilateral trading facility that provides an alternative marketplace for growth companies who do not yet meet the requirements for listing on the regulated market. Around half of the companies floated in 2007 applied for trading on First North.

While the technology and healthcare sectors have been at the forefront, in general the new floated companies have represented a variety of industries and sectors and have also varied in terms of size. The admission of Fondia to trading on First North was the first ever public floating of an external legal service provider in Finland, and one of the first ones on the European scale.

Despite the recent turmoil in the stock markets, the trend has continued in the first quarter of 2018 and the outlook of Finnish IPO market looks positive. It is believed that Nasdaq Helsinki will see more listings in 2018 than in the years before.

The IPO process: steps, timing and parties and market practice

A listing process usually starts by the company changing its legal form from a private limited company to a public limited company and amending its articles of association, capitalisation, composition of the board of directors and other governance to suit the requirements of a listed company. If there are any restrictions on the transferability of the company's shares, such restrictions must be removed. Also, to meet the applicable listing requirements, the company would replace its paper-form share certificates or registered shares with book-entry shares issued in the Finnish book-entry securities system (or in a book-entry system maintained by a foreign depositary, as allowed since the implementation of the CSD Regulation in 2017). To effect these corporate changes, shareholders and board resolutions will be required and the changes must be filed with the Trade Registry for registration and publication.

The shares offered in an IPO may be new shares or existing shares or, as often is the case, a combination of new shares issued by the company and existing shares sold by the current shareholders. Where new shares are issued, it is customary for the shareholders' meeting to authorise the board of directors to make the final resolution on the issuance, allocation and pricing. The shareholders' meeting may in such case take place well in advance of the IPO, while the board of directors would pass its resolution on allocation and pricing only at the end of the offer period.

Prior to listing, the issuer is required to organise its administration and financial reporting and monitoring in a manner that enables the issuer to fulfil the obligations imposed on a public company relating to, e.g., disclosure and corporate governance. A company with an IPO prospect would, therefore, have to build up its reporting, risk management and communication functions and train its personnel to produce the requisite financial information and to report, manage and disclose any inside information that the company may from time to time possess. As a separate work stream, if the company has applied the Finnish accounting standards (FAS) in its financial accounts, and not the international financial reporting standards (IFRS) which are mandatory for listed companies, reconciliation of the company's FAS financials to the IFRS would be required.

The requirements for listing on the regulated market of Nasdaq Helsinki include the following:

- the company is duly incorporated or otherwise established under the laws of its place of incorporation or establishment;
- the shares conform to the laws of the company's place of incorporation, and have the necessary statutory or other consents;
- the shares are freely transferable;
- the listing application covers all shares of the same class;
- the company has published financial statements for at least three years in accordance with the applicable accounting standards. The company and its group have sufficient operating history;
- the applicant has sufficient earnings capacity or working capital available for conducting its business, as contemplated in the business plan included in the prospectus, for at least 12 months after the listing;
- the shares have sufficient supply and demand;
- a sufficient number of shares are distributed to the public (comprising at least 25 per cent of the shares of the class to be listed) and the company has an appropriate number of shareholders;

- the expected aggregate market value of the shares is at least EUR 1 million;
- the management and the members of the company's board of directors have appropriate competence and experience to manage and govern a listed company;
- the company has adequate procedures, controls and systems in place to provide the market with timely, reliable, accurate and up-to-date information; and
- the company discloses how it will apply and comply with the Corporate Governance Code published by the Securities Market Association.

The lead arranger would typically guide the company through the listing process. The lead arranger together with the other financial advisors would also place and market the IPO and advise the company on pricing. The financial advisors may further undertake to underwrite the IPO and/or to support the share by stabilisation activities after the listing. Legal advisors would be appointed to assist the company and the financial advisors with the legal documentation and to advise on the process and the applicable listing requirements. The auditors of the company would be engaged to review the financial information produced.

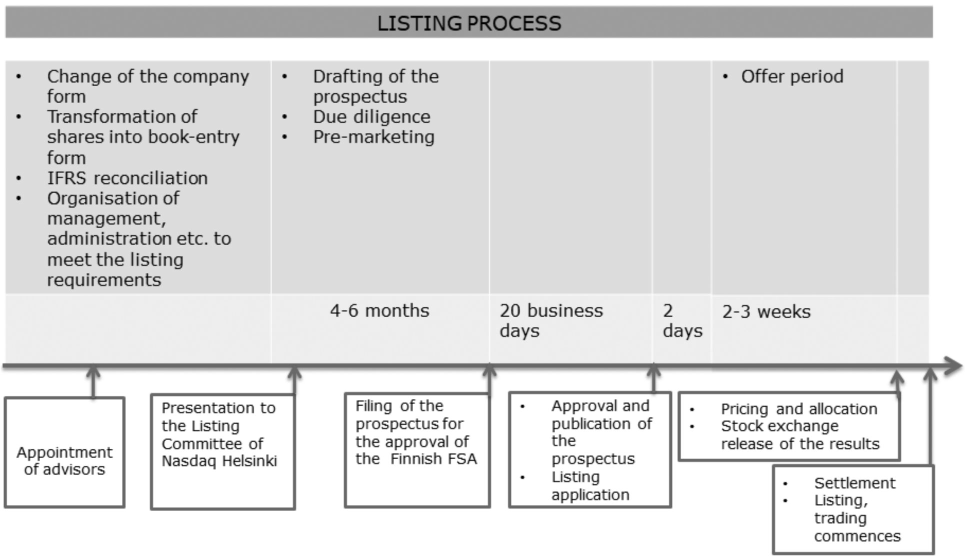
Once the company has the appropriate legal form and functions, and has appointed financial and legal advisors to assist it in the IPO process, the company would commence negotiations with the exchange to confirm eligibility for listing and to prepare for presentation to the listing committee. Concurrently, the company's advisors would start the drafting of the prospectus, which is required for the listing on a regulated market and the public offer of shares, and reviewing the company's documentation and processes in a due diligence review.

Prior to the commencement of the offer period, the prospectus must be approved by the Finnish Financial Supervision Authority (the Finnish FSA). In addition, if additional marketing material is prepared, such material needs to be filed with the Finnish FSA in advance of its dissemination (but does not require the Finnish FSA's approval). The issuer has to seek approval for the prospectus from the Finnish FSA approximately one month prior to the launch of the public offer. The Finnish FSA is required to make a decision on the approval of the prospectus within 20 business days after submission of the prospectus for its review. Once approved, the prospectus must be published by the company and made available for the investors throughout the offer period. Any updates or changes to the prospectus, including the price range or final price if pricing takes place only at the end of the offer period, must be published as supplements to the prospectus.

The authority to approve listing on the regulated market is vested in Nasdaq Helsinki and its Listing Committee. The issuer presents itself, its business and its financial position in a form of a company presentation to the Listing Committee approximately two to three months prior to the contemplated listing. The formal listing application is then processed in a subsequent meeting of the Listing Committee. The material of the company presentation and the listing application must be delivered to the Listing Committee in draft form two weeks prior to the relevant meeting and in final form at least one week prior to the meeting. The final approval for listing is made once the offer period has ended and a sufficient number and portion of shares has been distributed to the public.

A registration fee is to be paid to Nasdaq Helsinki before the issuer submits the listing application. The rules of Nasdaq Helsinki become applicable to the issuer after submission of the listing application. The issuer is thereafter obliged to comply with, for instance, the disclosure requirements applicable to listed companies. The submission of the listing application must be disclosed to the public without undue delay.

The following is an example of a typical timetable for an IPO on Nasdaq Helsinki:



If the company is a start up with limited history or earnings capacity, or otherwise does not meet the listing requirements of the regulated market of Nasdaq Helsinki, the company may consider applying for admission to trading on the multilateral trading facility First North. Trading on First North can act as a stepping stone for listing on the regulated market. There is no Listing Committee procedure or similar involved with First North, and the disclosure requirements applicable to companies traded on First North are lighter. There is also no requirement to comply with the IFRS.

Regulatory architecture: overview of the regulators and key regulations

The Finnish FSA is the competent authority that supervises the operators and operations in the Finnish securities markets and that is vested with the authority to approve prospectuses, grant dispensations from the statutory listing and prospectus requirements and to impose administrative sanctions for non-compliance. The Finnish FSA is also the authority for supervising market places, including Nasdaq Helsinki, and the clearing and settlement systems operating in Finland. Also, the supervision of compliance with the IFRS by listed companies is the responsibility of the Finnish FSA. The Finnish FSA works in close cooperation with the European Securities and Markets Authority (ESMA).

Nasdaq Helsinki operates the regulated market and First North, and in such capacity makes decisions on listings, admission to trading and delisting and, where necessary, on suspension of trading. Nasdaq Helsinki is further obligated to provide sufficient and reliable surveillance to ensure compliance with its rules and with good securities market practice. Any misconduct detected by Nasdaq Helsinki is reported to the Finnish FSA for further action.

The regulatory framework governing IPOs and the Finnish securities market more generally is a combination of European Union (EU) regulations, national laws and regulations and self-regulation:

- The key national piece of legislation is the Securities Markets Act. The Securities Market Act governs the issuance of securities to the public, disclosure requirements on

the securities markets, takeover bids, prevention of market abuse and supervision of the securities market.
- The statutory framework for listings, trading and delistings, including listing requirements, is laid down in the Act on Trading in Financial Instruments of 2017. The Act on Trading in Financial Instruments also regulates the licensing and operations of regulated markets, multilateral trading facilities and organised trading facilities.
- The Ministry of Finance has issued several degrees complementing the Securities Market Act and the Act on Trading in Financial Instruments with more detailed regulations.
- The Finnish FSA has published a wide set of guidelines and regulations addressing, among other things, due conduct in connection with IPOs and marketing of securities, disclosure requirements and compliance with good securities market practice. The standards, recommendations and guidelines issued by ESMA are also applicable in the Finnish securities market.
- Companies listed on Nasdaq Helsinki must further comply with the rules of the exchange and the specific regulations issued by Nasdaq Helsinki on, for example, acquisition and transfer of own shares and guidelines for insiders.
- In addition, the Securities Market Association, which is a self-regulatory body, maintains the Corporate Governance Code and the Takeover Code, which are deemed to represent good securities market practice and thereby have a statutory footing in the Securities Market Act.
- Finally, as in any other Member State of the EU, the EU securities market regulation is directly applicable in Finland – most importantly the Prospectus Regulation (Commission Regulation (EC) No 809/2004 of 29 April 2004), which sets out the rules for the publishing of a prospectus and the applicable content requirements in connection with an IPO and listing, and the Market Abuse Regulation (Regulation (EU) No 596/2014 of the European Parliament and Council of 16 April 2014), which, together with the Commission Implementing Regulations, governs questions such as disclosure of inside information, market soundings, dissemination of research reports and stabilisation.

As discussed above, different rules and regulations apply to IPOs on First North, as compared to IPOs on the regulated market of Nasdaq Helsinki. The difference in the regulation is due to First North being organised as a multilateral trading facility rather than a regulated market. The rules and requirements applicable to IPOs on First North are less extensive, and the companies listed on First North are subject to a less heavy administrative burden and lighter disclosure requirements. First North has its own rules under the First North Nordic Rulebook.

An IPO process aiming at listing on the regulated market of Nasdaq Helsinki would typically give rise to the drafting of at least the following documents:
- Prospectus (often in Finnish and English).
- Listing application.
- Agreement with Nasdaq Helsinki.
- Agreement with Euroclear Finland Oy (or another clearing system providing corresponding service).
- A placing or underwriting agreement between the company and the lead arranger/underwriter(s).
- Relevant shareholders' and board resolutions.
- Legal opinions.

- Auditor letters.
- Marketing materials.
- Stock exchange release to announce the results.

The disclosure of information to prospective investors in an IPO process occurs through the publication of the prospectus, which is the most important legal document in the IPO process. The contents of the prospectus are specifically regulated by the Prospectus Regulation and the Securities Market Act and aim at providing the investors with adequate information, enabling them to make an informed assessment of the shares and the issuer. The prospectus must include essential and sufficient information on the company's assets and liabilities, financial position, the results and future prospects as well as rights attached to the shares and other factors which have material effect on the value of the shares. The prospectus includes a description of the company and the management, financial information and information on accounting standards, the shares and share capital, conditions of the IPO, company's business and risk factors. The prospectus must include a summary that provides the key information that investors need in order to understand the nature and the risks of the issuer and the shares on offer. The prospectus may consist either of a single document, or of a registration document, a securities note and a summary. Typically, to serve both domestic and international investors, the prospectus (or at least the summary) is made available both in Finnish and English.

Public company responsibilities

There are several obligations imposed on public companies that do not apply to private companies. These include disclosure requirements, corporate governance requirements and obligations relating to inside information. While the disclosure regime has widely been harmonised throughout the EU, the applicable framework for corporate governance is still primarily domestic. Notable in this context is that the disclosure obligations and the rules of Nasdaq Helsinki become applicable upon the filing of the listing application, i.e., prior to the actual listing of the shares and commencement of trading.

Public companies are under strictly regulated disclosure obligations. They are required to inform the investors and the market of certain circumstances that are significant for the company or its business by publishing stock exchange releases. The disclosure obligation includes two legs: the regular disclosure obligation; and the ongoing disclosure obligation. The regular disclosure obligation covers the regular financial reporting of the company and includes the periodic disclosure of financial statements and management reports, auditor's reports, half-year reports and financial statement releases. The ongoing disclosure obligation in turn requires the company to disclose, without undue delay, any inside information that it possesses (as further specified in the Market Abuse Regulation). The company may, however, delay the disclosure of inside information in circumstances where the immediate disclosure is likely to prejudice the legitimate interests of the issuer, the delay of disclosure is not likely to mislead the public and the issuer is able to ensure the confidentiality of that information. Further, the Market Abuse Regulation obliges the company to maintain insider lists and to disclose transactions on the company's shares by the persons discharging managerial responsibilities at the company and by persons closely associated with the former.

The general legal framework for corporate governance is based on the Companies Act. The Companies Act sets out the qualifications, authorities and responsibilities of the board of directors and the managing director and includes a general obligation for the directors to act diligently in the interests of the company, as well as a principle of equality of all shares and a so-called general clause prohibiting resolutions that confer inadequate benefit to one shareholder at the cost of the company or other shareholders. While the basic rules are the same for public and private companies, the requirements in relation to the notice periods, information obligation and majority requirements are in some respects more stringent in public companies.

The main self-regulatory instrument addressing corporate governance is the Corporate Governance Code of the Securities Market Association. The Corporate Governance Code complements the provisions of the Companies Act and applies to companies listed on the regulated market of Nasdaq Helsinki. The purpose of the Corporate Governance Code is to promote transparency, comparability and good corporate governance, as well as to harmonise the communication practices of listed companies and increase the quantity and quality of information provided to shareholders, investors and the general public. The Corporate Governance Code includes recommendations relating to, among other things, board composition, diversity, nominations practices and remuneration. The Corporate Governance Code operates on a "comply or explain" principle, which means that the company must, in general, comply with all the recommendations set by the Corporate Governance Code or publish adequate reasons justifying a deviation from the recommendations. The Securities Market Act provides that a listed company must include a statement addressing its compliance with the Corporate Governance Code in its management report or in a separate report describing its administration and administrative policies.

Further, listed companies and their shareholders are subject to an obligation to disclose major holdings. This obligation is triggered where a holding in a listed company reaches, exceeds or falls below 5, 10, 15, 20, 25, 30, 50 or 90 per cent or two-thirds of the voting rights or total amount of shares of the listed company. In such case, the shareholder must without undue delay notify both the company and the Finnish FSA of the change in ownership and voting rights. The company must further disclose the information to the market. Additional disclosure and other obligations apply in the event of a takeover of the company.

Potential risks, liabilities and pitfalls

The issuer is primarily liable for the contents of the prospectus published in connection with an IPO. This liability extends to the issuer's board of directors and managing director who are under an obligation to ensure that the prospectus is accurate and not misleading and does not omit to state anything required to be stated therein. A misstatement in the prospectus may give rise to an obligation to compensate any loss thus caused to an investor as well as to an administrative sanction imposed by the Finnish FSA or, should the Finnish FSA choose to press charges, criminal sanctions for market abuse, including fines or, in severe cases, imprisonment. In addition, the Disciplinary Committee of Nasdaq Helsinki may impose a warning or a fine if the issuer commits a breach of the applicable legislation, rules of Nasdaq Helsinki, its agreement with Nasdaq Helsinki, commitments given to Nasdaq Helsinki or good securities market practice. In the event of a very serious breach, the issuer's securities may be delisted.

Under the Securities Market Act, the prospectus liability extends, in addition to the issuer and the offeror of the shares, also to any party who is "commissioned to take care" of the IPO and listing, which is generally understood to mean the lead manager and financial advisors placing the shares and marketing them to the investors. Liability to the investors may also be incurred under inaccurate marketing materials or by misselling.

Liability under the Securities Market Act (and, indeed, under the Penal Code which imposes applicable criminal sanctions for market abuse) is negligence-based. Therefore, any risk for prospectus or other liability may be effectively mitigated by complying with generally recommended procedures and guidelines and by ensuring that the disclosure in the prospectus and any marketing materials is in all respects adequate and backed by customary legal and financial due diligence reviews of the company's affairs.

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Introduction

Commonly known as the 'Paris Stock Exchange', Euronext Paris is the French subsidiary of Euronext – the market operator. Euronext Paris regulates the stock market in Paris and also organises its financial activities.

Raising capital on Euronext may be done from Amsterdam, Brussels, Paris, Lisbon and recently from Dublin, demonstrating the success model of Euronext. With an integrated pan-European trading platform, companies stay listed on the stock exchange of the city of origin in addition to harmonised admission rules.

In France, French or international companies benefit from a harmonised regulatory framework established by Euronext and under the control of the *Autorité des Marchés Financiers* (AMF), the French financial market regulator (it is needless to mention that listed companies on Euronext have to comply with numerous obligations, in particular with regards to transparency). As to the various rules applicable to those listed on Euronext Growth (formerly Alternext) and Euronext Access (formerly Free Market and Easynext) the framework is significantly more lenient both in terms of organisation and functioning.

For the past few years, IPOs in France have gained more interest from companies and Paris is considered as one of the major European markets in the 'biotech' and 'cleantech' sectors.

In a country where administrative and legal constraints in labour and tax laws seem to render the allocation of private equity less attractive, IPOs may be considered an incentive for employees, especially for mid-cap companies.

In 2017, Euronext Paris registered 14 IPOs. This is slightly behind the numbers in 2016, during which 17 IPOs were registered.[1] Some experts in the field expect an increase of IPOs in the coming years.

The IPO process: steps, timing and parties and market practice

<u>Sustained timetable</u>

Generally speaking, listing a company on the stock exchange in France implies a long and complex procedure which requires many resources and countless hours of work. Depending on the complexity of the operation, the process, as a whole, may take from six (6) to nine (9) months or even longer in some cases.

To this end, the preparation of an IPO requires meticulous planning, leading the way to the upcoming strict timetables and milestones of listed companies. For instance, from an accounting perspective, higher accounting standards and practices will need to be put in place starting in the year preceding the IPO (e.g. the requirement to audit biannual financial statements).

Uncertainties may arise and impact the timetable. Nevertheless, it is important to evaluate the timing cautiously in order to mitigate the risks of deferring the IPO.

Delaying an IPO triggers reputational and financial consequences. In some cases, some companies are even obliged to register losses on their financials following such postponement.

Diagnosis, restructuration and legal compliance

This step necessarily begins with a diagnosis of all legal, financial and operational issues. Defining the perimeter of the listing is the first step to be undertaken in any IPO.

In some cases and in order to put in place a coherent set up, it is sometimes necessary to proceed with preliminary restructuring operations. These may involve the exclusion of certain assets from the scope of the operation through carve-outs or, inversely, verifying the status of exploitation of the assets and their ownership which triggers, for instance, and in certain cases, the assignment of certain intellectual property rights to the company by the owner/shareholder of the company who previously owned all of the intellectual property rights.

Considering that certain legal and administrative formalities must also be observed in France, a thorough management of the timetable is essential. For instance, a merger or asset sale also entail an opposition period and publication formalities, all of which need to be taken into account to best manage the schedule.

As for the appropriate corporate vehicle, the only corporate vehicles in France which allow listing in the stock market are the *Société Anonyme* (SA) and the *Société en commandite par actions*. The latter is rarely used, despite the fact that it presents various guarantees against takeovers. Only these two (2) types of corporate vehicle are permitted to public offerings as further set out under Articles L225-1, L226-1 and the following of the *Code de commerce* (Commercial Code).

Most of the functioning and organisational aspects of the SA are defined by law. The shareholders must also make the appropriate modification to the articles of association, such as the deletion of clauses which require formal approvals in the case of transfer to third parties, non-transfer clauses or any other clauses which may restrain the sale and transfer of shares. They will also need to adopt the conditions surrounding the capital increase, grant all the necessary power of attorney to the board of directors to carry out the IPO and obviously approve the admission request to trading.

Parties commonly involved

A successful IPO implicates many parties, all and each in charge of a specific aspect of the listing. This supposes efficient and precise organisational governance of the project. The parties most commonly involved in an IPO are an investment service provider, accountants and auditors, legal counsel, brokers, a communication and public-relations agency and a listing sponsor.

Investment service provider

The investment service provider (ISP), usually represented by the investment banker, plays one of the most important roles in the organisation and management of the IPO, as further set out in Article L.531-1 of the *Code monétaire et financier* (Monetary and Financial Code).

The ISP will namely ensure coordination between all of the involved parties (the company, the regulator, the other professionals, etc.), evaluate the issuer's financial and operational abilities to trade on the stock exchange, proactively participate in the request to admission, coordinate the preliminary due diligences, determine the price, organise the subscription or ascertain the commercialisation of the operation and the investment of securities. This is also essential since the ISP will undertake to subscribe to all the remaining securities which have not been subscribed by the end of the IPO process (*"engagement de bonne fin"*).

Accountants and auditors

The accountants and auditors also play an important role since they will perform a financial review of the company and its financial audit. The auditors will also issue guarantee letters confirming that the financial and commercial activities and situation of the company is stable and there exist no facts which would lead to a financial collapse. These letters are intended for the company and to the AMF.

Legal counsel

The legal counsel of the issuing company mainly intervene during the tax and legal due diligences and for the purposes of various corporate restructuring operations necessary for the compliance of the corporation with the listing procedures. Legal counsel of the issuing companies also ensure that all pertinent information has been identified within the prospectus or the information memorandum as well as coordinate all necessary actions with the ISP.

Brokers

In order to increase liquidity and the volume of trades, many listed companies also enter into liquidity agreements with a broker, for instance. The broker will ensure the permanent presence of securities in its order books and will also ensure a certain price bracket. This will amortise the delta of volatility and facilitate the transactions at all times and at the best possible price as well as increase the number of transactions traded in the central orders book.

Communication and public relations agency

Companies may also need to hire a communication and public relations agency specialised in the financial sector in order to put in place a strategic and coherent communication plan and enhance their reputational value with the media as well as the members of the financial community. Its pivotal role to broadcast positive media coverage will aim at convincing potential investors and stimulate demand for the subscription of securities.

Listing sponsor

When listings take place on Euronext Growth, Euronext Access or Access +, it is mandatory to appoint a listing sponsor certified by Euronext. Its presence is designed to reinforce the investors' confidence and will also pilot all operations in aid of the listing. The listing sponsor will also verify the compliance of the issuer's candidacy. In the case of a public offering, the listing sponsor also needs to collaborate with an ISP (where the listing sponsor and ISP are two different entities).

Regulatory architecture: overview of the regulators and key regulations

Euronext

As a market operator, Euronext oversees the Euronext Paris regulated markets and enacts the requirements for market access and admission of financial instruments to trading, provides services to the issuing companies with regards to the listing and oversees the achievement of financial transactions.

To this end and pursuant to Article L.421-10 of the *Code monétaire et financier* (Monetary and Financial Code), Euronext has also established common rules to ensure equitable trading and efficient execution of the orders on each of the markets described below.

The French Securities and Exchange Law and the French Regulatory Authority

Most of the legislative dispositions setting forth the principles of French securities and exchange law are set forth within the *Code de commerce* (Commercial Code) and the *Code monétaire et financier* (Monetary and Financial Code).

Access and admission of financial instruments to trading dispositions may also be found within the *Réglement général de l'AMF* (AMF General Regulation) as per the terms set forth in Article L.621-6 of the *Code monétaire et financier* (Monetary and Financial Code).

The AMF is a public independent power and guardian of investments in financial participants and products on the regulated and non-regulated market, but also other types of investment products in public offerings. It safeguards investments in financial products, ensures that investors receive all material information and also maintains orderly financial markets.[2]

The AMF also enacts various professional conduct rules which impose certain obligations to issuer companies, participants, listed companies, public offering through the AMF General Regulation and various policies which are passed by its various bodies. It also organises the functionalities of the regulated market, the multiple trading facilities (MTF) and market operators and puts in place the legal obligations applicable to the said entities.

Furthermore, the AMF is also considered the stock exchange watchdog and consequently empowered to investigate various market-related violations (insider trading offences, price manipulation, misrepresentations, etc.).

The AMF ensures significant control over an IPO, namely with regards to the information which is provided to the public. Decisional powers are rather taken through the market operator Euronext Paris for all markets it has under management (Euronext has the faculty to require additional undertakings (i.e. lock-up)). Thus, the AMF is not entitled to oppose itself to the admission or supply of financial instruments to trading on the regulated market in cases where there is no specific legal disposition allowing the AMF to take such actions. However, the AMF has the faculty to suspend an admission for a maximum period of ten (10) days, or even prohibit the operation in the cases where it notes infringements of the operation in view of legislative and regulatory dispositions (Article L.621-8-1, II-2 of the *Code monétaire et financier* (Monetary and Financial Code) as well as Articles 213-2 and 213-1 of the *Réglement général de l'AMF* (AMF General Regulation)). Consequently, prior to any admission, Euronext Paris is required to inform the AMF and receive all types of information necessary to the decision-making.

Euronext's markets

The trading of financial instruments is made possible in France through various types of markets.

Apart from the regulated market, multiple trading facilities (MTF) are authorised in France. These refer to non-regulated markets where simplified access to capital markets is made possible, which suit small and mid-cap companies (SMEs) or even non-mature companies or those which have been incorporated recently (e.g. Euronext Growth and Euronext Access). Euronext Growth is controlled but not regulated and part of the organised MTFs as set forth under French legislation. Euronext Access, also an MTF, refers to the open market segment of Euronext. Alongside these markets, we should also note the existence of over-the-counter (OTC) markets (direct bilateral trade between buyer and sellers without the necessity to pass though a trading facility) as well as derivative markets such as the MONEP and the MATIF, known together as Euronext LIFF.

Below we restrict our analysis to three principal markets: (1) Euronext; (2) Euronext Growth; and (3) Euronext Access.

(1) Euronext, a regulated market[3]

Euronext attracts the vast majority of corporations and offers access to capital markets through the trading of shares, bonds, warrants and exchange-traded funds. All listed companies are classified alphabetically and identifiable by reference to their market capitalisation.

As such, Euronext is segmented by market capitalisation:

- **Compartment A – Blue Chips**: companies with a capitalisation of more than €1 billion.
- **Compartment B – Mid-Cap**: companies valued between €150 million and €1 billion.
- **Compartment C** – **Small Cap**: companies with a market capitalisation below €150 million.
- **The Professional Compartment.**

The admission of equity securities listed or traded on Euronext is conditioned on various elements as set forth in Article 6702/1 of the Euronext Rule Book – Book I Harmonised Rules:

> "6702/1 A first admission to listing of Shares, Depository Receipts for Shares or Equity Securities is subject to the following conditions being met:
>
> (i) at the time of admission to listing, a sufficient number of Securities must be distributed to the public. **A sufficient number of Securities shall be deemed to have been distributed to the public if at least 25% of the subscribed capital represented by the class of Securities concerned are in the hands of the public or such lower percentage determined** – in its absolute discretion – by the Relevant Euronext Market Undertaking in view of the large number of the Securities concerned and the extent of their distribution to the public. **This percentage shall not be lower than 5% of the subscribed capital represented by the class of Securities concerned and must represent a value of at least five (5) million euro calculated on the basis of the subscription price**; **and**
>
> (ii) **at the time of admission to listing, the Issuer or, in the case of Depository Receipts, the issuer of the Underlying Securities must have published or filed audited annual financial statements or *pro forma* accounts, consolidated where applicable, for the preceding three financial years, drawn up in accordance with the accounting standards of the country where the Issuer has its registered office, IFRS or any other accounting standards allowed by National Regulations for the period covered by the financial information**. If the fiscal year closed more than nine (9) months before the date of the admission to listing, the Issuer must have published or filed semi-annual accounts."[4]

We underline the necessity for the prospectus to receive prior approval from the AMF.

Although most transactions are cash transactions executed upon the order, a Deferred Settlement Service (SRD – its French acronym) is also available on the French market. This permits a financing of the clients' position by the intermediary until the end of the month unless a postponement (on securities delivery or payment) is acceptable.

(2) Euronext Growth

Previously known as Alternext, Euronext Growth is a dedicated market for SMEs who wish to access capital markets through a simplified procedure and by eliminating some of the rigorous constraints of Euronext. Although not regulated, Euronext Growth remains controlled and applies various directives and precise listing regulations as set forth in paragraphs 3.1 and précised by paragraph 3.2 of the Euronext Growth Markets Rule Book.

> "3.2.1 Methods of first admission to trading of Equity Securities
>
> (i) Public offer
>
> A **public offer** referred to in Rule 3.1.1(i) **requires that orders in an amount of at least €2.5 million have been received in respect of the relevant Securities**.
>
> [...]
>
> (ii) Private Placement
>
> An **unique Private Placement** referred to in Rule 3.1.1(ii) **requires that orders in an amount of at least €2.5 million during the year prior to the scheduled date of first admission to trading on the relevant Euronext Growth Market have been received in respect of the relevant Securities**.
>
> Unless an exemption is granted by the Relevant Euronext Market Undertaking, **the number of persons involved in an unique Private Placement of Equity Securities as referred to in Rule 3.1.1(ii) must be at least three (3) persons** [...]
>
> (iii) Direct Admission
>
> A Direct Admission referred to in Rule 3.1.1(iii) **requires that Securities having a value of at least €2.5 million have been placed in public hands as a result of the admission to listing and/or trading on that other market**.
>
> [...]
>
> 3.2.3 Track record and financial statements
>
> **Without prejudice to the National Regulations applicable to the Issuer regarding accounting standards and the standards of presentation required for the approval of a prospectus by any competent authority, the financial statements published by the Issuer must be established in accordance with the accounting standards set out in Appendix II (Track record and financial statements).**
>
> **Unless an exemption is granted by the Relevant Euronext Market Undertaking, each Issuer must have published or filed audited annual financial statements or *pro forma* accounts, consolidated where applicable, for the two (2) financial years preceding the application to first admission to trading of Equity Securities**.
>
> **If the most recent financial year ended more than nine (9) months prior to the first admission to trading, the Issuer must have published interim financial statements**.
>
> **The financial statements** for the last two (2) years **must be audited by the auditors** (or Person considered equivalent to auditors) appointed by the relevant Issuer."[5]

In other words, the following conditions must be met:

- For a public offering, orders in an amount of €2.5 million must have been received in respect of the relevant securities. In the case of public offerings exceeding €2.5 million, a prior approval of the prospectus by the AMF is also required. However, this is not required for public offerings of €2.5 million addressed to qualified investors.
- For a private placement, for orders in an amount of €2.5 million during the year prior to the scheduled date of first admission to trading and unless provided otherwise by a specific exemption, the number of persons involved in a unique private placement of equity securities must be at least three.

- As for direct admissions, securities having a value of at least €2.5 million must have been placed in public hands as a result of the admission to listing and/or trading on that market.

For all three methods of first admission, a clear track record and financial statements and the existing of a "listing sponsor" is also required.

(3) Euronext Access and Access +

Euronext Access is even more lenient than Euronext Growth.

This market targets SMEs as well as start-ups who wish to enter a stock exchange to underline their well-regarded reputation as a listed company without the compelling procedures linked to a first admission. The transactions are cash-settled and not controlled by the AMF. The prices are negotiated directly between the buyer and the seller.

In June 2017, a new compartment was created within Euronext Access, called Euronext Access +, to entice start-ups and SMEs to transit through the market.

We note that Euronext Access does not impose the same transparency obligations as the other markets. As such, there is no obligation to provide financial accounts drawn up in accordance with the international financial reporting standards, no audited accounts, no publication of biannual accounts (except for Euronext Access + for accounts created in the past two (2) years, and for audited accounts created in the last year), no free float for trading (except for Euronext Access + where a minimum of €1 million is required) and no obligation to designate an audit committee.

As for the listing sponsor, it is mandatory during admission to trading and for Euronext Access + it is mandatory at all stages.

Overall, Euronext Access may represent a first step (although not necessary) in an company's path to the stock market. When a company registers important growth, they are usually encouraged to transfer their securities in a more mature market.

A project broadcasted to the public

The operation requires a number of documents destined to inform the public by way of a prospectus for the regulated market or in the case of a public offering on Euronext Growth, or by way of an information memorandum for all other cases.[6]

Financial, legal and accounting information are provided on the basis of specific standards and presented for a number of years which allow investors to evaluate the history, results and appreciate the perspectives as well as the other risks which may arise. To this end, the presentation shall contain the financial statements of the three (3) preceding years, the company's plan, and its strategy (type of operation, number and nature of the securities, the timetable, etc.).[7]

In order to facilitate the reading of the information, it is mandatory to have a summary at the very beginning as an introductory note which contains the principal characteristics of the corporation, the financial instruments which are part of the operation as well as identified risks.

We should note that the prospectus can just recently now be drawn up in the English language; however its executive summary has be included in French pursuant to Article R.212-12-1 al. 3,4 and 7 of the *Réglement général de l'AMF* (AMF General Regulation).

Furthermore, on the regulated market or throughout any operations following the three years after its admission, the ISP has to certify that all diligences have been undertaken and that there has been no discrepancy or omission in the content of the prospectus which could mislead the investor. This certification has to be made before the AMF.

Apart from the certification of the accounts, the auditors will also prepare a letter confirming the end of the mandate and attesting all documents. This letter may contain observations, which have been disclosed to the public during the broadcast of the prospectus, and shall be addressed to the AMF prior to the issuance of the visa or upon filing (Article 212–15 of the *Réglement général de l'AMF* (AMF General Regulation)). Prior to delivering the visa, if the AMF believes that the mandate of the auditors is not complete, it may require further investigations or a review of the accounts by other auditors.

Once all of this process is finalised, the AMF will issue a visa certifying that the prospectus is complete, comprehensible and coherent. The visa is not to be considered an opinion of the company, or related risks to be incurred by the relevant stakeholders. The visa simply certifies all the essential elements that an investor needs to know are included in the prospectus.

The admission to trading is made available by a public notice issued by the AMF, which also includes the required procedures for the envisaged transaction as well as the first listing of admissible securities and the timetable. Once this step is finalised, we move forward to the IPO.

Listing on the regulated market

Issuing companies may choose the type of introduction (transfer of securities or capital increase) as well as the introductory procedure.

Based on the type of introductory procedure, the modalities for pricing differ.[8]

- Firm price offer (OPF): fixes in advance a definitive price of the issued securities. The offerings shall only be made possible at the fixed price.
- Minimal price offer (OPM): fixes a minimum price for securities.
- Open price offer (OPO): fixes a bracket (minimum and maximum) within which the definitive price will be fixed at the very last moment, based on the purchase orders and available quantities of securities.
- Direct listing: fixes a minimum price; the retained price will consist of a price which will enhance trading. The price cannot exceed 10% of the minimum price.
- Guaranteed investment: the securities are traded only to institutional investors and investments are given discretionary powers in order to better balance the market. In this case, the price is either superior or equal to that under an OPF.

Usually the offering is made through service providers for institutional investors and a specific procedure of OPF or OPO when the offering is addressed to individuals.

We should also note that all listed companies in Paris have the obligation to receive a legal entity identifier (LEI). This standardised code is unique and allocated by the INSEE. The LEI should be renewed every year. In the absence of a LEI, financial instrument trading may be questioned and participation in trading endangered.

Potential risks, liabilities and pitfalls

Potential liabilities in IPOs

The duly authorised representatives of the company (as listed in the commercial registry) (collectively "Authorised Representatives") are liable for the veracity and correctness of the prospectus or the information memorandum. To this end, it is market practice to have the Authorised Representatives grant indemnities arrangements to the ISP in charge of the IPO.

As mentioned above, the visa from the AMF does not constitute an opinion as to the investment opportunity. Furthermore, various violations to the dispositions setting forth the prospectus content do not entail its nullity. However, the AMF may sanction the Authorised Representatives by way of a monetary penalty, the amount of which can not exceed €100 million or up to the 10 times the amount representing the realised profits. An increase of 10% may also be pronounced for victim assistance (Articles L621-15 II c and III c of the *Code monétaire et financier* (Monetary and Financial Code)).

In the case of a capital increase, the AMF may solicit the suspension of the operations before competent courts of law up until the company regularises its situation. All decisions made by the AMF may be appealable before the Paris Court of Appeal ((Article L621-30 and Article R 621-45 II of the *Code monétaire et financier* (Monetary and Financial Code)).

Generally speaking, although Authorised Representatives are liable for the information provided to the public, legal procedures by third parties in the case of alleged damages are quite rare.

Main constraints, liabilities and pitfalls

The listed company and stakeholders are required to comply with legislative dispositions referring to the holding of the securities and other obligations pertaining to various rules enacted by the regulator and market operators.

A series of reporting and communication obligations requires the company to further detail its activities and financial information on a regular basis in order to reach the highest degree of transparency.

This type of communication is also necessary since such information may impact the stock exchange.

(1) The principal applicable rules – regular information

The listed company should ensure regular transparency by publishing the following elements:

- an annual financial report, including the annual and consolidated financial statements, the management report and the reports of the statutory auditor, every four months following the end of the financial year (Article L 451-1-2 of the *Code monétaire et financier* (Monetary and Financial Code));
- the biannual financial statement (Article L 451-1-2 III of the *Code monétaire et financier* (Monetary and Financial Code));
- the opinion on the approval of the annual accounts within 45 days from the annual general assembly (Article R 232-11 of the *Code du Commerce* (Commercial Code));
- the report on corporate governance and internal control (Articles L 225-37, L 225-68 and L 226-10-1 of the *Code du Commerce* (Commercial Code)); and
- on Euronext Growth, the following must be disclosed (Euronext Growth rules §4.2.1):
  - the annual accounts and the management report must be published within four (4) months of the end of the financial year; and
  - the half-yearly financial result and a half-yearly financial report.

(2) The principal applicable rules – a permanent information

On Euronext Paris, any listed company is required to comply with the rules governing the treatment of insider information. This includes any information likely to have a significant influence on the price of a listed security.

This must be communicated as soon as possible to the market, unless an immediate communication is likely to prejudice the legitimate interests of the issuer (example: proposed acquisition of a company), if the delay of publication is not likely to mislead the public and whether the issuer is able to ensure the confidentiality of the information (Article 17.1 of European Regulation No 596/2014 of 26 April 2014 on Market Abuse Regulation).

As such, the issuer must maintain and update lists of insiders, including all persons who have access to privileged information (with their professional and personal contact information and the date and time they had access to privileged information), and inform the AMF *a posteriori*.

Issuers are also required in December of each year to address Euronext with a certificate confirming, among other things, that the issuer has complied and will continue to comply with this regulation and its various obligations *vis-à- vis* Euronext.

The unlawful use of privileged information constitutes an insider's breach, giving rise to financial penalties falling within the jurisdiction of the AMF, or an offence punishable by a fine or imprisonment (Article L.465-1 of the *Code monétaire et financier* (Monetary and Financial Code)).

In addition, a website with up-to-date information must be accessible in order to inform the public of its activities, its governance rules, and any privileged and financial information.

Finally, the issuer must notify Euronext of any changes in the composition of its management team or of its management and supervisory bodies, as well as any change in beneficial ownership, to be made public. Issuers who do not comply may be exposed to the risk of criminal and administrative sanctions.

(3) The applicable rules – shareholders and crossing thresholds

Shareholders of listed companies are subject to numerous obligations, including declarations pertaining to threshold crossing.

Any crossing of the legal thresholds, upwards or downwards, for the regulated market up to 5%, 10%, 15%, 20%, 25%, 30% ⅓, 50%, ⅔, 90% and 95%, and for Euronext Growth, up to 50% or 95%, of the capital or voting rights of an issuer, by a shareholder acting alone or *"de concert"*, must be declared to the company and to the AMF (Articles L 233-7 and 223-14 of the *Réglement general de l'AMF* (AMF General Regulation)). The AMF brings this information to the attention of the public.

In addition, on the regulated market, any person who acquires more than 10%, 15%, 20% or 25% of the capital or voting rights must send to the company and to the AMF a declaration of intent for the six upcoming months (Article L 233-7, VIII of the *Code du Commerce* (Commercial Code)).

Not complying with these mandatory declarations may lead to civil sanctions (including the temporary suspension of voting rights exceeding the percentage that has not been declared), criminal sanctions (including a fine of €18,000) and administrative sanctions. Among these, the AMF may impose monetary sanctions, the amount of which may not exceed €100 million or 5% of the company's total annual turnover (Article L. 621-15 III *bis* of *Code monétaire et financier* (Monetary and Financial Code)).

(4) The applicable rules – executive declarations

In order to avoid any situation giving rise to a conflict of interest and insider trading, Authorised Representatives as well as the executives or any other person with access to privileged information is required to declare all of the transactions that they carry out with regards to the issuing company and its securities. This declaration is addressed to the AMF (Article L. 621-18-2 of the *Code monétaire et financier* (Monetary and Financial Code)).

(5) The applicable rules – publishing of voting rights and number of securities

On the regulated market or Euronext Growth, companies are required to publish on a monthly basis the total number of voting rights and the number of shares making up the share capital in the event of a change from those previously published.

Other obligations are also imposed and fall under the responsibility of the Authorised Representatives or shareholders. Amongst these, we have chosen to mention the two most recent: the say-on-pay procedure; and parity:

(a) The say-on-pay procedure
Shareholders of French companies, whose shares are listed on the Euronext regulated market, have the right to monitor the remuneration the Authorised Representatives receive, allowing it to be controlled or even opposed by a double binding vote (Article L225-37-2, L225-100 of the *Code du Commerce* (Commercial Code)).

(b) Parity within boards of directors and supervisory boards
As soon as a listed company on the Euronext regulated market or those listed on Euronext Growth reach two of the three following thresholds for three (3) consecutive years (more than 500 employees and total turnover or balance sheet of at least €50 million), parity between male and female members shall be met.[9]
This parity underlies a progressive quota. Since January 1, 2017, 20% to 40% of the members of boards of directors and supervisory boards must be women (Articles L 225-18-1, L.225-69-1 and L 226-4-1 of the *Code du commerce* (Commercial Code)).
Not complying with these parity rules may incur monetary sanctions, the temporary suspension of the *"jetons de présence"* (directors' fees) and the potential nullity of the decisions and appointments made by such boards, except when these concern the appointment of women.

* * *

An IPO transaction in France has obvious economic and strategic advantages and just as in other European markets it underlies many legal, financial and accounting constraints.

Many companies initially introduced in the 2000s took the decision to trade P2P due to increasing regulation, rather heavy constraints and cost. As such, e-commerce activities are currently under-represented in the French listed market. Time constraints also need to be taken into account.[10]

Legislative measures taken recently in France, the healthier economic trend, and the occurrence of certain events (Brexit...) may lead to a renewed interest for IPOs in France.

* * *

Endnotes

1. Euronext Factbook 2017.
2. http://www.amf-france.org/en_US/L-AMF/Missions-et-competences/Presentation.
3. Article L. 421-10 of the *Code monétaire et financier* (Monetary and Financial Code).
4. Article 6702/1 Euronext Rule Book – Book I Harmonised Rules.
5. Chapter 3, Paragraph 3.2 Euronext Growth Markets Rule Book.
6. Articles L 411-1 and L 412-1 of the *Code monétaire et financier* (Monetary and Financial Code) and Article 211-1 and the following of the *Réglement général de l'AMF* (AMF General Regulation).

7. Article L 212-7 of the *Code monétaire et financier* (Monetary and Financial Code).
8. Article P 1.2.11 and following of Euronext Rule Book – *Livre II : règles particulières applicables aux marchés réglementés français.*
9. These parity rules also apply to other certain non-listed companies.
10. It is estimated that an Authorised Representative may spend 15% of their time on communication.

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Introduction

The decision for a private company to go public and to list their shares on a stock exchange provides a number of advantages. The company may raise a large volume of capital and get broader access to further equity funding; it diversifies its range of financing options and might become less reliant on bank financing; it might use its shares as acquisition currency and to incentivise employees; increased transparency may have positive effects on the perception of the company by its customers, suppliers and prospective employees, and an Initial Public Offering ("IPO") may allow a business to grow faster and thrive in a competitive international environment. In addition, an IPO provides an exit strategy for private equity sponsors and other shareholders. In sum, an IPO, securing a long-term source of financing less reliant on banks, forms a key element in a sustainable corporate strategy and could lay the foundations for future success.

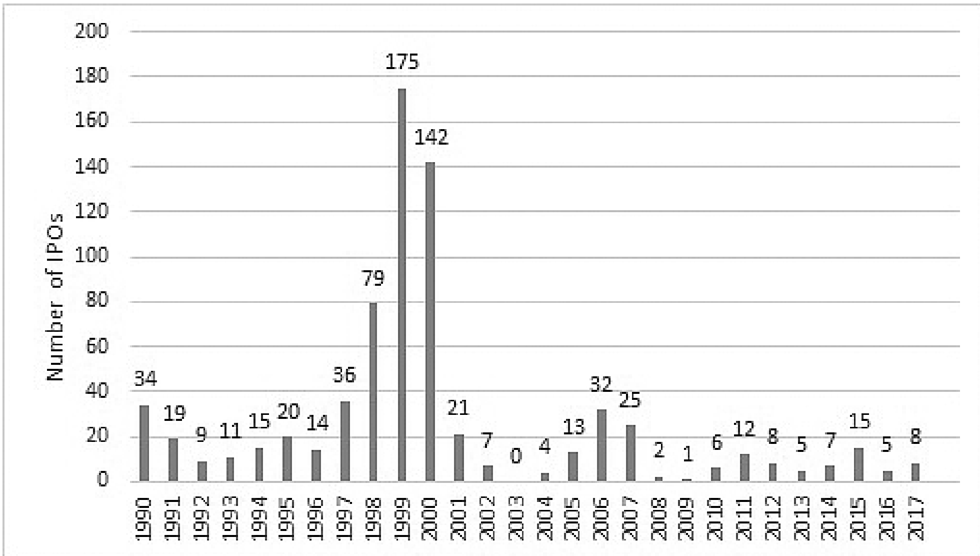
In Germany, companies may trade their shares at nine stock exchanges, which are the regional stock exchanges in Berlin, Düsseldorf, Hamburg, Hannover, Munich and Stuttgart in addition to the most important stock exchange, being the Frankfurt stock exchange ("FSE"). Trading platforms at the FSE, which are Xetra and Börse Frankfurt, comprise more than 95% of all German shares and around 85% of all foreign shares. Founded in the 16th century, the FSE became one of the leading international stock exchanges for securities and bonds and it is a pre-eminent location for companies of all different industries.

At the FSE, issuers may choose between admission to the regulated market and the open market. For admission at the regulated market, issuers may choose between the sub-segments General Standard and Prime Standard, with the Prime Standard bearing additional admission follow-up obligations and setting the highest transparency requirements, which also have to be complied with in the English language. The Prime Standard is therefore tailored to suit companies wishing to position themselves specifically towards international investors. The Management Board of FSE will decide upon application on the admission to the Prime Standard, which gives access to the selected indices DAX®, MDAX®, TecDAX® and SDAX®. Issuers in the General Standard segment meet the high transparency requirements of the Regulated Market without being specifically focused on international investors. Thus the General Standard is primarily meant for medium-sized and large companies who focus on mainly domestic investors.

The particular access requirements for the Frankfurt stock exchange, as well as the follow-up obligations, are set forth in the German Stock Exchange Act (*Börsengesetz*, "BörsG"), the German Stock Exchange Admission Regulation (*Börsenzulassungs-Verordnung*, "BörsZlVO") as well as in the Exchange Rules for the FSE (*Börsenordnung für die Frankfurter Wertpapierbörse*, "BörsO FWB").

Admission to the open market and the related standard "Scale", which was introduced in March 2017, is rather suitable for small and medium-sized enterprises (SMEs). The open market provides for lower listing requirements and ongoing obligations as well as low transparency standards. The new standard scale, which replaced the Entry Standard, offers an efficient equity financing option tailored to the needs of SMEs. It provides access to investors, both domestic and international.

Even though the regulatory framework is highly supportive of IPOs, the number of successful IPOs in Germany on the regulated market (Prime Standard) has varied over the years, as can be seen in the following table:



After three extraordinary years in 1998 to 2000, which reflects the new economy boom, and except for the financial crisis in 2008 and 2009, the average number of IPOs recently amounts to eight to 10 successful IPOs per year. It can be assumed that the number of IPOs which have been prepared, but not been launched, is two to three times as high. The reason for this discrepancy is twofold. On the one hand, the so-called IPO windows which allow for a launch, depending on the recorded date of the financial statements of the company wishing to go public, are quite limited. Sometimes the company and the accompanying banks focus on a time period of two to three weeks, which are, due to the lengthy preparation schedule, fixed and only to a certain extent flexible. If the market is insecure due to economic tendencies, global crises or industry-specific developments, the envisaged IPO window might fall apart.

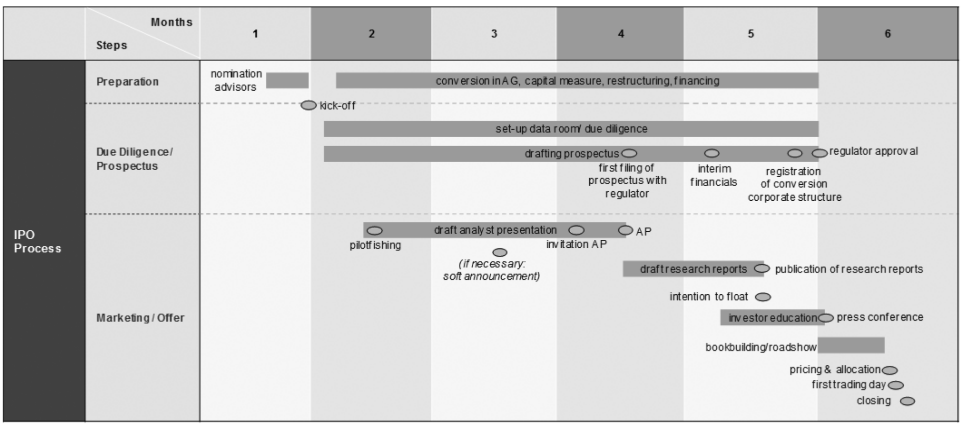
On the other hand, the high number of aborted IPOs is partly due to dual-track exits. Given the high evaluations of listed peer companies, many sponsors prepare an exit for portfolio companies through a trade sale and an IPO simultaneously (so-called dual-track exit). The IPO track serves as a floor for the pricing and determines a strict timeline for the preparation of both tracks. Due to the IPO discount, the fact that the IPO track does not allow an exit in one go and/or special circumstances that might occur, such as, for example, a drop in the share prices of peer companies, sponsors finally often opt for the trade sale exit.

The IPO process: Steps, timing and market practice

An IPO offers a world of opportunities; however, the step of going public must be prepared thoroughly. The IPO process starts long before the first day of trading. From the decision to go public until the initial listing, issuers must undergo a number of processes. Among other steps, these include: recruiting appropriate advisors and banks; assessing whether the requirements for going public are met; elaborating the issuing concept and the equity story; preparing the IPO vehicle to be IPO-ready; preparing the required documentation; and successfully offering the shares.

Timeline

The typical timeline for an IPO process looks as follows:



Preparation time for an IPO requires usually five to six months. In case the company has already set up a data room, for example, for a preceding bond or M&A process, and/or has issued a bond with a respective comprehensive bond prospectus, preparation time can be shortened, respectively. The setting of the launch date is generally driven by the 135-Day Rule, which stipulates that settlement of the IPO must be no later than 135 days after the date of the last financial statement included in the prospectus.

Step 1: Preparation phase

Starting with the preparation phase means, first of all, selecting the right advisors. For companies envisaging a listing at the regulated market, they will need to appoint a credit institution, financial services institution or a company that performs its business activities pursuant to sec. 53 para. 1 clause 1 or sec. 53 b para. 1 clause 1 of the German Banking Act (*Kreditwesengesetz*, KWG). The credit institution will act as the accompanying bank and usually as the global coordinator who supports the issuer in preparing the IPO, i.e. define the equity story, draft the analyst and road show presentation, approach investors, advise the issuer as to timing and pricing, sign the prospectus, underwrite the offered shares, and apply for listing at the stock exchange.

Depending on the size of the IPO and the issuer, additional banks might join and support the IPO as joint and co-bookrunners. Accountants will assist to ensure that the financial statements to be disclosed in the prospectus meet the accounting standards and are in line with the requirements under the prospectus regulation. Legal advisors are usually mandated for the issuer (issuer's counsel) as well as the underwriter(s) (underwriter's counsel). They will set up the corporate governance structure of the IPO vehicle required for the IPO, assist with the due diligence, prepare all relevant documentation, in particular the prospectus, and advise on the implications and obligations in connection with the IPO and the listing. Depending on the size of the IPO and the industry of the issuer, communications advisors might establish and/or increase the relevant publicity of the issuer. The authoritative party to the IPO will be the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "BaFin"), which approves the prospectus as well as the management of the German stock exchange, which decides on the admission of the company to trading on the stock exchange, as well as its inclusion into the respective sub-segment.

The right corporate, capital and financing structure of the issuer is key in the preparation of an IPO.

Right from the beginning, the issuer, together with its advisors, should focus on the corporate IPO-readiness of the issuer. This refers to the change of legal form into a stock corporation (*Aktiengesellschaft*) and the amendment of the articles of association to reflect the standard for public companies. In addition, the right composition of the supervisory board (gender quota, independent member, etc.) needs to be implemented and the management contracts, in particular the compensation, should be in line with the German Stock Corporation Act (*Aktiengesetz*, "AktG") and the German Corporate Governance Code (*Deutscher Corporate Governance Kodex*). In addition, the issuer might want to set up employee participation programmes, stock option or phantom stock programmes for the management and key employees. Even though the appropriate corporate governance needs only to be implemented shortly before the launch of the IPO, preparation time should not be underestimated.

The capital structure of the issuer has to allow the share price to be in the normal range (€10 to €30). This might require the conversion of reserves or a shareholder loan into share capital, or even the merger of shares in order to reduce the current number of shares. Even though the implementation of the capitalisation can be delayed until the end of the offer period, the company should discuss these issues upfront. In addition, the financing structure of the company should be addressed right at the beginning in case existing financing arrangements need to be amended or extended.

Step 2: Due diligence and prospectus

In parallel, the issuer will set up a data room and the parties will commence due diligence and drafting the securities prospectus. Due diligence and the drafting of the securities prospectus are the most time-consuming steps in the IPO preparation and may require up to four months. The prospectus is an information document and has to contain the legally regulated information which is necessary to put the investors in a position where they can form a true opinion about the securities they are offered and, above all, about the risks connected to these securities. The prospectus shall, on the one hand, exclude a potential prospectus liability of the issuer and, on the other hand, serve as a marketing document for the IPO. It will form the basis for the analyst presentation to be drafted by the underwriter(s) and for the investor's decision to invest in the securities or not. Approval of the prospectus by BaFin requires a review process which needs to be agreed with BaFin upfront. The approval process with BaFin usually takes six to eight weeks from the first submission until approval.

It is not possible to launch an IPO without a prospectus unless it is exempted under the German Securities Prospectus Act (*Wertpapierprospektgesetz*, "WpPG"). An exemption is stipulated, *inter alia*, for a private placement to only qualified investors or to fewer than 150 non-qualified investors. In addition, the new prospectus regulation, which came into force in July 2017, contains further exemptions related to small IPOs which have a volume below

€1m and stipulates simplified prospectus requirements for issuers which can be considered SMEs and which will not be listed on the regulated market.

Step 3: Marketing and offer

In parallel with the review process of the prospectus, the underwriter(s) starts with so-called pilot fishing in order to get initial feedback from selected investors on a potential IPO of the issuer. If the investors communicate interest to invest in the shares, the underwriters continue with preparing and distributing the analyst presentation in order to provide analysts and researchers with the relevant information. Research reports will be published hand-in-hand with the company's first official publication to the market of its so-called "intention to float" ("ITF").

Approaching approval and publication of the prospectus, the "underwriting agreement" will be finalised, determining the agreement between the issuer, the selling shareholder(s), if any, and the underwriters, *inter alia*, as to the terms of the offering, the placement of the shares, the termination rights of the underwriters, indemnity clauses and representations and warranties from the company. It usually also contains lock-up obligations of the company, its directors and any selling shareholder, which are standard for a period of 6–12 months but not obligatory.

After having received approval by BaFin, the prospectus needs to be published immediately whereupon the public offer starts. During the subsequent subscription period, which usually lasts for two weeks, the company will present itself accompanied by the banking syndicate at various finance venues to give interested investors an opportunity to collect information regarding the securities and the company. These so-called "road shows" focus on potential investors by means of professional marketing and individual contacts to certain investor groups. At the end of the subscription period, the amount of securities that will be sold can be determined and, unless the price has been fixed at the beginning of the subscription period, which is rather unusual, the underwriter(s) and issuer agree on the final offer price.

The placement of the securities is among the most important functions of the banking syndicate and is critical for going public successfully. In the offering process it is the company's objective to sell the complete amount of stock to be placed at a price attractive to both company and investors. In case of a private placement, as opposed to a public placement, the stock to be placed is offered for sale exclusively to a limited circle of investors, and the offering will not be published. This has become quite common in recent years since it allows the company to remain on a confidential basis as long as possible and to disclose its intention only shortly before listing. If appropriate, the private placement may be complemented by a short official public placement immediately before settlement.

Price determination is among the most important steps in the course of a securities issue, as the price will determine the proceeds and, thus, the success of the issue. The offering price can be determined as a fixed price, through a so-called tender or auction procedure, or as part of a book building procedure.

When the fixed price procedure is chosen, the company and the syndicate members will fix an offer price which forms the base for the public offering and will be communicated to the market together with the prospectus. This method of price determination bears the disadvantage that company and syndicate members will not be in a position to react to a changing market environment in the course of the offering. For placing a securities issue through the so-called tender or auction procedure, the offer is based on a minimum price as a lower limit. During the subscription period, interested investors may enter a purchase bid at minimum price or above. However, investors are required to have sufficient knowledge of the capital market and the current market situation in order to submit an adequate bid for the securities, which makes it more difficult for the syndicate members to successfully place the securities. The most common procedure is the book building procedure, which is based on a price range to be published by the company at the beginning of the offer period. The price range will be ascertained in advance by the syndicate members, based upon the due diligence performed in combination with a targeted investors' survey.

During the road show, all bids received within the price range are entered into a central order book. After the period's expiration, the offer price is determined according to the existing bids. In case the number of purchase bids should exceed the number of stock to be issued by the company, allocation criteria will be determined. Thus, this kind of price determination leaves the company with the option to influence the kind and spread of their future shareholders in the course of deciding on the offer price. In the course of the allocation, the company and the syndicate manager decide if and how many stock an investor shall receive based on the bid it has submitted. For the final allocation decision, the intended shareholder structure as well as the achievement of a sufficient free float of the securities will be the central criterion. The latter is not only a requirement for the securities' admittance for stock exchange trading on the regulated market, but also for well-functioning stock trading in general.

As a variation of the classic book building procedure, so-called "decoupled book building" has developed. For this method, the subscription period is shortened to a few days and the price range is published only shortly prior to opening the order book. At this time, usually the road show has ended. Therefore, the marketing of the securities is decoupled from the determination of the price range and the offer price. In doing so, the risk that the offer price might be put under pressure, e.g. from public opinion, is limited to the stage of the shortened subscription period.

Some companies use the option to reserve part of the securities offered to the public for employees of their company, or of affiliated or partner companies of the issuer, and to allocate stock preferably to these investor groups in the scope of "friends and family" programmes.

Generally, the allocation takes place on the evening of the last day of the placement period directly following the closing, and is published through electronic media on the same day.

Prior to the start of trading, the securities have to be admitted to the stock exchange. In order to safeguard the formation of a liquid market in the stock to be admitted and, thus, to guarantee orderly trading, the following minimum listing requirements should be considered for the regulated market: (a) reporting history dating back at least three years; (b) minimum market value: €1.25m; (c) minimum issuing volume: 10,000 shares; and (d) minimum free float: 25% (exemption possible). As a general requirement, the company shares have to be held by at least 100 shareholders. Admission to trading on the open market requires a minimum share capital of €250,000 and a minimum free float of at least 30 initial shareholders.

Regulatory architecture: overview of the regulators and key regulation

The regulatory framework for an IPO in Germany is harmonised with the regulations of the European Union (EU). The main regulatory acts are the German Securities Prospectus Act (WpPG) and the German Stock Exchange Act (BörsG). Admission to trading is further regulated by the German Stock Exchange Admission Regulation (BörsZlVO) as well as in the Exchange Rules for the FSE (BörsO FWB).

The central part of the IPO is the prospectus, which must be drafted in accordance with the WpPG and Commission Regulation (EC) No. 809/2004 of 29 April 2004 (last amended by delegated regulation (EU) No. 2016/301) implementing Directive 2003/71/EC of the European Parliament and of the Council, last amended by (EU) No. 2016/301 (the "Prospectus Directive"). Further details as to the layout and content of the prospectus are laid out in the ESMA recommendations and Questions & Answers published by ESMA. On 30 November 2015, the European Commission, as part of its Capital Markets Union action plan and its commitment to simplify and harmonise EU laws, adopted a proposal for a new prospectus regulation, intended to replace the Prospectus Directive, along with its corresponding implementing measures. The new regulation (EU) 2017/1129 of the European Parliament and of the Council came into force in July 2017 and will apply from 21 July 2019, except for Art. 1 para. 5 subpara. 1 lit. a to c and subpara. 2 (20 July 2017) as well as Art. 1 para 3 and Art. 3 para. 2 (21 July 2018), which are immediately applicable. The new regulation amends the disclosure requirements for the prospectus and aims at simplifying the rules for companies wishing to issue shares or debt on the market and reduces the costs of preparing a prospectus. However, it does not generally change the current disclosure obligations of the issuer in accordance with the Prospectus Directive.

Pursuant to the general provision in sec. 5 para. 1 WpPG, the prospectus has to be written in an easily analysable and comprehensible manner. The order of the different chapters of the prospectus, and the content to be addressed, are laid out in the Prospectus Directive and quite standardised.

However, certain issues need to be addressed in advance in order to be able to insert the relevant information in the prospectus. This refers in particular to the financial information required in accordance with the Prospectus Directive. Regular financial disclosure obligations refer to the audited historical financial information covering the latest three financial years of the issuer to be prepared according to the International Financial Reporting Standards ("IFRS"). If the issuer has published quarterly or half-yearly financial information, this must be included as well. If the prospectus is dated more than nine months after the end of the last audited financial year, it must contain interim financial information covering at least the first six months. In case of a significant gross change, for example due to a transaction, the issuer has to present *pro forma* financials which need to be examined by an auditor. German issuers are usually obliged, in addition to the consolidated financial statements prepared in accordance with IFRS, to also insert unconsolidated financial statements prepared in accordance with the German Commercial Code (*Handelsgesetzbuch*, "HGB") in order to meet the requirements regarding information for the assessment of dividend distribution.

The competent authority for the approval of the prospectus is the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin).

The approved and published prospectus is also the legal basis for the admission of securities to trading on a Regulated Market (sec. 32 para. 3 BörsG). The written application to the Deutsche Börse for admission for trading needs to be filed by the company together with the syndicate bank. The syndicate bank as co-applicant must be a credit institution, financial services institution or a company that performs its business activities pursuant to sec. 53 para. 1 clause 1 or sec. 53 b para. 1 clause 1 of the German Banking Act (KWG) and must be admitted for trading on a German securities exchange. The documents to be submitted are listed in sec. 48 para. 2 BörsZulV. Companies submitting an application for admission to the regulated market (General Standard) can simultaneously apply for admission to the sub-segment Prime Standard.

Public company responsibilities

An IPO results in several continuing responsibilities and obligations, which need to be carried out and respected by the issuer post-IPO. These obligations and responsibilities include insider trading restrictions, *ad hoc* disclosure and publication and notification requirements. In Germany, these obligations are governed by the Market Abuse Regulation (*Marktmissbrauchsverordnung*, "MAR"), which came into force on 3 July 2016, and the German Securities Trading Act (*Wertpapierhandelsgesetz*, "WpHG").

The provisions of the MAR apply for companies listed on the regulated market as well as the open market, whereas notification obligations under the WpHG only apply for companies listed on the regulated market.

Pursuant to Art. 17 MAR, issuers are obliged to disclose inside information, i.e. information of a precise nature, which has not been made public, relating directly to the issuer, and which, if it were made public, would be likely to have a significant effect on the prices of its financial instruments or on the price of related derivative financial instruments. Insider information must be disclosed as soon as possible, in a manner which enables fast access and complete, correct and timely assessment of the information by the public and, where applicable, by the officially appointed mechanism as well as on the website of the issuer for a period of at least five years (*ad hoc* disclosure). The disclosure may be delayed under very limited circumstances, such as not to prejudice the issuer's legitimate interests or in order to preserve the financial stability of the issuer or the stability of the financial market. Regarding the decision to delay the disclosure, the company is required to comprehensively record such decision, including information about who was responsible for the decision and how the conditions of delaying the disclosure were satisfied. The inside information must be disclosed without undue delay, when the conditions of the temporary delay are no longer fulfilled. The obligation to publish may already be triggered by certain specific rumours; if the non-disclosure can no longer be guaranteed, the source of the rumours is irrelevant.

The issuer is further obliged to keep records, so-called "insider lists" (Art. 18 MAR). These lists must include details of every person who has been provided with inside information and is working for the issuer, such as executives bodies or employees as well as external advisors like auditors and legal advisors.

According to Art. 19 MAR, the issuer is obliged to disclose any subsequent transaction(s) once a total amount of EUR 5,000 has been reached within a calendar year relating to purchases of shares or debt instruments of the issuer or to derivatives or other financial instruments linked thereto, of persons discharging managerial responsibilities and persons closely associated with them (directors' dealings). The transaction must be disclosed no later than three business days after the date of the transaction. Dealing of such persons is, in any case, not permitted during a 30-day "closed period" prior to the announcement of an interim financial report or a year-end report by the company.

As far as these responsibilities concern SMEs, the Commission started a consultation process to discuss ways of easing the burdens imposed on SMEs in order to simplify market participation for them.

Beside the obligations under the MAR, the WpHG determines further post-IPO obligations of the issuer.

According to sec. 33 *et seq*. WpHG, shareholders are obliged to notify the issuer in case their voting rights in the issuer, or financial instruments with regard to voting rights in the issuer (or voting rights attributable to the shareholders), exceed, reach or fall below certain thresholds (3% (only with regard to voting rights), 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%). The issuer must publish the voting right notifications received from its shareholders no later than three business days after the receipt of such information and inform BaFin as well as the companies register (*Unternehmensregister*).

Additionally, the issuer is obliged to publish and to inform BaFin and the companies register about any change in the total number of voting rights, including the decrease and increase of voting rights, without undue delay and no later than two business days after the issuer has received the information (sec. 41 WpHG).

Issuers are further obliged to publish the convening of the shareholders' meeting in the federal gazette (*Bundesanzeiger*). This publication must include the agenda, the total number of shares and voting rights at the time of the convening, and the shareholders' rights regarding the participation of the shareholders' meeting (sec. 49 para. 1 sentence 1 no. 1 WpHG).

Furthermore, details of distribution and payment of dividends, issue of new shares, and exercise of conversion, subscription and cancellation rights must be published in the federal gazette without undue delay (sec. 49 para. 1 sentence 1 no. 2 WpHG).

Finally, all changes in the rights attached to the admitted securities and information published in other countries must be published without undue delay and BaFin and the companies register must be informed (sec. 50 para. 1 sentence 1 no. 1, 2 WpHG).

In addition to the regulations mentioned above, the German Corporate Governance Code (*Deutscher Corporate Governance Kodex*) presents essential statutory regulations for the management and supervision of German listed companies and contains, in the form of recommendations and suggestions, internationally and nationally acknowledged standards for good and responsible corporate governance. The recommendations and suggestions are not mandatory. Through the declaration of conformity pursuant to sec. 161 AktG, the issuer has to disclose and explain any deviation from the recommendations – not the suggestions – in the form of an annual declaration of conformity (comply or explain).

Potential risks, liabilities and pitfalls

Under the WpPG (sec. 21 WpPG), those who assumed liability for the prospectus (i.e. the issuer and the underwriters), as well as those persons who ordered the issuance of the prospectus, will be held liable if material information for the assessment of the securities is incorrect or incomplete. Pursuant to sec. 21 para. 1 WpPG, the incorrect or incomplete information has to be of significant importance for the evaluation of the securities. However, the prospectus liability does not apply if the incorrectness or incompleteness of the prospectus was not caused by wilful intent or gross negligence. In order to prevent any potential risk, underwriters focus on the submission of legal and disclosure opinions by the legal counsels, officers' certificates, due diligence documentation and comfort letters by the accountants, which might help in building a legal defence and contribute to a discharge from liability.

The relevant event causing liability pursuant to sec. 21 WpPG is the purchase of securities, which are admitted to stock trading, based upon an incorrect or incomplete prospectus. The contractual purchase transaction has to be concluded within six months following the publication of the prospectus and the initial listing of the securities, irrespective of whether it is a first or a subsequent purchase.

The purchaser is entitled to reimbursement of the purchase price plus the usual costs connected to such purchase in turn for reassignment of the securities. If the purchaser does not hold the securities any longer, it may demand the difference amount between the purchase price and sales price, including the costs usually connected with securities transactions. In both cases, the purchase price is limited by the initial offering price of the securities, sec. 21 para. 2 clause 1 WpPG.

The new prospectus regulation further provides for administrative sanctions in case of an infringement of provisions of the new prospectus regulation related to the content of the prospectus.

In addition to the prospectus liability resulting from the WpPG, prospectus liability might exist based upon the German Investment Act (*Vermögensanlagegesetz – Kapitalanlagegesetz*), the prospectus liability resulting from investment-related regulations and the prospectus liability provided by civil law.

In order to protect the issuer and banks from a prospectus liability, so-called IPO insurances cover all claims based on wrong statements or materials made or distributed in connection with the IPO as well as other actions made in connection with the preparation and implementation of an IPO. This also covers any indemnity claims by the underwriters against the issuer as well as costs of defence against claims. Insured persons are the issuer, selling shareholders, board members of the issuer, employees of the issuer as well as the underwriters (optional).

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Hong Kong

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Introduction

Brief history of IPOs in Hong Kong

- The Stock Exchange of Hong Kong Limited (the "**SEHK**") was incorporated in 1980, unifying the then four exchanges in Hong Kong.[1]
- In July 1993, the first PRC incorporated enterprise was listed in Hong Kong.[2]
- In November 1999, the Growth Enterprise Market ("**GEM**") was established to provide a platform for fund raising for companies with growth potential.
- The SEHK, Hong Kong Futures Exchange Limited and Hong Kong Securities Clearing Company Limited merged and formed a single holding company, Hong Kong Exchanges and Clearing Limited ("**HKEx**"), the shares of which were listed on the Main Board on 27 June 2000.
- In 2012, HKEx, Shanghai Stock Exchange and Shenzhen Stock Exchange established a joint venture, China Exchanges Services Company Limited, for developing financial products and related services. Shanghai-Hong Kong Stock Connect was launched in November 2014 while Shenzhen-Hong Kong Stock Connect was launched in December 2016, creating access for Mainland investors to securities traded on the SEHK through their domestic brokers.
- The efforts of HKEx and the other relevant market participants have made Hong Kong one of the leading listing venues in the world. From January 2017 to November 2017, the equity funds raised by the SEHK amount to US$14,911 million, ranking fourth in the global listing market.[3]

Reasons for companies to choose to list in Hong Kong

The Hong Kong Government and HKEx endeavour to maintain Hong Kong as an attractive spot to local and foreign companies for fund-raising and listing activities. The following features of the Hong Kong securities market are some of the major reasons for companies to choose to list in Hong Kong:

- **Objective listing qualifications**: The SEHK adopts a rather objective set of listing qualifications, with very limited policy consideration, giving certainty to the listing process.

* * *

Main Board (satisfying one of the following tests)			GEM
Profit Test	Market Capitalisation / Revenue Test	Market Capitalisation / Revenue / Cash Flow Test	-
• 3-year aggregate profit ≥ HK$50m • Market capitalisation ≥ HK$500m	• Latest year revenue ≥ HK$500m • Market capitalisation ≥ HK$4bn	• Latest year revenue ≥ HK$500m • Market capitalisation ≥ HK$2bn • Positive 3-year aggregate operating cash flow (OCF) ≥ HK$100m	• Positive 2-year aggregate OCF ≥ HK$30m • Market capitalisation ≥ HK$150m
• 25% free float minimum (can reduce to 15% if market capitalisation > HK$10bn) • 3 years' management continuity • 1-year ownership continuity			• 25% free float minimum (can reduce to 15% if market capitalisation > HK$10bn) • 2 years' management continuity • 1-year ownership continuity
Minimum 300 shareholders			Minimum 100 shareholders

- **Leading position in the global market**: Hong Kong has successfully established itself as an international financial centre and as a leading listing venue in the world. In the past two decades, the market capitalisation of all companies listed on the SEHK has grown 790% to HKD29 trillion as at 31 May 2017, and the SEHK has been the top IPO venue in terms of the amount of funds raised in five of the past eight years.[4]
- **Well-established legal system**: The well-established common law system with the rule of law upheld by an independent judiciary, together with a robust regulatory regime protecting the investors' interest, afford confidence to the local and foreign issuers as well as investors.
- **Strong bonds with China**: Hong Kong is a common listing and fundraising venue for PRC companies and international enterprises. Hong Kong serves as a key link for China to connect with the global capital markets. It is also a trusted channel for foreign enterprises to access funds of China investors.
- **Diversity of investors and issuers**
  Hong Kong enjoys a balanced mix of institutional and retail investors. This helps to attract issuers from a wide range of industries, including industries of real estates, telecommunications, upstream and downstream manufacturing, retail business, e-commerce, financial services, construction, internet business, education, energy, etc.
- **Way forward – innovative sectors and weighted voting rights ("WVR")**
  In December 2017, HKEx published the New Board Concept Paper Consultation Conclusions, in which it was proposed that two new chapters shall be added to the Main Board Listing Rules for allowing: (i) the listing of companies engaged in the

research and development, application and commercialisation of products, processes or technologies in the biotech sphere; (ii) the listing of innovative and high-growth issuers that have WVR structures; and (iii) the secondary listing of innovative issuers that are primary-listed on a Qualifying Exchange (e.g. the United Kingdom, the United States, etc.).[5]

In February 2018, HKEx published a Consultation Paper regarding a listing regime for companies from emerging and innovative sectors.[6] The purpose of the Consultation Paper is to present HKEx's proposals for giving effect to the way forward set out in the Conclusion Paper. The relevant consultation was concluded on 23 March 2018 and it is expected that the blueprint outlined in the Consultation Paper will be subject to further revision.

The IPO process: steps, timing, parties and market practice

Steps and timing of IPOs in Hong Kong

The SEHK adopts a streamlined vetting process for listing application. The listing application submitted to the SEHK must be substantially complete. Depending on the complexity and the scale of the IPO together with the extent of pre-IPO planning, the listing process can be completed within months after the kick-off meeting.

Steps	Estimation of Time Required According to Usual Market Practices	Particulars
Pre-IPO Diagnosis	One year or more before the target date of listing ("**Listing Date**")	• Assessing the applicant's business, financial conditions and management to see if the applicant will meet the listing qualifications. • Identifying any issues regarding regulatory compliance, accounting and tax which shall be resolved in advance.
Pre-IPO Reorganisation	One year or more before the Listing Date	• Restructuring the group for listing purposes. • Transferring all material contractual rights, licences and assets to the listing group. • Delineating the excluded business from the listing group.
Pre-IPO Investment	One year or more before the Listing Date	Securing financial resources from private equity investors or strategic investors.
Kick-off	Six months before the Listing Date	• Engaging professional parties to form an IPO team. • Circulating a memorandum on publicity restrictions on all parties in the IPO team. • Fixing a listing timetable.

Steps	Estimation of Time Required According to Usual Market Practices	Particulars
Sponsor's Due Diligence, Prospectus Preparation and Verification	Six months before the Listing Date	• Conducting reasonable enquiries and investigation regarding the listing group, the controlling shareholders as well as the directors and senior management, the listing group's business operations, major customers, suppliers and subcontractors, principal bankers, etc. • Drafting the contents of the prospectus. • Preparation of an accountants' report by the reporting accountants. • Verification of the contents of the prospectus by obtaining documentary evidence.
A1/5A Submission	80 days before the Listing Date	• Submission of the listing application to the SEHK by the Sponsor. The application shall include a substantially completed draft of the prospectus.[7]
Vetting Process	70 days before the Listing Date	• The SEHK gives comments on the listing application (usually two rounds of written comments will be given). • The first round of comments are usually issued within 10 business days from the listing application. • There is no pre-set timeframe for the vetting process. The length of such process depends largely on the quality of the listing application submitted and the complexity of the issues involved.
Listing Hearing	40 days after submission of A1	Attending the hearing in which the remaining issues and concerns regarding the listing application will be raised by the Listing Committee of the SEHK.
Post-hearing	14 days before the Listing Date	• Addressing and replying to any further queries from the Listing Committee. • Convening a long board meeting to approve the listing and the relevant documents. • Publishing post-hearing information pack on the SEHK's website. • Issuing pre-deal research and distributing a red-herring prospectus during the roadshow.
Prospectus Registration	8 days before the Listing Date	• Entering into a Hong Kong underwriting agreement. • Registering the prospectus and other relevant documents with the Companies Registry of Hong Kong.
Before Dealings Commence	7 days before the Listing Date	• Printing the prospectus and posting it on the SEHK's website. • Entering into an international underwriting agreement. • Fixing the listing price. • Continuing to conducting pre-listing due diligence by the sponsor.

Steps	Estimation of Time Required According to Usual Market Practices	Particulars
Listing Date	-	The dealings in shares on the SEHK commence.
Post-listing	Within 30 days after the publication of the prospectus	Exercising an over-allotment option (if any).

Parties involved in the IPO process in Hong Kong

Parties	Role and Duties
The listing applicant	The major roles and duties of these key personnel include: (a) providing assistance to the professional parties to accelerate their understanding of the business and commercial strategies of the listing applicant and providing the basis for the drafting of the prospectus; (b) providing the professional parties with information and documents about the company for due diligence, prospectus drafting and verification; and (c) making presentations to the financial and investor community during roadshows.
The sponsor	Under the Listing Rules, every applicant must appoint a sponsor for the listing application.[8] The key roles and duties of the sponsor include: (a) conducting due diligence on the listing applicant, its controlling shareholders and management in accordance with Practice Note 21 to the Listing Rules to ensure the suitability for listing of the listing applicant and that the prospectus contains sufficient information; (b) coordinating all professional parties involved in the listing application to conduct due diligence, draft the prospectus and the listing application documents; (c) addressing matters raised by the SEHK and the Securities and Futures Committee (the "**SFC**"); and (d) attending any meetings with the SEHK.
Legal advisers to the listing applicant	The legal advisers to the listing applicant shall advise on legal and regulatory issues to the listing applicant. Their major responsibilities include: (a) advising on the corporate structures and group reorganisation; (b) drafting and preparing the prospectus sections and application documents which are customarily prepared by the legal advisers to the listing applicant; (c) providing training to the directors and senior management of the listing applicant; (d) reviewing and commenting on the underwriting agreements; and (e) attending to prospectus registration.
Legal advisers to the sponsor and underwriters	The legal advisers to the sponsor and the underwriters provide assistance and advice to the sponsor and underwriters. Their major responsibilities include: (a) assisting the sponsor in conducting due diligence in accordance with Practice Note 21 to the Listing Rules; (b) drafting and preparing the prospectus sections and application documents which are customarily prepared by the legal advisers to the sponsor and the underwriters; (c) attending to prospectus verification; and (d) drafting and reviewing underwriting agreements.

Parties	Role and Duties
Reporting accountants	The major duties of the reporting accountants include: (a) preparing an accountants' report and the unaudited *pro forma* financial information to be disclosed in the prospectus; and (b) delivering comfort letters to the sponsor and underwriters regarding the financial information provided in the prospectus.
Financial printer	The financial printer is primarily responsible for typesetting, translating and printing the prospectus and application forms.
Property valuer	The independent property valuer is responsible for the valuation of property interests held by the applicant. The property valuation report will be included in the prospectus.
Internal control consultant	The internal control consultant is responsible for: (a) reviewing the internal control system and procedures of the listing applicant; (b) providing recommendations to enhance the internal control system and procedures; and (c) assisting the sponsor in assessing the applicant's ability to meet the internal control requirements under the Listing Rules.
Hong Kong share registrar	The Hong Kong share registrar is responsible for maintaining the applicant's register of members in Hong Kong and recording any transfers in the issuer's shares.
Industry consultant	The industry consultant is usually engaged for the purpose of conducting market research and analysis, which will be disclosed in the prospectus.
Compliance adviser	The compliance adviser is engaged for the period from the date of listing until the publication of the issuer's financial results for the first or second full financial year following its listing. The issuer shall consult the compliance adviser regarding certain compliance matters.
The underwriters	The key roles of the underwriters include administering the "book building" process and distributing the securities of the issuer during the offering period.

Bilingual prospectus requirement – unique feature of IPOs in Hong Kong

One of the unique features of the SEHK is the requirement of a bilingual prospectus (in English and Chinese).[9] Market players in Hong Kong are accustomed to prepare dual-language documentation and to conduct bilingual communication with the regulatory authorities. These enable the listing applicant to be closely involved and fully informed throughout the listing process.

Regulatory architecture: overview of the regulators and key regulations

Organisations responsible for regulating IPOs in Hong Kong

- The responsibility of overseeing the regulatory regime of the Hong Kong IPO market primarily falls on the SEHK and the SFC.
- In general, the SEHK assumes the role in regulating the market operation. In particular, it is the duty of the SEHK to make sure that the Hong Kong listing market is operated in a fair, orderly and informed manner.[10] The aforementioned regulatory functions of the SEHK are shared between the Listing Division and the Listing Committee.
- The SFC, being an independent statutory body, is entrusted with the responsibility to maintain and promote fairness and transparency of the securities and futures industry, to protect public investors and to reduce systemic risks in the securities and futures industry.[11] The SFC carries out its functions through the exercise of its statutory powers of investigation and enforcement.

Key rules and regulations applicable to the IPO process in Hong Kong

The major laws and regulations governing the listing process in Hong Kong include the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), the Securities and Futures Ordinance (Cap. 571) and the Listing Rules.

- Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32):
  - A prospectus complying with certain content requirements is required for the offer of shares in a company to the public.[12] The prospectus must also be registered with the Registrar of Companies before publication.[13]
  - Section 40 provides that the following persons shall be liable to compensate investors for the loss they have sustained by reason of any untrue statement or a material omission in a prospectus:
    - the directors of the company at the time of issue of the prospectus;
    - persons who are named in the prospectus as directors or as having agreed to become directors and who have authorised themselves to be so named;
    - a promoter of the company; and
    - any person who has authorised the issue of the prospectus.
  - Section 40A provides that any person who has authorised the issue of a prospectus (e.g. directors) containing any untrue statement or material omission may be liable to imprisonment and a fine, unless he proves either that the statement was immaterial or that he had reasonable grounds to believe and did up to the time of the issue of the prospectus believe that the statement was true.
- Securities and Futures Ordinance (Cap. 571) (SFO):
  - The SFO imposes civil and criminal liabilities for misstatements which induce investment. Section 108(1) provides that a person who makes any fraudulent, reckless or negligent misrepresentation which induces others to deal in securities may be liable for compensation. Section 107 imposes criminal liability for making fraudulent or reckless misrepresentation inducing others to deal in securities, which is punishable by a maximum fine of HK$1 million and up to seven years' imprisonment.
  - By virtue of section 277, it is a market misconduct to disclose false or misleading information, or omit a material fact from the disclosure, which induce securities transactions. Pursuant to section 257(1), the Market Misconduct Tribunal may impose different sanctions for market misconduct, including disqualification order, cold shoulder order, cease and desist order, disgorgement order, costs order, disciplinary referral order, etc. Section 298 imposes criminal liability on the similar circumstances as section 277, which is punishable by a fine of up to HK$10 million and imprisonment for up to 10 years. Any person committing market misconduct may be liable for compensation under section 305.
  - Section 384 imposes criminal liability on any person who intentionally or recklessly provides any information which is false or misleading in a material respect in filing with the SEHK or the SFC a prospectus, other listing document or any public disclosure materials disseminated under the Listing Rules. Copies of applications to list on the SEHK and all ongoing disclosure materials are filed with the SFC through the SEHK under the "dual filing" regime. An offence under Section 384 is punishable by up to two years' imprisonment and a maximum fine of HK$1 million.

- Listing Rules:
  - The Listing Rules set out conditions which the listing applicants are expected to meet before securities may be listed in Hong Kong. In addition, the Listing Rules also contain continuing obligations which listed issuers must comply with.[14]

Public company responsibilities

Obligations exclusively imposed on public companies in Hong Kong

The Listing Rules require companies listed on the SEHK to comply with a list of continuing obligations. Listed below are some examples of such obligations:

Manner of Disclosure	Particulars
Announcement	An issuer is required to publish an announcement for different matters, e.g. inside information,[15] any change of directors, supervisor or chief executive,[16] specific types of advances to an entity,[17] notification transactions,[18] connected transactions,[19] etc.
Circular	A circular shall be issued when an issuer needs to seek the shareholders' approval for certain matters, e.g. connected transactions, certain types of notifiable transactions, proposed alteration of the memorandum and articles of association and proposed issue of shares.
Annual Report and Interim Report	A Main Board issuer should issue an annual report not later than four months,[20] and a half-year interim report not later than three months,[21] after the end of the relevant period. A GEM issuer should issue an annual report not later than three months after the financial year end.[22] A half-year interim report and a quarterly report for the first three- or nine-month period of each financial year shall be issued not later than 45 days after the date on which the relevant financial period ends.[23] The following information shall be included in the annual report: financial statements; management discussion; details of directors' emoluments; and corporate governance report, etc. If an environmental, social and governance report ("**ESG Report**") is not included in the annual report, the issuer should publish an ESG Report separately.[24]
Response to the SEHK's Inquiries	There is a general obligation on the part of the issuer to answer the enquiries raised by the SEHK in relation to the unusual movements in the price or trading volume of securities of the issuer.[25] The issuer is expected to respond to such inquiries promptly and, where appropriate or requested by the SEHK, issue an announcement containing a statement in the prescribed form to the effect that it is not aware of any matter or development relevant to the unusual price movement or trading volume.[26]

Potential risks, liabilities and pitfalls

Potential legal liabilities and penalties associated with going public in Hong Kong & Common missteps and pitfalls during and after the IPO process

As discussed above, the listing market in Hong Kong is subject to joint regulation by the SEHK and the SFC. Under the current regulatory regime, civil and criminal liabilities may arise during and after the IPO process.

In recent years, the SFC and SEHK have expressed grave concern over the price swings of GEM stocks after listing. In addition, the regulators raised concern about the highly concentrated shareholdings and small shareholder bases of GEM stocks. On 20 January 2017, the SFC issued a guideline to sponsors, underwriters and placing agents involved in the listing and placing of GEM stocks[27] and a joint statement with SEHK regarding the price volatility of GEM stocks.[28] Subsequent to the issue of the joint statement by the SFC and SEHK, the regulators have taken actions against different GEM listing applicants, in particular those of placing-only GEM listings, delaying their listings. Listing applicants should consult the sponsor and legal advisers on compliance with the guideline and ensure that there will be an open market in the securities for which listing is sought.

* * *

Endnotes

1. "History of HKEX and its Market – HKEX Group"– http://www.hkexgroup.com/About-HKEX/Company-Information/About-HKEX/History-of-HKEX-and-its-Market?sc_lang=en.
2. HKEx Fact Book 1999 – https://www.hkex.com.hk/-/media/HKEX-Market/Market-Data/Statistics/Consolidated-Reports/HKEX-Fact-Book/HKEx-Fact-Book-1999/FB_1999.pdf.
3. HKEx Market Statistics 2017 – https://www.hkex.com.hk/-/media/HKEX-Market/News/News-Release/2017/171220news/171220news.pdf?la=en.
4. New Board Concept Paper (June 2017) – https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/Concept-Paper-on-New-Board/cp2017061.pdf.
5. Consultation Conclusions – New Board Concept Paper (December 2017) – https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/June-2017-Concept-Paper-on-New-Board/Conclusions-(December-2017)/cp2017061cc.pdf.
6. Consultation Paper – A Listing Regime for Companies From Emerging and Innovative Sectors (February 2018) – https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/February-2018-Emerging-and-Innovative-Sectors/Consultation-Paper/cp201802.pdf.
7. Rule 9.03(3) of the Main Board Listing Rules and Rule 12.09 of the GEM Listing Rules.
8. Rule 3A.02 of the Main Board Listing Rules and Rule 6A.02 of the GEM Listing Rules.
9. Section 38(1) of the Companies (Winding up and Miscellaneous Provisions) Ordinance.
10. "How We Regulate" – https://www.hkex.com.hk/Listing/How-We-Regulate/Overview?sc_lang=en.
11. "Introduction to Regulatory Framework" – https://www.hkex.com.hk/Services/Rules-and-Forms-and-Fees/Regulatory-Framework/Introduction?sc_lang=en.
12. Sections 38 and 342 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance.
13. Section 38D(1) and 342C(1) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance.
14. Chapter 13 of Main Board Listing Rules and chapter 17 of the GEM Listing Rules.
15. Rule 13.09 of the Main Board Listing Rules and 17.10(2) of the GEM Listing Rules.
16. Rule 13.51(2) of the Main Board Listing Rules and Rule 17.50(2) of the GEM Listing Rules.
17. Rules 13.13 and 13.14 of the Main Board Listing Rules and Rules 17.15 and 17.16 of the GEM Listing Rules.
18. Chapter 14 of the Main Board Listing Rules and Chapter 19 of the GEM Listing Rules.
19. Chapter 14A of the Main Board Listing Rules and Chapter 20 of the GEM Listing Rules.

20. Rule 13.46 of the Main Board Listing Rules.
21. Rule 13.48(1) of the Main Board Listing Rules.
22. Rule 18.03 of the GEM Listing Rules.
23. Rules 18.53 and 18.66 of the GEM Listing Rules.
24. Note 1 to Rule 13.91 of the Main Board Listing Rules and Note 1 to Rule 17.103 of the GEM Listing Rules.
25. Rule 13.10 of the Main Board Listing Rules and Rule 17.11 of the GEM Listing Rules.
26. Rule 13.10(2) of the Main Board Listing Rules and Rule 17.11(2) of the GEM Listing Rules.
27. Guideline to sponsors, underwriters and placing agents involved in the listing and placing of GEM stocks – http://www.sfc.hk/web/EN/assets/components/codes/files-current/web/guideline-to-sponsors,-underwriters-and-placing-agents-involved-in-the-listing-and-placing-of-gem/guideline-to-sponsors,-underwriters-and-placing-agents-involved-in-the-listing-and-placing-of-gem.pdf.
28. Joint statement regarding the price volatility of GEM stocks – http://www.sfc.hk/web/EN/news-and-announcements/policy-statements-and-announcements/joint-statement-regarding-the-price-volatility-of-gem-stocks.html.

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India

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Introduction

Capital markets in India continued their robust trajectory in 2017, with record-setting numbers in terms of the number and amounts raised in equity market offerings. Amounts raised in main-board IPOs in India nearly tripled to ₹821.09bn from 45 transactions in the financial year 2018, compared with ₹282.25bn from 25 transactions in the year before. Qualified institutions placements, or QIPs, which are private placements to institutional investors by listed issuers under the SEBI regulations, also increased to an all-time record of ₹611.18bn from 44 transactions in 2017, with more than a majority of such capital being raised by banks and financial services companies. (*Source: Prime Database.*)

The year saw a significant contribution by issuers in the financial sector, including insurance, financial services and banking, partly as a result of the formalisation of the economy following the government's "demonetisation" initiative to withdraw high-value currency notes in 2016. In fact, the five largest IPOs of the year were all by insurers. There were also several offerings by financial services providers, intermediaries and market participants, including IPOs by one of India's two leading stock exchanges (BSE), one of India's two principal securities depositories (Central Depository Services (India)), a power trading exchange and in the rapidly expanding mutual funds sector, as well as by a non-banking finance company (NBFC) and a "small finance bank", a recently introduced category of bank to promote financial inclusion. The Life Insurance Corporation of India continues to be a major investor in IPOs, particularly by public sector issuers. The markets also witnessed new deal structures in the introduction of IPOs by infrastructure investment trusts, or InvITs. Government privatisation and divestment initiatives were also a driver of primary market activity, including IPOs by several state-owned companies such as General Insurance Corporation of India, New India Assurance Company Limited, Cochin Shipyard Limited and Housing and Urban Development Corporation. The government exceeded its targeted amount of divestment for the current year and has in fact increased its target for the next financial year by more than 10% to ₹800bn (US$12.3 billion), and also announced the proposed privatisation of the debt-laden national airline, Air India. During the financial year ended on March 31, 2018, there were no overseas public equity offerings by Indian companies, although overseas debt offerings (private placements) remained a preferred option for issuers.

The Indian banking sector has been in focus over the past year. State Bank of India, India's largest public sector bank, merged with five of its associate entities and another public sector bank, making it one of the largest banks in the world in terms of deposits. Bandhan Bank, a new banking licensee with roots in microfinance, completed an IPO amid strong demand in 2018. Mindful of the high amount of non-performing assets (NPAs) in the banking sector, the Reserve Bank of India (RBI) has prompted banks in India to pursue the resolution of bad debts of certain large defaulters that constitute a significant percentage of outstanding NPAs under the Insolvency and Bankruptcy Code, 2016, or IBC, and also recently eliminated other previous debt restructuring alternatives, which were seen as ineffective, in favour of compelling resolution under the IBC. In order to strengthen capital and encourage credit growth, the government has also announced a recapitalisation package of ₹2,110bn for public sector banks over the next two years through a combination of recapitalisation bonds, direct investment by the government and capital-raising from the markets. NPAs, however, remain a major concern for the banking sector. More recently, there has been an impact on the banking sector as a result of large amounts involved in fraud and internal controls issues and related ongoing investigations, notably in public sector banks, as well as governance concerns in certain banks.

A notable feature of the Union Budget this year was the re-introduction of a long-term capital gains tax on equities of 10% after a holiday of nearly 15 years. This tax (without indexation benefit) applies to capital gains over ₹100,000 (approximately US$1,500) made on the sale of equity shares or units of equity-oriented mutual funds after March 31, 2018 (but grandfathers capital gains accrued until January 31, 2018) and on dividend income from equity mutual funds in the hands of the investor, and has been seen as responsible for some volatility in the markets in the period following the announcement.

The economic effects of the government's "demonetisation" exercise in 2016, the commencement of India's new goods and services tax (GST) regime in July 2017, the government's focus on bad debts resolution, including under the new IBC, together with the current spotlight on governance issues and instances of fraud and operational risks in India's banks and the ongoing transition from Indian GAAP to Indian Accounting Standards, as well as marginally less than normal monsoon rainfall, continued to have a bearing on the Indian markets. In particular, the slowdown GDP growth in 2017 to a three-year-low of 5.7% in the April–June quarter of 2018 has been partly attributed to the knock-on effects of demonetisation and the uncertainty related to the GST rollout – growth gradually recovered to 7.2% for the quarter ended December 31, 2017. Globally, an increase in oil prices, some indications of trade protectionism from developed economies, Brexit and geopolitical developments involving North Korea were key economic themes. Central banks and other regulators around the world have also been grappling with the regulation of Bitcoin and other cryptocurrencies amidst a rapid increase in speculation – for example, the RBI has prohibited banks and other entities regulated by the RBI in India from transacting in or facilitating any transactions involving virtual currencies. The RBI has given banks and other entities a period of three months from the date of the circular to stop providing these services under any existing relationships.

Indian equity IPO process and features

Indian regulations have permitted book-built IPOs since 2000 under the Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000, which were subsequently replaced by the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, or the SEBI ICDR regulations. Participation by foreign institutional investors in India's capital markets increased following the advent of India's economic liberalisation policies in 1991 and the establishment of the Securities and Exchange Board of India, or the SEBI, in 1992. The Companies Act, 2013, the Securities Contracts (Regulation) Act, 1956 and the Securities Contracts (Regulation) Rules, 1957 also include requirements applicable to an IPO.

The Indian IPO and listing process under the SEBI ICDR regulations begins with the SEBI's review of a publicly filed draft offer document, or draft red herring prospectus, prepared by the issuer company, which can take between eight weeks and several months, depending on the complexity of the issues involved. This is followed by revisions based on the SEBI's and the stock exchanges' review and filing of an offer document, or red herring prospectus, with the registrar of companies where the issuer is registered. Marketing of the IPO is to be on the basis of the offer document and typically a book-building process, essentially a regulated bidding process within a specified price band. The offer period lasts a few days, and is required to commence within one year of the SEBI's final observation letter following its review of the draft offer document.

Allocation to investors (unlike in some other securities markets) is, for the most part, required to be on a non-discretionary *pro rata* basis for qualifying bids within each specified and defined category of investors: qualified institutional buyers, or QIBs; retail investors; and the residual category of non-institutional investors. The SEBI ICDR regulations also permit initial allocations on a discretionary basis during the start of the offer period to be made to so-called "anchor investors", which benchmarks the IPO price.

Following the allocation to all investors, the underwriting agreement is executed and the final offer document, or the prospectus, is filed with the registrar of companies. Full payment for shares, rather than a margin payment, is required at the time of initial bidding by investors, and all investors (other than anchor investors) are required to place bids only using an "application supported by blocked amount", or ASBA, which is a payment mechanism whereby amounts in bidders' bank accounts are electronically earmarked for such bids, obviating the need for cheques or movement of funds from bidders' bank accounts prior to final allocations of shares. The board of directors of the issuer allots shares pursuant to such funds being actually received into an escrow account after the allocation. Although the stock exchanges, principally the National Stock Exchange of India Limited, or the NSE, and the BSE Limited, or the BSE (previously known as the Bombay Stock Exchange), grant "in-principle" approval for listing of the issuer's shares after the filing of the draft offer document, the final listing approval is granted only after the allotment of shares in the IPO. As part of the application process, the issuer company executes a standard listing agreement with each stock exchange, which previously covered corporate governance, periodic reporting and other related matters. The SEBI has, since the introduction of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, made these matters part of such regulations directly rather than listing agreement provisions, and actively regulates and supervises the stock exchanges.

Trading begins following the stock exchange approval, usually within a few days of the application. Notably, there is no "when issued" trading of shares of Indian companies immediately upon pricing and in advance of listing. The SEBI has been focused on progressively reducing the period between the last date for bidding for shares in an IPO and the listing date, most recently requiring in its November 2015 circular that all market intermediaries are to ensure such period is not more than six working days (previously this period was 12 working days). All told, the IPO process could take between three and six months from the time the draft red herring prospectus is filed with the SEBI, although it may take longer depending on the issues involved. In addition, issuers are required to ensure a minimum level of public float of 25% of the class of shares offered and allotted following the IPO, or 10% for large issuers with a market value based on the IPO price of ₹400bn or more, with a deferred requirement for such issuers to achieve 25% within three years of the IPO.[1] The SEBI has prescribed various methods for listed companies to achieve minimum public shareholding, most recently permitting open market sale of shares held by the promoters and promoter group of the company, subject to certain conditions, and qualified institutions placement.[2] IPOs by small and medium enterprises, or SMEs (where the post-issue capital of the issuer is ₹250m or less), are subject to separate and generally less detailed requirements,[3] and shares of such issuers are listed on SME platforms of the NSE and the BSE.

The SEBI ICDR regulations require a fresh filing and review of the draft offer document by the SEBI in the event any specified material changes occur after the initial filing, including changes to the issuer's promoter (which includes any person or entity in control of the issuer), changes to more than half of the issuer's board of directors, changes of more than 20% to the estimated size of the IPO and changes of more than 20% in the specified use of proceeds, or objects of the issue.[4] The SEBI has also specified certain criteria based on which draft offer documents are liable to be rejected by it, including but not limited to: litigation affecting the issuer's survival; provision of incomplete or incorrect information or documentation to comply with disclosure requirements; misleading business models; questionable changes to financial statements or accounting policies ahead of the IPO; lack of crucial business-related approvals in relation to the use of proceeds of the fresh issue; and unidentifiable promoters of the issuer.[5] If there is any investigation, enquiry, adjudication, prosecution (including a show cause notice) or other regulatory action against the issuer, its promoter (controlling shareholder), or any of its directors or group companies, the SEBI can withhold its observations on the draft offer document for a specified period, which may delay the IPO.[6]

An underwritten offering fails if it does not receive subscription of at least 90% of the fresh issue through the offer document, in the event of which all bid amounts received are required to be refunded with interest – this requirement does not apply to an offer for sale.[7] In addition, the SEBI ICDR regulations prohibit underwriting of the portion to be allotted to QIBs in offerings under Regulation 26(2), which is intended for issuers that have not yet achieved a specified minimum level of financial performance and are based more on prospects and upcoming projects.[8] Such offerings require at least 75% of the offer to be allotted to QIBs.[9]

Unlike some other jurisdictions, the SEBI, which licenses investment banks advising on offerings under its regulations, liaises only with such merchant bankers or lead managers for all practical purposes related to the IPO, rather with the issuer directly or its lawyers. Any such merchant bank that is an associate of the issuer can only be a lead manager for purposes of marketing the offering.[10]

<u>IPO working group</u>

The issuer and the underwriter teams are assisted by counsel, including to help draft and review the offer document and the agreements related to the IPO. In an offering that includes a private placement pursuant to Rule 144A under the U.S. Securities Act of 1933, at least one U.S. counsel is also part of the team. The issuer's statutory auditors are required to audit the financial statements included in the offer document and deliver customary comfort letters to the underwriters. In certain cases, reports from experts in sectors such as life insurance are also included in the offer document. The registrar to the IPO holds responsibilities to administer the offering process, including bidding by various categories of investors. Certain banks registered with the SEBI, called "self-certified syndicate banks" or SCSBs, are also permitted to collect bids and earmark ASBA funds for such bids, and other banks perform the role of escrow or refund banks to help with the movement of investor funds. In transactions where proceeds of the fresh issue exceed a specified amount (as discussed below), a monitoring agency is appointed to oversee the use of such proceeds, in accordance with the offer document.

Liability

Indian laws and regulations impose strict obligations on the issuer, its directors and merchant bankers to make full, complete, true and accurate disclosures in a draft offer document and the offer documents issued in relation to an IPO to enable investors to make an informed decision on investment in the offering, and prohibit any person from defrauding investors in connection with an issue of securities. In addition, promoters of an issuer are liable to pay compensation to investors for losses arising from misleading statements or omissions in a prospectus. Any violation of these laws and regulations could subject the issuer, its directors and merchant bankers to punitive action. The SEBI has broad powers to undertake inspection of documents or records of any listed public company or public company which intends to list its securities if the SEBI has reasonable grounds to believe that such company has indulged in fraudulent or unfair trade practices relating to securities markets, and has the same powers vested in a civil court while trying a suit in respect of such inspection of documents. Additionally, the SEBI may, in the interest of investors or the securities market, issue orders restraining persons from accessing the securities market, or prohibit any person associated with the securities market from buying, selling or dealing in securities or direct any intermediary or any person associated with the securities market in any manner, not to dispose of or alienate an asset forming part of any transaction under investigation.

While the issuer is primarily responsible for the correctness, adequacy and disclosure of all relevant information in the offer document, the merchant bankers are required to: make efforts to protect the interests of investors; exercise due diligence and deliver certificates to such effect to the SEBI at the time of filing; ensure proper care and exercise independent professional judgment; ensure that adequate disclosure is made to investors in a timely manner in accordance with applicable regulations and guidelines so as to enable them to make an informed investment decision; and refrain from making an untrue statement or suppress any material fact in any documents, reports or information furnished to the SEBI. The SEBI has the power to undertake inspections and take action against the licensed merchant bankers in the event of any violation, including suspension of the licence.

Exit offer to dissenting shareholders

In order to protect investors who have made investments relying on a prospectus, the Companies Act, 2013[11] and the SEBI ICDR regulations require promoters or shareholders in control to provide for exit opportunities to dissenting shareholders in the event of any change in the objects (use of proceeds of a fresh issue of shares) or variation in the terms of a contract referred to in the prospectus of a company in certain cases, including that at least 10% of the voting shareholders voting dissented, and that the amount to be utilised for the objects in the prospectus is less than 75% of the amount raised (including the amount earmarked for general corporate purposes). This exit opportunity is not available to shareholders in listed companies where there is no identifiable promoter or shareholders in control.[12]

Safety net

The SEBI introduced the concept of a mandatory safety net in a 2012 discussion paper to protect retail investors in the event of a loss in value of shares of the issuer below a certain level and for a sustained period following the IPO. If such a reduction in market price occurred, the promoters would be required to provide retail investors who purchased shares at the IPO and held such shares during the relevant period with the right to tender such shares to the promoters at the IPO price. This has remained a proposal and has not yet been included as a mandatory requirement in the SEBI ICDR regulations. The 2013 IPO by Just Dial Limited, one of the first offerings by an Internet company in India, included a safety net mechanism on a voluntary basis.

Shareholder class actions

Provisions relating to class action suits under the Companies Act, 2013,[13] permit shareholders or depositors to challenge actions of a company and seek damages from the company, its directors, auditors or any other expert by way of class action suits if the management and conduct of the affairs of the company are conducted in a manner prejudicial to the interests of the company or its shareholders or depositors. The minimum number of shareholders or depositors required to bring such action is: (i) for a company with share capital, not less than 100 members or 10% of the total number of shareholders or depositors, singly, whichever is less, or shareholders or depositors singly or jointly holding not less than 10% of the issued share capital or total value of outstanding deposits, respectively; and (ii) for a company without share capital, not less than one-fifth of the total number of its members. Class action suits have not yet been widely seen in India in securities matters.

Materiality in disclosure

IPO prospectuses of Indian companies are characterised by extensive disclosure based on the SEBI's traditionally prescriptive approach, and typically run to 500–1,000 pages of material. A key change since SEBI amendments in 2015 to the SEBI ICDR regulations has been the introduction of materiality thresholds for certain matters in an offer document, including litigation, dues to creditors and the identification of "group" companies.[14] This is an evolution of the SEBI's approach to disclosure – the board of the issuer is now permitted to formulate a policy on materiality, typically a quantified amount on the basis of net worth, profit or revenue as reported in the financial statements of the most recent completed financial year. However, such a materiality policy does not apply to certain items, such as criminal litigation, tax cases or actions by regulatory authorities.

The SEBI ICDR regulations also include disclosure of information pertaining to group companies of the issuer, including certain limited financial information and details of the interests of the promoters in such entities.[15] Pursuant to the amendments, the SEBI has modulated its focus on these entities, which were previously defined as other entities promoted by the issuer's promoter, but have now been revised to only include entities covered under the applicable accounting standards and others considered material by the issuer. This, in part, addresses concerns from issuer companies, particularly those with many years of operations or an inorganic growth strategy with acquisitions and joint ventures, that information on all group companies can be onerous to gather.

Use of proceeds

Another aspect in which SEBI ICDR regulation differs from certain jurisdictions is the emphasis on the objects of the issue, or use of proceeds. The SEBI stipulates detailed disclosure for the use of proceeds of a fresh issue, including information about the equipment, land and other materials to be purchased using IPO proceeds.[16] In addition, for primary offerings exceeding a certain amount (currently ₹1bn), the SEBI requires the appointment of a monitoring agency, usually a bank or other financial institution, to periodically report on whether the use of proceeds is in accordance with the offer document.[17]

Promoter and statutory lockups

Unlike regulators in other jurisdictions, the SEBI is particularly focused on ensuring that the promoter of the issuer (controlling person or entity) has "skin in the game" and continues to hold a substantial shareholding in the issuer following the IPO. Promoters are required to "contribute" not less than 20% of the post-offering capital of the issuer, in order that all such shares are "locked-in" for three years following the offering.[18] In addition, certain securities are ineligible to be included in the promoter's contribution, such as pledged shares, bonus shares by utilisation of revaluation reserves or unrealised profits of the issuer or from bonus issue against equity shares which are ineligible for minimum promoters' contribution, shares acquired for consideration other than cash and pursuant to revaluation of assets or capitalisation of intangible assets in the preceding three years and shares acquired during the one-year period preceding the offering at a price lower than the price in the offering.[19] In addition, all pre-IPO shareholders (including the promoters) of the company (other than with respect to the minimum promoter's contribution described above), subject to certain limited exceptions, are locked-up for one year following the offering.[20]

Outstanding options or rights to receive equity shares

If there are any outstanding convertible securities or any other right which would entitle any person with any option to receive equity shares, then the issuer is not permitted to undertake the IPO. The only exceptions are employee stock options granted to employees under an ESOP scheme framed in accordance with the relevant Guidance Note or Accounting Standards, if any, issued by the Institute of Chartered Accountants of India and fully paid-up outstanding convertible securities which are required to be converted on or before the date of filing of the red herring prospectus with the relevant registrar of companies.[21]

Ind AS

2017 was a transition year for Indian companies moving to prepare their financial statements under the Indian Accounting Standards, or Ind AS, as notified in February 2015 by the Ministry of Finance, Government of India,[22] and 2018 will be a transition year for Indian companies in the non-banking financial services sector. Ind AS implementation for banking and insurance companies has been deferred to 2019 and 2020, respectively. The Ind AS approach used during transition would depend on whether the issuer is a "Phase 1" or "Phase 2" company in the compliance roadmap specified by the government in its notification. Issuers have taken different approaches to Ind AS compliance during the transition period in 2017, which ranged from: (a) using the SEBI's relaxation to continue reporting only in Indian GAAP prior to the IPO to the extent permitted; (b) including a qualitative discussion of the differences between Indian GAAP and Ind AS; and (c) including supplementary Ind AS financial statements for the stub period (with the prior year comparative) leading up to the offering. Notably, banks, non-banking financial services companies and insurance companies are not permitted to voluntarily adopt Ind AS for prior periods.

Typically, Indian issuers do not provide a reconciliation of Indian GAAP financial statements in offering documents, including to IFRS or U.S. GAAP. As reporting in Ind AS is required immediately after listing, issuers have typically provided some Ind AS information or guidance in the offer document so as not to surprise IPO investors when Ind AS financial statements are reported following the listing.

Investor rights following IPO

The SEBI and the stock exchanges generally require all special rights attached to securities of an issuer to be eliminated upon listing of the securities pursuant to completion of an IPO. In certain instances in the past, the SEBI has permitted financial investor shareholders to retain the right to nominate a director on the issuer's board of directors. However, more recently, the SEBI has required any such rights to be kept in abeyance following the completion of an IPO, pending approval from the public shareholders at the next shareholder meeting.

Publicity restrictions

The SEBI ICDR regulations include publicity restrictions for issuers in the period around an offering.[23] In particular, public communications and publicity material cannot contain information extraneous to the offer document and projections or estimates are prohibited. Issuers are only permitted to advertise or otherwise issue public communications and publicity material consistent with its past practices in the period between when the issuer's board of directors approve the IPO and the draft offer document is filed with the SEBI. In addition, any such communication or material (other than product advertisements) in the period thereafter until securities are allotted in the IPO is required to also disclose that the issuer is contemplating an IPO and refer to the offer document. Advertisements are also subject to content restrictions. Lastly, the merchant bankers are required to certify to the SEBI whether news reports regarding the issuer, including in specified newspapers and in major business magazines, are consistent with the offer document.

Recent IPO activity

Major IPOs completed during the financial year ended on March 31, 2018 included offerings by:

- General Insurance Corporation of India (₹111.76bn), a public sector reinsurer;
- New India Assurance Company Limited (₹94.67bn), a public sector general insurer;
- HDFC Standard Life Insurance Company Limited (₹86.90bn), a private sector life insurer;
- SBI Life Insurance Company Limited (₹83.86bn), a life insurer promoted by India's largest public sector bank;
- ICICI Lombard General Insurance Company Limited (₹57.00bn), which was the first-ever IPO by a general insurer in India;
- IRB InvIT Fund (₹50.30bn), which was the first-ever IPO by an infrastructure investment trust in India;
- Bandhan Bank Limited (₹44.73bn), a banking company focused on microfinance;
- ICICI Securities Limited (₹35.15bn), a securities firm in India;
- India Grid Trust (₹20.50bn), an infrastructure investment trust owning power transmission assets;
- AU Small Finance Bank (₹19.13bn), a small finance bank;
- Reliance Nippon Life Asset Management Limited (₹15.40bn), which was the first-ever IPO by a mutual fund asset manager in India;
- Godrej Agrovet Limited (₹11.57bn), a diversified agri-business company;
- Indian Energy Exchange Limited (₹10.00bn), a power trading exchange;
- Aster DM Healthcare Limited (₹9.80bn), a private healthcare service provider;
- Mahindra Logistics Limited (₹8.29bn), a third-party logistics solutions provider in India;
- Future Supply Chain Solutions Limited (₹6.49bn), a third-party logistics service provider;
- Central Depository Services (India) Limited (₹5.24bn), which was the first-ever IPO by a securities depository in India; and
- Matrimony.com Limited (₹4.90bn), a provider of online matchmaking services.

The five largest IPOs during the past year have been by insurance companies, which is a heavily regulated sector in India. Offerings by insurers are regulated and involve review of the draft offer document by the SEBI as well as the sectoral regulator, the Insurance Regulatory and Development Authority of India, or the IRDAI. The IRDAI issues an "in-principle" approval prior to filing of the draft red herring prospectus and final approval prior to filing of the red herring prospectus with the relevant registrar of companies. Additional disclosure requirements over and above those specified in the SEBI ICDR regulations have been prescribed by the IRDAI for offer documents. The IRDAI has also issued guidelines for listed insurers in addition to the listing requirements prescribed by the SEBI and the stock exchanges in India.

In 2017, for the first time, InvITs (business trusts) completed IPOs in India after regulations permitting such structures were first issued by the SEBI in 2014. While InvIT units are hybrid instruments with equity and debt features, they are listed and traded on the equity segment of the stock exchanges. As a new product, the market's understanding and expectation of returns from this product continues to evolve, as compared to traditional equity shares.

Upcoming developments

Regulations on offerings by real estate investment trusts in India, or REITs, were first issued in 2014, although no IPOs have as yet been completed. Based on market feedback, the SEBI has recently notified amendments to relax requirements for REITs, such as permitting single-asset REITs to be set up (earlier a minimum of two assets was required) and permitting REITs to issue vanilla loans to the underlying special purpose vehicles. The real estate sector has also generally been affected by the "demonetisation" initiative of the government and the recently enacted Real Estate (Regulation and Development) Act, 2016. Currently, Embassy Office Parks REIT is the only REIT registered so far with the SEBI in India and is required to undertake an initial offer of its units within a specified time.

In January 2018, against the backdrop of large-scale financial manipulation in the books of accounts of Satyam Computer Services Limited by a PwC entity in 2008, the SEBI passed an order prohibiting all entities practising as chartered accountants in India under the brand and banner of Price Waterhouse from undertaking audits and issuing compliance certificates for any listed companies in India for a period of two years, but permitted assignments for fiscal 2018 to be undertaken for the removal of operational difficulties. This order has been challenged before the appellate authority and partial relief has been granted pending a final hearing in the matter.

The SEBI remains an active regulator in the Indian markets, focusing recent primary market efforts on, among others: new products such as InvITs and REITs; issue and listing of debt securities by municipalities (institutions of self-government constituted under the Constitution of India); and further liberalisation of the foreign portfolio investor (FPI) regulations to enable more kinds of investments by FPIs through measures such as excluding rupee-denominated bonds from the corporate debt limit for FPIs. Recent enforcement efforts to prevent market manipulation, fraudulent and unfair trading practices and insider trading include the SEBI's preliminary examination of the circulation of material non-public information about various large-cap listed companies ahead of earnings releases in WhatsApp groups and SEBI orders directing such companies to strengthen their controls and processes to prevent leakage of such information. The SEBI has also recently introduced a requirement for "minimum fair compensation" to investors whose applications were not considered for allotment in an IPO due to failures by SCSBs in processing such applications.[24]

In an effort to regulate liquidity migration and trading in offshore derivative instruments, the NSE, the BSE and the Metropolitan Stock Exchange of India announced in February

2018 that they would stop the trading of derivative contracts based on the Indian indices on overseas bourses. This, together with the SEBI's increasing restrictions on "P-Notes" and other offshore derivative instruments, was seen as a move to discourage offshore trading in derivatives and promote trading in derivatives on exchanges set up in GIFT City, a business district promoted by the government as India's first international financial services centre. However, the Singapore Exchange has recently proposed new Indian equity futures to be linked to the closing price of the CNX Nifty index.

In order to further streamline the IPO process in India, the Companies Act, 2013 has also been proposed to be amended to remove prospectus-related requirements, such that disclosure requirements for offerings are contained only in the SEBI regulations, and the SEBI has also permitted online filing of offer documents.

While the pipeline for offerings remains strong, India's capital markets may be impacted by global market volatility and by the local market factors discussed above. Also, developments from the 2019 general election in India and state and local elections this year are expected to play a key role in influencing market sentiment, and any related political uncertainty may be treated cautiously by the market.

* * *

Endnotes

1. Rules 19(2)(b) and 19A of the Securities Contracts (Regulation) Rules, 1957.
2. SEBI circular SEBI/HO/CFD/CMD/CIR/P/43/2018 dated February 22, 2018.
3. Chapter XB, SEBI ICDR regulations.
4. Regulation 11(4) and Schedule VII, SEBI ICDR regulations.
5. SEBI (Framework for Rejection of Draft Offer Documents) Order, 2012.
6. SEBI (Issuing Observations on Draft Offer Documents Pending Regulatory Actions) Order, 2006.
7. Regulation 14, SEBI ICDR regulations.
8. Regulation 13, SEBI ICDR regulations.
9. Regulation 43, SEBI ICDR regulations.
10. Regulation 5, SEBI ICDR regulations.
11. Sections 13 and 27, Companies Act, 2013.
12. Chapter VI-A, SEBI ICDR regulations.
13. Section 245, Companies Act, 2013.
14. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Fourth Amendment) Regulations, 2015.
15. Part A(2)(VIII)(F)(7) and Part A(2)(IX)(C), Schedule VIII to the SEBI ICDR regulations.
16. Part A(2)(VII), Schedule VIII to the SEBI ICDR regulations.
17. Regulation 16, SEBI ICDR regulations.
18. Regulations 32 and 36, SEBI ICDR regulations.
19. Regulation 33, SEBI ICDR regulations.
20. Regulation 37, SEBI ICDR regulations.
21. Regulation 26(5), SEBI ICDR regulations.
22. Companies (Indian Accounting Standards) Rules, 2015.

23. Regulation 60, SEBI ICDR regulations.
24. SEBI circular SEBI/HO/CFD/DIL2/CIR/P/2018/22 dated February 15, 2018.

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Ireland

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Introduction

Public trading of shares has a long history in Ireland and, as it predates Irish independence, is closely linked to the development of the concept in the UK. The first Irish stock exchange was the Dublin Stock Exchange (DSE) formed in 1793 which was first regulated under the Stock Exchange (Dublin) Act of 1799. In 1890, the DSE became a founding member of the Council of Associated Stock Exchanges which was made up of a group of Irish and English exchanges. In 1971, the DSE and the Cork exchange merged with the Irish members of the Provincial Brokers Stock Exchange to form the Irish Stock Exchange (ISE). In 1973, the ISE merged with its UK counterpart and became the Irish constituent of the International Stock Exchange of the United Kingdom and Republic of Ireland. The exchanges de-merged in 1995 and the London Stock Exchange (LSE) and the ISE once again became independent entities. One legacy of the tie-up is that it continues to be possible to maintain a dual primary listing and have shares admitted to the official lists in both Dublin and London. Subject to regulatory clearance, the ISE will be acquired by Euronext in 2018.

Whilst the number of issuers maintaining equity listings in Ireland has never been large, constituents of the ISE's primary market, the Main Securities Market (MSM), do tend to have relatively high market capitalisations and include many household names (albeit many also maintain a listing in London). Issuers listed in Ireland tend to be linked by an Irish heritage and have historically clustered in sectors important to the Irish economy such as financial services, construction, aviation, natural resources and pharmaceuticals.

The Irish equity markets have seen an upturn in initial public offering (IPO) activity in the period since the worldwide financial crisis. Initially this was fuelled by IPOs of real estate investment trusts (REITs) in 2013 and 2014, but a range of issuers have pursued IPOs in the intervening period. Since 2013 there have been nine listings on the MSM, including three REITs and two move-ups from the ISE's junior market, the Enterprise Securities Market (ESM) and nine IPOs on the ESM. As of March 2018, there were 29 issuers listed on the MSM and 22 on the ESM. There are currently no issuers listed on the ISE's third equity market, the Atlantic Securities Market (ASM), which was launched in 2015.

Ireland has a listing regime that is conducive to IPO activity and it is a well-trodden path for domestic companies of scale. The listing process is open and transparent and will be familiar to issuers and advisers with experience in the UK or under the Prospectus Directive.[1] The Central Bank of Ireland (the Central Bank) is an experienced and pragmatic regulator and the ISE is proactive in marketing Ireland as a listing venue and in creating listing products to attract new issuers (as demonstrated by its creation of the innovative ASM). Dublin is home to sophisticated accountancy and law firms and Ireland's domestic investment banks offer excellent coverage for Irish listed issuers and can create strong liquidity. An issuer with a primary listing on the MSM or ESM may be eligible to be quoted on the ISE Quotient indices (the Irish equivalent of the FTSE indices in the UK).

Ireland has not historically attracted many non-domestic equity issuers save for a handful with important markets in the State. This is perhaps unsurprising given the prestigious and highly liquid markets of the LSE across the Irish Sea. The UK's exit from the European Union (Brexit) may change this. The MSM should then be the main English-speaking equity market still subject to European legislation and with the benefits of passporting under the Prospectus Directive. It is not beyond the realms of possibility that Ireland could see a trend of overseas issuers carrying out IPOs or taking secondary listings in Ireland. Depending upon the terms of Brexit, it is certainly possible that UK-incorporated, London-listed issuers will consider electing Ireland as their Home Member State in order to make the Central Bank their home regulator for the purposes of the Prospectus Directive.

The IPO process: Steps, timing and parties and market practice

An Irish IPO is often run in conjunction with a UK process to achieve a dual listing and is very similar to the equivalent UK process. A typical IPO on MSM takes between four and five months. An IPO on ESM will not usually require a Central Bank approved prospectus and the IPO process can therefore be considerably shorter.

Advisers

At the start of the process, the issuer (sometimes acting on the advice of a financial adviser) will appoint investment banks (generally including at least one of the domestic Irish investment banks who will act as Irish sponsor or ESM Advisor) as global coordinators, bookrunners and/or underwriters. Irish lawyers (and UK and US lawyers, if a dual listing or offering into the US is contemplated) will also be appointed together with reporting accountants, registrars and financial PR agents. The investment banks will also appoint their own set of lawyers.

Due diligence and offering documents

The reporting accountants will carry out financial due diligence and produce a long-form report on the issuer's business, a working capital report and a Financial Position and Prospects Procedures report. A legal due diligence process will also be commenced and will form the basis of the prospectus or ESM admission document. The issuer's lawyers will verify the material statements in the prospectus or admission document. If a prospectus is being produced, an advanced draft is submitted to the Central Bank for review. The Central Bank responds with comments within 20 working days (considerably less for later submissions). The prospectus procedure to effect a dual listing is very similar to applying for a single primary listing. The Central Bank and Financial Conduct Authority (FCA) in the UK will separately scrutinise and raise queries on the prospectus, but will maintain a regular dialogue with each other throughout the process.

Marketing and bookbuilding

Following the diligence processes, an analyst presentation will usually be given by the issuer to the independent analysts at the investment banks, who will subsequently publish research reports on the issuer to coincide with its 'intention to float' announcement and a fortnight of 'investor education'. A subsequent two-week investor roadshow, usually encompassing at least Ireland, the UK and the US will typically be undertaken, where management will present a verified presentation to prospective institutional investors (often using a 'pathfinder prospectus' with an indicative price range (gauged from feedback from the investor education process) as a marketing document). Simultaneously, the investment banks will be bookbuilding on the basis of non-binding bids from investors. Recent Irish IPOs have followed the trend in the UK of involving significant domestic and US 'cornerstone investors' who sign conditional subscription agreements and are named in the pathfinder prospectus. Increasingly, this might include the Ireland Strategic Investment Fund (formerly the Irish National Pensions Reserve Fund) which is an €8 billion sovereign development fund mandated to support economic activity and employment in Ireland. From 1 July 2018, the FCA is introducing new rules in the UK that require the publication of an approved prospectus or registration document before the publication of connected research reports. This will alter the timetable of UK Main Market IPOs that are conducted with research by requiring earlier approval and publication of a prospectus or registration document. Whilst not directly applicable to Ireland, these measures are likely to see changes to the timetables of MSM IPOs as many issuers pursue dual primary listings in Ireland and London.

Closing

Finally, pricing occurs, the Central Bank approves the prospectus and it is published (and passported into the UK in the case of a dual listing, or the ESM Advisor will approve the admission document and it will be published). For an IPO on the MSM, the issuer's shares will be admitted to trading and to the Official List of the ISE (the Official List) and credited to CREST accounts. The risk of non-payment by investors between pricing and payment is usually the subject of an underwriting agreement. The IPO is complete when dealings commence.

Regulatory architecture: overview of the regulators and key regulations

Regulators

The two main regulatory institutions involved in Irish IPOs are the ISE and the Central Bank. The ISE is the competent authority for listing and admission to trading and maintains Ireland's three equity markets: the MSM, the ESM and the ASM. The Central Bank is the country's financial services regulator. It is the competent authority with respect to the implementation of the Prospectus Directive and has been responsible for prospectus scrutiny since December 2011.

Key regulations

The laws and regulations governing IPOs in Ireland are derived from domestic law, EU directives and regulations and implementing regulations and guidelines.

Prospectus Regulations and Rules

The Prospectus Directive, Prospectus Regulations[2] and the Central Banks' Prospectus Rules are the primary sources of prospectus law in Ireland, although save for a limited number of provisions subject to earlier repeal, the Prospectus Directive will be repealed with effect from 21 July 2019 by the new Prospectus Regulation.[3]

The Prospectus Directive was implemented in Ireland by the Prospectus Regulations which provide that a prospectus required to be published in connection with a public offer of securities or an admission to trading on the MSM must:

- contain, as a minimum, the information prescribed by the Prospectus Regulations;
- be approved by the relevant competent authority; and
- be published in accordance with the specific requirements of the Prospectus Directive.

The Central Bank publishes a Prospectus Handbook encompassing a number of sources of information relating to Irish prospectus requirements and procedures. It also contains the Prospectus Rules and related guidance which cover the format, structure and content of a prospectus based upon the 'building blocks' prescribed by the Prospectus Directive. Content requirements include a summary, risk factors, historical financial information and an Operating and Financial Review or OFR. The Prospectus Rules also contain the procedures for submission, review and passporting together with applicable fees.

Listing Rules, Admission to Trading Rules, ESM Rules and ASM Rules

Applicants to the MSM must comply with the ISE's Listing Rules (the Listing Rules) for admission to the Official List, and the ISE's Admission to Trading Rules for the admission of securities to trading. The Listing Rules set out the detailed procedures for making an application for admission of an issuer's securities to the Official List. As mandated under the Markets in Financial Investments Directive (MiFID),[4] the ISE publishes the Admission to Trading Rules which contain parallel rules and responsibilities in relation to a company's admission to trading on the MSM.

The ISE also publishes the ESM Rules for Companies and the ASM Rules for Companies which govern the listing processes of those markets.

<u>The Irish Equity Exchanges</u>

MSM

The MSM is a 'regulated market' for the purposes of MiFID. Issuers are therefore required to comply with EU legislation such as the Prospectus Directive and the ongoing obligations under the Transparency Directive.[5]

A primary listing requires an admission of securities to trading on the MSM and admission to listing on the Official List and, by virtue of the latter, the listed company becomes subject to the full requirements of the Listing Rules. An Irish incorporated company must apply for a primary listing, unless the company has or intends to have an overseas primary listing on a recognised stock exchange and its primary market is in a country other than Ireland.

Like a premium segment listing on the LSE, an MSM primary listing involves governance obligations that are 'super-equivalent' to the minimum standards of regulation prescribed by European legislation. These are designed to enhance investor protection and include provisions on related party and substantial transactions (which may require shareholder approval), sponsors, and compliance with codes relating to corporate governance and directors' dealing in the issuer's securities. Many of these super-equivalent standards apply to primary and dual primary listed companies only. A company with a primary listing on an overseas stock exchange may apply for a secondary listing on the MSM, which will subject it to less onerous obligations.

An MSM issuer must appoint a sponsor for the duration of its listing, which must be registered with the ISE.[6] The sponsor is the primary point of contact between the ISE and the issuer throughout the application process. The sponsor is responsible for various matters relating to the listing, including ensuring the issuer's suitability for listing prior to making any submission to the ISE.

The key listing requirements under the Listing Rules and Admission to Trading Rules for a primary or dual primary listing on the MSM include:

(a) that the issuer must be validly established and operating in conformity with its constitution and its securities must conform with the law of the issuer's country of incorporation, be freely transferable and fully paid;

(b) that the issuer should have a minimum market capitalisation of €1,000,000 (although the ISE may make an exception if there will still be an adequate market for the shares);
(c) the preparation of a prospectus. The requirement for a prospectus is triggered by virtue of there being an application for transferable securities to be admitted on a regulated market, irrespective of whether there is also an offer being made of transferable securities to the public in the EEA;
(d) the issuer must have published or filed audited consolidated accounts covering a period of at least three years, ending no more than six months before the date of the prospectus (although this condition can be modified or waived by the ISE);
(e) the issuer must generally:
  (i) control the majority of its assets;
  (ii) be carrying on an independent business as its main activity; and
  (iii) possess a three-year revenue-earning record that supports at least 75% of its business (100% for an issuer seeking a primary listing only);
(f) the issuer satisfying the ISE that it has sufficient working capital available for at least 12 months following the date of publication of its prospectus;
(g) the issuer's securities being eligible for electronic settlement;
(h) the issuer maintaining a free float in one or more EEA Member States of 25% (the ISE may relax this requirement in certain circumstances); and
(i) that an issuer seeking a primary listing only must be able to carry on its business independently of any controlling shareholder (a person who either controls 30% or more of the votes in the issuer or who has the right to appoint a majority of the board of directors) and all transactions and relationships between the issuer and any controlling shareholder must be at arm's length and on a normal commercial basis.

Most of these conditions also apply equally to secondary listings except for the requirements relating to the publication of accounts and the conditions relating to assets, business activities and working capital.

ESM

The ESM is an exchange-regulated (that is, it is regulated by the ISE) equity market for small to medium-issuers, and is a multi-lateral trading facility (MTF) for the purpose of MiFID. ESM has been modelled very closely on the LSE's AIM, with reduced admission criteria, no requirement for a prior trading record and no minimum free float requirement. Unlike on AIM, all ESM applicants must have a minimum market capitalisation of €5,000,000 to maintain the credibility of the market. The ESM Rules are very similar in content and feel to the AIM Rules for Companies, facilitating the option of a dual listing by coordinating an IPO to achieve admission to both markets using the same timetable and essentially the same admission document. Of the 22 companies listed on ESM as of March 2018, 18 are also listed on AIM.

An ESM issuer is required to appoint an ESM Adviser approved by the ISE (equivalent to a Nominated Adviser on AIM) for the duration of its listing.[7] The role of an ESM Advisor is broadly similar to that of a sponsor on the MSM. In particular, it is responsible for assessing the appropriateness of an applicant for admission. In light of this responsibility, there are no other specific eligibility requirements that apply to companies seeking admission to ESM, save for the €5,000,000 minimum market capitalisation.

As on AIM, an admission document, containing prescribed information set out in the ESM Rules (and similar in format to a prospectus) is required to be published in connection with the applicant's admission to ESM, but must be approved by the ESM Advisor rather than the Central Bank. The ESM Advisor must make a declaration to the ISE that the admission document complies with the relevant requirements of the ESM Rules. Applicants already listed for 18 months on one of 13 'designated markets' can avail of a fast-track admission process which removes the requirement for an admission document but instead requires a detailed pre-admission announcement. The current list of designated markets includes the MSM, ASM, Main Market of the LSE, AIM, the New York Stock Exchange (NYSE), NASDAQ and the Australian Stock Exchange.

ASM

The ASM is also an MTF and is compatible with the Security Exchange Commission (SEC) requirements of companies listed on the NYSE or NASDAQ. It is primarily designed for companies already listed on one of these markets and issuers can avail of a dual quotation with trading in euros and US dollars.

An ASM issuer must appoint an ASM Advisor approved by the ISE for the duration of its listing. An ASM applicant must meet a number of listing requirements, of which the most important include:

(a) that the issuer must be seeking admission to, or be admitted to the NYSE or NASDAQ;
(b) a three-year revenue-earning record reflected in published or filed audited accounts;
(c) the issuer satisfying the ISE that it has sufficient working capital available for at least 12 months following the date of publication of its admission document;
(d) the ability of the issuer to carry on its business independently of any controlling shareholder;
(e) a minimum market capitalisation of US$100 million (although the ISE may make an exception if there will still be an adequate market for the securities);
(f) that the issuer's securities must be eligible for electronic settlement; and
(g) that the issuer must have a free float on admission of 15%.

Applicants already listed on the NYSE or NASDAQ for 18 months are not required to publish an ASM admission document, and can utilise a fast-track admission process (unless they are required to publish a prospectus by virtue of making an offer of transferable securities to the public in the EEA). Other applicants must produce an ASM admission document, but should usually be able to incorporate by reference information contained in its SEC registration statement or filings.

Public company responsibilities

<u>Ongoing obligations on MSM</u>

An issuer with securities admitted to trading on the MSM must comply with a diverse set of continuing obligations set out in the Listing Rules, the Transparency Regulations,[8] the Admission to Trading Rules and the Prospectus Regulations, as well as having regard to the UK Corporate Governance Code.

<u>The Listing Rules</u>

Where an MSM issuer undertakes transactions of a certain size, a notification to the market is required. If a proposed transaction would constitute a 'Class 1 Transaction' because it represents 25% of an issuer's value under a gross assets, profits, market value or gross capital test, it will require shareholder consent. Similarly, non-ordinary course-related party transactions require prior shareholder approval.

The Listing Rules impose obligations on MSM listed companies to ensure timely disclosure to the market and equality of treatment of shareholders. Sanctions for breach include the public censure of the issuer, the public or private censure of directors, and the suspension or ultimate cancellation of the issuer's listing.

The UK Corporate Governance Code

The UK Corporate Governance Code (the Code), together with the Irish Corporate Governance Annex (which is annexed to the Listing Rules) contains corporate governance guidelines for MSM issuers. The Code sets out good practice recommendations on board leadership, accountability, remuneration and shareholder relations. The Listing Rules require an MSM listed issuer to include in its annual report a compliance statement in respect of the Code, and auditors must review the statement in relation to financial reporting, internal controls and audit committees.

Transparency Regulations and Rules

The aim of the Transparency Directive was to harmonise, at an EU level, requirements for the provision of financial information, notification of major shareholdings and the disclosure of corporate information to shareholders. The Transparency Directive was implemented in Ireland by the Transparency Regulations. They establish minimum requirements in relation to the disclosure of periodic and ongoing information by issuers and are supplemented by rules published by the Central Bank (most recently in November 2016) (the Transparency Rules). Most material modifications to the Transparency Directive are, in fact, contained in the Transparency Rules which set out procedural and administrative requirements and guidance in respect of the Transparency Regulations.

The Transparency Regulations require MSM listed issuers to publish their annual financial report within four months of the end of the financial year, and a half-yearly financial report no later than two months after the period to which it relates, and contain detailed content requirements.

Under the Irish Companies Act 2014 (the Companies Act) and the Transparency Rules, a shareholder must notify an Irish issuer and the Central Bank when it acquires an interest in 3% or more of the issuer's share capital. Subsequent transactions which change the percentage interest by a whole number (up or down) must also be notified. In the case of non-Irish MSM issuers, the thresholds are at 5, 10, 15, 20, 25, 30, 50 and 75% (being the thresholds set out in the Transparency Directive). When a shareholder ceases to have a notifiable interest, that must also be notified. The notification must be made within two trading days of the transaction, or four days for non-Irish issuers. The issuer must notify the market by no later than the end of the trading day following receipt of a notification.

Continuing obligations on ESM

Companies admitted to trading on the ESM must comply with continuing obligations contained in the ESM Rules. The key continuing obligations are:

(a) information on new business developments must be notified to the market without delay;
(b) preparation of half-yearly reports and publication within three months of the period to which they relate;
(c) preparation of annual accounts and publication within six months of the period to which they relate;
(d) any documents sent to shareholders must be available on the issuer's website;
(e) an ESM issuer must ensure that its directors and certain relevant employees do not deal shares during a close period;
(f) an ESM issuer must notify the market without delay of substantial transactions (those representing 10% or more of an issuer's value under a gross assets, profits, turnover, consideration or gross capital test (the ESM Class Tests)) and related party transactions representing 5% or more under the ESM Class Tests;

(g) reverse takeovers (transactions representing 100% or more under the ESM Class Tests) require shareholder approval, as do fundamental changes of business (disposals which, when aggregated with disposals in the previous 12 months, exceed 75% under an ESM Class Test);
(h) directors must accept full responsibility for compliance with the ESM Rules; and
(i) ESM issuers must retain an ESM Advisor and ESM broker at all times.

Continuing obligations on ASM

Continuing obligations under the ASM Rules are designed to dovetail with SEC requirements so that an ASM listing does not create a significant extra administrative burden for an issuer. Indeed, the only significant further obligation for NYSE or NASDAQ listed issuers is compliance with the Market Abuse Regulation (MAR).[9] The key requirements under the ASM Rules are that:
(a) an issuer that files information with the SEC or makes a public announcement pursuant to the rules of the NYSE or NASDAQ must issue a notification to the market;
(b) an issuer that discloses a material transaction under SEC rules in accordance with a Form 6-K or Form 8-K or undertakes a related party transaction which is required to be disclosed under Regulation S-K of the US Securities Act of 1933, as amended or Form 20-F of the US Securities Exchange Act of 1934, as amended, must issue a notification to the market;
(c) an issuer that files annual or periodic financial reports in the US must issue an announcement to the market when such accounts are filed with the SEC. If it does not file such accounts then it must prepare and publish them outside of SEC requirements;
(d) directors must accept full responsibility for compliance with the ASM Rules; and
(e) ASM issuers must retain an ASM Advisor at all times.

Other continuing obligations

Irish companies listed on any of the Irish equity markets must have regard in general to the provisions of the Companies Act. The Irish Takeover Rules[10] and Substantial Acquisition Rules apply to takeovers of listed Irish issuers.

Market Abuse Regulation

MAR has been the most complex change to the rules and regulations applying to Irish securities laws in recent years. It came into effect in July 2016, replacing the previous rules implementing the Market Abuse Directive.[11] It applies equally to issuers on regulated markets such as MSM, and MTFs like ESM and ASM and sets out a standardised EU-wide regime around three core principles:
(a) a prohibition on market manipulation;
(b) restrictions on dealing in securities whilst in possession of inside information; and
(c) requirements as to prompt disclosure of inside information to the market.

There are also detailed provisions around the maintenance of 'insider lists' by issuers and restrictions on dealings by directors and certain senior officers. MAR provides for certain 'safe harbours' from these restrictions relating to share buy-back programmes, stabilisation and market soundings or wall-crossing.

Potential risks, liabilities and pitfalls

Eligibility requirements

As described above, MSM applicants face a number of eligibility requirements under the Listing Rules and the Admission to Trading Rules. Of these, the two that most frequently cause difficulties for IPO candidates are:

(a) *Listing Rule 3.3.4*
An issuer must be able to produce historical financial information representing at least 75% of its business over the previous three years. Acquisitive issuers may have difficulty in meeting this requirement. Under the Listing Rules, issuers with such a 'complex financial history' may produce separate historical financials relating to acquired entities, provided it is in the same format. Financial information presented as a *pro forma* may be required to illustrate the impact of transactions on an issuer's position.

(b) *Listing Rule 3.3.7A*
An MSM applicant must be able to show that it will be carrying on an independent business as its main activity. This may prove difficult for issuers with a 'controlling shareholder'. This is defined as a shareholder exercising or controlling 30% of votes able to be cast at general meeting. An issuer must enter into a relationship agreement with any controlling shareholder to ensure that transactions are carried out at arm's length. Furthermore, the constitution of the issuer must allow for the election and re-election of independent directors to be approved by resolutions of both the independent shareholders and the entire membership.

* * *

Endnotes

1. Directive 2003/71/EC of 4 November 2003.
2. Prospectus (Directive 2003/71/EC) Regulations 2005.
3. Regulation (EU) 2017/1129.
4. Directive 2004/39/EC of 21 April 2004.
5. Directive 2004/109/EC of 15 December 2004.
6. As of May 2017, 11 institutions were registered with the ISE as MSM sponsors: AIB Corporate Finance Limited; Barclays Bank PLC; Credit Suisse Securities (Europe) Limited; Deutsche Bank AG London; Davy Corporate Finance; Goldman Sachs International; Goodbody Stockbrokers; IBI Corporate Finance Limited; Investec Bank PLC; Morgan Stanley & Co. International Limited; and UBS Limited.
7. As of May 2017, six institutions were registered with the ISE as ESM Advisors: AIB Corporate Finance Limited; Davy Corporate Finance; Goodbody Stockbrokers; IBI Corporate Finance Limited; Investec Bank PLC; and Morgan Stanley & Co. International Limited.
8. Transparency (Directive 2004/109/EC) Regulations 2007.
9. Regulation (EU) No 596/2014.
10. The Irish Takeover Rules comprise rules made by the Irish Takeover Panel under the powers granted to it by the Irish Takeover Panel 1997 Act and the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006.
11. Directive 2003/6/EC.

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Matthew Cole is a partner in the Capital Markets Group of A&L Goodbody in Dublin. He has an extensive track record advising issuers and underwriters on equity capital markets transactions, both in Ireland and in London where he practised for many years. His experience encompasses IPOs, rights issues and equity placings on the MSM and ESM in Ireland as well as the Main Market of the London Stock Exchange and AIM. Mr Cole is listed in *The Legal 500*, who describe him as 'a key name' and an 'equity capital markets expert', and *Chambers Global* and *Chambers Europe*, who noted that: 'The technical expertise he has is extremely strong and his client service is excellent. He performs wonderfully well in a demanding environment.'

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Italy

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Introduction

An initial public offering ("IPO") of a company's shares – here alternatively named stock – is in Italy, as in other jurisdictions, a key way to raise capital. Structurally and from a documentary perspective, IPOs in this market are very similar to those made in other jurisdictions. Stocks are listed on the Italian Stock Exchange, now part of the London Stock Exchange group. For this reason, their regulatory framework has progressively become similar. The Italian Stock Exchange allows for the possibility to list on the main market, the MTA, or on a multilateral trading facility as such, AIM Italia. Other regulated market segments are available, the main one being STAR, for medium-sized companies with high compliance requisites and MIV, being the market segment on which investment vehicles are listed. Foreign companies access the Global Equity Markets segment.

The general framework has also aligned over the years with other European jurisdictions, mainly due to the adoption of a regulation at EU level on prospectuses, lately contained in EU Regulation 2017/1129 superseding, with effect from 21 July 2019, EU Directive 2003/71/CE and its related rules, such as EU Regulation 809/2004. Prospectus and offering of securities rules maintain some jurisdiction-specific features linked to the rules issued by the *Commissione Nazionale per le Società e la Borsa* ("CONSOB"), while progressively this has aligned its rules to the EU framework.

Market practices that have consequently developed are very much in line with practices more widely shared in the other main EU jurisdictions. Subsequent public-company obligations have also moved very much closer to Italy's main European peers, although some country-specific rules can be found, most notably in the corporate governance context, with a comprehensive set of related party transaction rules and on gender parity, respectively regulated by CONSOB Regulation 17221/2004, as amended, and Law 120/2011.[1] Strict interlocking arrangements have also been imposed by Article 36 of Law Decree 201/2011,[2] as implemented by joint guidelines issued by *Banca d'Italia*, CONSOB and IVASS on 20 April 2012.

The vast majority of recent IPOs have been on AIM Italia. In 2018, at the time of writing, there have been five new listings, all on AIM Italia. In 2017, 24 out of 32 listings were sought on AIM Italia. The remaining eight were split as follows: four on MTA; three on STAR; and one on MIV. AIM listings generally do not involve a public offering. €5.4bn in aggregate was raised in 2017.

In 2016, 14 companies sought listing in Italy: three on MTA and 11 on AIM Italia; in 2015, there were 27: eight on MTA, 18 on AIM Italia and one on MIV, raising in 2016 and 2015 respectively €1.4bn and €5.5bn in aggregate.

In recent years, listing on the MTA has been mainly sought by long-established companies, often with State entities being the offering shareholders.

A recent successful trend since 2017 has been to seek listing for SPAC companies, i.e. shelf companies that, upon raising capital with a listing, will subsequently identify target companies to invest in and merge with the target.

Forthcoming IPOs in Italy are likely to be principally for companies to be listed on AIM Italia or on the STAR segment, also due to the introduction in 2017 of the PIR – individual investment plan rules[3] at retail level, aimed at increasing and channelling retail investor appetite for Italian medium-sized companies, whether through a direct investment or, most likely, through funds – such as UCITS – that also target such companies. Consequently, to tap the need of new companies being potential targets of new investments with a PIR, the market is focusing more on seeking listing for them, while technically all companies not falling within the FTSE MIB index may qualify for that purpose. A high number of medium-sized companies are regarded as a perfect target for new listings. PIR-driven investments are focusing the investor community more on medium-sized companies, while a good part of the activity and analysis has been by targeting large companies.

Related party transaction rules differentiating between major transactions and minor transactions, and requiring qualified majority approval for the former, are increasingly impacting upon management practice for medium-size companies, whereby founders and main shareholders are increasingly sharing roles.

Year 2017 and the first part of 2018 have shown one of the strongest trends towards IPOs in the last 25 years, albeit mostly for small and medium-sized companies and not for large companies.

Italian companies seek listing for reasons that are very much the same as in other jurisdictions; in short, among others: increasing their visibility both domestically and internationally; gaining better access to capital markets in Italy and abroad; investing in new areas of business or enhancing their current business activities; and creating value for shareholders.

Current regulatory schemes and market practices are conducive to going public, particularly after they have been comprehensively revised with the adoption of the EU Rules that mostly harmonise them at EU level.

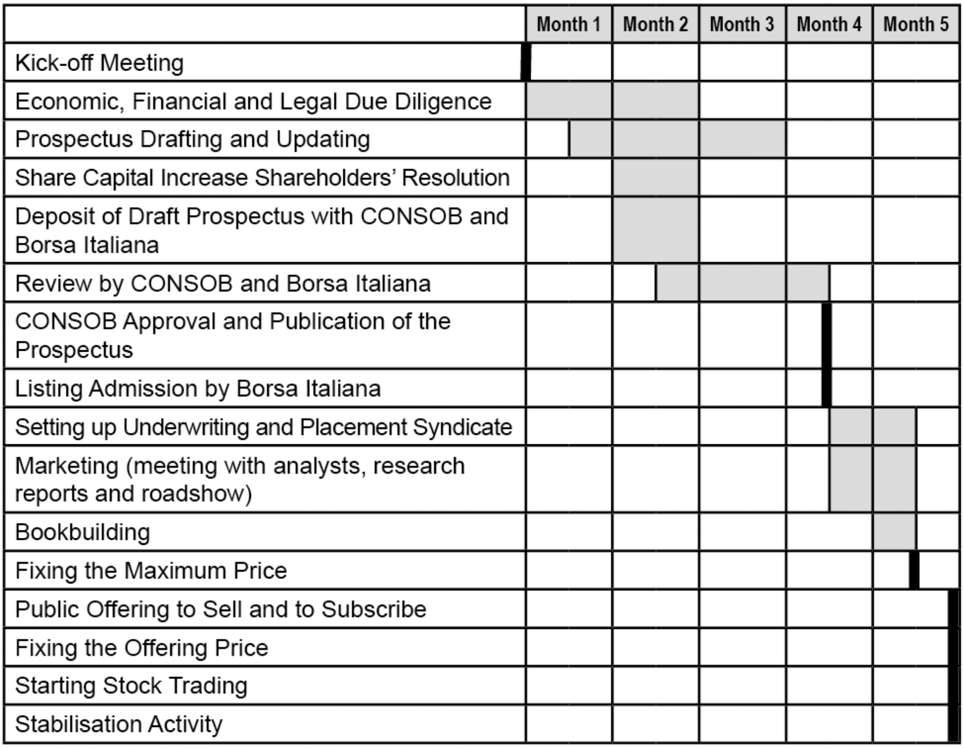
Companies going public are either medium-sized companies seeking growth or large companies, often State-owned, seeking diversification of stockholders. In general, both companies in productive sectors and companies in the financial sector, such as banks, have sought listing in recent years.

The IPO process: steps, timing and parties and market practice

The basic timetable and process for going public may be better summarised in the following table, which outlines the steps of a typical timeframe, starting with the decision to go public, to completion, assuming that there is no delay in seeking approval of the prospectus.

* * *

Admission to Listing – Open Price Bookbuilding Offering



The parties commonly involved in an IPO are the following:

- The **issuer**, being the entity whose stocks, and other financial instruments, if any, are to be listed.
- The **offering party**, which may in turn be:

  The *placing entity* of the public offering, i.e. the entity that organises and constitutes the underwriting syndicate and which normally qualifies as sponsor or specialist (as such, being a bank or an EU or an extra-EU investment company or a financial intermediary). It is responsible for the underwriting/placement of the stock and for managing the syndicate in the public offering. It releases declarations/statements/notices to CONSOB. In performing these activities, it qualifies as global coordinator.

  The *global coordinator* that coordinates all the listing and offering processes and is responsible for: (i) managing and selecting the members of the underwriting syndicate; and (ii) coordinating the syndicate's activities during the offering period.

Dealers and brokers

- The **issuer's main advisors** are:

  The *financial advisor* that cooperates with the issuer and the other parties in performing the feasibility study, drafts the prospectus and the offering circular, with the law firm, and draws up the budget, business plan and the Quotation Management Admission Test (QMAT, Italian broker certification). It may also assist offering shareholders, if any.

  The *law firm* (or legal advisers) that are appointed by the global coordinator/sponsor to advise the parties involved as to the prospectus and offering circular by drafting them, to carry out the due diligence and the performance of all the other legal requirements including by-laws updates, drafting board minutes and minutes of shareholders' meetings, together with producing all relevant agreements instrumental to the offering (underwriting/placement agreements, lock-up agreements and legal opinions).

- The **issuer's other advisors** are:
  The *auditors*, who are responsible for audit of the accounts. They shall also check the issuer's internal procedures, including allowing the issuer's management a sufficiently exhaustive overview of its economic and financial situation and on the forecast data production so that the sponsor may release the comfort letters necessary to filing with Borsa Italiana/CONSOB.
  A *tax advisor* to be in charge of the relevant fiscal issues and the relevant sections of the prospectus.
  A *communication company* to manage the issuer's profile and its relationship with the press. It has a crucial role in the marketing phase of the offering.
  The *bookrunner* to keep the records of investment orders upon offering/placing.
- **Specialist roles** required by the listing regulations are:
  A *specialist* who is appointed for listing in the STAR segment in order to ensure liquidity of the listed stock by continuously offering an offer price of the stock. After listing, the specialist shall:
  - upon release of half-yearly and yearly results of the issuer, publish at least two financial analyses per year to the issuer, the first to be complete and the following for update;
  - publish a short analysis when interim information is released and upon occurrence of any major company event of the issuer; and
  - set up, at least twice a year, a meeting between the issuer's management and the financial community, and take part in it.

  The *sponsor*, being appointed, mandatorily, to assist the issuer during the listing process. The appointment shall be made before the date on which the request for admission to trading is filed at Borsa Italiana. This is to act as the financial intermediary that ascertains for the market that: (i) the information contained in the prospectus is accurate; and (ii) all requirements provided for the listing are fulfilled. It also releases declarations/statements to Borsa Italiana and to CONSOB.
  After listing, the sponsor shall (when not handled by the specialist):
  - upon release of half-yearly and yearly results of the issuer, publish at least two financial analyses per year as to the issuer, the first to be complete and the following for update;
  - publish a short analysis upon occurrence of any major company event of the issuer; and
  - set up, at least twice a year, a meeting between the issuer's management and professional investors and take part in it.

One of the idiosyncratic steps in the IPO process is the CONSOB prospectus approval, which calls for close scrutiny by the regulator based on the EU rules and on CONSOB framework.

Regulatory architecture: overview of the regulators and key regulations

<u>The governmental bodies, self-regulatory organisations and public stock exchanges responsible for regulating IPOs</u>

- **CONSOB**, in charge of regulating and supervising securities markets and issuers. It is competent for approval of listing and offering prospectuses. Regulation No.

11971/1999 (as defined below) regulates its activity by providing for, *inter alia*, the information to be included in the prospectus (on the basis of EU Regulation 2017/1129), the documents to be filed and the notices to be released to the public before and after listing or offering.

- **Borsa Italiana**, being the self-regulatory organisation that manages the stock market. It is competent for the admission to listing, to set the issuing period and the starting date for trading of the stock. Its activity is regulated by its regulation and market instructions, which are previously approved by CONSOB. It sets the documents to be part of the listing admission request.
- **Monte Titoli**, being the company – part of the Borsa Italiana group – through which the stock is held in dematerialised form within a centralised management system. All companies listed on Borsa Italiana have their listed securities held through Monte Titoli.
- **Banca d'Italia**, which is the supervising authority for credit institutions and which may request such entities issuing or offering financial instruments to release periodic notices, data and information. It has, in general, a marginal role in the IPO, with an involvement only in subsequent reports notices as to issued or offered financial instruments.

In addition, at EU level, ESMA is in charge of developing, among others, regulatory technical standards.

<u>The key rules and regulations applicable to the IPO process and key documents</u>

The **legal and regulatory framework** is primarily set by:

First-level rules

- Legislative Decree No. 58 of 1998 as amended (the Italian consolidated financial act or "TUF");
- Legislative Decree No. 385 of 1 September 1993 as amended (the Italian consolidated banking act or "TUB"); and
- Italian decrees and laws implementing the EU Rules by amending the TUF and the TUB.

EU rules

- Regulation (EU) No 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, still in force up to 20 July 2019;
- Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities;
- Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC;
- Regulation (EC) No 809/2004 implementing Directive 2003/71/EC as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements;
- Directive 2010/73/EU amending Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market;
- Regulation (EU) No 486/2012 of 30 March 2012 amending Regulation (EC) No 809/2004 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements;

- Regulation (EU) No 862/2012 of 4 June 2012 amending Regulation (EC) No 809/2004 as regards information on the consent to use of the prospectus, information on underlying indexes and requirement for a report prepared by independent accountants or auditors;
- Regulation (EU) No 759/2013 of 30 April 2013 amending Regulation (EC) No 809/2004 as regards the disclosure requirements for convertible and exchangeable debt securities;
- Directive 2013/50/EU of 22 October 2013 amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading, and Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC;
- Regulation (EU) No 382/2014 of 7 March 2014 supplementing Directive 2003/71/EC with regard to regulatory technical standards for publication of supplements to the prospectus; and
- Regulation (EU) No 301/2016 of 30 November 2016 supplementing Directive 2003/71/EC with regard to regulatory technical standards for approval and publication of the prospectus and dissemination of advertisements and amending Regulation (EC) No 809/2004.

Also relevant are the following additional side rules:

- Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 – in relation to which the bail in risk of the issuer is to be considered in the prospectus;
- Regulation (EU) No 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs);
- Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC and Directives 2003/124/EC, 2003/125/EC and 2004/72/EC; and
- Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

Second-level rules

- CONSOB Issuers' Regulation 11971 of 1999 as amended ("Regulation 11971/1999" or "Issuers Regulation") partially implementing the TUF;
- CONSOB Related Parties Transaction Regulation 17211 of 2004, as amended;[4]
- Regulation of the Organised Markets Managed by Borsa Italiana S.p.A. as amended (the "Borsa Regulation");
- Borsa Regulation instructions, as amended; and
- other regulations and instructions by Borsa Italiana, such as those on AIM Italia.

Other second-level rules

- CONSOB Intermediaries Regulation 20307 of 2018, partially implementing the TUF;
- CONSOB Market Regulation 20249 of 2017, partially implementing the TUF; and
- an extensive set of point-specific recommendations and notices issued by CONSOB.

The **key legal documents** applicable to the IPO process are the following:

- The (listing and offering) **prospectus**, which is meant to be, under EU Rules, the document drafted in order to inform public investors. It shall be compliant with, among others, the following main rules:

- to be published in advance with prior approval by CONSOB;
- it may be in a single document or constituted by different ones, those being: (i) the registration document; (ii) the securities note containing the information notice on the financial instruments and the offered products; and (iii) the summary;
- it shall be presented in an easily analysable and comprehensible form, under EU Regulation 2017/1129 rules it shall also be concise;
- the summary part of the prospectus is to be short and in a non-technical language in order to give the key substantial information on the financial products (and in relation to the issuer), with an exclusion in principle for liability arising from the summary itself. Under EU Regulation 2017/1129, the summary shall be written in a concise manner and of a maximum length of seven sides of A4-sized paper;
- investors that have already agreed to purchase or subscribe to financial products before a prospectus supplement is published have the right to revoke their acceptance within two days following the new publication with the facts, errors or inconsistencies before the final closing of the public offering or of the delivery of the financial products; and
- under EU Regulation 2017/1129, frequent issuers may file a universal registration document containing the issuer's information lasting for 12 months. Such document may be approved by the authority, for two consecutive years. After such period, it can be issued without prior approval and with *ex post* verification, given that the issuer is to be considered well-known to the competent authority.

An exemption applies, from 21 July 2018, to the offering of securities to the public for €1,000,000 or less over a period of 12 months.

SMEs (under the EU rules) and other specific entities having no securities admitted to trading on a regulated market may also issue an EU growth prospectus under the proportionate disclosure regime. For this, delegated acts are expected to be enacted by 21 January 2019. These provisions are aimed at encouraging the use of capital market financing by SMEs, along with EU capital markets union objectives.

Among others, offers of securities to fewer than 150 natural or legal persons, with a €100,000 denomination per unit amount, are also exempt.

Under current rules, up to 20 July 2019, the prospectus shall be made up of, among others, a summary together with a registration document, highlighting the risk factors and information as to financial instruments, offering conditions and expenses. The prospectus may be in a single document or across different ones, those being: (i) the registration document; (ii) the information notice on the financial instruments and the offered products; and (iii) the summary. The summary part of the prospectus is to be short and in non-technical language in order to give the key substantial information on the financial products, with an exclusion in principle for liability arising from the summary itself. Investors that have already accepted to purchase or subscribe to financial products before a prospectus' supplement is published have the right to revoke their acceptance within two days following the new publication with the facts, errors or inconsistencies before the final closing of the public offering or of the delivery of the financial products.

Prospectuses approved under Italian rules in adherence to Directive 2003/71/EC before 21 July 2019 shall continue to be governed by such rules up to the earlier of the end of their validity and 12 months after 21 July 2019, whichever occurs first.

CONSOB is competent for regulating the internal decision processes aimed at adopting the final decision for the approval of the prospectus.

- The **offering circular** being the offering document for institutional investors produced in English in the customary international practice.
  Please note that the prospectus and the offering circular, if any, are drafted on the basis of the due diligence that is coordinated by the sponsor and is aimed at verifying all information on the issuer and its group. Normally, it is split into:
  - Management due diligence, focusing on the issuer knowing its main business features, both operative and financial, and the strategic plans for the future.
  - Legal due diligence, carried out by the legal advisors and aimed at verifying all aspects having a legal, contractual and regulatory relevance.
  - Financial due diligence, aimed at verifying the reliability and sustainability of the financial data and their accurate representation in the offering documents.

  The sponsor and the advisors are responsible for the information in the offering documents to be correct.
- The **QMAT – Quotation Management Admission Test**. This is a document containing quantitative data of the issuer set in a prescribed format and produced by the sponsor with the aid of the issuer.
- **Business Plan/Budget/Certified accounts.**
- The **underwriting agreements**. There are normally two of these: one for the public offering; and one for the institutional offering. They may or may not provide for underwriting of the stock, depending on the kind of offering.
  The agreements entered into in conjunction with the IPO may also contain two types of lock-up clauses (which are also summarised in the prospectus):
  - **Mandatory**: for issuers that have been carrying out their activity for less than three years and are requesting a listing on the MTA market. The proposing shareholders (and others such as directors and managers) that have purchased to-be-listed-stock in the 12 months prior to the date on which the request was filed, undertake, for one year starting from the listing date, not to sell, offer, pledge and, in general, not to perform any transaction relating to at least 80% of such stock.
  - **Voluntary**: the above shareholders (or directors and managers) undertake not to sell, in full or in part, their stocks for a given period of time, often of two years.

The type and extent of disclosure that must be presented to prospective investors in an IPO is set by the EU Rules. Additional information that is customarily added relates to financial information, in case of extraordinary transactions involving the issuer or the group, whereby *pro forma* financials are added to give a comprehensive representation of the issuer and its group. For listing on the MTA, this will typically cover the last three calendar years prior to listing, although not necessarily always required.

As to rules and regulations not applied uniformly to all IPOs, with different types of issuers being subject to different requirements or restrictions, it is worth noting the STAR segment and AIM Italia.

STAR

STAR is subject to more stringent requirements. STAR (Stock Segment with Higher Requirements) is the market for medium-size companies, having a capitalisation between €40m and €1bn, seeking a high profile. Companies listed in this segment undertake to fulfil specific more stringent obligations, compared to the general ones as to liquidity, information transparency and corporate governance. This segment is aimed at leveraging medium-size companies, with revenues between €100m and €1bn. In particular:

- High transparency and communication: besides the accounts and yearly and half-yearly information, four quarterly reports must also be published within 45 days and all available company information is to be published on the issuer's website in Italian and in English. The issuer shall also appoint an investor relator.

- Stock high liquidity: minimum free float of 35% – including greenshoe stocks up to a maximum of 10% of the value of the offering – for newly listed companies, and of 20% for already-listed companies.
- Corporate governance: the issuer shall observe consistently international management best practice, as a general rule, and, in particular, it shall also adopt and act according to the corporate governance principles set out in the self-regulatory code on corporate governance (e.g. appointment of independent directors, an internal control system, incentive remuneration for directors and managers providing for a variable component depending on the company's results, etc.).[5]

AIM Italia

AIM (Alternative Investment Market) Italia is a multilateral trading facility, dedicated to Italian SMEs willing to invest in their growth. AIM Italia is subject to considerably less stringent requirements. It is inspired by the parallel AIM facility at the London Stock Exchange and it provides for simplified listing procedures and a more flexible admission process, aimed at facilitating the financing of Italian or foreign SMEs.

Changes

There are currently no impending changes to the regulatory architecture, while implementation of the EU rules, also with secondary level regulation, is made in a fairly regular manner. The regulatory framework has improved considerably over the years, also due to a consistent input by the regulator at national level.

The prospectus framework has considerably changed, and has been simplified, with the new prospectus regulation set by Regulation (EU) No 2017/1129 repealing, with effect from 21 July 2019, Directive 2003/71/CE and its relevant rules, and by constituting directly applicable EU rules in each Member State.

At EU level, ESMA (European Securities and Markets Authority) is increasingly influencing the shaping of new rules (also by issuing recommendations, technical standards and Q&As), while the regulator operating at national level for Italy is CONSOB.

The most significant market practice that impacts how IPOs are conducted, partly reflected in the rules, is on the stabilisation activity. This is conducted through the exercise of a greenshoe, with an over-allotment option, for up to 15% more stock than the original volume set by the issuer, in order to stabilise the listing price after trading on the stock has commenced. This is the commonly used practice, in the same form as in other jurisdictions such as the US and the UK.

The other main practice developed over recent years, relating specifically to AIM Italia, is to produce only a listing prospectus with an offering in the primary market, addressed only to institutional investors. This enables listing to be sought by producing a listing prospectus which, however, does not require CONSOB approval as such, making the whole process quite straightforward. Query whether Regulation (EU) No 2017/1129 will progressively partly change this practice.

Public company responsibilities

Obligations imposed on public companies that do not apply to private companies include corporate governance rules, disclosure to the market of price-sensitive information, interlocking rules, gender-parity rules and having periodic research reports produced relating to the issuer. Different market segments may provide for further specific rules.

Periodic reporting requires publishing yearly and half-yearly accounts. New TUF provisions in this context, however, have allowed measures to be introduced at national level that impose a requirement to publish more frequent periodic information. CONSOB, however, has not exercised any discretion by imposing such requirement, but has issued general rules in case quarterly results are published.

Disclosure requirements mainly focus on disclosing any information that may be considered relevant to the price of the stock.

Holding stock of a listed issuer triggers on the holder a disclosure requirement to the issuer and to CONSOB, if the following percentages, whether by increasing or decreasing the shareholding stake, are hit: 3% (not applicable to SMEs), 5%, 10%, 20%, 30%, 50%, 66.6% and 90%. An exemption applies for a stakeholding below 5% for entities that subscribe or place stock by underwriting it. Several rulings have been issued by CONSOB which clarify, *inter alia*, also that physically settled derivative instruments of a listed company have to be disclosed when entered into if the above thresholds are hit.

As to corporate governance standards, most of the main listed companies have adopted a self-regulatory code issued by a corporate governance committee representing many issuers, published by Borsa Italiana and updated from time to time. A report on the issuer's corporate governance is to be issued yearly, based on the "comply or explain" principle.

Potential risks, liabilities and pitfalls

Potential risks that should be addressed during the due diligence process, in addition to ascertaining that the prospectus provides an accurate description of the issuer by focusing also on all critical aspects, may include ascertaining that there are no hidden liabilities in general and *vis-à-vis* tax authorities. Risks for an increase in the company tax bill may simply occur, for example, by increased charges as a consequence of the revaluation by the authority of the asset value of real estate assets of the issuer, or other technical reasons. The impact of split payment rules regarding VAT to be paid to FTSE MIB companies is also to be assessed if such a company is considered. On top of the tax aspects, other risks may be more properly identified and addressed as the due diligence process is being performed.

Legal liabilities and penalties associated with going public mainly relate to misleading information in the prospectus. It is mandatorily required for the issuer and the global coordinator to sign the prospectus in order to be fully accountable if it were to contain non-accurate information. This is the liability that may arise during the IPO process. Auditors may also be responsible if the information relates to the financials.

Liability that may arise after a company is listed mainly relates to non-disclosure of price-sensitive information, or by not properly following related party transaction rules, in entering into transactions with certain related parties. To the extent an investigation is started by CONSOB in this respect, a sanction is likely to follow. The cases where the regulator has been prepared to put aside a case are few. Strict observance is highly recommended.

Common missteps and pitfalls during the IPO process are for the management not to fully address the importance of the information to be inserted in the prospectus, and consequently to be lax in the drafting process. Management should devote sufficient time and importance to the process, and not delegate it to operatives within the issuer. Liability risk may otherwise be increased due to inaccurate information, and the prospectus may also become less useful for its purposes.

Common missteps and pitfalls for listed companies after becoming public are not to fully adopt corporate governance rules with allocation of responsibility between, for instance, the CEO who should be running the business and the chairman who should be more in a coordinating role, not directly involved in operational activities. Other pitfalls are the selection of directors, often chosen on the basis of links with the shareholders and not necessarily for their specific expertise. Nomination committees provided by the self-regulatory code typically identify candidates only for substitution of board members but not for new appointments, this being regarded as one of the main pitfalls of the rules, albeit reflecting a specific corporate culture. Borsa Italiana has developed a programme for companies to get closer to the capital markets environment, which also addresses these issues. The programme is named Elite, which non-listed companies may apply to in order to prepare themselves to access funding through the capital markets. Currently there are 759 companies admitted, 287 of which are not Italian from 30 countries and with over €58 billion aggregate revenues per year. Some of them, after some years of tutoring under Elite SpA, a group company of Borsa Italiana SpA, end up being listed either on AIM or on the main market. Others may never list, while some may seek funding through other means, such as by issuing bonds, through private equity or venture capital or through a club deal arrangement run by Elite, but without going through an IPO and listing process. The programme has been very successful.

In the autumn of 2016, CONSOB issued guidelines on warnings for investors (or risk factors) on offering or listing prospectuses. These seek to show specific risk profiles as to the economic, asset, financial and management position of the issuer, the financial instruments covered by the prospectus, and the good result of the transaction. These warnings have to be separate from the prospectus as regards the risk factors of the issuer and the financial instruments. They have to give immediate evidence, in a clear, short and understandable way, as to the most significant and relevant critical profiles of the issuer and of the investment, in order to facilitate a correct perception of the investor's risk. Warnings should be such as to be read without needing to read other parts of the document. An update at national level of such rules is likely to come with Regulation (EU) No 2017/1129 coming into force. This will further enhance the effectiveness of the current applicable regime for new IPOs in the market.

* * *

Endnotes

1. Law 120 of 12.7.2011 has introduced new Article 147-*ter*, para 1-*ter* of TUF (as defined below), under which at least one-third of the board members are to be of the least represented gender.
2. Law Decree 201 of 6.12.2011 converted by Law 214 of 22.12.2011.
3. For an analysis, please see Lantelme M., 'PIR: Individual Savings Plans, JIBLR – *Journal of International Banking and Regulation*, London, 2017, Volume 32, Issue 8.
4. For an analysis, please see Lantelme M., 'CONSOB Regulation of 12, 2010 on Related Party Transactions', JIBLR – *Journal of International Banking and Regulation*, London, 2010, Volume 25, Issue 8.
5. For an analysis, please see Lantelme M., 'The Italian Self-Regulatory Code for Listed Companies', JIBLR – *Journal of International Banking and Regulation*, London, 2013, Volume 28, Issue 1.

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Marco has been a partner at a law firms for the last 14 years, and has spent 16 years in three of the top UK international law firms, in Milan and in the City of London. He is a board member of an Italian insurance company in a leading international NYSE-listed group, he chairs the AmCham Italian insurance task force, and is a JIBLR country correspondent for Italy.

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Japan

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Introduction

Brief history of IPOs in Japan: The Tokyo Stock Exchange ("TSE"), the largest stock exchange in Japan in terms of its market capitalisation (approximately JPY 700 trillion) as of December 29, 2017, has the following markets/sections as of December 31, 2017:

- the Main Markets with 2,065 listed companies in the First Section and 518 listed companies in the Second Section;
- "Mothers" with 248 listed companies;
- JASDAQ, consisting of the "Standard" market with 708 listed companies and the "Growth" market with 41 listed companies; and
- TOKYO PRO Market, an investment market for professional investors, with 22 listed companies.

Other than the TSE, there are three stock exchanges in Japan (the Nagoya Stock Exchange, the Sapporo Securities Exchange and the Fukuoka Stock Exchange), each having its main board(s) and market for emerging companies.

The First Section of the TSE has a long history, being established prior to World War I, and currently acts as Japan's main stock exchange for large and top-tier Japanese and foreign companies. The Second Section was established in 1961, initially as an alternative to an over-the-counter market, and currently constitutes, together with the First Section, the main boards of the TSE.

The Japanese IPO market for emerging companies has rapidly grown since 1999, when Mothers was established to provide start-up and emerging companies with risk money through capital markets under a new governmental policy motivated by the problems faced by Japanese financial institutions having to deal with bad loans in the 1990s. With its relatively relaxed listing criteria, Mothers enabled start-up companies with high growth prospects to list at an early stage of their development.

In 2011, in an effort to rebuild investor confidence lost due to accounting frauds perpetrated by companies listed on the emerging markets and to recover from the significant downturn caused by the financial crisis following the failure of Lehman Brothers, the TSE introduced a major reform of Mothers which included tightening the listing criteria and improving the efficiency of its review process. This reform also involved a rule that requested listed companies, after 10 years from the date of their listing and (if remaining listed in Mothers) every five years thereafter, to elect whether to go up to the Second Section of the TSE or remain in Mothers, and also introduced the same level of strict delisting criteria as the First and Second Sections with respect to such companies. The effect of this reform was to recharacterise Mothers as the market for high-growth start-ups aiming to be reassigned to the First or Second Sections in the near future.

Since this major reform, there has been an increasing number of new start-up companies listing on Mothers (54 in 2016 as compared to 11 in 2011) as well as an upward trend in the number of those companies that go up to the First or Second Sections from Mothers (29 in 2016 as compared to 7 in 2011).

Further to this success in the reform of Mothers, JASDAQ, with its Standard market, characterised as the market for companies having a certain level of business size and track record, and Growth market, characterised as the market for high-growth companies having innovative technologies or business models, have been strong alternatives for young companies (especially IT companies) to list their shares.

Reason for going public: Management boards of Japanese companies generally decide to go public because they want to: (i) increase their company's name recognition and credibility; (ii) acquire high-profile personnel; and (iii) improve their fund-raising and acquisition capacity. Start-up companies tend to put greater emphasis on: (i) increasing their name recognition and credibility; and (ii) acquiring high-profile personnel.

Current regulatory scheme and market practices conducive to IPOs: Since the current regulatory scheme only requires a company applying for listing ("Company") to file and deliver a securities registration statement and prospectus (see "Regulatory architecture: overview of the regulators and key regulations – Key regulations"), and the listing criteria of each stock exchange are definitively stipulated, we believe that there is no significant obstacle to the IPO procedure within the regulatory scheme.

In addition, in Japan, significant portions (in the range of between 60% and 80%) of shares offered in IPOs have been allocated to individual investors under a government policy designed to broaden the individual investor base, which was driven by a concern that allocations to corporate investors may lead to cross-shareholdings, which have been considered to be an obstacle to corporate governance in Japan. This market practice has enabled relatively small or medium-size companies, in which institutional investors tend not to invest in light of their policies, to list their shares with small offering sizes, and has contributed to broaden the IPO market in Japan.

Frequency of IPOs by a particular type of company or from a particular industry: In Japan, companies in the service industry, including IT venture businesses, go public more frequently. Additionally, due to a recent increase in the amount of investment by venture capitals, IPOs by start-up companies are also becoming more frequent.

Current trend of IPOs in Japan: The number of companies newly listed on the Japanese stock exchanges in recent years demonstrates an upward trend in the Japanese IPO market as a whole (86 in 2016, as compared to 37 in 2011), largely contributed to by an expansion of the Mothers market (54 in 2016, as compared to 11 in 2011 when the reform of the Mothers market was introduced).

Other noteworthy trends in the Japanese IPO market: There are no noteworthy trends other than as described in this article.

The IPO process: Steps, timing and parties and market practice

Organising the IPO project team – before the beginning of FYLA-3: The internal process for the Company commences with decisions of management boards and/or major shareholders (such as individual founders, venture capitals and private equity funds) to list the Company's shares and organise an IPO project team within the Company. In Japan, it generally takes two or three years for such a team to build up an internal control system sufficient to meet the listing criteria. Where a listing application is planned for a particular fiscal year ("FYLA"), the operation of the system shall begin at the start of the fiscal year one year prior to the FYLA ("FYLA-1"). Therefore, it is preferable for the IPO project team to be organised before the beginning of the fiscal year, three years prior to FYLA ("FYLA-3"). This timeframe, however, may be shortened with respect to a small-sized start-up company, as such a company generally has a relatively simple financial status and corporate structure.

Selection of Lead Manager – as soon as possible after organising the IPO project team: In Japan, more than one securities firm is typically assigned as managers to provide support in connection with the listing procedure. Among them, a securities firm ("Lead Manager") plays a main role in respect of the various tasks required in each step of an IPO, including: (i) providing advice on the Company's capital structure and strategies (including advising the Company in relation to dealing with funding needs both prior to and after listing, undertaking share splitting and share consolidation, stabilising the base of shareholders, and structuring incentive plans for officers and employees), internal control system and compliance issues as well as drafting various application documents for the period leading up to the listing application; (ii) conducting due diligence and valuation, acting as an underwriter and book-runner as well as submitting a listing recommendation letter to the relevant stock exchange at the stage of the listing application and offering; and (iii) providing advice and support in respect of IR activity and follow-on offerings and so on, even after the Company's listing. Further, the Lead Manager is expected to coordinate the relevant parties involved in the IPO process. As the Company needs to seek the advice of a Lead Manager in respect of various issues throughout the IPO process, it is crucial for an efficient IPO process to select and assign a Lead Manager as soon as possible after organising the IPO project team.

In Japan, there is no requirement to appoint a securities firm or investment bank as a sponsor responsible for direct negotiation with a stock exchange, something which may be required in other jurisdictions.

Appointment of audit corporation – no later than the beginning of FYLA-2: An audit corporation must be appointed to perform: (i) an audit of the annual financial statements with respect to the most recent two fiscal years (i.e., FYLA-2 and FYLA-1); and (ii) a review of quarterly financial statements as at the end of the relevant quarter and on a cumulative basis for quarterly period(s) ending in the FYLA, each included in the securities registration statement (as described below). Therefore, such appointment needs to be made no later than the beginning of FYLA-2, considering the time required for its preparation of the audit and review reports. In addition, such audit corporation provides various services and advice regarding the Company's capital structure and strategies, internal control system and application documents, as well as comfort letters with respect to the prospectus to be used in the offering. In light of its important role in the IPO process, the earlier an audit corporation is appointed, the more efficient the process.

Involvement of lawyers – in the range of a year to six months prior to the application: the Company, underwriters and selling shareholders often appoint lawyers to advise them on legal matters arising in connection with the offering and listing, including the conduct of due diligence and preparation of a prospectus and other offer documents, particularly in respect of cases where the Company's shares are offered globally (i.e., both in Japan and overseas). After listing, the Company's lawyer often undertakes the issuer's post-listing activities, such as ongoing corporate disclosure.

Appointment of trust bank – preferably before planning capital structure and strategies: a trust bank acts as the Company's transfer agent and handles the settlement and transfer of shares, provides advice on its capital structure and strategies, and also assists in dispatching a notice of general meeting of shareholders after its listing of shares.

Application – after the general meeting of shareholders held in FYLA: the Company submits the listing application and a detailed report on the status of the Company to the relevant stock exchange, typically after its general meeting of shareholders held in FYLA. Upon receipt of such application, the stock exchange checks if the Company meets the quantitative listing criteria, including number of shareholders, number of tradable shares, market capitalisation and amount of profit (see "Listing criteria – Quantitative criteria" below). If such criteria are satisfied, the stock exchange accepts the application and initiates the listing examination of qualitative criteria, including an examination of corporate continuity and profitability, sound corporate management, effective corporate governance and internal control systems and appropriate disclosure of corporate information (see "Listing criteria – Qualitative criteria" below), by conducting interviews of the management board and its audit corporation as well as conducting an inspection at the Company's offices.

The Company may make preliminary applications to the stock exchange to mitigate the possibility of an unforeseeable event and resulting delay in schedule arising during the listing examination procedure.

There is no material difference between the listing criteria for domestic and foreign companies.

Meanwhile, the Company and advisers involved conduct due diligence for the offering and draft the offer documents including the prospectus, securities registration statement and underwriting agreement.

Approval and launch of offering – typically three months after application (in the case of the First and Second Sections of the TSE and assuming that no preliminary application is made): Once approved by the stock exchange, the Company files a securities registration statement whereby it launches the offering.

Closing of offering and listing – typically a month after approval.

Listing criteria: The tables below briefly illustrate the main criteria with respect to the TSE's First Section of the Main Markets and Mothers.

<u>Quantitative criteria</u>

	First Section	**Mothers**
Expected number of shareholders at the time of listing	2,200 or more	200 or more
Expected number of tradable shares at the time of listing	• 20,000 units or more; • JPY 1 billion or more of market capitalisation of such tradable shares; and • the proportion of such tradable shares to the total number of issued shares being 35% or more	• 2,000 units or more; • JPY 0.5 billion or more of market capitalisation of such tradable shares; and • the proportion of such tradable shares to the total number of issued shares being 25% or more
Expected market capitalisation at the time of listing	JPY 25 billion or more	JPY 1 billion or more
History of conducting business	Three consecutive years or more	One year or more
Expected amount of net assets at the time of listing	JPY 1 billion or more	-

	First Section	Mothers
Profit or market capitalisation	• Total amount of ordinary income for FYLA-1 and FYLA-2 being JPY 0.5 billion or more; or • expected market capitalisation at the time of listing being JPY 50 billion or more, with the amount of sales for FYLA-1 being JPY 10 billion or more	-

<u>Qualitiative Criteria</u>

First Section	Mothers
Corporate continuity and profitability	Reasonable business plan
Sound corporate management	
Effective corporate governance and internal control systems	Effective corporate governance and internal control systems depending on the size and maturity of the Company
Appropriate disclosure of corporate information	Appropriate disclosure of corporate information with emphasis on risk information
Other matters deemed necessary from the viewpoint of the public interest or the protection of investors	

Regulatory architecture: overview of the regulators and key regulations

Regulators: The regulators involved in any IPO process in Japan are as follows:

- *Governmental bodies*: The authority for supervision and regulation of securities markets, including IPOs, rests primarily with the prime minister of Japan, the head of the cabinet office, who in turn delegates a major part of such authority to the commissioner of the Financial Services Agency ("FSA"). The commissioner of the FSA further delegates its authority with respect to: (i) ensuring fairness in transactions and conducting investigations for various purposes of financial administration, to the Securities and Exchange Surveillance Commission, a commission established within the FSA; and (ii) corporate disclosure, to the directors of the local finance bureaus ("DLFB").
- *Self-regulatory organisations*: Among the various self-regulatory organisations in the Japanese markets, the Japan Securities Dealers Association ("JSDA"), an association of registered financial instrument business operators including securities firms, is the main regulator involved in the IPO process. The JSDA imposes rules and regulations which must be complied with by its member firms including with respect to the due diligence procedure, and allocation of shares to investors, as well as for the procedure for book building and over-allotment.
- *Stock exchanges*: Stock exchanges also act as self-regulatory organisations through their listing examinations and by imposing various rules on listed companies, including timely disclosure rules, reporting requirements and delisting criteria. The TSE commissions the Japan Exchange Regulation, a separate self-regulatory body in the form of a corporation, to perform such functions for the purpose of maintaining a certain level of independence from the exchange market itself.

Key regulations: The key rules and regulations applicable to the IPO process in Japan are the listing criteria provided by the relevant stock exchange, and the offering and disclosure regulations under the Financial Instruments and Exchange Act of Japan (Act No 25 of 1948, as amended) ("FIEA") and JSDA rules. They are summarised as follows:

- Key legal documents produced for an IPO:
  - *Securities registration statement*, which must be filed with the DLFB for public inspection through an electronic disclosure system operated by the FSA on the launch date (which is the same date as the listing approval), pursuant to the FIEA. Pursuant to the FIEA, no public offering of securities can commence without filing a securities registration statement, and no sale of securities can be executed before the registration becomes effective.
  - *Prospectus*, which is required to be delivered to investors on or before the sale of the shares to be listed pursuant to the FIEA, the content of which is almost identical to the securities registration statement.
  - *Press Releases*, the publication of which are not required by the listing rules but published as a matter of practice and are generally accepted in the Japanese IPO market;
  - *Agreements*, including an underwriting agreement.
  - *Listing application documents*, to be submitted to the stock exchange pursuant to its listing rules.

  The securities registration statement, prospectus, press releases and listing application documents must be prepared in Japanese. Although a foreign company may technically prepare a securities registration statement and prospectus in English and accompany this with a few supplementary documents in Japanese, we do not believe it to be practical for a company listed in Japan to adopt such English-language disclosure given the preference of providing such documents to shareholders in their native tongue.
- Underwriting and syndicate matters: IPOs in Japan are typically fully underwritten, with the underwriters contracting with the Company and/or selling shareholder(s) to purchase all shares to be offered, even if not all of the shares can be sold to investors. Such underwriters have to be registered financial instruments business operators under the FIEA. The terms of underwriting are set out in an underwriting agreement, which often includes an over-allotment option for underwriters. The number of shares subject to an over-allotment option is limited by the JSDA rules to no more than 15% of the total number of shares planned to be offered in the offering. Matters related to underwriting, including the names and addresses of the underwriters and the over-allotment option, are described in the securities registration statement and prospectus.
- Contents of disclosure: Information that must be contained in the securities registration statement and prospectus and presented to prospective investors in connection with an IPO pursuant to the FIEA is summarised as follows:
  - *Information concerning securities*, including type and number of shares offered, offer price (to be paid by investors to the underwriters) and purchase price (to be paid by underwriters to the Company or the selling shareholder(s)), names and addresses of selling shareholder(s) and underwriters, over-allotment and use of proceeds.
  - *Information concerning the Company and its corporate group*, including an overview of the group, the group's business (e.g., an outline of the results of operations, risk factors, material contracts and management's analysis of the financial condition, operating results and cash flows), principal facilities of the group, information concerning the Company's stock, names and holding ratios of large shareholders, corporate governance as well as the consolidated and non-consolidated financial statements together with their notes.

As to the financial statements, the Company is required to disclose: (i) audited financial statements for the FYLA-1 and FYLA-2; and (ii) reviewed quarterly financial statements on a cumulative basis for quarterly period(s) ending in the FYLA. The accounting standard for such financial statements must be either: (i) generally accepted accounting principles in Japan; or (ii) international financial reporting standards. In limited circumstances, generally accepted accounting principles in the U.S. are also permitted.

In addition, EBITDA and other key financial figures, depending on the nature of the Company, are often disclosed in the securities registration statement and prospectus, although they are unaudited and not required by the rules or regulations.

- <u>Uniform application of the rules and regulations</u>: Basically, the rules and regulations apply uniformly to all IPOs in Japan. In the case of foreign companies, however, disclosure of financial statements prepared in accordance with generally accepted accounting principles in other jurisdictions may be permitted with the prior approval of the commissioner of the FSA.
- <u>Restrictions on communications or publicity applicable to the IPO process</u>: Solicitation directed to potential investors prior to the filing of a securities registration statement is prohibited under the FIEA (see "Key legal documents produced for an IPO" above) unless such solicitation meets the requirements of certain exemptions stipulated in the FIEA. Although the term "solicitation" is not expressly defined under the FIEA, with the result that the permitted scope of communications between the Company and potential investors is unclear, the relevant guidelines under the FIEA provide certain circumstances where a company may engage in limited, necessary communications with investors prior to filing a securities registration statement. In particular, such circumstances include the communication or publication of information concerning such company, which does not contain any reference to a planned offering, conducted on or before such date one month prior to the relevant launch date. In accordance with this guideline, any pre-deal research reports in respect of the Company (if prepared) are to be distributed to potential institutional investors in Japan on or before such date one month prior to the launch date.

International Organization of Securities Commissions: The FSA closely follows and publishes on its website releases by the International Organization of Securities Commissions ("IOSCO"), an international organisation of regulators of securities markets and stock exchanges. Given the importance of IOSCO's role in the international markets, the principles, policies and standards published by it have in the past influenced and, we believe, will continue to influence the Japanese regulatory framework including the rules and regulations regarding IPOs.

Recent developments: Please see the section titled "Public company responsibilities – Corporate governance standards for listed companies" below for a discussion of recent major developments in Japanese corporate governance standards.

Disclosure of earnings estimates: In most IPOs in Japan, estimates of earnings for the current fiscal year (i.e., FYLA) are published in the form of a press release on the relevant launch date, being the same date as a listing approval, which is around a month before the listing date. Such estimates usually include sales, operating income, ordinary income, net income, net income per share and dividend per share. Although disclosure of such estimates is not required by the rules or regulations, publication is a matter of practice that is generally accepted in the Japanese IPO market. In recent cases, some emerging companies significantly lowered such earnings estimates just after listing (in one case, three months after listing), which resulted not only in strong criticism of the management of such companies, the Lead Managers and audit corporations, but also a loss of investor confidence in the emerging market. Since then, motivated by a request from the TSE to the JSDA and Japanese Institute of Certified Public Accountants, the practice has been changed to include a detailed explanation regarding assumptions made in such estimates contained in press releases.

Public company responsibilities

Periodic reporting and disclosure obligations: A listed company must file the following with the DLFB under the FIEA:

- an annual securities report, disclosing the business and financial results with audited annual financial statements, within three months (six months in the case of a foreign company) after the end of each fiscal year;
- a quarterly securities report, disclosing the business and financial results with reviewed quarterly financial statements, within 45 days after the end of each quarter;
- an internal control report, disclosing a listed company's own assessment of internal control systems for financial reporting as well as the auditor's report thereof, to be filed together with the annual securities report; provided, however, that except for certain large companies, a newly listed company is not required to include such auditor's report for three years after its listing date; and
- an extraordinary report, disclosing certain important decisions and events that may significantly affect the business and financial results of a listed company, without delay after the occurrence of such decisions or events.

Although a foreign company may file these reports prepared in English and accompanied by a few supplementary documents in Japanese, this is not usually done, for the same reason as mentioned above.

In addition, a company listed on a Japanese stock exchange must issue press releases immediately (called "timely disclosure") through the TSE's online disclosure system, including with respect to:

- information concerning material corporate decisions, such as issues of new shares, stock splits or reverse stock splits, and mergers and other corporate restructuring, immediately after such decision;
- information concerning significant events, such as changes in major shareholders, lawsuits and court rulings, and damage caused by disasters, immediately after the occurrence of such events; and
- annual and quarterly financial results and forecasts.

In practice, a listed foreign company issues such press releases prepared in Japanese, immediately, or as soon as practically possible when the burden of Japanese translation is excessive, after its disclosure in the home country.

Corporate governance standards for listed companies: In an effort to improve the corporate governance of Japanese listed companies for the purpose of revitalising their earnings power, as described in the growth strategy as amended and published by Japan's government in 2014, a council established jointly by the FSA and the TSE published a form of the corporate governance code ("CGC") which was modelled after the 2004 version of the OECD Principles of Corporate Governance. The CGC was in turn incorporated into the listing rules of each of the stock exchanges in substantially the same form and, together with a reform of the Companies Act (Act No 86 of 2005, as amended) in 2016, set the corporate governance standards for Japanese listed companies. The CGC consists of five general principles: (i) securing the rights and equal treatment of shareholders; (ii) seeking appropriate cooperation with stakeholders other than shareholders; (iii) ensuring appropriate information disclosure and transparency; (iv) fulfilling the responsibilities of the board; and (v) seeking dialogue with shareholders. In the context of improvement of Japanese corporate governance, it is noteworthy that the CGC provides that a listed company should appoint two or more independent directors in connection with principle (iv) above.

As the CGC adopts a principle-based approach, its rules are not definitively written and so a listed company may interpret the rules in accordance with each company's situation. Also, the listing rules relating to the CGC are not legally binding. Rather, they adopt an approach of "comply or explain", meaning that a listed company may choose whether to comply with a principle; however, should they choose not to, they must explain the reasons for their choice.

In relation to this, a listed company is required under the stock exchanges rules to submit a corporate governance report which addresses matters related to the CGC, including explanations of the reasons for not implementing any principle as described above, as well as a basic policy regarding the corporate governance, management organisation with respect to management decision-making, operation and supervision, and basic policy regarding internal control systems. This report must be submitted as one of the listing application documents and each time there are any changes after the listing, and an amended version is publicly available on the website of each stock exchange.

Other obligations: The corporate code of conduct of each stock exchange provides certain rules and regulations for listed companies including with respect to large third-party allotments with a significant dilution, issuing convertible bonds with a moving strike clause, introducing anti-takeover measures, and entering into transactions with a controlling shareholder.

Potential risks, liabilities and pitfalls

Potential risks that should be addressed during the due diligence process: The stock exchanges and DLFB have had a keen interest in the adequate disclosure of the use of proceeds from offerings including IPOs. Therefore, a Lead Manager should conduct a particularly careful due diligence exercise on the use of proceeds in terms of timing and purposes of use in light of the Company's growth strategy, to meet regulators' expectations and to avoid any lengthy comments from the regulators in respect of the description of the use of proceeds which would impact the IPO schedule.

Potential legal liabilities and penalties associated with going public:

- <u>During the IPO process</u>: Under the FIEA, the Company, its management, selling shareholders, auditors and underwriters may be liable for damages incurred by investors resulting from a misstatement or omission of a material fact in the securities registration statement. Also, the Company, its management, selling shareholders and persons using the prospectus for the offering may be liable for damages incurred by investors resulting from a misstatement or omission of a material fact in the prospectus. In addition, a certain surcharge, the amount of which is calculated based on the economic benefit obtained through the offering, may be imposed under the FIEA on the Company or any members of the Company's management who sold their shares in the IPO with knowledge of such misstatement or omission.

Further, the Company or members of the Company's management who intentionally made such a misstatement in the securities registration statement may be subject to criminal penalties pursuant to the FIEA.

- After listing: Under the FIEA, a listed company, its management or auditors, may be liable for damages incurred by shareholders as a result of a misstatement or omission of a material fact in the company's annual securities reports, quarterly securities reports, internal control reports, or extraordinary reports.

  In addition, the FIEA provides surcharges and criminal penalties similar to those described above with respect to the company's annual securities reports, quarterly securities reports, internal control reports (except for surcharges), and extraordinary reports.

  With respect to breaches of a listed company's obligations under the TSE's listing rules including, without limitation, any misstatements in its timely disclosures, the following penalties may be imposed on the listed company:

  - orders to submit reports to the TSE detailing the history of the breach and planned action to remediate the breach;
  - publication by the TSE of the fact that the company has been designated as a company cautioned regarding such breaches;
  - penalty charges; or
  - de-listing.

Other stock exchanges also have similar rules.

Common missteps and pitfalls:

- During the IPO process: Some companies publish their medium-term management plans with quantitative targets with respect to future financial results such as sales and EBITDA shortly before their listing. Although such quantitative targets are not disclosed in offer documents, there is a risk that investors, having seen such medium-term plans on a Company's website, consider such figures to be a commitment by the Company. In such cases, if the actual financial results show a shortfall, the Company's reputation may suffer significant damage and investors may launch claims against the Company for loss suffered.
- After listing: As described in the section above titled, "Regulatory architecture: overview of the regulators and key regulations – Disclosure of earnings estimates", companies going public disclose their estimates of their earnings for the current fiscal year (i.e., FYLA) in the form of a press release on the relevant launch date, and, in some cases, they significantly lower such earnings estimates just after their listing. To avoid this and any associated reputation risk resulting therefrom, the management of these companies have to carefully estimate the results and, more importantly, the relevant Lead Manager has to conduct sufficient and substantive due diligence on such estimates.

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Mexico

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Introduction

Brief history of IPOs in Mexico

Although there are Mexican issuers listed since the 1970s, the most recent history and launching of IPOs as they are currently known occurred in 1990 with the privatisation of Telmex (*Teléfonos de México*). The Telmex IPO was one of the most successful ones, supported by the increasing perception of Mexico leaving the 1980s debt crisis and adopting the free-market policies of President Carlos Salinas de Gortari, which included mass privatisation of state enterprises such as Telmex. From then on, several companies launched their IPOs in the following years, and the Mexican securities market started developing as one of the most significant in Latin America. It was not, however, until approximately 10 years ago, that IPOs in Mexico became more notable and for larger volumes, with a greater level of diversification in their investor base and more market depth. IPOs in ranges close to US$1.0 billion have been very notable in the last few years, with companies such as Nemak, Cuervo (Becle) and OHL being good examples.

Why are companies, domestic and foreign, choosing to go public in Mexico?

As in any other country, in Mexico, IPOs are a well-recognised mechanism to access new sources of capital. In addition, companies desiring to fund their business plans and continue their growth strategy experience financing limitations or, even if it is available, financing is offered at high costs. An IPO becomes, then, an alternative to fund their future capacities while they strengthen their corporate governance practices. It has also become a useful exit mechanism for private equity firms that have invested in Mexican companies as well as a practical cash-out scheme for existing shareholders. From the point of view of foreign companies, listing their securities at the Mexican *Sistema Internacional de Cotizaciones* or SIC, expanding their investor base, promoting their brands in jurisdictions other than Mexico and giving the opportunity to Mexican investors to invest in securities listed in other jurisdictions, makes the process worthwhile.

In your view, are the current regulatory scheme and market practices conducive to going public in Mexico? Why or why not?

The Mexican legal framework has significantly evolved during the last few years to create new instruments and schemes to assist Mexican businesses in going public, such as the so-called Fibras, Fibras E, CKDs, SPACs and Cerpis. During the last two years, the Mexican legal framework has incorporated more instruments than in the 10 years previous. In addition, the Institutional Stock Exchange (*Bolsa Institucional de Valores*) (www.biva.mx) ("BIVA"), a new stock exchange, is about to be launched. At first sight, all these initiatives might be seen as conducive to an increasingly attractive environment to go public; however, there are some challenges still to be faced. Mexico, historically, when compared to other Latin American economies such as Brazil, has had poor growth in terms of publicly listed companies. It is yet to be seen how BIVA, the new stock exchange, will affect or be able to promote new listings. One of the worst things that could happen is to have two stock exchanges with the same number of listed companies dividing their trading operations. There are theories that conclude that having two stock exchanges may fragment the market and affect the liquidity of the securities. Likewise, there are a number of other long-lasting discussions on a number of issues that still persist. For example, reforms to the Securities Market Law of 1975, later on reflected in the Securities Market Law of 2005, prohibited the offering of instruments bundling voting and limited-voting or non-voting stock, which had been a successful instrument in the market. During the 1990s, several companies successfully launched their respective IPOs of *certificados de participación ordinarios*, or CPOs, representing voting and limited-voting stock, which incentivised family-owned businesses to go public without excessively diluting their voting power, while granting all economic benefits to public investors. The result has been evident. Many family-owned businesses are reluctant to go public with fully voting stock that, at a certain point, will endanger control of the relevant company. The discussions so far have centered in disclosure issues. If there is a good disclosure on the instrument and the kind of rights granted to its holders, regulation should create the conditions for its issuance. There is also still work to do. Mexican regulations still do not provide enough detail as to day-to-day concerns such as the disclosure of information that, if made publicly available, may situate companies at a disadvantage *vis-à-vis* their competitors. Furthermore, the guidelines for the preparation of annual reports require, in certain instances, the disclosure of information that from a competition point of view might be detrimental to certain companies. In addition, although the Mexican Stock Exchange has been very active in promoting the listing of new companies, potential issuers still do not have enough information and knowledge on the benefits and implications of going public. For example, the current Securities Market Law provides for the so-called *Sociedad Anónima Promotora de Inversión Bursátil* or SAPIB, which was created as a pre-IPO or preparatory regime for medium-sized companies that intended to go public. In practice, the concept has not been as successful as it promised to be and a large number of medium-sized companies with the potential to becoming publicly listed companies are still struggling to find their way to grow.

<u>Are companies that go public in Mexico more frequently of a particular type or from a particular industry? If so, why?</u>

It has been the case that, during certain periods, specific industry sectors have taken pre-eminence in number of IPOs. During the period 2004–2014, the real estate industry accounted for approximately 30%–40% of the IPOs while the transportation and construction industries accounted for approximately 25%. Generally speaking, the reason for such distribution has been a combination of (i) the appetite of investors at a specific point in time for such industries, (ii) the current and expected growth of such industries, and (iii) the existing legal framework for those particular industries.

In addition, other specific political and economic initiatives have triggered IPO momentum in Mexico in specific industries. The privatisation of the airport system in the 1990s, for example, was implemented through a public bidding process, followed by the IPOs of the three resulting airport holding companies in 2000 and 2006, that made their inaugural listing, two of them on the Mexican Stock Exchange and NYSE, and the other one on the Mexican Stock Exchange and NASDAQ.

As a result of the Mexican energy reform, it is expected that energy-related companies should be active participants in the securities markets in the coming years. The infrastructure sector will definitely be another.

Is there a trend of the number of IPOs in Mexico, to the extent it is discernible?

The sophistication of the Mexican regulatory framework through, among other things, the creation of new equity-like securities or mechanisms such as the CKDs, Fibras, SPACs and Cerpis, has been paving the way for an increased number of IPOs in the country. During the last two years, Mexico has seen a clear trend towards a significant number of IPOs. Political and economic stability, however, will continue to play a significant role in the way in which the Mexican securities market will develop and perform in the future. The Mexican presidential election will be key and will prove how the financial and securities markets will react and develop during 2018 and the following years.

Are there any other noteworthy trends in your jurisdiction?

Public policies will be an important driver. The creation and support of financial education programmes will be key for the development and growth of the securities marketplace in Mexico. Strengthening the financial culture in the country will create knowledge and interest in the new generations for alternative investment opportunities such as equities of Mexican companies. An appropriate tax regime would also incentivise more companies to go public. Continuous discussions on potential tax reforms come and go, but a conclusion and definitive tax reform would definitively create a trend for an increasing number of IPOs in Mexico.

The IPO process: steps, timing and parties and market practice

The main ways to structure an initial public offering (IPO) in Mexico are through: (i) a direct, primary dilutive offering of the company's shares; or (ii) a mixed offering that includes a primary offering and secondary non-dilutive offering (by shareholders selling previously acquired shares). The IPO is documented in share certificates deposited in *S.D. Indeval Institución para el Depósito de Valores, S.A. de C.V.*, which is Mexico's sole deposit institution.

Sometimes, due to certain restrictions on direct foreign investment, the IPOs are also made through the issuance of participation certificates (*certificados de participacion ordinaria*) by a Mexican trust, where the shares of the company are transferred to the issuer trust, although this is becoming less common as full foreign direct investment is permitted in almost all types of economic activity.

The National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*) ("CNBV") is the main regulator of the securities market in Mexico.

The traditional stock exchange in Mexico is the Mexican Stock Exchange (*Bolsa Mexicana de Valores*) (www.bmv.com.mx) ("BMV"). However, in the following months, the Institutional Stock Exchange (*Bolsa Institucional de Valores*) (www.biva.mx), a new stock exchange developed by *Central de Corretajes, S.A.P.I. de C.V.*, will start operations in Mexico. Meanwhile, below please find the traditional steps required for listing in the BMV.

In addition to the local exchange, the BMV manages the International Trading System (*Sistema Internacional de Cotizaciones*), which is an electronic mechanism that allows the trading of shares of foreign issuers listed on other stock exchanges. This mechanism can be used to trade shares from IPOs carried out abroad.

In order to carry out an IPO in Mexico, registration and authorisation by the CNBV is required for any securities to be publicly offered in Mexico. To trade in the BMV, the relevant securities must be registered before the National Securities Registry (*Registro Nacional de Valores*) ("RNV"), and other information documents, such as a prospectus, legal opinions, financial statements and stock certificates, must be authorised and publicly disclosed. Trading of securities in the BMV is allowed upon authorisation and registration by the CNBV.

All issuers must file information documents with the CNBV and the BMV. Filings are made electronically through the CNBV and the BMV's systems (known as STIV and Emisnet, respectively) and only the final filing of authorised documents is made in printed and executed form.

Companies listed in the BMV can be:

- Incorporated as or transformed into a limited liability corporation (*Sociedad Anónima Bursátil*) ("SAB"). This is the most common form for listed companies.
- Incorporated as or transformed into a transitory limited liability corporation created to support new business and ventures (*Sociedad Anónima Promotora de Inversión Bursátil*) ("SAPIB"). SAPIBs are used to support new businesses and raise capital for new ventures and have more flexible listing requirements (see below). SAPIBs must be converted into SABs within two years of listing their shares.

All public companies must adopt minimum corporate governance, comply with minimum size requirements, trading record and minimum marketability requirements set out in the Securities Market Law (*Ley del Mercado de Valores*), the CNBV Regulations (*Disposiciones de carácter general aplicables a las emisoras y a otros participantes del Mercado de Valores* or *Circular Única de Emisoras*) and the Mexican Stock Exchange Regulations (*Reglamento Interior de la Bolsa Mexicana de Valores*), as well as comply with the commercial practices of financial markets.

The timetable for a typical equity offering can range from four to six months and would typically be as follows:

- The parties meet for a kickoff meeting, where they discuss general terms of the deal and structure thereof, including the preparation of a working group list, a working calendar and step plan, (detailing all necessary steps to implement the IPO including any amendments that the company shall implement to its corporate by-laws to adopt the transformation and provide for a poison pill, any reclassification of existing shares, the new corporate governance and committees (audit and corporate practices), etc.).
- Typically, the underwriters meet with the CNBV and the BMV to present and explain the deal and advisers work in parallel in due diligence and in the preparation of the transaction documents.
- Several drafts of the IPO documents are prepared and discussed with the different teams involved in such a process before an initial public filing is done with the CNBV and the BMV.
- The preliminary prospectus is disclosed and underwriters start the roadshow with prospective investors, on which comments from such investors and other parties will be addressed or clarified in the subsequent drafts of the offering documents.
- Depending on the complexity of the deal, the CNBV and the BMV take from two to four weeks to review and comment on the offering documents.
- The parties include in the offering documents acceptable requirements and comments from the CNBV and the BMV, as well as comments and questions from investors, and make a subsequent filing.
- Depending on the feedback from prospective investors, the company together with the underwriters decide whether to continue with the offering or not (go/no-go).

- The CNBV and the BMV authorise the final version of the documents, and after filing final versions, the relevant securities are registered with the RNV.
- Securities are listed and traded on the BMV.

The CNBV takes more time to analyse documents from first-time issuers (such as in the case of IPOs), as they have no background concerning the companies' financial information or market behaviour. The BMV has a new issuers committee that admits or rejects new issuers. Subsequent offerings usually take less time than IPOs.

The parties commonly involved in an equity public offering in Mexico are the following:

- Issuer & selling shareholders. The company issuing the shares and the shareholders selling shares in the public offering. The issuer is responsible for drafting most of the prospectus content except for certain marketing sections for which the underwriters are primarily responsible.
- Underwriter. Underwriters are Mexican licensed broker-dealers. They structure the deal, have contact with potential investors, build the book and communicate with regulators. The underwriters market the securities and are liable for most of the prospectus content.
- Independent legal adviser. The independent legal adviser issues the legal opinion that states the issuer company is in good standing and in a position to issue the securities and that the transactions documents are valid and binding.
- The independent legal adviser usually collaborates in the drafting of the offering documents and signs the prospectus to assume liability for the relevant legal structure and information. Usually it is the legal adviser that conducts all formal communications and filings with the regulators.
- Independent auditor. The independent auditor reviews the company's financial statements and issues an auditor's opinion of the company's audited financial statements. The independent auditor signs the prospectus and is liable in connection with the financial information contained in the prospectus.
- Underwriters legal adviser. The underwriters hire legal advisers to perform a legal due diligence review of the prospectus and other marketing materials pursuant to the general regulations applicable to brokerage houses (*Disposiciones de carácter general aplicables a las Casas de Bolsa*).
- Other advisors. Depending on the structure and complexity of the deal, the parties may hire additional advisors.

Regulatory architecture: overview of the regulators and key regulations

The CNBV is the main regulator of the securities market in Mexico, and the traditional stock exchange has been the BMV. However, as mentioned above, in the coming months, BIVA will start operations and will be an alternative for listing securities, including those to be offered in an IPO.

The CNBV is in charge of the RNV, which contains a database with relevant information concerning listed securities.

The main legal and regulatory framework is as follows:

- Securities Market Law (*Ley del Mercado de Valores*).
- CNBV Regulations (*Disposiciones de carácter general aplicables a las emisoras y a otros participantes del Mercado de Valores* or *Circular Única de Emisoras*), issued by the CNBV.
- Mexican Stock Exchange Internal Regulations (*Reglamento Interior de la Bolsa Mexicana de Valores*).

- General regulations applicable to brokerage houses (*Disposiciones de carácter general aplicables a las Casas de Bolsa*), issued by the CNBV.

A company applying for a primary offering of its shares must file, among other documents:

- A request for authorisation of the public offering, for registration before the RNV, and for publication of the issuance documents.
- Corporate information (incorporation deed, by-laws and powers of attorney).
- A prospectus.
- Placement notices.
- Opinions (such as the independent counsel's legal opinion and the independent auditor's opinion).
- Financial statements.
- A form of share certificates.
- Agreements (such as an underwriting agreement, a shareholders' agreement, if any, and other relevant agreements).
- Corporate resolutions.

These documents must be filed (along with other relevant documents) simultaneously with the CNBV and the BMV. The main marketing document is the prospectus which shall be published on the website of the BMV and on the issuer's website and, once authorised by the CNBV, printed in hardcopy and available for investors at the issuer's offices.

Once the documents and request for authorisation have been filed, the CNBV will then review and comment on these documents, and finally approve the documents. The Securities Market Law allows marketing of the securities after the relevant documents are made public. This allows the company to sell the relevant securities through the BMV.

Material information (information required to take an informed investment decision) must be disclosed in the prospectus. Generally, a prospectus must contain the following information:

- General information regarding the securities.
- An executive summary of the transaction.
- Risk factors for the investors as a consequence of their investment in the relevant securities.
- The main use of the proceeds to be obtained from the public offering.
- The structure of the company before and after the public offering.
- The distribution plan (securities marketing plan).
- Dilution risks (the risk of investors of being diluted with respect to their percentage of participation in the issuer's equity).
- Detailed information about the issuer company, such as:
  - A description of its businesses.
  - Existing legal actions or claims against the company.
  - Its corporate structure and main shareholders.
  - Financial information for the previous three years (or from the date of incorporation of the entity) concerning the issuer company and its group, as well as any other entity that contributed 10% or more to the issuer company's income or total sales in the previous year. As an exception, the issuer can provide financial statements for the last fiscal year only (provided that the statements are not older than six months) in the following cases: (a) when the issuer is a limited liability corporation created to support new business ventures (*Sociedad Anónima Promotora de Inversión Bursátil*); and/or (b) issuance of a restricted public offer (an offer made to institutional and qualified investors).

    - A description of the company's management structure and policies.
    - A description of the company's main assets and liabilities.
- A description of the responsible parties and individuals that must provide information to the CNBV and the BMV.
- If any report, statistics or other information contained in the prospectus was prepared by an expert, a statement of this expert must be included, indicating that:
    - this information has been included; and
    - the relevant expert consented to the inclusion of the information to the prospectus.

The generally accepted accounting standards in Mexico are the International Financial Reporting Standards ("IFRS") issued by the International Accounting Standards Board. All financial statements must be audited by an independent auditor in accordance with the International Quality Control, Auditing, Review, Other Assurance, and Related Services Pronouncements issued by the International Auditing and Assurance Standards Board of the International Federation of Accountants. These standards are also applicable to financial statements of issuer companies where subsidiaries perform activities subject to the supervision of Mexican regulators.

Underwriting agreements are typically structured either as:

- Best efforts (*mejores esfuerzos*), where the underwriter(s) agree(s) to use best efforts to secure investors.
- A firm commitment (*en firme*), where the underwriter is responsible for unsold shares.

Firm commitment underwriting agreements are uncommon in Mexico. Greenshoe options (where underwriters receive the right to sell additional shares at the offering price, if demand for the securities exceeds the original amount offered) must be explicitly agreed or the underwriter will not be entitled to offer additional shares.

Stabilisation activities are permitted by the Securities Market Law and do not require a specific agreement. However, they can only be performed with funds obtained from securities sold after exercising a greenshoe option. The common practice is to authorise lead underwriters to enter into sub-placement or placement participation agreements with other broker dealers. Only underwriters can perform stabilisation activities in the BMV. Stabilisation activities can only be performed in the secondary market within 30 days of the offering. The underwriter can only use the funds it obtained from exercising a greenshoe option.

Public company responsibilities

In general terms, public companies have the following ongoing obligations:

(i) Reporting obligations

(a) Public companies must provide annual reports. This information updates the prospectus and includes the company's annual audited financial statements. The annual reports also provide information about the company's:
    - capital structure;
    - board members that are holders of 1% or more of the company's shares;
    - investors that hold 5% or more of the company's shares; and
    - ten principal stockholders.

(b) Companies must also provide quarterly reports. This information is filed pursuant to certain forms provided by the CNBV and the BMV. These reports include the company's *pro forma* quarterly financial statements.

(ii) Information obligations. Pursuant to the CNBV Regulations and the Mexican Stock Exchange Internal Regulations, public companies have an obligation to inform investors, within specific time frames, about the following:
- any shareholders' meetings;
- corporate restructurings;
- mergers or spin-offs; and
- any notices addressed to their shareholders.

(iii) Disclosure obligations. Public companies must disclose to the public any information that may affect the price or value of the shares (relevant events). The CNBV Regulations provide an indicative list of such relevant events. To determine if a specific event is relevant to investors, the company must consider if the event:
- is equivalent in value to 5% or more of the company's assets, liabilities or consolidated capital;
- amounts to 3% or more of the previous year's total sales; and
- if it is not possible to determine, the company must consider if the event constitutes relevant information for investors to make an investment decision, so as to understand the real situation of the company or what may affect the value of the shares.

(iv) Duty of care and duty of loyalty. The Securities Market Law also imposes a duty of care and a duty of loyalty on members of the board of directors of publicly traded companies.

According to the Securities Market Law, the duty of care consists of acting in good faith and in the company's best interests.

The duty of loyalty consists primarily of maintaining the confidentiality of information received in connection with the performance of duties and abstaining from discussing or voting on matters where a member of the board has a conflict of interest.

The consequence of breaching the duty of care or duty of loyalty may be the obligation to pay losses and liquidated damages notwithstanding any other administrative or criminal actions that may be incurred.

Liability actions for losses and liquidated damages resulting from a violation of the duty of care or the duty of loyalty may be exercised solely for our benefit and may be brought by us or by holders representing 5% or more of the outstanding shares, and, if applicable, criminal actions may only be brought by the Mexican Ministry of Finance, after consulting with the CNBV.

Potential risks, liabilities and pitfalls

Quiet period/misleading information

No offering nor marketing of securities are allowed before a public filing or disclosure of the preliminary prospectus and the other offering documents. Once these are publicly filed with the CNBV and the BMV, and publicly disclosed, the underwriters can:
- Start contacting potential investors freely.
- Reach clients through conference calls.
- Start the roadshow to market the securities (management presentations or meetings).

The publication of a prospectus that either contains misleading information or does not contain all the relevant information of the issuing company is considered to be a distribution of misleading information, which can result in civil, administrative and criminal liability.

Breach of ongoing reporting obligations

Issuers must comply with the maintenance requirements and reporting obligations mentioned above. The penalties for breaching the continuing obligations range from suspension or cancellation of listed securities to personal liability of the individuals appointed to provide the information.

A very common cause of suspension of a listing by the BMV is the failure to file financial reports (annual or quarterly) of the issuer or the failure to disclose material information in a timely manner. The CNBV has also been actively reviewing whether public issuers are in compliance with accounting standards and if such standards are being applied on a consistent manner by issuers.

Restrictions on market abuse/insider dealing

Any information in whole or in part that is not public and has, or may have, an impact on the value of specific listed stocks is deemed as "privileged information".

Any person or persons that have access to privileged information as a result of their position in the issuer, or as an adviser to the issuer, must maintain confidentiality over that privileged information until that information becomes public. The following actions are deemed to constitute insider trading/dealing (*abuso de información privilegiada*) under the Securities Market Law:

- Performing or instructing operations, directly or through another person, on any type of listed securities, where the price of those securities may be influenced by that privileged information.
- Providing privileged information to any other persons, unless those other persons are entitled to that privileged information as a result of their position with the issuer, or with an adviser of the issuer.
- Issuing recommendations on listed securities that may be influenced by that privileged information.

There are several criminal and civil penalties applicable to individuals who perform insider trading/dealing. The criminal penalties range from significant fines to imprisonment. The CNBV has recently begun closer scrutiny of insider trading activity and has publicly sanctioned individuals that have traded on the basis of material non-public information, including people in senior management positions in diverse issuers.

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Mr. Maldonado has over 20 years of experience advising issuers and financial institutions in domestic and international, public and private, debt and equity offerings. During the last 12 months, Mr. Maldonado has represented at least five Mexican companies in establishing bond programmes and in the offerings under such programmes, two companies in their IPOs and another one in a tender offer. Mr. Maldonado has broad experience in securities regulatory matters and advises over 20 stock exchange listed companies on strategic and day-to-day securities matters. Mr. Maldonado advises and/or serves in different positions of the Board of several stock exchange listed companies such as Alfa, Grupo Televisa, Banorte, Grupo Aeroportuario del Centro Norte (OMA), Consorcio Ara, Grupo Famsa, Grupo Simec, Rassini and Volaris.

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Netherlands

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Introduction

History of IPOs in the Netherlands

The main equity market and stock exchange in the Netherlands is called NYSE Euronext Amsterdam (hereafter Euronext). Trading originates back to 1607 in Amsterdam, where the Dutch East India Company became the world's first publicly traded company. Euronext Amsterdam is, together with several other regulated markets in different jurisdictions, one of the largest stock exchanges in the world.

Euronext's three most well-known indices are the AEX, the AMX and the AScX. The 25 largest and most frequently traded companies at Euronext are stated on the AEX. The AMX states the 25 next largest and most frequently traded companies, whilst the AScX states the following 25 largest and most frequently traded companies.

According to Euronext's website, there are currently 148 companies listed on Euronext (some of which are dual-listed on other markets as well). Roughly 100 of those companies are Dutch legal entities.

Only a couple of companies went public during the financial crises and the years thereafter. Since 2014, however, in spite of difficult market conditions and political uncertainty in Europe and the rest of the world, this trend reversed. In 2017, seven companies obtained a listing in the Netherlands. Amongst those VolkerWessels, Avantium, Veon and NEPI Rockcastle. Although volatility on the stock markets recently increased and new entrants are viewed in a more critical light, it is expected that in 2018 approximately eight companies will go public in the Netherlands. Euronext remains an attractive market for issuers, selling shareholders and investors.

Reasons for choosing the Dutch jurisdiction

The Netherlands is a very well-suited jurisdiction to go public in. The Netherlands is prosperous and has a well-maintained, digital infrastructure. On top of that, the political climate is very stable in the Netherlands. These factors increase the accessibility of financing. Moreover, the stable political climate decreases political and other external risks that might affect the company, or its investors, when it goes public and during the period the company is listed.

Corporate law in the Netherlands is flexible and conducive. On top of that, European regulation has increased harmonisation in the European Economic Area (hereafter EEA). The main regulator for equity markets and stock exchanges in the Netherlands, the Netherlands Authority for the Financial Markets (hereafter AFM), is a constructive and supportive supervisor.

The Enterprise Chamber of the Amsterdam Court of Appeal is a court that sets the Netherlands apart from other jurisdictions. This court is specialised in corporate proceedings. In this court, among other things, inquiry proceedings can be held to investigate the affairs of the company.

Lastly, as of 3 January 2018, MiFID II (a European legislative framework to ensure fairer, safer and more efficient markets and to facilitate greater transparency for all participants) has brought, amongst other things, significant changes to trades in the dark. Pursuant to this new regulation, Euronext has launched Euronext Block, a multilateral trading facility (hereafter MTF) in 2017. This MTF allows participants to trade blocks proactively in a safe environment. Such facility further increases liquidity of stocks on Euronext.

Is the regulatory scheme conducive for an IPO?

The Dutch regulatory framework is highly conducive for an IPO. Dutch corporate law is flexible and the regulator is constructive. This leaves room for tailoring an IPO to the needs of the specific company. In addition, the Dutch corporate governance code (hereafter the Dutch Code) provides for a set of clear best practice rules and principles that have to be followed on a comply-or-explain basis.

Most of the rules and regulations governing an IPO process in the Netherlands originate from the European Union (hereafter EU). Regulation and legislation at EU level increases harmonisation in the EEA. One of the key benefits of these EU rules is the so-called passporting regime. It allows a company to draw up a single prospectus and have it approved by the competent authority of their home member state and ask that the competent authority issues a certificate of approval. By doing so, the company usually does not need to draw up another prospectus for admission to trading of that same offering in another EEA member state.

Are companies more frequently of a particular industry?

Companies on Euronext are not more frequently related to a particular industry. In 2017 and 2018, the Netherlands saw a well-balanced mixed of companies. Recent examples of IPOs and IPOs that have been announced include Avantium (chemical technology), VolkerWessels (construction), B&S Group (distribution), NIBC (banking) and Varo Energy (integrated fuel supply).

Trend of number of IPOs

The number of IPOs follows a stable but slightly upward trend. Market sentiment at this time is relatively high and companies are trying to take advantage of this sentiment. In this context, the Netherlands has proven itself a fruitful country in which to list. Market and political developments have impacted the timing of IPOs, but seem to have limited impact on the number of IPOs.

Other noteworthy trends

An international noteworthy trend is the rise of international coin offerings (hereafter ICOs). ICOs are often structured in such a way that they fall outside the scope of financial supervision by, amongst others, the AFM. The protection provided to investors by financial supervision legislation is therefore absent. The Netherlands ranks relatively high based on the adoption rate of cryptocurrencies. There are many cryptocurrency start-ups based in the Netherlands as a result.

Also, after having disappeared in the years following the 2008 financial crisis, the special purpose acquisition company (hereafter SPAC) has now returned. Dutch Star Companies ONE, at the time of its listing in February 2018 not being engaged in any activities, intends to acquire a significant minority stake in a business post-IPO.

The IPO process: timeframe, parties and market practice

Typical timeframe

In general, the entire IPO process takes approximately six to eight months provided that the market conditions are stable. The IPO process can be divided into eight phases (i) initial tasks, (ii) preparation, (iii) analyst presentation and research, (iv) ITF, (v) PDIE, (vi) launch, (vii) management roadshow and bookbuilding, and (viii) pricing, allocation and listing. Subsequently, a period of stabilisation starts, during which the over-allotment option may be used. A detailed description of each phase is as follows:

(i) Initial tasks: Before an issuer decides to pursue an IPO, the feasibility thereof and the critical issues have to be identified.

(ii) Preparation: The IPO process starts with the selection and engagement of advisors by the issuer. In general, a kick-off meeting is organised, during which the transaction team is introduced to each other and to the characteristics of the issuer. Besides a kick-off meeting with the transaction team, a courtesy meeting with the AFM is also often organised. During the preparation phase, the due diligence is initiated, the outline for the corporate governance structure is established and the publicity guidelines are drafted. Furthermore, several drafting sessions are organised with the issuer to produce the first draft of the prospectus. In this period, early-look meetings with investors will also be held to establish a dialogue with investors, educate them on the company's equity story, and get an understanding of how they see the company evolving to become a successful IPO candidate.

(iii) Analyst presentation and research: During this phase, the issuer gives a presentation to the syndicate analysts (connected to the syndicate banks, but independent within their bank as required) and the research reports are drafted. The presentation is sometimes accompanied with site visits. Following the presentation, the research reports are circulated to the transaction team for a factual accuracy review.

(iv) Intention to float (ITF): Euronext is engaged and arrangements are made with the selected listing and paying agent. When the documents are ready, the IPO is formally announced to the market in a press release, the syndicate analyst research reports are distributed and pre-deal investor education (hereafter PDIE) begins.

(v) Pre-deal investor education (PDIE): This is the process by which the syndicate analysts use their distributed research as a basis for discussing the issuer with potential investors and to answer questions on the issuer and its potential valuation drivers ahead of the setting of the price range and management commencing the roadshow.

(vi) Launch: Two weeks before the actual listing, the prospectus is approved by the AFM and published by the issuer. The prospectus contains the maximum IPO size and the price range. There is no minimum market capitalisation requirement for companies listed on Euronext. However, Euronext requires a minimum free float of 25% of the issued shares in the capital of the issuer, or 5% if this represents at least EUR 5 million.

(vii) Management roadshow and bookbuilding: This involves the issuer's management marketing the transaction through roadshows to potential investors with the aim of securing orders from those investors to purchase shares and facilitating the bookbuilding process.

(viii) Pricing, allocation and listing: At the conclusion of the bookbuilding process, the final offer price and the final offer size are set and published in a press release. Also the shares are allocated to the investors. The next day, trading starts on an "as-if-and-when-issued-or-delivered" basis. Two trading days after the first trading date, the transactions are settled through Euroclear Nederland and unconditional trading starts.

(ix) Stabilisation: Following the IPO, the underwriters may stabilise the price of the shares on the stock exchange. The issuer or the selling shareholders will therefore grant one of the underwriters appointed as the stabilisation agent an over-allotment option to buy additional shares from the issuer or the selling shareholders that can be exercised for up to 30 days after the IPO. This over-allotment option is typically for a number of shares equal to 15% of the shares offered in the IPO. If the share price goes up, the over-allotment shares are sold. If the share price drops below the IPO price, the stabilisation agent will support the share price by buying shares back from the market and will redeliver these shares to the issuer or the selling shareholders. Stabilisation activities following an IPO are allowed under the Market Abuse Regulation (hereafter MAR).

<u>Parties involved and their roles</u>

(i) Management: During the IPO process, management shall represent the company to various parties involved in the IPO process, such as syndicate analysts and potential investors. Management is also heavily involved in the drafting sessions for the prospectus, the analyst presentation and the roadshow presentation. Management shall further be involved in several due diligence sessions and various due diligence bring down moments during the IPO process (ITF, launch, pricing and allocation and stabilisation).

(ii) Supervisory board: Many Dutch listed companies have a two-tier board structure, whereby the supervisory board is entrusted with the supervision of management, also during an IPO process. In the post-IPO structure, the supervisory board shall establish three different committees if the issuer is compliant with the Dutch Code being (i) the audit committee, (ii) the remuneration committee, and (iii) the selection and appointment committee.

(iii) The (lead) underwriters: The lead underwriters' role is to coordinate the overall process of the IPO, to advise on the structure and size of the offering, to perform a thorough due diligence exercise to ensure a non-misleading prospectus and to coordinate all marketing activities necessary to make the deal a success. In addition, the banks will act as listing, paying, settlement and stabilisation agent.

(iv) Lawyers: An IPO process is a very complex and technical process. The lawyers will draft the majority of the prospectus and will check compliance with the applicable laws and regulations. The various other documents such as the underwriting agreement, the share lending agreement, the relationship agreement (an agreement with a substantial or controlling shareholder), governance documents such as the articles of association and board and committee rules, policies and employee incentive plans, are also drafted and negotiated by and between the lawyers.

(v) Public relations firm: A public relations firm can assist the company in its preparation for a public status. They are responsible for obtaining media coverage for the IPO, carefully drafted press releases and training of management for their presentations to investors and media interviews.

(vi) Accountant: The accountant will audit the financial statements of the issuer over the last three financial years that will be included in the prospectus and deliver a report thereon. The accountant also provides comfort letters to the underwriters in which certain confirmations are included with respect to the financial information as set out in the prospectus.

<u>Anti-takeover measures</u>

Under Dutch law, there are various active, passive, and other anti-takeover measures. If a company decides to implement an active anti-takeover measure, it is best do so when listing a company. In the context of an unsolicited public bid, the use of an anti-takeover measure is only permitted for the purpose of allowing a publicly traded company, for a limited period of time, the opportunity to ascertain the intentions of a bidder and to create a level playing field in order to either consult with shareholders or to investigate alternatives preferable to an unsolicited bid.

The three most common active anti-takeover measures are (i) protective preference shares, (ii) priority shares, and (iii) the issuance of depositary receipts.

(i) Protective preference shares: The issuer grants a call option on preference shares to an independent foundation, which gives the foundation the right to acquire such number of preference shares equal to 100% of the outstanding shares at the time of exercise of the call option, less one share. The foundation's objects are generally to protect the interests of the issuer and its business by making every effort to prevent anything which may affect the independence, continuity or identity of the issuer.

(ii) Priority shares: The holder of priority shares, generally an independent foundation, may have certain special statutory rights attached to those shares. Commonly, such rights include the right to make a binding nomination to appoint members of the management or supervisory board, the right to issue shares and the right to approve certain important decisions of the company.

(iii) Issuance of depositary receipts: In this structure, the economic rights are separated from the voting rights of shares. A foundation will be the holder of the shares and will issue depositary receipts. The depositary receipts, which will be listed, represent the beneficial ownership of the underlying shares. The holder of the depositary receipts is entitled to all dividend payments and other distributions. The voting rights are legally held by the foundation. However, the foundation will generally grant a power of attorney to the holders of the depositary receipts to exercise the voting rights at their own discretion. In hostile situations, the foundation may limit, exclude or revoke the power of attorney (to be) granted to the depositary receipt holders. The Dutch Code provides that depositary receipts for shares should not be issued as an anti-takeover protective measure and that the board of the foundation should issue voting proxies under all circumstances and without limitations to all depositary receipt holders who request this. Companies may, however, deviate from the Dutch Code if they explain such deviation.

Other passive anti-takeover measures are, amongst others, (i) majority shareholding, (ii) a dual-voting structure containing two types of shares with different voting rights attached thereto and, (iii) the major company regime (*structuurregime*) acting as extra layer for the appointment of members of the management board. In addition, based on the Dutch Code, the management board may invoke a response time of 180 days in the event that a shareholder puts an item on the agenda that may lead to a change in the company's strategy.

Regulatory architecture: overview of the regulators and key regulations

Regulatory architecture

Governmental bodies

The AFM is the Dutch regulatory body that verifies the compliance of the prospectus with prospectus regulation and, in case of compliance, approves it. The AFM is also the authority to which substantial holdings in Dutch listed companies have to be notified. Other notification requirements pursuant to the MAR also fall under the supervision of the AFM. The AFM also supervises the application of financial reporting standards by Dutch companies whose shares are listed on a Dutch, European or foreign stock exchange.

Public stock exchanges

Euronext is the main regulated (equity) market and stock exchange in the Netherlands. Euronext is governed by the Dutch Financial Supervision Act (hereafter DFSA). Operation of a regulated market in the Netherlands is subject to prior licence by the Dutch Central Bank (*De Nederlandsche Bank)* (hereafter DCB). The AFM, together with the DCB, monitors this market and ensures compliance with market rules.

Self-regulatory organisations

The VEB is an investor association that represents the interests of investors. The association, among other things, seeks attention in the media and takes action or initiates a class action on behalf of investors in case of (financial) abuses in listed companies.

Key rules and regulations

EU and Dutch rules and regulations

Most of the rules and regulations governing the Dutch equity markets and exchanges originate from EU legislation (for example, the Prospectus Directive and the Prospectus Regulation). Such EU legislation has been implemented into Dutch law or, in the case of regulations, is directly applicable in the Netherlands.

The Prospectus Regulation contains annexes or so-called reference tables which prescribe what information has to be included in the prospectus. The annexes can be downloaded from the website of the AFM and should contain a reference to the paragraphs and page numbers on which the information as prescribed by the annex can be found in the prospectus.

The DFSA is the main body of law governing the Dutch equity markets and exchanges. The DFSA mainly contains regulatory law, such as periodic and ongoing obligations and incidental disclosure obligations for listed companies. Additional rules and regulations applicable to listed companies can be found in a variety of other laws, governmental decrees and regulations.

Certain legislation is only applicable to listed companies that have their registered seat in the Netherlands, such as the Dutch Code. Certain other rules, such as market rules applicable in a public takeover bid, apply only to companies listed in the Netherlands, irrespective of their jurisdiction of incorporation.

Euronext rules and regulations

Euronext has certain specific rules and regulations in place for companies listed on one of their markets. Euronext Rule Book I contains harmonised rules, applicable to all companies listed on any of the Euronext markets (that is, Amsterdam, Brussels, Lisbon, London or Paris). Euronext also has a non-harmonised rule book for each separate market it operates. The non-harmonised rule book for a particular market only applies to the companies listed on that particular market.

Different regulation for different issuers

Separate reference tables are available for different type of companies, such as credit institutions, property companies, scientific research-based companies and start-up companies. These reference tables have to be submitted to the AFM as part of the prospectus approval process.

Recent, impending or proposed changes to regulatory architecture and the impact

The current Prospectus Directive, which was adopted in 2003 and revised in 2009, will be replaced by a new Prospectus Regulation from the EU. This Prospectus Regulation enters into effect in three phases and aims to create a capital markets union by further increasing harmonisation. The new Prospectus Regulation will enter into effect in its entirety on 21 July 2019. However, some parts have already entered into effect on 20 July 2017 and some parts will enter into effect on 21 July 2018. The new Prospectus Regulation specifies, with greater clarity, the amount of information required in order to make prospectuses shorter and clearer.

As part of the new Prospectus Regulation, any issuer whose securities are admitted to trading on a regulated market or an MTF may in the future draw up every financial year a registration document in the form of a universal registration document (hereafter URD) describing the company's organisation, business, financial position, earnings and prospects, governance and shareholding structure. Such URD reduces the cost of compliance with the new prospectus regulation for frequent issuers and enables them to swiftly react to market windows.

Influence of supranational regulatory regimes or bodies

ESMA is an independent EU authority that contributes to safeguarding the stability of the EU's financial system by enhancing the protection of investors and promoting stable and orderly financial markets. It achieves this by, amongst other things, completing a single rulebook for EU financial markets, and promoting supervisory convergence by providing guidelines and Q&As on EU regulation.

Significant market practices impacting IPOs

Shares in Dutch IPOs are generally offered within the United States of America in accordance with Rule 144A (hereafter Rule 144A) under the US Securities Act of 1933, as amended (hereafter Securities Act). Offers and sales of securities to the public in the United States must be registered, absent an exemption. In very general terms, Rule 144A establishes an exemption from this registration requirement where the securities are only offered and sold to qualified institutional buyers in the United States in a way that would not otherwise constitute a US public offering. As a result hereof, several US practices have become market practice in the Netherlands.

Rule 144A does not, however, provide an exemption from the various US securities anti-fraud laws, in particular the broad anti-fraud provisions of Rule 10b-5, under which the company, its directors, its underwriters and others may potentially be liable to US investors if the prospectus or other offering materials contain any untrue statement of a material fact or omit material facts necessary to make the statements that are made in the prospectus not misleading. To be found liable under Rule 10b-5, the defendant must have acted recklessly or with intent to deceive. The investor making a claim under 10b-5 needs to have suffered a loss caused by the misstatement or omission. While in principle the Dutch disclosure regime also prohibits such misstatements or omissions, as a practical matter US investors and regulators are much more likely to pursue securities law claims or otherwise seek compensation from the company, its underwriters and its directors than investors in the Netherlands. Consequently, this risk is taken very seriously. The exercise of reasonable care, in the form of a carefully conducted due diligence investigation, tends to negate the existence of the intent to deceive or recklessness required for a 10b-5 claim. As a consequence, enhanced underwriter due diligence has become a critical component of a defence to liability in Rule 144A offerings. As part of that exercise, underwriters typically also request what are known as "10b-5 disclosure letters" from both their own and the company's US counsel, which are negative assurance letters as to the absence of any such misstatement or omission. This in turn leads the lawyers to insist that the prospectus is generally drafted to US disclosure standards, in addition to the standards that would apply in the Netherlands.

Another US practice relates to the financial information included in the prospectus. Pursuant to the Dutch requirements, the prospectus must include the audited financial statements of the company over the last three years using the international financial reporting standards (IFRS) or equivalent generally accepted accounting principles (GAAP) as well as interim financial information, which may be unaudited, covering at least the first six months of the financial year if the prospectus is published more than nine months after the end of the last financial year. In practice, the 135-day rule is applied and the prospectus contains financial statements with a balance sheet as of a date that is within 135 days prior to settlement of the IPO. This requirement is driven by US accountants' comfort letter practices. Depending on the timing of the offering, this sometimes requires the preparation and inclusion of additional financial statements in the document, as well as additional disclosures relating to that information in the "operating and financial review" paragraph of the prospectus, while this would formally not be required under the Dutch rules. It may also be necessary to have those financial statements reviewed by the auditors, which has timing and cost implications.

Public company responsibilities

<u>Obligations imposed that do not apply to private companies</u>

Periodic reporting and disclosure requirements

After a company is listed, the company, its shareholders, or other affiliated persons may be bound by extra regulation.

Most importantly, the company is required to disclose inside information without delay. This obligation derives from the MAR. Inside information is information of a precise nature, that has not been made public, relating directly or indirectly to one or more issuers or to one or more financial instruments, and that, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments. The information must be made public in the form of a press release. The press release must also be submitted to the AFM and published on the company's website. The company will be entitled to delay the disclosure of inside information if all of the following three conditions are met:

(i) immediate disclosure is likely to prejudice the legitimate interests of the company;
(ii) delay or disclosure is not likely to mislead the public; and
(iii) the company is able to guarantee that the information concerned is kept confidential.

In addition, a major shareholder who, directly or indirectly, obtains or loses capital or voting rights in a listed company which exceeds or falls below certain threshold values, must, without delay, notify the AFM of its holdings and the relevant change. The threshold values for the purpose of this obligation are 3%, 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95%.

Furthermore, there are several other ongoing (notification) obligations. These include, amongst others:

(i) notifications by members of the management and supervisory board of their shares and voting rights and of changes therein where these concern shares, depositary receipts for shares and rights to acquire shares (such as employee share options, share awards, call options, warrants and convertible bonds) in the issuer;
(ii) notifications of transactions that have been performed by managers in shares of the company;
(iii) notifications of changes in share capital or voting rights of the company;
(iv) the obligation to provide shareholders with certain information on the upcoming general meeting ultimately on the 42nd day before that meeting;

(v) the obligation to publish the general meeting's voting results; and
(vi) the obligation to publish (semi-)annual accounts and interim reports.

Corporate governance standards

In 2016, a new Dutch Code was published. Starting from 2018, companies have to comply with or explain the new Dutch Code in their 2017 annual reports. The new Dutch Code places, amongst other things, more emphasis on long-term value creation and introduces "culture" as a component of effective corporate governance. The Dutch Code operates according to the "comply or explain" principle. This principle means that listed companies must apply the principles and best practice provisions, or provide reasons as to why they are opting not to apply a particular principle or best practice provision.

Potential risks, liabilities and pitfalls

Potential risks that should be addressed during the due diligence process

Pursuant to the Prospectus Directive, any prospectus in the EU must contain all material information relating to the issuer and the shares offered by the issuer. In addition, it must contain all information that is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position and prospects of the issuer. Pursuant to the DFSA, the information in a prospectus may not be inconsistent or in conflict with information present at the AFM with regard to the issuer and must be presented in a form comprehensible to a reasonably informed person exercising due care.

If the prospectus is misleading, underwriters may establish a so-called due diligence defence to avoid prospectus liability. They must prove that they conducted a "reasonable investigation" in respect of material misstatements or omissions and, following such investigation, the underwriters must have reasonable grounds to believe, and must believe, at the time the prospectus was published, that the statements therein were materially true and that there was no omission to state a material fact. Therefore, the due diligence performed by the underwriters will generally cover all items that need to be included in the prospectus pursuant to the annexes to the Prospectus Regulation.

Potential legal liabilities and penalties when going public

After the company has gone public, the possibility of prospectus liability can arise. Prospectus liability can arise from several legal grounds, such as unlawful acts or unfair commercial practices. There are not many prospectus liability cases in the Netherlands. The most famous one is the World-Online case. In this case, the Dutch Supreme Court held that, in order to assess whether a statement is misleading, the starting point must be the presumed expectations of an averagely informed, prudent and observant ordinary investor at whom the statement was aimed or which is received by the latter. It can be expected that this "reference investor" is prepared to go deeply into the offered information but not that he is a specialist or has special knowledge and experience. This has become a very important criterion for disclosing information in a prospectus and in marketing material.

Common missteps and pitfalls that may increase liability risk

There are strict rules on publicity and marketing during an IPO process. Investors should make investment decisions based on the full disclosure in the prospectus and not on information that has not been approved by the relevant regulator. Providing information prior to an IPO that has not been approved is known as "gun jumping". An interview given by Google executives in Playboy prior to the IPO of Google is an iconic example of such. A company and all affiliated parties should be aware of all statements it makes, including interviews in magazines or on the internet, during the IPO process.

Following the IPO, inside information has to be published immediately by way of a generally accessible medium to investors pursuant to the MAR. For newly listed companies, the MAR contains a whole new regime with obligations to be compliant with, especially the assessment of whether certain information is considered as inside information. The AFM has published practical guidelines which contain points of reference as to what could be considered as inside information; however, the final assessment of whether information qualifies as inside information is entirely up to the issuer. Especially when a company has just become a listed company, such assessment can be difficult.

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Norway

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Introduction

2017 was a very good year for the Oslo Stock Exchange, with the Oslo Stock Exchange's Benchmark achieving more than 50 new highs and climbing 19.1% during the year (compared to an average annual index climb of 10%[1]). With 21 new listings in 2017, the number of issuers admitted to the Oslo Stock Exchange's marketplaces has not been as high since 2007.

There are currently three main listing alternatives in Norway:

- Oslo Børs is the "main list" intended for large companies with an established track record and significant shareholder base, and ability to adhere to the comprehensive regulations and standards relating to reporting, accountability and transparency. Oslo Børs is regulated as a stock exchange fully compliant with EU requirements.
- Oslo Axess is a fully regulated market with largely the same continuing obligations as those of issuers on Oslo Børs, but Oslo Axess is deemed suitable for companies younger than three years old who seek the advantages of listing on a fully regulated market, but in a lighter manner.
- Merkur Market is a multilateral trading facility ("MTF") governed by EU legislation, but with lighter rules and regulations both in respect of listing requirements and continuing obligations than those applicable for issuers listed on Oslo Børs and Oslo Axess. Merkur Market is normally suited for small, young or growth companies and is often used as a stepping-stone for listing on Oslo Børs.

At the end of February 2018, there were 227 issuers listed on one of the Oslo Stock Exchange's marketplaces, of which 45 were foreign issuers. Oslo Børs had 187 issuers with a total market cap of NOK 2,551 billion, illustrating that there are several small and medium-sized issuers with a market cap of less than NOK 1 billion. Oslo Axess had 24 issuers, which represented a total market cap of NOK 22 billion and Merkur Market, which was established in January 2016, had 16 issuers with a total market cap of NOK 4 billion.

The predictions for the 2018 IPO market in Norway are generally optimistic across all industries. As of 1 March 2018, two companies have been admitted to, and two companies have applied for listing on, the Oslo Stock Exchange.

The Oslo Stock Exchange was established in 1819 and is the principal market for trading of shares, bonds and other financial instruments in Norway. Although it has issuers across all industries, the Oslo Stock Exchange has a long-standing and strong position for issuers in the energy, shipping and seafood sectors, which correlates with Norway's position within these sectors globally, being a top-five oil and gas exporter, the fifth largest maritime nation and the world's second largest exporter of fish and other seafood products. The Oslo Stock

Exchange emphasises leading research coverage as a key selling point to attracting foreign issuers within these three sectors.

The Oslo Stock Exchange is generally known for its flexibility, and straightforward and speedy listing process. Further, the Norwegian capital market has traditionally been known for its strong distribution capacity both for equity and debt instruments. During 2017, NOK 62 billion was raised in equity capital on the Oslo Stock Exchange (incl. in the 26 IPOs completed in 2017).

The Norwegian bond market is widely known for its high levels of activity and placing power, as well as accessibility. The marketplace Nordic ABM is an alternative marketplace for listing and trading bonds and short-term debt instruments (certificates). Nordic ABM is not an MTF or a regulated market, and is not subject to the provisions of the Norwegian Securities Act. The Norwegian bond market's strong position results in both foreign issuers and investors being attracted to Norway and Oslo.

The IPO process: steps, timing and parties and market practice

IPOs in Norway generally take four to six months to complete, starting from the issuers deciding to list, to admission to listing. IPO processes that are not straightforward, such as corporate spin-offs and privatisations requiring government approvals or regulatory permits, may take substantially longer. There are three main "listing-tracks" for an admission process on Oslo Børs: the ordinary listing process; the flexible listing process; and the fast-track listing process. The latter was introduced in 2012 as an option for issuers who wanted minimum time to market.

Merkur Market is an MTF and the listing process is thus far less time- and resource-consuming than a listing on Oslo Børs or Oslo Axess both in terms of preparations for the issuer and the admission process with the Oslo Stock Exchange. The Oslo Stock Exchange has a lead time of one to two weeks from receipt of the application for admission. In the following, we have focused on IPO processes on Oslo Børs.

<u>Preparation phase – IPO readiness</u>

For an issuer initiating a listing process for the first time, an IPO readiness process will most likely be required for the purposes of preparing the issuer for the listing and securing compliance with the listing requirements.

The following actions will generally be steps in the IPO readiness phase:

- conversion into a public limited liability company. Note that, as from conversion into a public limited company, the gender requirements for public limited companies apply, thus requiring at least 40% of each gender on the board;
- establishment of a nomination committee and board committees, such as an audit committee and remuneration comittee;
- adoption of corporate governance policies, the most common being: corporate governance principles; insider trading policy; primary insiders instructions; instructions for the nomination committee; audit committee and remuneration committee; and corporate social responsibility code or code of conduct;
- restructuring of the share capital, split of shares, dissolution of share classes, change of nominal values; or private equity exits, repayment and cancellation of share classes and structures relating to preference shares;
- restatement of historical financial information into the international financial reporting standards ("IFRS"); and

- board and management education in the provisions of the Norweigan Securities Trading Act and the Continuing Obligations for companies listed on the Oslo Stock Exchange; in particular, the provisions relating to handling of insider trading.

Due diligence preparations

The listing requirements provide for financial and legal due diligence of the issuer. As part of the IPO readiness phase, the issuer will thus have to facilitate for a due diligence process by making relevant information available in a data room.

The purpose of such due diligence is two-fold: (i) confirm to the Oslo Stock Exchange that the issuer is suited for listing and fulfils (or will at listing fulfil) the listing requirements; and (ii) assuring that there are no faults or omissions in the IPO prospectus and other marketing documentation. The scope of the due diligence will generally be lighter than that of an ordinary M&A process. Note, however, that in an international-style IPO, the due diligence is extensive.

In accordance with the Listing Requirements, the financial and legal due diligences must be conducted by advisers that are independent from the issuer. The results of the due diligence are presented to the Oslo Stock Exchange before submission of the listing application.

Admission process towards the Oslo Stock Exchange

The Oslo Stock Exchange offers three different admission processes: ordinary; flexible; and fast-track. Both the ordinary and flexible processes take around two months, while the fast-track may theoretically be completed in four weeks after having formally initiated the process with the Oslo Stock Exchange.

Ordinary: An ordinary admission process follows a set of submissions and deliveries at fixed dates that are calculated based on the date of the Oslo Stock Exchange's board meetings. The schedule of such board meetings are published by the Oslo Stock Exchange each year with monthly meetings.[2] In an ordinary admission process, the issuer's listing application is submitted four weeks prior to the Oslo Stock Exchange's board meeting. The issuer's application to list is made public from such submission.

Flexible: A flexible admission process involves the same submissions and deliveries as the ordinary process, but the submission deadlines are more flexible as the deadlines are not calculated based on the Oslo Stock Exchange's scheduled board meetings. The key advantage of a flexible admission process is that an issuer may delay submission of the listing applications until three days prior to the Oslo Stock Exchange's approval of the listing. This implies that flexible processes allows for the issuer to postpone having to inform the market about its plans to seek an admission to listing. Issuer/managers thus avoid having a listing process known in the market for a long period of time before it is actually launched, as such knowledge in the market may be a disadvantage in the event of a postponed listing. In this process, a company may in principle determine the date of the Oslo Stock Exchange's board of directors' approval.

Fast-track: A fast-track admission process would normally take four weeks from the time the admission process is initiated towards the Oslo Stock Exchange. The submission deadlines are flexible and the deadline for the listing application is three days before the Oslo Stock Exchange's approval of the listing. The fast-track process is more expensive than the ordinary and flexible process, with a fixed fee of NOK 3 million. In a fast-track process, all preparations for the admission to listing should be ready before the admission process with the Oslo Stock Exchange is initiated.

The time to market in an IPO process is generally not driven by the admission process towards the Oslo Stock Exchange, but rather by the time needed to prepare the market materials, including the prospectus and the analyst presentation, which are generally the most time-consuming processes.

<u>Prospectus drafting and approval process</u>

The IPO prospectus is a critical document in the process. The prospectus is an EU prospectus, with the Norwegian Financial Supervisory Authority (the "NFSA") acting as the prospectus authority. The NFSA generally heavily relies on the guidelines issued by the European Securities and Markets Authority ("ESMA") in its control of the IPO prospectus.

The approval process would generally take four to five weeks if the first submitted draft has been thoroughly prepared. Drafting of the IPO prospectus is time-consuming for both the issuer and the advisers, as there are a lot relevant circumstances for the issuer that need to be accurately described.

One recurring issue in the preparation IPO prospectus is the historical financial information. Financial statements must be in accordance with the IFRS, which implies that some issuers may have to restate their historical financial statements to the IFRS. In addition to the provisions relating to preparation of *pro forma* financials in the event of significant gross changes, issuers with a complex financial history (typically spin-offs) may be required to prepare additional financial information as further agreed with the NFSA.

<u>Marketing activities</u>

The success of an IPO is generally measured by the interest of potential investors and the number of shares sold and the price obtained for the shares. A key aspect of this is to ensure investor and analyst education and marketing. There are certain restrictions and regulations as to how, when and to whom the issuer and the underwriters can market the IPO. The issuer's and the underwriter's counsel will thus be involved in the preparation of the marketing materials in order to ensure compliance with the restrictions and regulations applicable to the marketing of the IPO; in particular how, when and to whom. The most important requirement is that all marketing materials must be materially consistent with the information published in the prospectus.

- *Early-look/pilot fishing:* Informal meetings between members of management and the joint global coordinators with large, institutional investors who may ultimately purchase shares in the offering. The purpose of these early-look meetings is also to get the market's first impressions of the potential offering.
- *Analyst presentation:* Prior to the formal announcement to the public, the issuer's management will meet with selected research analysts whose equity capital markets teams are assisting the issuers in the IPO.
- *Research reports:* Following delivery of the analyst presentations, research analysts of the underwriting investment banks will prepare research reports on the issuer. The research analysts will have an opportunity to submit questions to and receive responses from the company management in Q&A format and research reports will be reviewed by the issuer and the issuer's counsel.
- *Intention to float:* The issuer publicly announces its IPO through an "intention to float" press release, which contains a statement that it intends to make an initial public offer of its shares. The intention to float is issued following preparation, but before publication of the research reports.
- *Road show presentation:* Following launch of the IPO and publication of the prospectus, the underwriters will organise a road show of investor presentations by the issuer. The

management meets with potential investors, typically large institutional investors, investment managers or brokerage firms. During the road show, the underwriters will have an opinion on the demand for the offer shares, which will be used as determining the final offer price.
- *Pricing:* A vast majority of IPOs in Norway are carried out as an open-price offer where the price is set through a book-building process. It is also possible to carry out an IPO as a fixed-priced offer. During the bookbuilding, the underwriters market the offering to investors based on an indicative price range included in the issuer's prospectus. The issuer discloses the final offer price in a stock exchange announcement to be published the day following the pricing with the first trading date usually occurring on the day following pricing.
- *Closing*: The share capital increase pertaining to the new shares issued in the IPO must be registered in the Norwegian Register of Business Enterprises and such new shares must further be issued in the Norwegian Central Securities Depository (the VPS or similar register) before the first day of listing. Trading in the issuer's shares commences on the listing day, but settlement generally occurs on a T+2 basis in the VPS, implying that a share lending arrangement must be in place to allow for investors' trading from the first day of trading.
- *Stabilisation:* Stabilisation activities are quite common in Norwegian IPOs. The stabilisation period commences on the first day of trading and generally lasts for 30 days. Any stabilisation activities are undertaken by the stabilisation manager (on behalf of the managers) in compliance with the EU safe-harbour regime.[3]

<u>The players</u>

The following advisers are commonly involved in a listing process on the Oslo Stock Exchange:
- *Investment banks*: One or several investment banks are engaged as bookrunners, underwriters or co-lead managers. Investment banks may underwrite the offering of shares, but it is more common that the shares are placed on a best-effort basis. The investment banks are responsible for the marketing of the IPO (together with the issuer) and also act as the general project manager for the IPO process.
- *Issuer's legal counsel*: Will advise and ensure implementation of the relevant steps in the IPO readiness phase, prepare and verify the prospectus, prepare and ensure implementation of the relevant corporate resolutions and steps, as well as negotiate the placement agreement and ancillary documentation.
- *Issuer's auditor*: Will typically be heavily involved in the preparation of any restated or new financial information, as well as *pro forma* figures (if any). In the absence of such tasks, the issuer's auditor will generally review the prospectus for verification purposes;
- *Manager's legal counsel*: Conducts the legal due diligence and prepares and negotiates the placement agreement and ancillary documentation. The manager's legal counsel will also verify the prospectus in the context of its due diligence.
- *Manager's financial advisor*: Conducts the financial due diligence.
- *PR advisor:* Will typically advise on media and stakeholder communications, as well as other investor relations-related questions.
- *Financial adviser:* Retained as an advisor for the issuer and/or the selling shareholder(s) to act as project manager and to advise on terms and structure of the offering.

Regulatory architecture: overview of the regulators and key regulations

The Listing Requirements set out the eligibility requirements for an applicant before admission to listing, while the Oslo Stock Exchange's continuing obligations for listed companies are a set of rules derived from the Norwegian Securities Trading Act (but with further detail in certain areas), that an issuer listed in Norway must comply with on an ongoing basis. Both the listing requirements and the continuing obligations vary somewhat, depending on which markets a company chooses to list on. The Continuing Obligations for companies listed on Oslo Børs and Oslo Axess are identical (with very few exceptions mainly relating to thresholds), while the continuing obligations for a company listed on Merkur Market are far less extensive. There are larger variations between the three markets in the listing requirements, where the key differences are the minimum market value and minimum operational history.

Key regulators

IPOs in Norway are regulated mainly by the NFSA and the Oslo Stock Exchange. The NFSA is responsible for the supervision of the Norwegian financial markets, and as part of this, its key role is supervision of the Oslo Stock Exchange and monitoring of issuers in the Norwegian financial markets. In the IPO process, the NFSA is involved in the preparation of the prospectus as the supervising and approving authority.

The Oslo Stock Exchange is the listing authority and decides whether an application for listing should be approved or not. The Oslo Stock Exchange has adopted a set of rules and requirements which applies throughout the listing process and following the listing (the listing requirements and the continuing obligations).

Key regulations

Norway is not part of the EU, but is associated with the EU through the European Economic Area Agreement. Norway has thus implemented and complies with relevant directives and regulation within the capital markets area, and also relies on guidance and technical standards provided by ESMA. Because of Norway's EEA status, EU regulations are only incorporated into Norwegian law through legislative actions (and not direct applicability), where Norway is currently not up to speed on all areas. Regulation (EU) No, 596/2014 on market abuse ("MAR") and Regulation EU (2017/1129) (the "New Prospectus Regulation") are currently not implemented into Norwegian law. There is no official guidance on when MAR is expected to be transposed into Norwegian law. The New Prospectus Regulation is at the earliest expected to be transposed into Norwegian during the summer of 2019.

Prospectus requirements

The Norwegian Securities Trading Act sets forth the issuer's obligation to prepare and issue an IPO prospectus. Such IPO prospectus shall satisfy the content requirements set out by Directive 2003/71/EC (the "Prospectus Directive"), Commission Regulation (EC) No. 809/2004 (the "Prospectus Regulation") and the three amending regulations to the Prospectus Regulations, all as transposed into Norwegian law through chapter 7 of the Norwegian Securities Trading Act (the "Securities Trading Act") and ancillary regulations. Further, the prospectus must be approved by the NFSA or a corresponding authority in the EU/EEA (in the latter case, the prospectus must be passported into Norway).

The ESMA questions and answers related to the Prospectus Directive and Prospectus Regulation, and the ESMA update of the CESR recommendations, are regularly used by the NFSA in the interpretation of the content requirements for prospectuses.

The prospectus rules are applied uniformly to all IPOs in Norway, except that a lighter touch regime is available for small and medium-sized enterprises.

Listing requirements

The applicability of the listing requirements depends on which market the issuer is applying for admission. While Oslo Børs and Oslo Axess share most Listing Requirements (with certain more strict requirements for Oslo Børs), listing requirements for Merkur Market are quite lenient, but require that the applicant is supported by a securities firm as a sponsor (which is not a requirement for listing at the Oslo Børs and Oslo Axess lists). For the remainder of this section, we have only focused on the listing requirements on the Oslo Børs and Oslo Axess lists.

A general requirement is that only shares of Norwegian public limited liability companies or similar foreign companies may be accepted for listing, and only provided that the shares are assumed to be of public interest and are likely to be subject to regular trading. In addition, the following specific requirements, *inter alia*, must be satisfied prior to listing:

- *Validly existing:* The issuer must be validly incorporated and operate its business in accordance with its articles and applicable laws.
- *Market value*: The market value of the shares must be at least NOK 300 million (NOK 8 million for Oslo Axess).
- *Equity*: The issuer must have a satisfactory equity situation, and sufficient liquidity to operate its business in accordance with the planned extent of operations for at least 12 months.
- *Financial statements*: The issuer must have prepared audited annual accounts in accordance with applicable laws and accounting standards for the last three full financial years (one year on Oslo Axess) prior to the listing application. In addition, the issuer shall prepare half-yearly accounts for the last six months prior to the listing application that must have been subject to a limited scope audit.
- *Operational history*: The issuer must have existed, and operated the major part of its activities, for at least three years prior to the listing application (neither is applicable on Oslo Axess).
- *Management*: The members of the issuer's management must not have acted in a manner that makes them unfit to participate in the management of a listed company.
- *Expertise*: The issuer must have sufficient expertise and routines to satisfy the requirements for appropriate management and distribution of information, and to prepare financial statements in accordance with applicable rules.
- *Board requirements*: At least two of the shareholder elected board members shall be independent of the company's executive management, significant business contacts and larger shareholders. Members of the executive management cannot be members of the board of directors and the board members must not have acted in a manner that makes them unfit to be a member of the board of a listed company. For Norwegian public limited liability companies, there are also gender requirements, as mentioned above.
- *Audit committee*: The issuer shall have an audit committee in accordance with article 41 of the EU Statutory Audit Directive (2006/43/EC).
- *Spread*: At least 25% of the shares must be spread among shareholders that are independent of the issuer and hold shares with a value of at least NOK 10,000. Further, the shares must be spread amongst at least 500 shareholders who hold shares with a value of at least NOK 10,000.
- *Same share class*: An application for listing shall apply for all issued shares within the share class (if the issuer has more than one share class).
- *Transferability*: The shares shall be freely transferable.
- *Market value per share*: Each share must have an expected market value of at least NOK 10 at the date of listing (NOK 1 for Oslo Axess).

- *VPS registration*: The shares shall be registered in the Norwegian Central Securities Depository or similar securities depository.

The Oslo Stock Exchange may grant exemptions from the listing requirements; for example, for companies that do not satisfy the requirement of three years' operation and history. Further, the Oslo Stock Exchange may impose additional requirements if it is deemed necessary for the protection of potential investors.

Public company responsibilities

Introduction

Issuers listed on each of the markets operated by the Oslo Stock Exchange are subject to a number of obligations, primarily through the Norwegian Securities Trading Act and ancillary regulations, and through the Continuing Obligations of the Oslo Stock Exchange which apply to all issuers listed on Oslo Børs and Oslo Axess (the "Continuing Obligations"). Issuers listed on Merkur Market are also subject to continuing obligations, but as Merkur Market is an MTF, the continuing obligations for issuers on Merkur Market are less stringent. In the following, we have only considered the Continuing Obligations for companies on Oslo Børs or Oslo Axess.

Disclosure obligations

The most significant responsibility for a listed company is to continuously disclose inside information to the market. Inside information is generally information of a precise nature, which has not been made public and would likely have an effect on the price of the financial instruments. The assessment of whether inside information exists is subject to a case-by-case assessment where the question of whether or not the information would have affected a reasonable investor's decision to trade in the shares or not is the critical test.

The obligation to disclose inside information applies from the issuer's submission of the listing application to the Oslo Stock Exchange.

In the event of inside information, the issuer may invoke delayed disclosure if it has just cause for such delay. Currently, the issuer will have an obligation to inform the Market Surveillance department on the Oslo Stock Exchange of the delayed disclosure, which is normally done by phone. This procedure is expected to change with the implementation of MAR into Norwegian law.

The Continuing Obligations set out further specific requirements for listed companies in addition to those of the Norwegian Securities Trading Act. Amongst others, an issuer is obligated to:

- treat all holders of its securities equal (i.e. irrespective of their relative ownership);
- not have a lower market value per share than NOK 1;
- ensure immediate public disclosure in the event of certain corporate actions, including, *inter alia*, proposals for, and resolutions regarding, dividends, merger, demergers, share capital changes, authorisations to raise share capital, share splits and reverse share splits, and further that non-immaterial transactions with certain related parties must be disclosed;
- issue a detailed stock exchange notice when making a transaction with an effect of 5% or more on the assets, revenues or annual results of the issuer; and
- issue an information memorandum when making a transaction with an effect of 25% (50 or 100% on Oslo Axess, depending on transaction type) or more towards the same measures. The information memoranda are quite similar to prospectuses in style, but with less comprehensive content requirements.

Companies listed on the Oslo Stock Exchange are further required to publish annual and half-yearly financial reports; such reports having to be prepared in accordance with IFRS and IAS 34, respectively. From January 2017, listed issuers were no longer required to publish quarterly reports, but it appears as if most issuers in Norway will still choose to publish quarterly reports.

The Norwegian Corporate Governance Code applies to all issuers listed on the markets operated by the Oslo Stock Exchange, and the issuers shall give a statement on their compliance with all of the provisions of the Norwegian Corporate Governance in connection with their annual reports. The Norwegian Corporate Governance Code is built on the comply-and-explain principle, which implies that all deviations from the code must be explained in the annual corporate governance statements.

Potential risks, liabilities and pitfalls

There are a number of risks and liabilities inherent to the issuer, the board of directors and the management in an IPO. However, there are no risks particular to IPOs in Norway. There are, however, certain Norwegian particularities that an issuer considering a listing in Norway or an investor considering investing on the Oslo Stock Exchange's marketplaces should be aware of:

- regulatory requirements and frameworks apply to certain sectors in Norway, including the financial sector, E&P sector, utilities sector as well as the aquaculture sector, in addition to the Norwegian state being a majority shareholder in several major listed companies;
- a Norwegian issuer is legally restricted from providing the managers with an indemnity in excess of the net proceeds received by the issuer in the IPO;
- a light verification process of the IPO prospectus is common to be undertaken by the manager's counsel, but there is a detailed verification process involving checking that material statements are verified and this is corroborated by reference to underlying independent documentation. It is not common to conduct a detailed line-by-line verification process and there are no formal notes that are signed by the directors of the company. It is common to have selected individuals from management (typically the CEO and CFO) sign general completeness statements confirming that the prospectus is in all material respects correct and complete;
- gender equality requirements for the board of directors of a Norwegian public limited liability company apply, and there are no precedents for being granted exemptions from this requirement; and
- Norway is not a member of the EU, and hence not all EU legislation applies to Norway; for example, MAR as mentioned above.

The IPO process is time-consuming and demanding for the issuer's management in several areas, including: facilitating a due diligence; preparation of the marketing documents, such as the prospectus and analyst presentation; as well as the actual marketing and investor education in advance of and during the road show by meeting investors and analysts. In addition to the IPO process itself, as a listed company, the issuer faces a new regime in terms of transparency, disclosure, inside information, etc., which very often implies implementation of new instructions and the routines to ensure compliance with such routines.

* * *

Endnotes

1. Based on average annual return since 2006, as calculated by the Oslo Stock Exchange.
2. www.oslobors.no.
3. EU 2016/2052.

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Poland

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Introduction

In a mere quarter of a century, since Poland began its transition from communism to a market economy, Warsaw has become a vibrant capital markets hub for Polish and CEE issuers. As a part of the profound economic changes in Poland, the Warsaw Stock Exchange (the "**WSE**") was reinstituted on 12th April 1991 and the first trading session took place on 16th April 1991, when seven investment firms participated in trading the shares of five commercialised state-controlled companies.

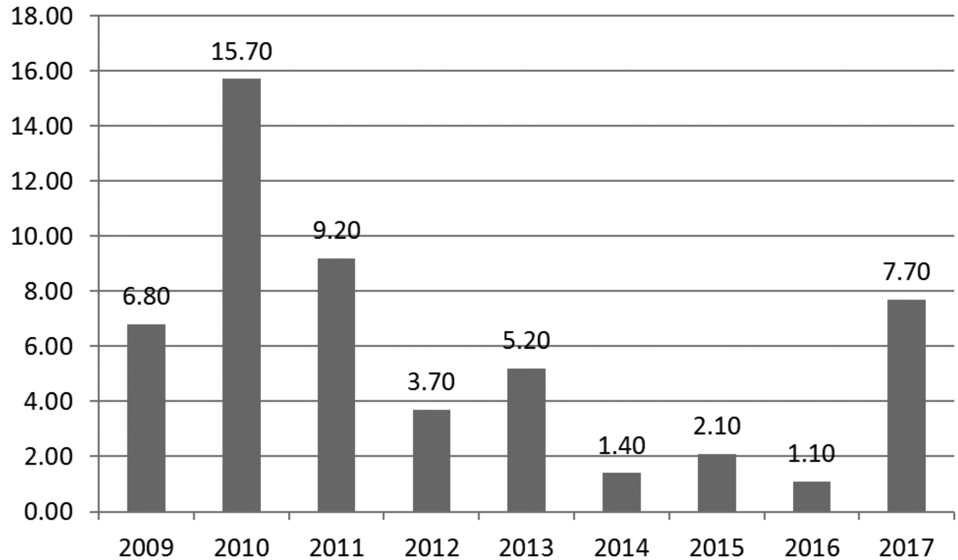
Twenty-six years later, the WSE experienced a particularly strong 2017, hosting Play Communications S.A. in the largest ever non-privatisation IPO in the Polish market, GetBack S.A. – one of the leading debt collection companies in the CEE region, and 13 other companies, adding to the almost 900 companies listed on the WSE at the end of 2017, both on the main market and NewConnect, an alternative trading system created in 2007 with the aim of facilitating listings of early stage companies with a large growth potential.

In its early days, one of the key drivers of the development of the WSE was the privatisation of state-owned companies associated with the systemic transformation from a command economy to a market democracy. By value, the peak growth of the WSE in 2004–2011 resulted mainly from the initial public offerings of the largest Polish companies undergoing the privatisation process. The Polish government's privatisation policy enhanced interest in the WSE for both domestic and foreign investors and substantially increased the total value of IPOs in Poland. Alongside the listing of privatised companies, during this period a large number of Polish corporates accessed the capital markets by way of listings on the WSE. Indeed, in terms of the number of deals offered by way of a public offering on the WSE, small and mid-size offerings accounted for the majority of new listings.

Since 2013, the most significant IPOs in Poland have been conducted by companies from the private sector, and the WSE has changed its nature from an institution supporting privatisation to a market economy stock exchange comparable to those existing in developed Western economies. This process coincided with the vibrant growth of the Polish economy, which resulted in Poland being promoted to the status of developed market by FTSE Russell in 2017.

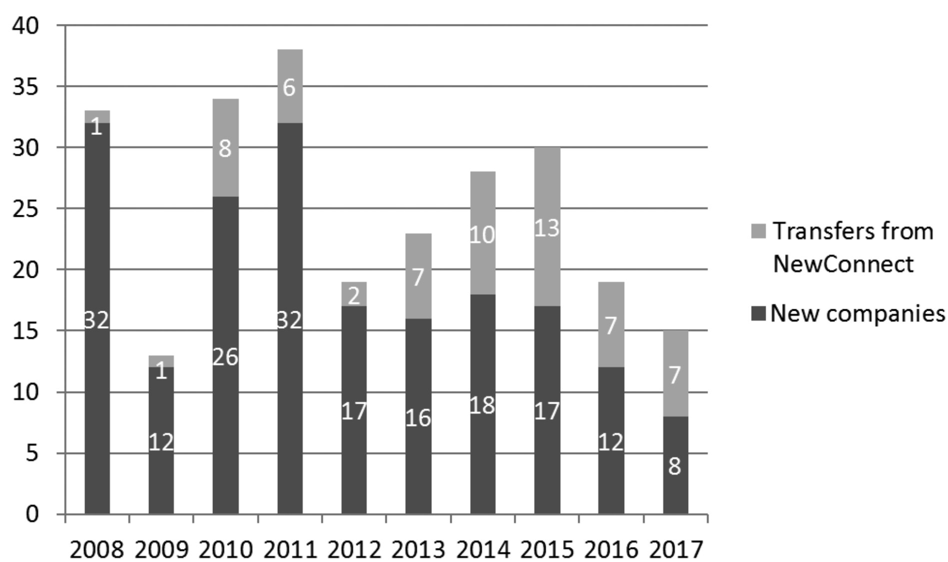
* * *

Value of primary offerings – WSE Main Market and NewConnect (PLN bn)



Source: the WSE

Number of new listings – WSE Main Market



Source: the WSE

Currently, WSE issuers represent all sectors of the modern economy, ranging from industrial and consumer products, retail and business services, natural resources, financial services to new technologies. Only a small proportion of listed companies are controlled by financial investors and the majority of them are controlled by single shareholders. Moreover, as a result of the partial privatisations through capital markets offerings, most of the largest companies listed on the WSE are state-controlled, or were state-controlled in the past.

The vast majority of the EUR 200m+ IPOs were structured as either Reg. S and/or Rule 144A transactions attracting foreign investors outside the US or QIBs in the US and brought international standards to domestic capital market practice. Moreover, the entry into force of Regulation (EU) No 596/2014 (MAR) on 2nd July 2016 introduced harmonised EU concepts and rules on information disclosure and market abuse into the Polish legal system.

The IPO process: steps, timing and parties and market practice

Overview

Although the common understanding of an initial public offering (or IPO) is simple enough in that it means the first time that a privately held company offers its securities to the public through an exchange platform that facilitates post-offering trading among investors, rules are required to define the line when a particular offering is broad enough to encompass a "public" offering. The distinction is important because on it depends the scope of regulation, primarily with the goal of protecting the wider public from fraud and information asymmetry, applicable to a given transaction. Accordingly, the Polish law implementing the EU Prospectus Directive defines a "public offering" as a communication made in any form and by any means to at least 150 persons in the territory of one EU Member State or to an unspecified addressee, which contains sufficient information on the securities to be offered and the terms and conditions of their acquisition, so as to enable an investor to decide whether or not to purchase the securities. As a general rule, and subject only to certain exceptions, both a public offering in Poland and the admission of shares to trading on the WSE require an issue prospectus to be approved by the regulator and disclosed to the public.

In general, depending on the transaction value and the targeted group of investors, an IPO conducted on the Polish market usually involves one of the following components or a combination thereof: (i) a public offering in Poland to Polish retail and institutional investors; and (ii) a private placement to international institutional investors outside the United States of America pursuant to Regulation S under the US Securities Act of 1933. In some IPOs, a tranche of securities is also offered to qualified institutional buyers ("QIBs") in the United States of America within the meaning of and pursuant to Rule 144A under the US Securities Act of 1933. A typical IPO in Poland is also topped off with a listing of shares on the WSE.

As with every IPO process, an IPO conducted in Poland also requires assembling a team of advisers assisting the issuer (and/or the selling shareholder). Typically, depending on the issuer's needs and profile, the complexity of the proposed transaction and the offering structure, such a team includes:

- a licensed offering broker, through which the application for prospectus approval is filed with the Polish Financial Supervision Authority (the "**PFSA**") and, in the case of more complex transactions, a consortium of managers (including the global coordinator and the bookrunner) responsible for structuring and marketing the transaction, financial and business due diligence, analyst coverage, valuation and pricing, placement of shares to investors and settlement of the transaction;
- a legal adviser to the issuer (and/or the selling shareholder) providing comprehensive legal services related to the IPO process, including legal due diligence, drafting of the prospectus and issuing legal opinions, drafting corporate and legal documents, and advising in the regulatory approval process;
- a legal adviser to the managers responsible for, *inter alia*, preparation of the underwriting agreement and issuing legal opinions;

- an auditor responsible for, *inter alia*, auditing the financial statements of the issuer and issuing comfort letters; and
- a PR adviser, coordinating communication from the issuer to the market and responsible for the marketing of the offering.

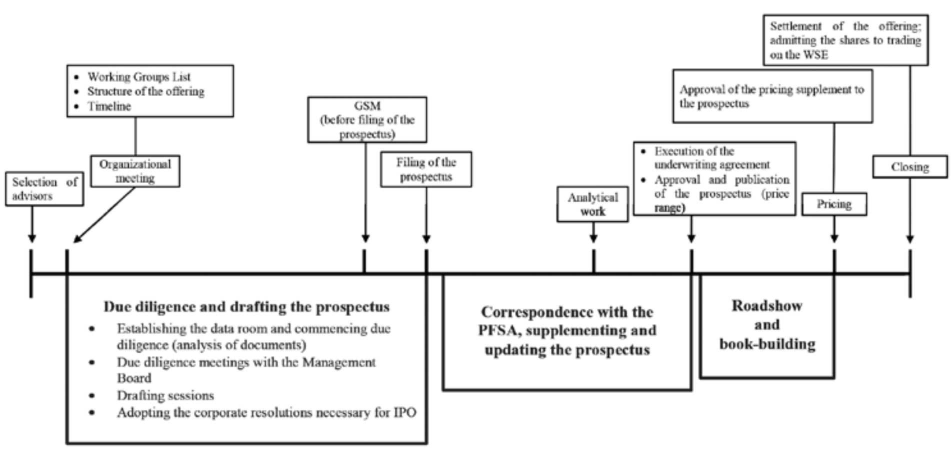
The key IPO documents include a prospectus (as well as supplements and update reports thereto), corporate resolutions of the issuer (and/or the selling shareholder), publicity guidelines, a due diligence request list, D&O questionnaires, research guidelines, analyst presentation and research reports, press releases, an underwriting agreement (and other related agreements, e.g. stabilisation agreement, lock-up agreements), comfort letters and legal opinions.

The prospectus should include the issuer's financial statements for the last three financial years, complete with the auditor's opinions. Financial statements for at least the last two fiscal years should be consistent in form with the next annual financial statements to be published by the issuer. Inclusion of a profit forecast in a prospectus is optional and issuers opting for the disclosure of a profit forecast are subject to additional disclosure requirements and such forecasts must be accompanied by a relevant auditor's report. The historical financial information should cover the issuer's entire organised business. If the inclusion of the company's financial statements does not satisfy that requirement, additional financial disclosures are required.

As a result, an issuer who carried out a business reorganisation or significant business acquisitions/divestments during the IPO year or within the three preceding years may have to satisfy additional requirements in preparing financial information for the purpose of its prospectus. If an issuer has a complex financial history, it may be required to include in the prospectus certain items of financial information relating to an entity other than the issuer (e.g., relating to a recently acquired entity). Those items of financial information may include *pro forma* information and the financial statements of such an entity. Preparation of such additional financial information usually lengthens the transaction timetable.

Usually, an IPO in Poland can be completed within approximately six months; however, more complex transactions may take longer. In particular, some additional time needs to be allocated in order to manage significant risks that have been discovered in due diligence or to complete necessary corporate reorganisation. In particular, in order to launch the IPO process, an issuer must be organised in the form of a joint-stock company. As a result, entities organised in any other legal form should undergo a transformation process first to become an IPO eligible entity, which impacts the overall IPO timetable.

An overview of a typical IPO process is presented below:



Stage 1 – IPO preparation, drafting the disclosure and due diligence (approx. 2–3 months)

A prospectus is the principal information document prepared by the issuer of shares to be offered to the public and/or admitted to trading on the WSE. The minimum requirements related to the scope and format of information disclosed in prospectuses are defined in the Prospectus Regulation. Broadly, the prospectus should contain all the information necessary to make an informed assessment of the company's economic and financial position and its growth prospects.

Information in a prospectus must be true, accurate, complete and relevant to the type of issuer and the securities to be offered in a public offering or admitted to trading on a regulated market. Furthermore, the prospectus should convey information in a language understandable to investors and in a manner enabling investors to make an informed assessment of the issuer. In addition, the Prospectus Regulation provides for additional requirements for specialist issuers, including property and mineral companies.

In order to identify the material information in respect of an issuer that is required to be disclosed in a prospectus prepared in connection with an IPO, a due diligence exercise is undertaken. The due diligence varies depending on the specifics of the transaction and the issuer; therefore establishing a uniform set of due diligence procedures for all transactions is difficult. Nonetheless, usually the due diligence process covers at least financial, business, accounting and legal areas.

Stage 2 – Approval of the prospectus (approx. 2 months from filing with the PFSA)

A prospectus is subject to approval by the PFSA.

In order to have a prospectus approved, the issuer or the selling shareholder must submit to the PFSA – through a licensed offering broker – a relevant application along with the prospectus. The fact that a prospectus has been submitted to the PFSA for review is publicly disclosed by the PFSA.

Pursuant to the Public Offering Act, the PFSA is to approve the prospectus within 20 business days from the filing of the application by the issuer contemplating the IPO. However, in practice the approval process for IPO transactions takes up to two or even three months. When the prospectus is filed with the PFSA for approval, the PFSA commences the review process and provides comments on the prospectus (often several times), while the issuer and its advisers correct the document taking into account the PFSA's comments and also updates the prospectus if necessary. When all the comments have been taken into account, the PFSA approves the prospectus by way of a formal decision.

The issuer must promptly publish the prospectus approved by the PFSA on its website. In addition, the prospectus may be disclosed to the public in hard copy. Once the prospectus is approved, the issuer can use it to offer shares to the public and subsequently seek the listing of the shares on the WSE. A prospectus approved by the PFSA may also be used to conduct public offerings of the issuer's shares in other EU Member States and ultimately to list shares on EU stock exchanges other than the WSE based on the so-called "*single passport procedure*". Such offerings do not require the issuer to conduct the entire prospectus approval procedure in each given EU Member State, but instead require a simplified notification procedure.

The Prospectus Directive allows foreign companies based in the EU to draw up a single EU prospectus and have it approved by their home member state competent authority. Following such approval, the prospectus will be passported to the PFSA under the single passport procedure. In order to complete the single passport procedure, the authority approving the prospectus provides the PFSA, in particular, with:

- a certificate of approval attesting that the prospectus has been duly approved; and
- a copy of the approved prospectus, drawn up and updated in compliance with the relevant law, together with its translation into the Polish or English language and a translation of its summary into the Polish language.

Once these documents are provided to the PFSA, the procedure is complete.

<u>Stage 3 – Offering process (approx. 3–4 weeks)</u>

IPO marketing activities are carried out among institutional investors on a step-by-step basis, starting with pre-deal investor education and so-called pilot fishing meetings. Once the prospectus is approved and published, the offering phase begins. It usually lasts no longer than four weeks and in that period, the issuers organise promotional activities and meetings with investors (roadshow) and collect subscriptions. The offering price may be set in the prospectus at the time of its publication, but in order to optimise the issue price and the offering size, the bookbuilding process is usually used. In a majority of cases, retail investors may place orders for the shares during the bookbuilding process, before the final price has been set. Then retail investors only know the top end of the price range, but they have the right to opt out within two days from the announcement of the final issue price.

Certain Polish issuers invite foreign institutional investors to acquire shares as part of limited marketing efforts. To that end, issuers usually prepare an International Offering Circular (the "**IOC**"), which is not subject to approval by the PFSA or any form of registration or notification requirement in countries outside Poland.

Marketing efforts are undertaken in reliance on Regulation S and/or Rule 144A under the US Securities Act of 1933, which may be applied jointly or separately. The Rule 144A/ Regulation S label raises the profile of the offering and of the issuer, facilitating access to foreign investors.

In practice, an IOC is a slightly modified version of the prospectus translated into English, e.g., it does not contain the section of the offering addressed to retail investors. On the other hand, it implies certain additional disclosure or requirements with respect to the prospectus in the case of an offering also addressed to QIBs in the United States based on Rule 144A.

<u>Stage 4 – Dematerialisation and Listing on the WSE (approx. 2 weeks)</u>

Dematerialisation of shares means that the shares introduced to trading on the WSE become uncertificated (book-entry form) from the time of their registration by the central securities depository of Poland, i.e. the National Depository for Securities (the "**NDS**"). Following the registration of shares in the NDS, the responsibilities of the NDS include, among others, the settlement of stock market transactions.

For the purposes of dematerialisation, the issuer has to: (i) collect and deposit its share certificates which are intended for listing on the WSE with the NDS; and (ii) file an application to the NDS for the registration of the shares in the depository maintained by the NDS; a mandatory attachment to this application is the corporate resolution containing an authorisation to enter into an agreement on the registration of shares covered by the prospectus in the depository for securities maintained by the NDS.

The relevant legislation defines a "*public company*" as a company having at least one share in uncertificated (book-entry) form.

In order to list shares on the Main Market of the WSE, the requirements detailed below should be satisfied, including:

(i) the free transferability of shares;

(ii) a minimum market capitalisation of the issuer (understood as the total estimated market value of all its shares post-flotation), which must be PLN 60 million or the PLN equivalent of EUR 15 million;
(iii) a sufficient dispersion of shares, i.e. at least 25% of the shares to be admitted to trading or at least 500,000 shares of the issuer with a total value equal to the PLN equivalent of EUR 17 million or more must be held by shareholders, each of which holds less than 5% of the total voting rights at the issuer's GSM;
(iv) the requirement for the issuer to publish audited financial statements for at least the last three consecutive financial years preceding the listing application; in line with market practice, this requirement is considered to be met if the issuer has prepared a prospectus containing the financial information specified above; and
(v) the requirement that all the shares of the same class (such as ordinary shares) of the given issuer be admitted to trading on the WSE.

To have the shares admitted to trading on the WSE, the issuer is required to file a formal application. The WSE decides on the application within 14 days of its complete filing and sets the first listing date. The WSE may refuse admission if it finds any inconsistencies in the documents submitted and statements/representations or if it has any reasonable doubts or concerns about the company. For listing on the Parallel Market of the WSE, the formal requirements are less stringent.

Regulatory architecture: overview of the regulators and key regulations

As a general rule, administrative jurisdiction over the admission and introduction of an issuer's shares to trading on the regulated market operated by the WSE is exercised by the PFSA, a governmental authority entitled to take relevant measures specified in Polish law, which, broadly speaking, may be divided into those of a preventive nature, forcing discontinuation of the violations of the law, and those of coercive nature, imposed in order to punish an entity infringing the law.

Poland is an EU Member State and EU capital market laws and regulations are common to Poland in the same way as to other EU countries (save for certain flexibilities granted to Member States under EU laws). The most important applicable Polish and EU laws are listed below:

- the Polish Act on Public Offering, Conditions Governing the Admission of Financial Instruments to Organized Trading and Public Companies of 29 July 2005 as amended (the "**Public Offering Act**"), which regulates public offerings conducted in Poland and the admission of securities to trading on a regulated market and sets out the consequences of achieving the status of a public company, as well as the rights and obligations of its shareholders;
- the Polish Act on Trading in Financial Instruments of 29 July 2005, as amended (the "**Act on Trading in Financial Instruments**"), which provides a regulatory framework for the organisation of the capital market in Poland and specifies the obligations of entities engaged in trading in financial instruments;
- Commission Regulation (EC) No 809/2004 of 29 April 2004 as amended (the "**Prospectus Regulation**"), on information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements, which defines, among others minimum information requirements for a prospectus and the method of publication of a prospectus;

- Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (the "**MAR Regulation**"), which regulates the use of inside information, unlawful disclosure of inside information and market manipulation, as well as measures aimed at preventing market abuse;
- Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (the "**Prospectus Directive**") (principally to be repealed with effect from 21 July 2019, save for certain exceptions); and
- the Regulation of the Polish Minister of Finance of 19 February 2009 on current and periodic information published by issuers of securities and on the conditions under which such information may be recognised as being equivalent to information required by the legal regulations of a state which is not an EU Member State (the "**Reports Regulation**"), which requires publicly listed companies to disclose selected additional information related to the public company.

Public company responsibilities

Disclosure obligations

The IPO process brings a number of benefits, such as access to capital, prestige, promotion and a market valuation, but it also carries certain burdens and costs. Leaving aside the listing costs and other post-IPO costs of operating as a public company, the legal obligation related to the continuous disclosure regime is typically one of the key areas of concern.

In the case of an issuer listed on the WSE for whom the Republic of Poland is the host Member State, the scope of information submitted to the PFSA, the WSE and to the general public in Poland and the deadlines for their submission are specified by the legislation in force in the home Member State. On the other hand, an issuer for which Poland is the host Member State is obliged to comply with the Polish regulatory framework, which requires companies listed on the WSE to disclose the following:

- inside information, i.e., precise price sensitive information to be disclosed via inside information reports, as required under the MAR Regulation;
- periodic reports, i.e., quarterly, semi-annual and annual reports specified in the Reports Regulation; and
- current reports specified in the Reports Regulation.

To comply with the above-mentioned obligations, an issuer should have appropriate reporting procedures. Appointment of a public relations officer is also to be considered.

Inside information

On 3 July 2016, the MAR Regulation took effect. This legal act applies directly throughout the European Union and creates a joint regulatory framework for the use of inside information, unlawful disclosure of inside information and market manipulation, as well as measures aimed at preventing market abuse. Under the MAR Regulation, an issuer whose securities are listed on the WSE is required to inform the public as soon as possible of inside information which directly concerns that issuer. Broadly, inside information is defined as information of a precise nature, which has not been made public, relating, directly or indirectly, to the issuer or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

Periodic reports

The detailed scope of information to be included in current and periodic reports is specified in the Reports Regulation. In particular, it should include the financial statements for a specific period. Periodic reports are to be disclosed: (i) within 60 days of the end of a quarter (quarterly reports); (ii) within three months of the end of a six-month period (semi-annual reports); and (iii) within four months of the end of a year (annual reports).

Current reports

The Reports Regulation requires publicly listed companies to disclose information regarding certain events or actions of an issuer, in particular, among others: (i) the acquisition or disposal of the company's securities by the company or its subsidiaries; (ii) court registration of changes in the share capital, (iii) the date, time, venue and detailed agenda of the GSM, as well as the date of registration for the GSM; and (iv) the wording of the draft resolutions together with any appendices thereto which are to be discussed during the GSM and which are important from the point of view of the resolutions to be adopted but which have not been disclosed in the form of inside information. With respect to securities offerings, the Reports Regulation provides for the disclosure of current reports constituting a summary of the public offering and giving notice of the admission and listing of securities on the WSE.

Some current reports should be disclosed promptly upon becoming aware of relevant events or circumstances, within 24 hours. Others should be disclosed within the deadlines indicated in the Reports Regulation.

Best practice for WSE-listed companies

Companies whose shares are listed on the Main Market of the WSE should apply the corporate governance principles promulgated by the WSE. The rules of corporate governance form a code of conduct for listed companies. The current version of the WSE corporate governance principles was published in 2016 as the Best Practice for WSE Listed Companies 2016 (the "**Code of Best Practice**"). The Code of Best Practice is a set of several dozen recommendations and detailed principles grouped into six chapters corresponding to the areas of major importance for a public listed company's corporate governance: (i) Disclosure Policy, Investor Communications; (ii) Management Board, Supervisory Board; (iii) Internal Systems and Functions; (iv) General Meeting, Shareholder Relations; (v) Conflict of Interest, Related-Party Transactions; and (vi) Remuneration. The detailed principles are instructions to be followed by the company for which the "*comply or explain*" rule has been adopted.

Other selected consequences of listing on the WSE

Listing on the WSE is also associated with additional obligations imposed upon the company's insiders and shareholders. These include, in particular, the obligations of persons discharging managerial responsibilities in a listed company as well as persons closely associated with them to notify the issuer and the PFSA of transactions conducted on their own account relating to the shares or debt instruments of that issuer or to derivatives or other financial instruments linked thereto, the prohibition of buying or selling shares by persons discharging managerial responsibilities in a listed company during closed periods, the obligation of shareholders to notify the issuer and the PFSA on crossing certain threshold in the total number of votes in the company, and obligations related to the announcement of tender offers.

Potential risks, liabilities and pitfalls

The key component of legal liability associated with going public in Poland is so-called "prospectus liability". Under Polish law, the entity responsible for information included in the prospectus or any updates thereto would be obliged to redress any damage caused by publishing inaccurate, false or incomplete information or by omitting information in such documents. However, in order to successfully hold such responsible entity liable for the above, the following requirements should be jointly satisfied: (i) such responsible entity should be at fault, either intentional or unintentional; (ii) an investor should prove that damage has been inflicted on that investor (i.e. the investor suffered a loss (*damnum emergens*) or has lost potential profits (*lucrum cessans*)); and (iii) the investor should demonstrate a causal link between the damage inflicted and the omission or the inaccurate, false or incomplete information included in the prospectus or any updates thereto.

The liability of the responsible entities (if more than one) for the above would be joint and several and may not be restricted or excluded; however it does not preclude the possibility of entering into a contract setting forth the mutual obligations of such entities in respect of the liability. Because of prospectus liability, a due diligence process is conducted to ensure that the prospectus does not contain any materially untrue or misleading statements and does not omit any material facts. Moreover, in international offerings, underwriters expect, among others, submission of legal opinions and disclosure letters by the legal counsels and comfort letters by auditors, which constitute part of the underwriter's due diligence defence.

Irrespective of the above, Polish legislation provides for criminal and administrative responsibility for certain violations of the public company regime.

Even though process of an IPO in Poland is regulated in a manner compatible with EU standards, there are some specific legal risks related to the Polish legal system, e.g. the risk related to statutory restrictions on a disposal of shares in companies which own agricultural land (shares admitted to trading on a regulated market are exempted from the restrictions but, nevertheless, these restrictions affect the process of the preparation of the IPO). Moreover, in relation to companies that were created by way of the commercialisation of state-owned companies, the statutory regime of the Act on Commercialization and Certain Rights of Employees (historically the Commercialization and Privatization Act) needs to be observed. Infringement of these specific statutory restrictions may even result in the invalidity of the entire share sale transaction. However, such risks, if properly addressed by professional advisors, can be fully managed.

In line with market practice in international public offerings, comfort letters are issued in accordance with the SAS 72 Standard. However, in light of the wording of a recent regulatory change, in case of certain issuers, Polish auditors are only entitled to issue such letters in accordance with the Polish standard. As a consequence, certain Polish issuers face a serious obstacle in ensuring that investment banks receive comfort letters issued in conformity with a standard acceptable for them. This situation currently places Polish-based issuers (in particular in case of the secondary offerings) in an inevitably worse position when pursuing financing from international markets; therefore market participants expect a legislative reaction or clear guidance from the regulator that will alleviate the grave implications of the new law.

Moreover, the reformed regulatory framework and the entry into force of the MAR Regulation in 2016 have caused a significant increase in the costs and risks related to being a public company, which contributed to a decrease in the attractiveness of public listing as a source of capital and, alongside the economic climate, became one of the reasons for the decline in the overall number of companies listed on the WSE. For these reasons, a number of initiatives have been undertaken aimed at boosting the attractiveness and improving the capitalisation of the WSE.

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Introduction

The evolution of capital markets in Portugal in recent decades has been greatly influenced by the political scene. The revolution of 1974, which reinstated a democratic regime in Portugal after a 48-year-long dictatorship, was a stepping-stone in the development of capital markets, with a clear impact on the upsurge of Initial Public Offerings (hereinafter, "**IPOs**").

In fact, in the first few years after the re-opening of the stock market, after a shut-down between 1974 and 1977 following the revolution, capitalisation was very low, as most of the larger companies listed before 1974 had been nationalised. However, the stock market grew strongly in the early and mid-1980s, supported by greater incentives for companies to list. Indeed, there were 88 Initial Public Offerings in 1986 and 1987 followed by listing, a period of unparalleled issuing activity in Portugal.

A significant number of the earlier IPOs in Portugal derive from a privatisation programme started in the late 1980s and early 1990s. There has been great disparity between the IPOs of state-owned and privately owned companies, with offerings in the former cluster averaging a size nearly 10 times greater than a typical privately owned IPO.[1] This is due to the fact that the largest Portuguese companies were nationalised in 1975, including banks and insurance companies as well as companies operating in strategic sectors such as telecommunications, electricity and oil and gas. These nationalised companies have been progressively privatised since the 1980s, mostly through IPOs. Conversely, the bulk of privately owned companies in Portugal are composed of small and medium-sized enterprises, resulting from several decades of detachment from international competition and from being mostly oriented to a small and emerging domestic market.

In recent years, the number of IPOs has been decreasing. Between 1988 and 2000, there were only 43 IPOs in Portugal and since 2005 there have been just 10 on the regulated market managed by Euronext Lisbon – *Sociedade Gestora de Mercados Regulamentados* (hereinafter "**Euronext Lisbon**").[2]

However, and despite the decreased volume of IPOs in recent times, a shifting trend can be noticed: as the majority of previously state-owned companies have been already privatised, most of the more recent IPOs have been executed by privately held firms and not by state-owned companies.

The IPO process: Steps, timing and parties and market practice

The way to attain an IPO in Portugal is through a public distribution offer ("*oferta pública de distribuição*") of shares, most commonly through an offer for subscription ("*oferta* *pública de subscrição*"), where the issuing company offers its shares for subscription to undetermined investors. In association with a distribution offer, the IPO process will often entail the admission of the company's shares to trading on a regulated market.

This analysis puts a focus on the procedure and listing requirements in the regulated market operated by Euronext Lisbon, currently the only regulated market for the trading of shares in Portugal.

(a) *Due diligence*

Most often, once a company decides to go public, its IPO process will kick off with a due diligence procedure, for the purpose of analysing several aspects and the status of the company – financial, commercial, legal, accounting, tax, and others.

This due diligence procedure may be conducted by the company seeking to go public with the assistance of legal counsel and financial intermediaries (e.g., investment banks) which may intervene in the IPO process as underwriters or, more generally, in the placement and distribution of the company's securities in the market.

The results of the due diligence exercise will also assist in the structuring and potential strengthening of the company's corporate governance practices and mechanisms.

(b) *Preparation of a prospectus*

The carrying-out of any public offer relating to securities should be preceded by the approval and disclosure of a prospectus containing complete, true, updated, clear, objective and lawful information necessary to enable the addressees to make an informed assessment of the offer, the securities concerned thereby and the rights attached thereto, its specific characteristics and the assets and liabilities, the economic and financial position of the issuer and the guarantor, if any, and the prospects for the business and earnings of the issuer and the guarantor, if any. Considering that the admission to trading of securities also requires, in general, the publication of a prospectus, usually the offer prospectus is prepared as an offer and listing prospectus.

The disclosure of information in the prospectus shall comply with the national legal provisions in the Portuguese Securities Code[3] which, *inter alia*, implemented Directive no. 2003/71/EC of the European Parliament and of the Council of 4 November 2003,[4] as amended, in Portugal, and with the provisions of Regulation no. 809/2004/EC of the Commission of 29 April 2004,[5] as amended (all of which are expected to be gradually replaced until July 2019 by the new prospectus regulation (Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017[6] on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market) and its respective implementing and delegated acts).

Without prejudice to the format adopted, the prospectus is required to include a summary that provides key information to investors, concisely and in non-technical language.

General information to be included in the prospectus comprises, among other aspects, information on:

(i) the persons who, according to the Portuguese Securities Code, are responsible for its contents;[7]

(ii) the issuer and its activity;

(iii) the main risks to which the Issuer, its activities and the investment in the offered securities are subject;

(iv) the issuer's corporate governance structure and the identity of the members of corporate bodies of the issuer; and

(v) the financial intermediaries that are members of the placing consortium, when applicable.

If the offer is made in Portugal, the prospectus shall be drafted in a language accepted by the **Portuguese Securities Market Commission** (***Comissão do Mercado de Valores Mobiliários***, CMVM), unless the offer is made in Portugal and other European Member States and the CMVM is not the competent authority, in which case the prospectus may also be drafted in a language commonly used in international financial markets, at the option of the issuer or the offeror.

(c) *Testing the waters: bookbuilding*

A possible step in the IPO process which may occur prior to the announcement of the offer is the collection of investment intentions ("*intenções de investimento*") in public, in order to help determine the price of the offer or assess the potential success of the offer.

Under Portuguese securities law, companies seeking to effect an offer for subscription of shares may "test the waters" through a bookbuilding procedure. Here, the company should issue a preliminary prospectus (which needs to be approved by the CMVM), describing the conditions and price of the offer and the bookrunner, acting through managers, evaluates the level of interest of the public in the company's shares. At the end of the bookbuilding period, the price is determined in accordance with the level of demand.

Although foreseen in Portuguese law, preliminary prospectuses are relatively unusual.

(d) *Approval and publication of the prospectus*

In order to obtain the approval of the CMVM of the prospectus for the public offer and admission to trading, the issuer shall present an approval request to the CMVM, together with a set of documentation which includes not only corporate documentation of the company (for instance, among others, a copy of the relevant resolutions and the necessary management decisions, copy of the issuer's by-laws, up-to-date certificate of company registration of the issuer, financial statements, etc.), but also other documentation pertaining specifically to the offer, such as copies of contracts entered into with the financial intermediary assisting in the operation, placing contracts, if applicable, and stabilisation contracts, if applicable.

The issuer must be notified of the approval of the prospectus within a maximum period of 20 days from the receipt of any complementary information required. The absence of notification from the CMVM within the above-mentioned period must be considered as a non-approval of the prospectus.

This prospectus, approved by the CMVM, must be disclosed under the terms and conditions of articles 140 and 236 of the Portuguese Securities Code through one of the following means:

(i) publication in one or more national newspapers;

(ii) printed prospectus available free of charge at the facilities of the regulated market or at the issuer's registered office and the branches of the financial intermediary in charge of the placing of the securities;

(iii) electronic form on the issuer's website and, if applicable, on the website of the financial intermediaries in charge of the placing of the securities;

(iv) electronic form on the website of Euronext Lisbon; or

(v) electronic form on the CMVM's website.

(e) *Listing application*

A request for the listing of shares must be submitted to Euronext Lisbon in order for the company's shares to be admitted to trading on a regulated market in Portugal.

With the listing application, a set of documents and information must be provided to Euronext Lisbon pursuant to the Portuguese Securities Code, Euronext's Harmonised Rules (as recently amended)[8] and other applicable legislation, which include some of the same documentation required for the approval of the prospectus by the CMVM and also, among others, the documents specified in the Euronext application form including, but not limited to, documentation evidencing that: a) the legal position and organisation of the issuer are in accordance with applicable laws and regulations; b) the administration of corporate events and the payment of dividends (if applicable) are ensured; c) adequate procedures are available for the clearing and settlement of transactions in respect of the relevant securities; d) the LEI code pertaining to the issuer has been provided; e) all press releases have been published in the context of the admission to trading; f) a paying agent and a representative for relations with the market have been identified; and g) a social security certificate and a tax office certificate, indicating if there are any amounts owed respectively to the social security system and to the national treasury, have been provided.

All documentation that is required to be submitted shall be in English or in a language accepted by Euronext Lisbon and, if necessary, translated by a certified translator.

With the submission of the listing application, the applicant and Euronext Lisbon should agree on a schedule for completion of the process of admitting the company's shares to trading. The issuer shall then appoint a Listing Agent ("*Agente de Admissão*") who will assist and guide the issuer during the entire process of admission to listing.

Euronext Lisbon shall decide on the application for admission to listing within a 30-day period, unless otherwise agreed with the issuer (and in no case later than 90 days after the application). This period only begins when Euronext Lisbon is in possession of all the relevant documentation and information required.

In case of a favourable decision to list, such decision shall remain valid for a maximum period of 90 days.

Simultaneously, the issuer should deal with the proceedings regarding the registration of the shares with the Portuguese Centralised System of Registration of Securities (*Central de Valores Mobiliários*) managed by Interbolsa – *Sociedade Gestora de Sistemas de Liquidação de Sistemas Centralizados de Valores Mobiliários*, S.A.).

Regulatory architecture: overview of the regulators and key regulations

As mentioned above, under Portuguese securities law, the IPO process entails a public offer for distribution of shares ("*oferta pública de distribuição*") as well as the admission of the company's shares to trading on a regulated market. This procedure poses a set of material and procedural requirements.

(a) *The role of the Portuguese securities regulating authority*

The process of offering and admission to trading in an IPO is overseen by the CMVM, which supervises the licensing process as well as trading operations and, more generally, the activity of securities markets in Portugal. In the context of IPOs, the CMVM must, within its supervisory role, approve a prospectus for the admission of securities to trading. Under article 145 of the Portuguese Securities Code, the CMVM is the competent authority to approve the prospectus for issuers with a registered office in Portugal, in relation, among other cases, to issues of shares. The CMVM is also competent to approve prospectuses which concern securities issued by non-EU issuers, when exclusively or firstly trading in a regulated market in Portugal.

The inclusion of any changes to the information and data disclosed in the prospectus must be subsequently approved by the CMVM, by means of an approved supplement.

In addition, as mentioned before, if a company intends to have its shares listed on a regulated market in Portugal, it must submit a formal request to Euronext Lisbon. In the process of admitting securities to trading, Euronext Lisbon may impose additional listing requirements, when reasonable, and demand any additional documentation from the applicant. Euronext Lisbon may also conduct inquiries and investigations in connection with the listing application.

(b) *Key rules and regulations*

Offer and listing requirements are set out in three main legislative frameworks:

(i) the Portuguese Securities Code;

(ii) regulations and instructions approved by the CMVM; and

(iii) the "Euronext Rule Book", including Book I (the harmonised market rules, in force for all Euronext entities) and Book II[9] (the non-harmonised market rules, specifically applicable to the Securities Markets, to the Non-Regulated Markets and to the Derivatives Markets operated by Euronext Lisbon),

as well as in European Union legislation concerning capital markets, including the legislation mentioned in the previous sections and market abuse regulations.[10]

In this respect, it is noteworthy that most of the rules contained in the Portuguese general framework in regard to securities regulation result from the implementation of EU Directives and suffer a great influence from EU legislation. As such, the Portuguese legal regime is very similar to other EU Member States.

(c) *Key listing requirements*

In order to have its shares admitted to trading on a regulated market, a company must meet a set of general eligibility criteria, as set out in articles 227 and 228 of the Portuguese Securities Code:

(i) the issuer must be incorporated and act in accordance with the respective applicable law;

(ii) the company must be able to prove that its economic and financial situation is compatible with the nature of the securities as well as with the requirements of the market on which listing is required;

(iii) the company must have carried out its business activity for at least three years; and

(iv) the company must have disclosed its annual accounting and financial reports for the three years preceding that of the requested listing (the so-called track record requirement).

In any case, the latter requirement may be waived by the CMVM, when the interests of the issuer and of the investors advise in such way and provided that sufficient information is disclosed in order to allow for informed investment decisions. This flexible solution may be particularly relevant in the case of recent or start-up companies.

Pursuant to article 227(4) of the Portuguese Securities Code, the application for admission to trading shall outline the means by which the company will disclose information to the public and identify a settlement system, accepted by the managing entity of the regulated market, through which equity payments and payments of other amounts associated with the securities can be assured.

Conversely, in order to decide on listing applications filed by issuers seeking to go public, Euronext Lisbon should also verify if the requirements established in the Euronext Rule Book are fulfilled. These requirements are set forth: (i) in section 6.6 of Rule Book I, which establishes general requirements, applicable to all kinds of securities' listing; and (ii) in section 6702 of Rule Book I, establishing specific requirements regarding share listings only.

The general requirements concern mostly corporate matters; for example, whether the issuer has the necessary legal form and structure in accordance with the Portuguese law, if it is in compliance with all requirements imposed by the CMVM, or if the necessary procedures for clearing and settlement of transactions are in order. Regarding the securities to be issued, it must be verified if the shares of the same class have identical rights and whether such shares are freely transferable and negotiable in accordance with Portuguese law, as well as whether they are compliant with the issuer's bylaws.

The specific requirements generally match the specific requirements on listing of shares specified in article 229 of the Portuguese Securities Code, which include, in particular, requirements on the company's minimum market capitalisation and public float.

According to the Portuguese Securities Code, the market capitalisation of the company's shares must be of, at least, €1M. In case it is not possible to determine the market capitalisation of the shares, the company's own funds, including the results of the preceding financial year, must be of at least €1M.

Euronext Lisbon may set stronger capitalisation requirements in case there are other regulated markets with higher capitalisation thresholds. However, as of today, Euronext Lisbon is the only regulated market for the admission and trading of shares in Portugal, and, for that reason, the applicable thresholds for minimum capitalisation are those set in the Portuguese Securities Code as described above.

On the other hand, the Portuguese Securities Code requires adequate dispersion of shares to the public. There is a legal presumption that the level of dispersion is adequate if the shares to be admitted to trading are dispersed to the public in a proportion of at least 25% of the share capital of the company represented by that class of shares. However, if the market is expected to trade regularly below that threshold, a lower proportion may be acceptable.

There are no additional requirements in regards to shareholdings, and the law sets no general restrictions on substantial or qualified shareholdings (except in the case of regulated companies, such as financial institutions). Conversely, there are generally no post-IPO share lock-up obligations established in the law.

Public company responsibilities

Under Portuguese law, when a company undergoes an IPO process, it will necessarily be deemed a "publicly held corporation" or "public company" ("*Sociedade Aberta*"), meaning that it has its share capital open to public investment. This status of "*Sociedade Aberta*" brings an additional legal regime which includes various duties and encumbrances, mostly related to greater transparency, reporting and corporate governance requirements.

These additional obligations are intended to provide the market with greater information and to provide protection to undetermined and dispersed shareholders.

(a) *Periodic reporting and disclosure requirements*

With regard to the disclosure of information, listed companies are required to publicly disclose inside information, i.e., any circumstances which exist or may reasonably be expected to come into existence or any event which has occurred or may reasonably be expected to do so, regardless of its degree of materialisation, which a reasonable investor would be likely to use entirely or partially as a basis for their investment decisions, since it would be likely to have a significant effect on the prices of securities or financial instruments.

Issuers which have securities admitted to trading on a regulated market, or which have requested their admission to such a market, must promptly disclose privileged information as established in Regulation (EU) 596/2014, of the European Parliament and the Council, of 16 April 2014 and respective regulations and delegated acts.

Issuers may delay the public disclosure of the abovementioned information in certain circumstances, as established in Regulation (EU) 596/2014, of the European Parliament and the Council, of 16 April 2014 and its respective regulations and delegated acts.

The Portuguese Securities Code further requires companies listed in Portugal to disclose additional information, including, among other items: (i) notices convening General Meetings of the holders of listed securities; (ii) the issue of shares and bonds, with an indication of beneficial privileges and guarantees, including information on any procedures for their allotment, subscription, cancellation, conversion, exchange or repayment; (iii) amendments to the details that have been required for the admission to trading of securities; and (iv) the acquisition or disposal of own shares, whenever as a result thereof the proportion of the same exceeds or falls below the thresholds of 5% and 10%.

Regarding own shares, CMVM Regulation no. 5/2008, as amended, further provides that issuers of shares or other securities that confer subscription, acquisition or disposal rights and are admitted to trading in a regulated market located or operating in Portugal or exclusively admitted to trading on a regulated market situated or operating in another EU Member State should notify the CMVM of any acquisitions and disposals of such securities. Issuers should also disclose the final result of any transactions that reach, exceed or fall below 1% of the share capital or successive multiples as well as all the acquisitions and disposals, regardless of their net balance, carried out in the same session of the regulated market reaching or exceeding 5% of the volume traded in said session.

It should also be noted that, according to articles 16 and 17 of the Portuguese Securities Code, public companies should disclose qualified shareholdings, as defined therein, as well as certain cases where a shareholder reaches or exceeds certain thresholds of the voting rights corresponding to the capital, or reduces its holding to an amount lower than any of such thresholds.

Besides, according to CMVM Regulation no. 5/2008, as amended, public companies are further required to disclose the following additional information:

(i) the exercise of subscription, incorporation and acquisition rights to securities, namely as a result of mergers or demergers;

(ii) the exercise of any existing rights to convert any securities into shares;

(iii) any changes in the attribution of voting rights in qualifying holdings;

(iv) any filing for insolvency, judgment initiating insolvency proceedings or dismissing the filing for insolvency, and also the approval and official confirmation of the insolvency plan;

(v) the increase or decrease of share capital;

(vi) information regarding applications for admission to regulated markets and respective decisions; and

(vii) the convening of a general meeting to determine the loss of public company status.

Furthermore, issuers are required to periodically disclose financial information and reports. Indeed, issuers must disclose within four months as from the end of the financial year, and make publicly available for a period of 10 years:

(i) the management report, the annual accounts, the audit report and other accounting documents required by law or regulation, even if such documents have not yet been submitted for approval of the general meeting of the company;

(ii) the auditor's report; and

(iii) statements from each of the responsible persons of the issuer, stating that, to the best of their knowledge, the financial information was drawn up in accordance with the applicable accounting standards, reflecting a true and fair view of the assets and liabilities, financial position and results of the issuer and the companies included in the consolidation as a whole, when applicable, and that the management report faithfully states the trend of the business, the performance and position of the issuer and companies included in the consolidation as a whole, and contains a description of the principal risks and uncertainties faced.

Issuers required to draw up consolidated accounts shall disclose individual accounts, drawn up in accordance with national legislation, and consolidated accounts, drawn up in accordance with Regulation (EC) no. 1606/2002, as amended.[11] Conversely, issuers that are not required to draw up consolidated accounts shall disclose the financial information individually, drawn up in accordance with national law.

In the event that the annual report does not provide an exact picture of the net assets, financial situation and results of the company, the CMVM may order the publication of supplementary information.

The documents that comprise the annual report and accounts shall be submitted to the CMVM as soon as the same are available to the shareholders.

Additionally, within three months of the end of the first six months of the financial year, issuers shall disclose the following with regard to the activity for the said period, and keep available to the public for 10 years:

(i) the condensed set of financial statements;

(ii) an interim management report, which shall include, at least, an indication of important events that have occurred during the said period, and the impact on the respective financial statements, together with a description of the principal risks and uncertainties for the remaining six months; and

(iii) statements by the persons responsible within the issuer, whose names and functions shall be clearly indicated, wherein it is stated that, to the best of their knowledge, the condensed set of financial statements has been prepared in accordance with the accounting standards applicable, gives a true and fair view of the assets and liabilities, financial position and results of the issuer and the companies included in the consolidation as a whole, when applicable, and that the interim management report includes a fair review of the required information.

Finally, issuers which are credit institutions or financial companies are obliged to publish quarterly financial information. The remaining issuers who decide nonetheless to disclose quarterly financial information shall comply with the CMVM's regulations in this respect and maintain such disclosure for at least two years.

The CMVM may waive some of the abovementioned disclosure duties whenever such disclosure would be contrary to the public interest or seriously detrimental to the issuer, provided that the omission would not be likely to mislead the public with regard to the facts and circumstances essential for assessing the securities.

(b) *Corporate governance standards*

Public companies must also comply with additional corporate governance disclosure requirements.

Current corporate governance standards derive from different legal sources, including the Portuguese Companies Code,[12] the Portuguese Securities Code, CMVM Regulation no. 4/2013 and the recommendations contained in the Corporate Governance Codes of the CMVM[13] and of the Portuguese Institute of Corporate Governance, *Instituto Português de Corporate Governance* (hereinafter "**IPCG**").[14]

According to article 245-A of the Portuguese Securities Code, issuers of shares admitted to trading on a regulated market, situated or functioning in Portugal shall disclose, in their annual management report, a detailed report on the corporate governance structure and practices of the company. This report shall contain at least the following information:

(i) the capital structure, including information on shares which are not admitted to trading, with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of share capital that it represents;

(ii) any restrictions on the transfer of shares, such as clauses on consent for disposal, or restrictions on the ownership of shares;

(iii) qualified holdings in the company's share capital;

(iv) identification of any shareholders that hold special rights and a description of such rights;

(v) the system of control of any employee share scheme where the voting rights are not exercised directly by the employees;

(vi) any restrictions on voting rights, such as limitations on the voting rights of holders of a given percentage or number of votes, deadlines for exercising voting rights, or systems whereby the financial rights attaching to securities are separated from the holding of securities;

(vii) shareholders' agreements which are known to the company and may result in restrictions on the transfer of securities or voting rights;

(viii) the rules governing the appointment and replacement of board members and amendment of the articles of association;

(ix) the powers of the board, notably in respect of resolutions to increase equity;

(x) any significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company following a takeover bid, as well as the effects thereof, except where their nature is such that their disclosure would be seriously damaging to the company; this exception shall not apply where the company is specifically obliged to disclose such information on the basis of other legal requirements;

(xi) any agreements between the company and members of the management body or employees providing for compensation if they resign or are made redundant without valid reason or if their employment ceases because of a takeover bid;

(xii) core information on the internal control and risk management systems implemented in the company regarding disclosure of financial information;

(xiii) compliance with the Corporate Governance statement to which the issuer is subject by virtue of legal or regulatory provisions;

(xiv) compliance with the Corporate Governance statement by which the issuer voluntarily abides;

(xv) location where the public may find the Corporate Governance Code to which the issuer is subject in accordance with the previous subparagraphs;

(xvi) content and description of the way the issuer's corporate bodies function, as well as the committees created thereby; and

(xvii) a description of the diversity policy applied by the company in relation to its management and supervisory bodies, namely, in terms of age, sex, qualifications and professional background, the objectives of such diversity policy, the way it was applied and results in the period of reference. In case a company does not apply a diversity policy, it must explain in its report why it does not apply such policy. This requirement does not apply to SMEs.

Issuers of shares admitted to trading on a regulated market subject to Portuguese law as their personal law shall disclose information on their corporate governance structure and practices in the terms laid down in a regulation of the CMVM, which shall include the abovementioned information.

Conversely, disclosure requirements for the annual governance report are further regulated by CMVM Regulation no. 4/2013, which includes a model corporate governance report.

Finally, the Corporate Governance Code includes a set of recommendations concerning the organisational structure and corporate bodies of public companies, as well more specific issues such as remunerations, auditing, risk management and conflict of interests and related party transactions.

Potential risks, liabilities and pitfalls

The process of going public through an IPO may present relevant risks and potential liabilities to the offeree company and other parties involved.

On the one hand, the IPO process and the admission to trading on a regulated market imply additional costs associated with the listing application and annual listing fees. Issuers with listed securities are required to pay any fee charged by Euronext Lisbon pursuant to the conditions set forth by Euronext. These fees are determined on the same terms as in other Euronext Markets abroad and may vary in accordance with the type of securities admitted to listing, the nature of the issuer or the amount of market capitalisation.

On the other hand, IPOs entail further liabilities related to the offering of shares to the public, beginning with those that necessarily arise with the publication of a prospectus. Under Portuguese securities law, the issuer and the members of its management bodies are liable for damages caused by non-compliance with the contents of the prospectus, except in the case they prove to have acted without fault. In certain cases, the issuer may even face a strict liability rule. Equally liable are: members of the auditing body, accounting firms, chartered accountants and any other individuals who have certified or, in any other way, verified the accounting documents on which the prospectus is based; financial intermediaries in charge of assisting with the offer; promoters of the offer and any other entities that accept being appointed in the prospectus as responsible for any information, forecast or study included therein.

Other than the liabilities directly connected with the offer and the publication of the prospectus, companies which undergo IPOs are also faced with the general costs and potential liabilities associated with their public and listed company status, which include the costs of complying with the strict corporate governance and periodic reporting and aggravated disclosure requirements described in chapter 4, as well the potential liabilities arising out of the application of, for instance, the framework on market abuse.

Furthermore, both public companies and their shareholders have to take into consideration the specificities of the legislation governing the former type of companies, including the provisions regarding mandatory takeovers, according to which anyone whose holding in a public company exceeds one third or one half of the voting rights attributable to the share capital has the obligation of launching a take-over for the totality of shares and other securities issued by the company that granted the right to their subscription or acquisition. Shareholders of the relevant company shall thus take due consideration of these rules and structure the transaction in a manner that minimises risks in this respect.

Endnotes

1. For an empirical analysis of the evolution of IPOs in Portugal see MARIA ROSA BORGES, *Underpricing of Initial Public Offerings: The Case of Portugal*, Int Adv Econ Res (2007) 13:65–80 and JOÃO DUQUE, MIGUEL ALMEIDA, *Ownership Structure and Initial Public Offerings in Small Economies: The Case of Portugal*, Paper for the ABN-AMBRO International Conference on Initial Public Offerings (2000).
2. A list of all IPOs in the regulated market of Euronext Lisbon since 2005 can be found at https://www.euronext.com/pt-pt/equities/ipos-initial-public-offerings.
3. Approved by Decree-Law 489/99, of 13 November, as amended.
4. Official Journal L. 345, 31/12/2003 p. 64.
5. Official Journal L. 149, 30/04/2004, p. 3.
6. Official Journal L 168, 30/06/2017, p. 12.
7. Portuguese law provides for a list of entities which may be held civilly responsible for prospectuses – please refer to section 5 in this respect.
8. Available at https://www.euronext.com/pt-pt/regulation/harmonised-rules.
9. Available at https://www.euronext.com/en/regulation/lisbon.
10. Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse.
11. Official Journal L. 243, 11/09/2002, p. 1.
12. Approved by Decree-Law n.º 262/86, of 2 September, as amended.
13. Available at http://www.cmvm.pt/pt/Legislacao/Legislacaonacional/Recomendacoes/Documents/C%C3%B3digo%20de%20Governo%20das%20Sociedades%202013.pdf.
14. Available at http://www.cgov.pt/ficheiros/Codigo_maio_2016_versao_para_consulta_VF.pdf. A new Corporate Governance Code of the IPCG, available at http://www.cgov.pt/images/stories/ficheiros/codigo_pt_ebook.pdf, resulting from a protocol between the CMVM and the IPCG and aiming at unifying in one single Code the two existing Corporate Governance Codes of the CMVM and of the IPCG, is expected to be in effect in the near future.

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Eduardo Paulino joined the firm in 2002, and became a partner in 2015. He is a member of the corporate and commercial and capital markets team.

Eduardo's main areas of practice include capital markets, company and corporate law and banking and finance. He especially focuses on M&A, public offerings, project finance and privatisations. He is also experienced in banking and finance law matters and compliance.

He has recently been involved in complex high-profile M&A transactions in the banking sector and in the process of recapitalisation of the Portuguese banking sector. Eduardo regularly acts in equity and debt public and private offerings, public takeover processes in the banking, telecommunications, construction, paper and media sectors, as well as in privatisations of Portuguese and foreign companies and complex financing transactions.

Eduardo Paulino also participates in various inter-disciplinary teams working in domestic and cross-border M&A transactions, acting both for Portuguese and foreign clients.

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Margarida specially focuses on mergers, acquisitions and joint ventures, acting both for Portuguese and foreign clients, as well as on the provision of general legal advice to companies mainly in the areas of commercial, corporate, securities and insurance law.

Margarida has also been involved in several transactions regarding the issue and offering of equity and debt securities.

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Russia

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Introduction

Acquisition by a Russian joint-stock company of the status of a public company means starting a new life: a public company gains better access to the capital markets; the investor base is expanded; the valuation of the market value of the company becomes easier and more precise; brand awareness increases; and additional ways to motivate the staff emerge.

The modern Russian stock market is quite young: the first initial public offering in Russia took place only in 2002 (with the amount of borrowed funds being USD 13 million). Since 2002,[1] more than 70 IPOs have been held in Russia, following which the issuing companies attracted about USD 83.9 billion. The boom of IPOs occurred in 2007 when 22 offerings took place. From 2004 to 2006 the major Russian companies combined the IPOs with regard to their shares in Russia with IPOs of derivatives (global depositary receipts or American depositary receipts) on their shares in London or the US, respectively. For example, this approach was chosen by PAO Novatek: the shares of Novatek were placed on the Russian stock exchanges, i.e. on the Moscow Interbank Currency Exchange (MICEX) and on the Russian Trading System (RTS), whereas GDRs on Novatek's shares were placed on the London Stock Exchange.

Another option was to hold the IPOs of the shares belonging to the Russian subsidiaries in Russia and to hold the IPOs outside the territory of Russia for the shares of the foreign companies controlling such Russian subsidiaries. This approach was chosen by Evraz S.A. (Luxembourg): its shares were placed on foreign stock exchanges and the shares of its Russian subsidiary steel-making plants were listed on the Russian stock exchanges.

Mid-size companies controlling assets in Russia did not hold IPOs in Russia at all, but posted their IPOs directly on stock exchanges abroad (for example, AIM in London) or on other foreign exchanges (Toronto, Stockholm, Frankfurt, etc.). This approach was chosen, for example, by Urals Energy plc. (Cyprus), which placed its shares on AIM.

However, such development hampered the development of the stock market in Russia and contributed to cross-border flows of capital outside Russia. Therefore, in 2002, Russia established the requirement that any Russian company which intends to hold the IPOs abroad is obliged to obtain a prior approval of the Russian Federal Commission for Financial Markets (currently – the Central Bank of Russia) and to hold an IPO in Russia.

In 2014, there were no IPOs in Russia. From 2015, the situation started to slightly improve: in 2015–2016, there were two initial public offerings, and in 2017 there were three. In 2018, several Russian companies have announced their plans to place the shares on the Moscow Exchange. The Moscow Exchange was established in 2011 as a result of a merger of MICEX (founded in 1992) and RTS (founded in 1995).

The IPO process: steps, timing and parties and market practice

IPO is a complex process consisting of a number of stages.

The shares offered within an initial public offering can be represented by primary shares (placed by the issuer through their sale during the IPO) or by secondary shares (the already-placed shares are sold at the stock exchange by the issuer's existing shareholders). When placing primary shares, the proceeds from their sale during the IPO are received by the issuer; when selling secondary shares, the selling shareholder receives such proceeds. Thus, when structuring an IPO, the following options are available to the issuer:

- to place only primary shares;
- to offer only secondary (i.e. already-placed) shares; and
- mixed offering: placement of primary shares and offering of secondary shares by selling shareholders.

Regardless of the structure chosen, any IPO requires careful planning and different specialists shall be involved in its implementation: investment advisors; auditors; lawyers; PR agencies, etc. (for further information please refer to the section titled "*Formation of the team to hold an IPO*" below).

The time to get an IPO through varies depending on the issuing company and the deal structure and can take from five to 12 months. As a rule, preparation for an IPO begins more than a year before the date of share placing/offering. The entire process can be conditionally divided into a preparatory and a public stage.

<u>Main stages of an IPO</u>:

Preparatory stage

1. Company restructuring

Only a joint-stock company is eligible to become a public company. If the issuer operates as a limited liability company, then preparation for an IPO will require reorganisation of the issuer, i.e. its transformation into a joint-stock company. Such transformation usually takes four months at least.

Besides, as a rule, in the course of preparation of any company for an IPO, external lawyers and tax advisors carry out a comprehensive due diligence of such company, its subsidiaries and the persons controlling the company itself *de jure* or *de facto*. Based on the results of this due diligence, these advisors make recommendations as for what kind of legal entities should be established, reorganised in one or another, divested from the family tree or should change their functions (for example, by executing, amending or terminating certain contracts).

2. Financial statements

Companies planning to enter their shares in the quotation list of levels I or II shall, in advance, start compiling financial statements in compliance with the international financial reporting standards (IFRS) (if there is are consolidated financial statements, then to prepare individual financial statements). The statements shall be audited. The requirements concerning financial statements also apply to the entities that have been reorganised by way of transformation and which have experienced merger or spin-off.

3. Corporate governance

The company shall build up its corporate governance that meets the requirements of the Corporate Governance Code (approved by Letter No. 06-52/2463 of the Bank of Russia dated 10 April 2014).

Independent directors. The issuer shall set up a Board of Directors (also called a supervisory board). The Board of Directors shall be composed of independent directors. These are the persons who have sufficient autonomy to build their own positions and are able to make objective judgments independent of the influence of the issuer's executive bodies, certain groups of shareholders or any other interested parties, as well as possess a sufficient degree of professionalism and experience. To be recognised as an independent director, the member of the Board of Directors shall not be related to the issuer, any substantial shareholder of the issuer, any substantial counterparty of the issuer, any competitor of the issuer, nor to the state (the Russian Federation, a constituent entity of the Russian Federation) or a municipal formation.

Committees of the Board of Directors. The Board of Directors shall set up the following committees: for audit; for remuneration; and for personnel and nomination. Such committees have to comprise primarily independent directors.

The main functions of the audit committee include:
- control over ensuring completeness, accuracy and reliability of the issuer's financial statements;
- control over reliability and effectiveness of the risk management and internal control system; and
- ensuring independence and objectivity in carrying out internal and external audit functions.

The main functions of the remuneration committee include:
- development and periodic review of the issuer's policy on remuneration to the members of the Board of Directors, the members of the issuer's management board and CEO, supervision over introduction and implementation of such policy;
- initial assessment of work of the issuer's management board and CEO based on the results of the year according to the issuer's remuneration policy;
- elaboration of conditions for early termination of labour contracts with the members of the issuer's management board and CEO; and
- development of recommendations to the Board of Directors on determining the amount of remuneration and the guidelines for awarding the corporate secretary.

The main functions of the nomination committee include:
- annually carrying out a detailed formal procedure for self-assessment or external KPI of the Board of Directors and its members, as well as the committees of the Board of Directors, identification of priority areas for strengthening the composition of the Board of Directors;
- interaction with shareholders in order to make recommendations to shareholders in respect of voting on the election of candidates to the issuer's Board of Directors; and
- planning of personnel appointments, including consideration of continuity of activities, for the members of the management board and CEO, making recommendations to the Board of Directors regarding the candidates for the position of the corporate secretary, the members of the company's executive bodies and other key executive employees.

The functions of the nomination committee may be delegated to the remuneration committee.

Company secretary. The issuer shall appoint a corporate secretary (or establish a special structural unit). The corporate secretary's task is to ensure:
- seamless functioning of the company's management bodies;
- interaction of the issuer with regulatory authorities, the stock exchange, the registrar of shares and other professional participants in the securities market; and

- that the Board of Directors is immediately informed of any and all detected violations of the law and provisions of the company's internal documents, if control over compliance with such provisions falls within the competence of the corporate secretary.

Internal audit. The issuer shall establish a structural unit carrying out internal audit or instruct an external independent entity to perform the internal audit.

4. Formation of the team to hold an IPO

The issuer planning to issue an IPO shall form a working group. It consists both of internal members (management, members of the Board of Directors, employees of the finance and legal departments) and external advisors (underwriting banks, legal advisors, industry consultants, auditors, PR agencies).

Underwriting banks develop a project plan and the scheme for the IPO, coordinate the working group, make a comprehensive evaluation, assess the issuer's financial position, examine the business plan, build the company financial model based on a comprehensive evaluation and assessment of the market conditions, compile an order book, pricing, carry out underwriting, arrange for road shows and prepare presentations for investors, interact with investors, and perform the functions of the market-makers.

The issuer's legal advisors provide comprehensive legal support for the project, develop a project plan and a scheme for the IPO (together with the underwriting banks), carry out due diligence, prepare corporate documents for the coming IPO, draft appropriate documents, including the prospectus of securities and information memorandum, prepare legal opinions and interact with the stock exchange on the issues of listing.

The issuer's tax advisors provide the issuer with tax advice in the context of due diligence.

Legal advisors of the underwriting banks are responsible for preparing the underwriting agreement; they examine all documents related to the share offering and all relevant contracts.

The auditors audit the company's financial statements according to Russian accounting standards and the IFRS and provide comfort letters (confirmation of accuracy of the financial information published in the prospectus).

The PR agency carries out overall PR support for the IPO and interacts with the Russian and foreign mass media.

Public stage

1. Acquisition of public status by the company

A non-public company acquires public status by introduction of changes containing the indication that the company is public into the company's articles of association. The introduction of such changes is possible only if the company's prospectus of securities is registered and the company has made a provisional agreement with the stock exchange on its share listing.

Conclusion of a provisional agreement on rendering listing services with the Stock Exchange.[2] To make a provisional agreement on rendering listing services, the issuer shall provide the stock exchange with a presentation. It shall contain the following information:

- general information about the company: name; brief description of its activities; participation in a group of companies; membership in associations; rating; information on its auditor; consultants; revenue; value of assets; and number of employees;
- company history;
- objectives/plans of the company for three to five years;

- key investment highlights;
- analysis of the economic sector in which the company conducts its business and advantages of the company as compared to its peers;
- information on the current ownership structure and preliminary offer structure;
- financial situation of the company, both before and after listing (forecast);
- information on the company's main competitors; and
- information on the range of activities, revenue, cost, operating cash flow, EBITDA and assets for the last three years.

The issuer is also obliged to provide the stock exchange with a set of documents confirming such information.

Upon receipt of the documents, the stock exchange carries out an examination as to the possibility to make a listing agreement (the period of examination is 14 business days). In the course of the examination, the stock exchange may request additional documents and information. In case of a positive decision on making a listing agreement such listing agreement is concluded **with a non-public company for a period up to six months with the possibility to extend its term in the future.**

Preparation and registration of the prospectus of securities, as well as additional issue of shares (if primary shares are offered). The prospectus of securities shall be registered with the Bank of Russia (the "megaregulator" that is also responsible for the securities market in Russia). The prospectus is an indispensable element for obtaining a listing on the stock exchange. In order to register the prospectus, it is necessary to present to the Bank of Russia the provisional listing agreement. Any additional issue of the shares to be placed by public offering shall also be registered with the Bank of Russia.

As a rule, the prospectus of securities is prepared by legal advisors together with the relevant employees of the company. The preparation of the prospectus takes about one month, and the period of state registration of the prospectus is 30–60 calendar days.

Introduction of changes containing the indication that the company is public into its articles of association. Such changes shall be introduced into the articles of association after registration of the prospectus of securities. As a rule, at the same stage the changes which harmonise the articles of association with the requirements established for the public company have to be introduced into the articles of association. The company acquires public status starting from the date of state registration of the changes to its articles of association.

2. Carrying out due diligence

This is a comprehensive due diligence: clean title of incorporation and activities of the issuer, its financial position and the operational stability of its business have to be verified.

3. Marketing and preparation of the information memorandum

The information memorandum is the main source of information on the issuer. The information memorandum is intended for a wide range of international investors. Preparation of the information memorandum requires the involvement of legal advisors, underwriting banks and the issuer's management.

For marketing purposes, many information and other public events and presentations are held. The main purpose of these events/presentations is to find out whether potential investors have an appetite for the company's shares offered for public sale.

4. Listing

Listing means enrolment of securities by the trade organiser (i.e. the stock exchange) in the list of securities that are admitted to on-exchange trading for conclusion of sale and purchase agreements. This list consists of three independent levels (the 1st and 2nd levels constitute the quotation list). The level of the list is of significance for (i) the range of investors who are eligible for the acquisition of shares, and (ii) for the requirements for enrolment of the securities into the list and maintaining the level. Placement of securities and stock trading may be carried out on the stock exchange and over-the-counter (OTC). Obtaining a listing on the stock exchange is an important stage of the IPO; it precedes the placement of securities and confirms that the issuer meets the corporate governance requirements.

The issuer shall submit to the stock exchange an application for enrolment of its securities in the list; the application shall be accompanied by supporting documents. For the purposes of the listing, legal or financial advisors usually directly interact with the stock exchange. The stock exchange examines the securities from the point of view of their compliance with the listing rules.

To be included in the list the issuer must meet a number of criteria:
- the securities shall comply with the requirements of the legislation of the Russian Federation, including the regulations of the Bank of Russia;
- the company shall register the prospectus of securities;
- the company shall disclose information in accordance with the requirements of the securities legislation of the Russian Federation; and
- the securities shall be transferred for servicing to the clearing depositary (when secondary shares are offered).

Enrolment into levels I or II of the list imposes on the issuer the following additional requirements:
- the issuer should have existed for at least three years (for level I) or at least one year (for level II);
- the issuer should have complied with, and disclosed its statements according to, the IFRS (or any other internationally recognised standards) for three complete years preceding the date of listing of the shares into level I or for one year (for the shares to be included into list of level II);
- the issuer shall maintain a sufficient number of free-float shares and their total market value at certain level; and
- the issuer shall meet the corporate governance requirements.

Since 15 July 2009, the Innovation and Investment Market is operating on the Moscow Exchange. This segment was created for those issuers who are high-tech companies. The main task of the Innovation and Investment Market is to promote attraction of investments in order to develop small and mid-size enterprises in the innovative sector of the Russian economy.

5. Securities offering

The commencement and ending dates for placement of securities are determined by the resolution on the issue. As a rule, in case of a public offering of securities, the period for placement is several business days (on average up to five business days) from the placement commencement date. As a general rule, placement shall be carried out within one year from the date of the state registration of securities. The specified term may be extended but the total period of offering cannot exceed three years.

Stock trading (i.e. subsequent sale of shares after their acquisition by the first purchaser from the issuer) is allowed from the date when the purchasers paid for securities during the IPO. Upon completion of the offering, the issuer shall send a notification on the results of the issue to the Bank of Russia indicating, *inter alia*, the price and the actual number of securities placed in the course of the IPO. The number of placed shares may be less than the total number of securities issued.

Upon placement of securities, all potential purchasers shall be offered equal conditions for acquisition of securities. If newly issues shares are being offered, existing shareholders are entitled to buy them with a certain discount. As a rule, placement is carried out by combining on-exchange and OTC trades.

6. Public company life disclosures

Starting from the date when the company acquired public status (i.e. from the date of state registration of the changes to the company's articles of association), the company shall disclose information in accordance with the securities legislation. When determining the scope of the information subject to disclosure, the company shall be guided not only by the legal requirements but also by how detailed the information should be for its adequate perception by the market participants. As a rule, for this purpose, public companies establish investor relations departments.

Regulatory architecture: overview of the regulators and key regulations

Key regulations overview

The key regulations governing the IPO process are the following Federal Laws: No. 39-FZ On the Securities Market dated 22 April 1996; and No. 208-FZ On Joint-Stock Companies dated 26 December 1995. Other important regulatory sources are the Securities Issue Standards (Regulation No. 428-P of the Bank of Russia dated 11 August 2014) and the Regulation On Admission of Securities to On-exchange Trading (Regulation No. 534-P of the Bank of Russia dated 24 February 2016).

The law on the securities market regulates the relations arising in the course of issue of securities and stock trading (including shares). The securities issue standards establish the detailed procedure for issue of securities at all stages, as well as the procedure for registration of the prospectus of securities and mandatory requirements to its content. The procedure for acquisition of the public status by a company is regulated by Federal Law No. 208-FZ On Joint-Stock Companies.

The listing procedure is prescribed by the stock exchange. For example, the Moscow Exchange approved its listing procedure in its Listing Rules. Such procedure shall comply with the requirements of the regulations of the Bank of Russia and be registered by the Bank of Russia.

Information disclosure at the stages of issue and after acquisition of the public status by the company is governed by the Regulation On Disclosing Information by Securities Issuers (approved by Regulation No. 454-P of the Bank of Russia dated 30 December 2014).

Key regulators and listing authorities in the IPO process

The key state authority influencing the IPO process is the Bank of Russia. Not only state registration of the prospectus of securities and additional shares but also approval of the securities issue standards, as well as other legal regulations concerning registration and placement of securities and stock trading, fall within the competence of the Bank of Russia.

Apart from the state registration of additional issue of securities and prospectus of securities, the company shall undergo the procedure for listing of securities on the stock exchange.

The largest Russian stock exchange is the Moscow Exchange.

Key documentation

Issue documents

Offering decision. Making a decision on offering is the basis for placement of securities. Offering is the transfer of shares by an issuer to the primary acquirer. The offering decision is made by the general meeting of shareholders or the board of directors depending on the amount of issue and the requirements of the issuer's articles of association.

Resolution on the issue. This is a key document in order to register an additional share issue. The resolution of the issue establishes key parameters for securities offering: number and type of securities; procedure for determining start and end dates of offering; method of offering; pricing procedure; procedure for exercising the preemptive right; and information disclosure procedure. Resolution on the issue is usually prepared by legal advisors; before being approved by the issuer's board of directors and registered with the Bank of Russia, a draft resolution on the issue is discussed with all parties to the transaction, including with the issuer, the banks, and stock exchange.

Russian prospectus of securities issue. The prospectus of securities is necessary in case of public offering and to obtain listing on the Moscow Exchange. Public status can only be acquired after registering prospectus of securities. The prospectus of securities must contain information reflecting the circumstances which may affect the decision to acquire shares. The prospectus of securities shall be approved by the issuer's board of directors and signed by its CEO and chief accountant. In addition, the prospectus of securities may also be signed by a financial advisor on the securities market; however, this option is not widely used, as such financial advisor requires extra payment for this service, explaining that he/she will be responsible for the prospectus for the securities content. The persons who signed or approved the prospectus of securities (e.g. the members of the board of directors who voted for approval of the prospectus) and the audit firm that prepared its audit report relating to the issuer's accounting (financial) records disclosed in the prospectus are jointly and severally or secondarily (depending on the case) liable for losses caused by the issuer to the investors due to inaccurate, incomplete and/or misleading information in the prospectus. The prospectus of securities must contain, among other things, information about financial and economic operations of the issuer, the issuer's market capitalisation, liabilities, risks relating to acquisition of shares, governing bodies and controlled entities. As IPO is usually accompanied by preparation of an international prospectus, the content of both prospectuses should be brought into line with each other.

In 2017, the Moscow Exchange developed recommendations on the scope of the information to be disclosed by issuers in prospectuses of securities in order to inform the issuers on the international best practices of information disclosure and to elaborate a uniform approach to information disclosure in prospectuses of securities. Adherence to the recommendations is not mandatory, but it facilitates submitting harmonised data in Russian and international prospectuses. The recommendations involve the disclosure of a broader list of information as compared to Russian statutory requirements; however, the benefit for the issuer from disclosure to such extent allows the issuer to meet international market standards relating to the scope and quality of the information disclosed.

Notification on the results of the issue. Notification on the results of the issue must be submitted to the Bank of Russia within 30 days from the expiration date of the securities offering. The notification shall be approved by the CEO, the board of directors or the management board (depending on the allocation of competences provided for by the company's articles of association).

Listing agreement

Obtaining a listing on the stock exchange is an important stage of an IPO. (In order to register the prospectus of securities and to obtain public status, the company typically enters into a "temporary" listing agreement for a period of six months. After registering the prospectus of securities and registering amendments to the issuer's articles of association concerning reference to the public status of the company, the issuer's securities are included in the list, and a fully-fledged listing agreement is made between the stock exchange and the issuer.) Obtaining a listing precedes the securities offering and confirms that the issuer meets the corporate governance requirements.

Transaction documents

Engagement letter with underwriting banks. The engagement letter shall be concluded between the issuer and the underwriting banks. The engagement letter is subject to foreign (English as a rule) law if the underwriting bank is a foreign entity. (Sometimes a foreign entity is artificially introduced as one of the underwriting banks for this agreement to be subject to foreign law.) In accordance with the engagement letter, the underwriting banks are engaged by the issuer to provide IPO services, and securities can be offered to both Russian and foreign investors. The engagement letter determines general parameters of IPO transactions, a list of banking services provided before the date of the underwriting agreement, banks' fees, confidentiality terms, etc.

Underwriting agreement. The underwriting agreement is made between the issuer and underwriter banks and is usually governed by a foreign (English as a rule) law. Underwriting banks undertake to ensure sale of certain number of shares at certain price, and the issuer and/or the selling shareholder undertakes to sell such shares under such conditions. (The underwriting agreement is not necessary if the shares are offered to Russian investors only.) The issuer and the selling shareholder make representations regarding accuracy of the information in the prospectus of securities, lawfulness of the shares and rights to them, the issuer's financial standing and stability of the issuer's business. If only secondary shares are offered in the course of the IPO, the underwriting agreement is made without participation of the issuer. In this case, an indemnity agreement or an underwriting support agreement can be made between the underwriting banks and the issuer. These agreements are aimed at protecting the interests of the underwriting banks from any risks associated with the IPO. As a rule, underwriting banks acquire shares under preferential terms (with a discount) and are given options to buy/sell shares.

Brokerage agreement. The brokerage agreement is made under Russian law between the issuer and a licensed Russian broker to perform an exchange tranche and to offer shares in Russia to the public.

Market-maker contract. This contract is made in order to stabilise the price for the company's shares.

International prospectus/information memorandum

On the one hand, the international prospectus of securities is a marketing document which describes the achievements and strengths of the issuer and its group. On the other hand, the international prospectus discloses accurate information about the risks relating to the acquisition of shares. The risk section of the international prospectus traditionally describes the industry, the home country of the issuer, its reputation risks, risks relating to the issuer's operations, as well as the issuer's policy for reducing the likelihood of the occurrence of such risks. The prospectus also describes the issuer's investment history and development strategy, the main types of products manufactured or services provided by the issuer, its relations with its counterparties, the sources of raw materials the issuer uses in its production activity, the issuer's position among its competitors, information about the issuer's employees, material transactions, the issuer's property and litigation involving the issuer. The international prospectus is prepared by external legal advisors with the participation of the issuer and underwriting banks.

Legal opinions

The purpose of legal opinions is to create an additional legal protection for the underwriting banks. The protection is based on the fact that the banks (*inter alia*, by engaging advisors and obtaining the relevant opinions) carried out due diligence and acted with necessary and sufficient prudence when examining the state of the issuer's business. Legal opinions are prepared by legal advisors to the issuer and its underwriting banks. Legal advisors usually confirm compliance with the statutory procedure for issuing and offering shares, the existence of the title to the selling shareholders' shares, and the existence of corporate and regulatory approvals. Legal advisors also confirm the existence of corporate approvals of transaction documents, their due execution by authorised persons and compliance of their contents with applicable laws.

Comfort letters

Comfort letters are submitted by an independent auditor and confirm the accuracy of the issuer's information contained in the prospectus of securities (in addition to financial records relating to which an auditor's opinion was issued) and with regard to the events occurred after the date of the auditor's opinion.

Marketing documents

Issuers usually issue announcements on the intention to float, on the price range, and press releases on the completed transaction. Marketing materials must comply with requirements of the Russian advertising laws; in particular, shares are not allowed to be advertised prior to the state registration of their prospectus. In addition, securities advertising is not allowed to contain promises to pay dividends on shares (this is, in particular, due to the fact that dividends are paid out of the net profit, but the net profit cannot be guaranteed: it depends on the company's performance) and forecasts of the growth of securities market value.

Public company responsibilities

Disclosures

Public companies must disclose information about their operations. The information disclosure procedure is established in Federal Law No. 39-FZ of 22 April 1996 "On the Securities Market", No. 208-FZ of 26 December 1995 "On Joint-Stock Companies" and No. 208-FZ of 27 July 2010 "On Consolidated Financial Statements", and Regulations on Disclosures by Issuers of Equity Securities (approved by the Bank of Russia on 30 December 2014, No. 454-P).

Annual report. The annual report is one of the main forms of disclosure of information about the joint-stock company's operations. The annual report shall give the shareholders and investors a complete overview of operations and development of the company for the last reporting year providing aggregate information intended first of all for long-term investors. The annual report is one of the most important tools of information exchange with shareholders and other interested parties. Therefore, it must contain information that allows evaluating the company's performance over the year. Not only public companies but also non-public companies with more than 50 shareholders must disclose annual reports; however, public companies must disclose more information according to the Corporate Governance Code.

The content of the annual report is governed by the Disclosure Regulations. The annual report has to contain information on the company's position in the industry, its business priorities, a report of the board of directors on the results of the company's development of its business priorities, information on the amount of energy resources used, the company's prospects of further development, dividend payout report, description of the main risk factors relating to the company's operations, information on major transactions and related party transactions, members of the board of directors, CEO information, information on compliance with principles and recommendations of the Corporate Governance Code.

Public companies are recommended to include a statement (aimed at the shareholders) of the chairman of the board of directors and the CEO in the annual report, containing:

- an evaluation of the company's performance over the year;
- information on the company's securities (including on offering additional shares by the company) and capital flow over the year, on number of shares held by the company and other companies under its control;
- key operating indicators, key accounting (financial) reporting indictors, results achieved over the year compared to the planned ones;
- information on profit distribution and on its compliance (or non-compliance) with the dividend policy adopted in the company;
- investment projects and strategic tasks of the company;
- company's development prospects (turnover, production capacity, market share under control, profits increase, profitability, debt-to-equity ratio);
- summary of the most essential transactions;
- corporate governance system description;
- risk management and internal control system description;
- description of personnel and social policy; and
- social development, personnel health protection, professional training of employees, compliance with safety of work requirements, information on environment protection policy and ecological policy.

The following corporate governance information is also recommended to be included in the annual report:

- BoD report;
- results of the evaluation by the audit committee of the efficiency of external and internal audit process;
- description of procedures used when electing external auditors;
- information on the main results of evaluation (self-evaluation) of the board of directors' work;
- information on direct or indirect shareholding by the board members and executive bodies;
- information on conflicts of interest that board members or executive bodies may have;
- information on remuneration of governing bodies, description of principles and approaches applied to the motivation of key executives; and
- information on loans granted by the company.

If foreign investors have a significant ownership interest in the capital of the company, it is recommended to disclose, along with disclosure in Russian, the same information in English and to ensure free access to such information.

Quarterly reports. Public companies must disclose quarterly reports, the content of which largely coincide with the content of the Russian prospectus of securities. Quarterly reports serve as a consolidated source of information for investors on the main aspects of the public company existence during the accounting quarter. Quarterly reports must contain the following information:

- on the issuer's core business;
- on the issuer's financial and economic performance;
- on the issuer's financial and economic operations (including liquidity, financial investments, intangible assets, position among competitors, etc.);
- on the issuer's plans for future business;
- on the persons who are members of the issuer's corporate governance bodies;
- on the issuer's auditor, shareholders, controlled entities; and
- the issuer's accounting (financial) statement.

Quarterly reports are signed by the issuer's CEO and chief accountant and must be disclosed within 45 days from the quarter end date.

Material events. Public companies must disclose the information which, if disclosed, can significantly affect the value or quotation of the issuer's securities. Material event notices shall be signed by the CEO or another person acting under a power of attorney issued by the CEO. Disclosure regulations provide for more than 60 events required to be disclosed; for example:

- calling a general meeting of shareholders/board of directors;
- decision-making by the general meeting of shareholders/board of directors;
- new controlling or controlled parties of the issuer;
- going through the stages of the securities issue procedure;
- making material transactions by the issuer or entities under the issuer's control; and
- failing to perform obligations to holders of securities, etc.

The list of material events is open; the issuer can disclose any information in the form of material event notices which, in the issuer's opinion, significantly affect the value of the issuer's equity securities. Disclosure of material event notices requires the issuer to be prompt: such notices must be published within one day from the date of the material event. As a general rule, each material event requires a separate notice. However, if occurrence of the same event or performance of the same action requires disclosure in the form of several material event notices, one notice can be made containing the description of all such material events the information about which is included in such notice.

Consolidated financial statements. Public companies must disclose annual and interim (for six months of the accounting year) consolidated financial statements. Annual consolidated financial statements are disclosed with the auditor's opinion attached. Annual statements shall be disclosed within 120 days from the end date of the accounting year, and interim statements within 60 days from the end date of the second quarter.

Other matters. Public companies must disclose information on concluding a shareholders' agreement by the shareholders of a public joint-stock company. Public companies must also disclose information on the fact that a person acquired, under the shareholders' agreement, the right to determine the voting procedure at the general meeting of shareholders of such company. Public companies must also publish a notice of intention to file a claim:

- for contesting the resolution of the general meeting of shareholders of a public joint-stock company;
- for damages caused to a public joint-stock company;

- for invalidation of the transaction of a public joint-stock company; or
- for application of consequences of invalidity of the transaction of a public joint-stock company.

Corporate management

In addition to the above disclosure obligations, the issuer must observe the corporate management standards established in the Corporate Governance Code. Detailed corporate governance requirements for the companies the securities of which are listed on a Russian stock exchange are described above in section "*The IPO process: steps, timing and parties and market practice / Preparatory stage / Corporate governance*".

Potential risks, liabilities and pitfalls

Due diligence

When getting ready for the IPO, the external legal advisors to the issuer and to the underwriting banks check whether at the date of the IPO launch the prospectus contains (i) any material inaccurate or misleading information, and (ii) all necessary material information. The company's financial and economic activity, the lawfulness of the company's formation and its management are examined at this stage. The due diligence review may include the analysis of financial statements, material contracts, tax returns, managerial decisions, production site visits, interviews with the employees and the members of the company's corporate governance bodies. The issuer is usually invited to fill out questionnaires; afterwards, external advisors check the content of the answers and can ask persons who answered the questions additional questions requesting comments on the information contained in the draft issue and transaction documents.

Responsibility

Violation of Russian laws in the process of an IPO results in civil, administrative and even criminal liability.

Civil liability occurs in case of guilty (intentional or negligent) infliction of damage by the issuer to investors. An investor has to prove a causal link between illegal behaviour (undue action or undue omission to act) of the issuer and losses caused thereby, the fact of losses itself and the extent of such losses, whereas the issuer's fault is presumed (but this is a rebuttable presumption, i.e. the issuer may proof that actually there is no fault on his side). Any damages can be recovered from the issuer: both direct loss and lost profit.

Violation by the issuer of the established procedure for issue of securities constitutes an administrative offence. It results in imposing an administrative (monetary) fine upon the issuer and its officers (article 15.17 of the Code of Administrative Offences). Inclusion of intentionally untrue information in the prospectus of securities, approval or confirmation of the prospectus or notice of the results of securities issue with intentionally inaccurate information, offering equity securities issue of which has not been registered with the state authorities are crimes if any of the said actions has caused damage over RUB 1.5 million to individuals, organisations or the state (article 185 of the Criminal Code).

The issuer's failure to disclose or violation of the disclosure procedure or time limits, and failure to disclose information to the full extent or disclosure of inaccurate or misleading information also results in administrative liability (article 15.19 of the Code of Administrative Offences). Liability for wilful evasion of disclosure or providing information, or providing intentionally incomplete or false information, if any of these actions has caused damage over RUB 1.5 million to individuals, organisations or the state are provided for by criminal law (article 185.1 of the Criminal Code).

Failure to comply with a legitimate prescriptive order of the Bank of Russian within the established time limits results in imposition of administrative liability (article 19.5 of the Code of Administrative Offences).

Market manipulation entails imposition of criminal and administrative liability (article 15.30 of the Code of Administrative Offences and article 185.3 of the Criminal Code).

Conclusion

Going public is a complex procedure which requires an in-depth and comprehensive preparation and skilled company management and advisors. It is advisable to start preparing for the IPO well in advance in order to properly examine all matters the company encounters with at the preparatory stage of IPO and to facilitate the period after acquiring the status of a public company.

* * *

Endnotes

1. Only IPOs of the Russian companies on the Russian exchanges are taken into account.
2. The procedure is described in compliance with the requirements of the Moscow Exchange.

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Ilia is a partner at Nektorov, Saveliev & Partners, a Russian law firm. Ilia specialises in dispute resolution, arbitration and international trade law. After his graduation from the law faculty of the Moscow State University named after M.V. Lomonossov (1996), Mr. Rachkov has gathered substantial experience in advising Russian and foreign companies (including banks and state bodies) on dispute resolution matters, both before state courts in and outside Russia, and before international and domestic arbitral tribunals, and on international trade law matters. Ilia Rachkov participated in the legal teams which prepared IPOs of RosBusinessConsulting (RBC), 36.6 Pharmacies (both Russian stock exchanges), Novatek (MICEX + RTS and London Stock Exchange), Urals Energy (AIM, London), Russoil Corporation (Nasdaq), White Bear Resources (Toronto Stock Exchange), ZAAB Invest AG (Deutsche Börse, Frankfurt), and Selena Oil & Gas AB (Stockholm Stock Exchange). Mr. Rachkov is a member of the Legal Committee of the German-Russian Foreign Trade Chamber. Mr. Rachkov teaches international economic law at the Moscow State Institute of International Relations – MGIMO (Moscow).

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Singapore

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Introduction

Going public signifies corporate success and marks a major milestone achieved for any private company. In Singapore, it is celebrated with the striking of the gong at the countdown to 9 o'clock on the morning of the first trading day of shares of the listed company at the Singapore Exchange Securities Trading Limited ("**SGX**"), followed by a euphoric dinner in the night. Most private companies will reach a stage in their corporate development when their growth is constrained by their available capital. Other than obtaining loan financing, opting to seek listing of their shares on a stock exchange is an alternative option to enable the company access to public funds as well as to increase its public profile, thus promoting its corporate branding and image, which can in turn augment its business.

An initial public offering of the shares of a private company ("**IPO**") involves the listing and quotation of its shares on either the Mainboard of the SGX or its Catalist board, the sponsor-supervised listing platform of the SGX. During the IPO exercise, a company will offer new shares and/or existing shares held by its shareholders to the general public for subscription. All new shares issued at IPO and existing shares (subject to a moratorium period over certain existing shares of the founders and promoters) are tradable on the SGX, either on the Mainboard or the Catalist board, from the first trading day.

<u>Why do companies choose to list on SGX?</u>

Singapore as a destination with political and economic stability. Given the vast changes which have swept across the political landscapes of many developed countries and developing counties in recent years, Singapore's political stability is well appreciated and favoured among listed firms and investors. Singapore's stable economic and financial markets are also important considerations, both for companies seeking listing on the SGX and international investors in their decision to invest in a Singapore publicly listed company.

The emerging Asia. The emerging market in Asia is a wave that has gained traction and is expected to continue to rise in the next few decades. However, some of these markets tend to be affected by currency volatility and unpredictable social issues and changes to political landscapes from time to time. Notwithstanding, each of these emerging markets has immense potential to become an economic powerhouse, due to its large domestic market that is fuelled by the fast pace of growth in its domestic consumption and economic development. Successful companies in these emerging markets seeking to list on an internationally recognised stock exchange will consider the SGX, as it is able to access international investors through its stock markets.

SGX is the Asian gateway. In Asia, the SGX offers an edge over its regional rivals with its stock market in Singapore, being reputed to be a well-regulated international financial centre, which prides itself in promoting high standards of corporate governance practices for its listed companies. This gives confidence to funds and international investors to invest in public companies that are listed on the SGX. In addition, an IPO exercise in Singapore requires the listing applicant to meet the international standard of disclosure requirements, with a high emphasis on transparency and integrity of the management team. This enables the investing public to assess the risk involved in making its investments.

Access to institutional investors. A high proportion of companies listed on the SGX have foreign-based operations and the SGX continues to attract foreign companies to seek listing in Singapore. Due to the quick and efficient secondary fundraising process in Singapore, the listed company can continue to tap and raise funds from the public after its initial fundraising exercise at IPO. With the stable Singapore currency, no exchange control, low-tax rate regime in Singapore and her strong reputation as an international financial centre, institutional investors and international funds are attracted to invest in stocks listed on the SGX.

The IPO process: steps, timing and parties and market practice

<u>Parties involved in an IPO exercise</u>

The parties involved in the IPO exercise are mainly:

Company's management team. Includes the key management personnel such as Executive Directors, Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, and other key members of the management team.

Issue manager (for Mainboard listing). Must be either a member company of the SGX-ST, a bank, a merchant bank or any other financial institution approved by SGX to manage the IPO process and liaise with SGX on all matters arising from the application for listing.

Sponsor (for Catalist listing). A qualified professional firm engaged in corporate finance and compliance advisory work who will assess the suitability of the company seeking listing on the Catalist board of the SGX, and to assume a continuous supervisory role to ensure the listed company's compliance with their continuing obligations post-listing. They will also manage the IPO process and liaise with SGX on all matters arising from the application for listing.

Underwriter and/or placement agent. An underwriter and/or placement agent is a licensed broker firm who will promote and sell all of the shares that are being offered in the IPO. In return, the company will pay the underwriter and/or placement agent a commission fee based on a certain percentage from the IPO proceeds raised during the IPO.

IPO lawyers. A qualified team of lawyers, who will advise on all the legal aspects of the listing application such as material contracts, litigation, intellectual property and information systems rights, and other regulatory issues. They assist in the legal due diligence process and drafting the non-financial sections of the prospectus. They will also advise the company regarding the disclosure requirements in a listing exercise.

Reporting accountants/Independent auditors. A qualified professional audit firm who will perform an independent audit on the latest three years of financial statements of the company, which will be attached as part of the prospectus or offer document to provide information to the potential investors regarding the financial performance of the company. They can also provide the company with an initial evaluation of its readiness to go public and assist in advising the company of the necessary requirements relating to its financial controls and other accounting aspects and matters that are important to a listed company.

IPO process

Planning and kick off. When a company decides to go public, the initial stage for the IPO process is the planning and preparation stage where the IPO professional team is selected, followed by a kick-off meeting involving the IPO professional team and management team. During the kick-off meeting, the issue manager or sponsor will present the IPO indicative timetable and draw up the action plans and deliverables required by the relevant timelines, discuss the due diligence requirements, identify the critical issues that will affect the IPO process and map out the proposed solutions. Each of the other professional team (including the lawyers and auditors) will present their work requirements during the kick-off meeting.

Due diligence process and preparation of the documentation. The execution stage begins with a due diligence exercise where the due diligence process is conducted on the listing entities to ensure the prospectus or offer document complies with the legal or accounting requirements, and prepare the disclosure of the material information. The company will also need to undertake a corporate restructuring exercise to form the holding company (being the listing entity) which will hold the group of companies. The lawyers will work with the company to draft the prospectus or offer document based on the specific requirements of the Fifth Schedule of the Securities and Futures Regulation.

Drafting and verification meetings. The management team and IPO professional team will meet regularly for drafting meetings, which involves the drafting and review of the respective sections required for the prospectus or offer document and the collation of the source documents to support the contents. Due diligence verification meetings will be held to check and verify the contents of the final draft prospectus or offer document prior to the submission to the SGX, lodgement or registration process. This is to ensure that the material statements of fact or opinion contained in the prospectus or offer document are complete and accurate.

Submission to the SGX. The issue manager or sponsor will submit the draft prospectus or offer document to the SGX to seek its approval for the listing of the company. The SGX will review the application and raise queries to the issue manager or sponsor, who will work with the company and other IPO professional team to address these queries in order to obtain the listing approval from the SGX. Once the listing approval is obtained, the company will then complete the restructuring exercise and convert the status of the company from a private to a public company to prepare for the next stage.

Lodgement and registration of the Prospectus or Offer Document. After the listing approval has been obtained from the SGX, the prospectus will be lodged on the website of MAS OPERA (for Mainboard listing) or SGX Catalodge (for Catalist listing). In the next two weeks after lodgement (being the "exposure period"), the prospectus or offer document will be available for public comment. This will provide an avenue for the public to air any serious concerns they may have, which serves as an additional avenue to safeguard the public interest for the listing of the company. After clearing the exposure period, the company can proceed to register its prospectus or offer document and launch its offer for shares to the public.

Listing. After the close of the offer for shares, the company will be listed on the Mainboard or the Catalist (as the case may be) and commence trading of its shares thereafter, which will generally take place around one week after the launch of the offer for its shares.

Timeline and preparation

The timeline for an IPO process varies for different companies. Generally, the pre-submission process will take about four to nine months after the kick-off meeting (depending on the readiness of the listing applicant) and the listing approval stage can take between two to three months (depending on the complexity of the listing group and issues arising). Quite often, an IPO process can take in excess of 12 months from the kick-off meeting to complete, and it is not uncommon for delays and postponements to the submission of the listing application to the SGX, as the pre-submission work for the IPO has not been completed.

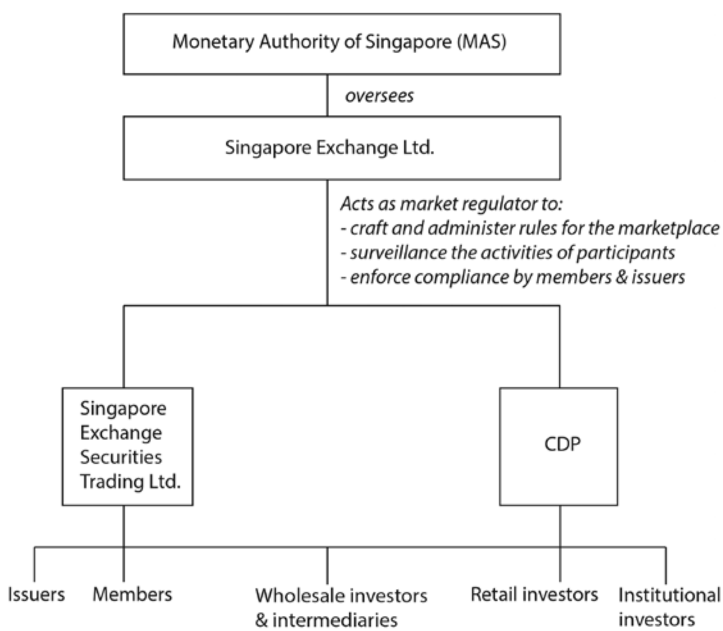
The key factors affecting the timelines of an IPO process are the readiness of the listing applicant for the IPO exercise and the commitment of the management team. Most of the time, the management team does not realise the extent of the time and resources commitment required for an IPO exercise. One of the common issues for companies facing delays in an IPO exercise is that the audit work for the last three financial years cannot be completed in time as the operational and accounting systems of the group seeking listing are not sufficiently robust to pass the rigorous audit process of the Independent Auditors.

The IPO process will become very costly to the listing applicant when time delays occur during the IPO exercise. Other than facing cost overruns due to the additional work to be performed by the IPO professional team arising from the time delay, the management team will also not be able to use the additional time and resources that have been committed to the IPO process to otherwise generate productive business and revenues for the group. Hence, the key to success for an efficient IPO exercise lies in the management team's deep understanding of the work requirements, coupled with its commitment and stamina to complete the IPO process.

Regulatory architecture: overview of the regulators and key regulations

Regulatory framework

The organisations involved in the regulatory framework for the listing process in Singapore and their respective roles are as follows:



The Monetary Authority of Singapore ("**MAS**") is Singapore's *de facto* central bank, which is established under the Monetary Authority of Singapore Act. MAS is the licensing authority for holders of a capital markets services licence, who are permitted to carry on a business in the regulated activities of dealing in securities, trading in futures contracts, leveraged foreign exchange trading, fund management, advising on corporate finance, securities financing, real estate investment trust management, providing custodial services for securities. SGX is under the supervision of the MAS in relation to the listing of companies and other securities matters in Singapore.

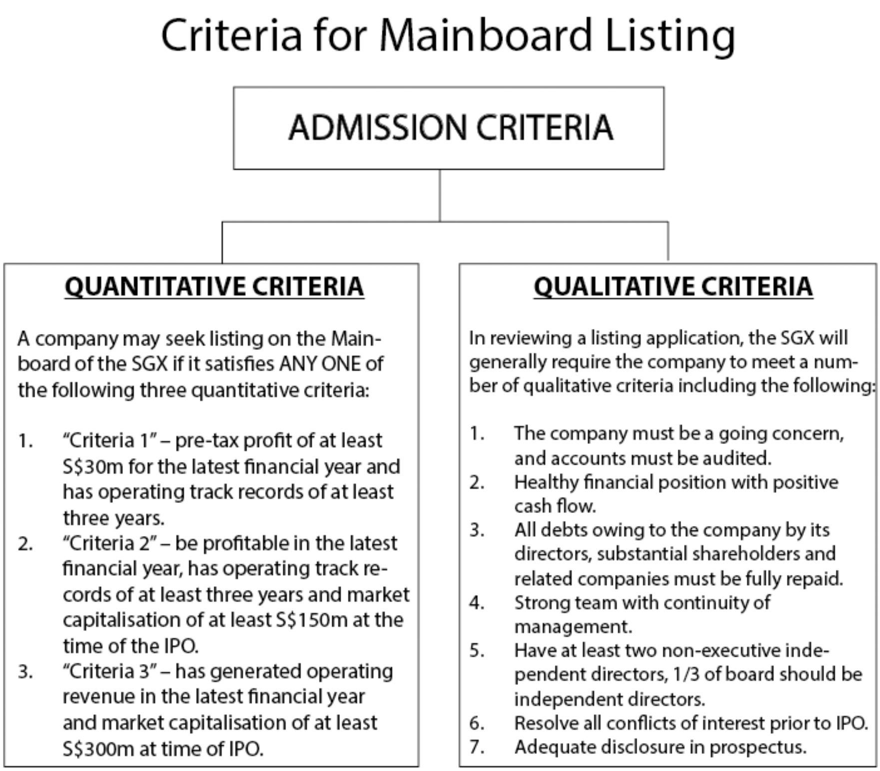
SGX is the primary regulator, whose approval must be obtained before a company can be listed in Singapore. It continues to regulate listed companies after its listing, to ensure that they comply with the continuing listing obligations. Where the company is listed on the Catalist board, the sponsors will assist the SGX in monitoring these Catalist issuers in regard to their compliance with the listing rules. These sponsors are in turn supervised by the SGX.

Listed companies are required to comply with listing rules, which are designed to promote a high standard of disclosure and corporate governance expected of listed companies.

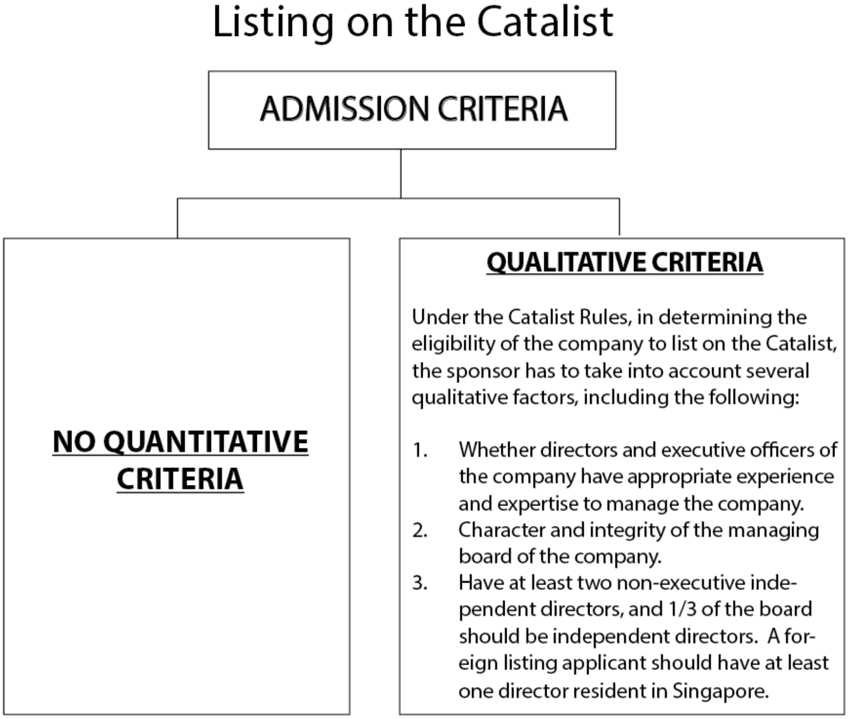
Listing and admission criteria

A company seeking a listing of its shares on the SGX Mainboard and SGX Catalist will need to meet the conditions set out in Rule 210 of the Mainboard Rules of the SGX or Rule 406 of the Catalist Rules of the SGX, respectively.

The listing and admission criteria for a company seeking Mainboard listing is as follows:



The listing and admission criteria for a company seeking Catalist listing is as follows:



Disclosure requirements for a prospectus or offer document

Under the Singapore Securities and Futures Act, a prospectus or offer document serves as an important document which is required to contain true and full disclosure of the company seeking a listing. Some of the important disclosures that are required to be made in the prospectus or offer document include:

- the identity of the company's directors, key executives, professional advisors and agents;
- the offer statistics and timetable;
- key information such as selected financial data, use of proceeds, risk factors and capitalisation and indebtedness;
- information on the company, including the company's history, business overview, group structure and fixed assets;
- the company's financial information, operating and financial review and prospects, such as the company's operating results, liquidity and capital resources, trend information, profit forecasts or estimates;
- research and development;
- information on the company's substantial shareholders, directors, key executives and employees including their interest in shares, background information and management reporting structure;
- interested persons transactions and conflicts of interest;
- litigation matters;
- information on the offer and listing, including the plan of distribution, dilution effect, expenses of the offer; and

- other additional information of the company, such as the company's share capital, relevant provisions of the company's constitutional documents and material contracts.

Public company responsibilities

The SGX is the primary regulator having oversight of the securities market and compliance of the continuing listing obligations by issuers in Singapore. Companies listed in Singapore are required to ensure full, accurate and timely disclosures of material information in order to maintain a fair, orderly and efficient market for the trading of their shares. In addition, listed companies are required to comply with the continuing listing obligations set out in the SGX listing rules, which include the changes in share capital, interested person transactions, acquisitions and realisations by the issuer, takeovers and the issue of circulars and annual reports to shareholders.

Continuing listing obligations

Following the listing on the SGX, the publicly listed company is obliged to comply with the provisions of the SGX listing rules: Mainboard listed companies to comply with Mainboard Rules; and Catalist listed companies must comply with Catalist Rules. Some of the continuing listing obligations of a listed company in Singapore under SGX listing rules are outlined below:

Matters requiring immediate public announcements. A listed company is required to keep its shareholders well informed of any material information relating to the company's business activities in order to avoid the establishment of a false market in its securities. The following is a non-exclusive list of matters which require immediate public announcement:

(a) a joint venture, merger or acquisition;
(b) the declaration or omission of dividends or the determination of earnings;
(c) firm evidence of significant improvement or deterioration in near-term earnings prospects;
(d) a sub-division of shares or stock dividends;
(e) the acquisition or loss of a significant contract;
(f) the purchase or sale of a significant asset;
(g) a significant new product or discovery;
(h) the public or private sale of a significant amount of additional securities;
(i) a change in effective control or a significant change in management;
(j) a call of securities for redemption;
(k) the borrowing of a significant amount of funds;
(l) events of default under financing or sale agreements;
(m) a significant litigation;
(n) a significant change in capital investment plans;
(o) a significant dispute or disputes with sub-contractors, customers or suppliers, or with any parties;
(p) a tender offer for another company's securities; or
(q) a valuation of real assets that has a significant impact on the financial position and/or performance.

Disclosure of other price-sensitive relevant information. All information which is necessary to avoid the establishment of a false market or is likely to materially affect the price of securities must be disclosed immediately. Timely disclosure of price-sensitive information is the foundation of SGX's regulatory policy. To ensure that such information is released to the market on a timely basis, listed companies are obliged to comply with the rules relating to corporate disclosure in the SGX listing rules.

Disclosure of substantial shareholders' shareholding. A listed company must maintain a register of substantial shareholders, which contains the names of the company's substantial shareholders together with details of these shareholders' interest in the shares of the company. A substantial shareholder is a person who has an interest in 5% or more of the voting shares of a company. "Interest" in shares or securities is not restricted to those registered in the name of the shareholder only (i.e. direct interest). It includes beneficial ownership through nominees or a trust as well as control over voting or disposition of a share (i.e. indirect interest).

Disclosure of directors' shareholding. Directors of a listed company are required to notify the company of their direct and indirect interests in its shares and securities and subsequent changes thereafter. The listed company must also maintain a register of directors' shareholdings.

Interested Person Transaction (IPT). The objective of disclosure in relation to IPT is to guard against the risk that such interested persons can influence the listed company to enter into transactions with other interested persons (including directors, senior management, controlling shareholders and their associates) which may adversely affect the listed company. Hence, any transaction entered between the listed company with interested persons will be required to be announced if the transaction value is equal to or more than 3% of the listed company's latest net tangible assets, and to obtain shareholders' approval for that transaction value which exceeds 5% or more.

Periodic reporting. Listed companies are required to announce their financial statements for the relevant financial period within 45 days after the end of that financial period. Their financial statements for the full financial year are required to be announced within 60 days after the end of its financial year end. Listed companies must hold its annual general meeting within four months after the end of the financial year, during which its annual report will be tabled for approval by its shareholders.

Sustainability reporting. In June 2016, SGX introduced sustainability reporting on a "comply or explain" basis where listed companies will have to publish a sustainability report at least once a year covering: the material environmental, social and governance (ESG) factors that affect their business strategies; their policies, practices and performance; their targets; their sustainability reporting framework; and a board statement on the organisation's sustainability actions. The new requirements take effect for the financial year ending 31 December 2017.

Code of Corporate Governance

Listed companies are required to observe the Code of Corporate Governance and disclose in their annual reports corporate governance practices adopted by them. Although the Code of Corporate Governance, which comes under the purview of the MAS and SGX, has no force of law, listed companies are required to explain any deviations from any principles and guidelines.

Potential risks, liabilities and pitfalls

In connection with an IPO, lapses which attract liability under the Securities and Futures Act include making false or misleading statements in the prospectus or offer document, omission of material information required to be included in the prospectus or offer document, as well as new circumstances which have arisen since the lodgement of the prospectus or offer document.

Lapses may also be discovered during the period between the registration of the prospectus or offer document and close of the offer. For instance, if it is confirmed that there are misstatements in the prospectus or offer document which were discovered after the launch of the IPO but prior to the close of the offer, the listing applicant can withdraw the offer and refund application monies to investors.

Due diligence review and disclosure requirements

Due diligence plays an important role in the IPO process from the kick-off through to the submission of the listing application to the SGX, as well as the lodgement and registration of the prospectus or offer document. An effective due diligence process supported by the relevant source documents is essential, especially if the issue manager or any other relevant party wishes to rely on the due diligence defence under the Securities and Futures Act when the need arises. An effective due diligence process would also help issue managers and sponsors to identify issues and concerns that must be addressed, and providing adequate disclosures in the prospectus or offer document.

The IPO process requires that the professional advisers exercise great care and diligence to ensure that the disclosures in the prospectus or offer document in relation to the IPO and the listing group are true, accurate and complete. As such, it is important to put in place an efficient process through which material and relevant information relating to the listing group is made available by the management team to the IPO professionals for disclosure in the prospectus or offer document. This process is a continuing process from the kick-off meeting until the first trading day of the shares of the listed company.

The statutory prescribed information to be disclosed in the prospectus or offer document is found in the Fifth Schedule of the Securities and Futures Regulation. The Association of Banks in Singapore has also issued its latest set of Listings Due Diligence Guidelines in 2016 to provide guidance to issue managers and sponsor in their conduct of the due diligence work in the listing process.

Persons liable for matters arising in the listing exercise

Under the Securities and Futures Act, persons who could be liable for any false or misleading statement in the prospectus include:

(a) the issuer and its directors;
(b) the selling shareholders (if any) and the directors of the selling shareholders (if the selling shareholder is a corporate entity);
(c) the issue manager;
(d) the underwriter or placement agent;
(e) persons considered to be experts for the purposes of the prospectus; and
(f) any other person who intentionally or recklessly makes a false or misleading statement, or omits to state information or circumstance.

Directors of the listed company are subject to collective and individual legal responsibility for the contents of the prospectus or offer document, and they must ensure that all material information of the listing group is fully disclosed and statements therein are true, complete and accurate in all material respects. Directors of the listed company must also ensure that the listing group has adequate internal controls and risk management systems to safeguard the assets and finances of the listed group, as they are responsible for the proper corporate governance and accountability of the listed group.

In addition, the issue manager or sponsor is primarily responsible for ensuring that the listing applicant satisfies all the listing criteria and conditions under the SGX listing rules. The issue manager in a Mainboard listing is in charge of the overall coordination of the IPO process. This role is undertaken by the sponsor in a listing on the Catalist board.

They are involved in the selection of other suitable professional advisers and experts, and a commercial investigator to assist in the IPO exercise.

Liability for issuing a misleading prospectus

If there is any false or misleading statement or non-disclosure of a material fact in a prospectus or offer document, the responsible persons listed in the above will be subject to criminal liability. In addition, these responsible persons are subject to civil liability to pay compensation to all persons who subscribe to or purchase shares in the listed company arising from any loss or damage sustained by reason of the false or misleading statement or non-disclosure.

Under the Securities and Futures Act, the MAS is empowered to stop an offer if, *inter alia*, the prospectus or offer document: (i) contains any false or misleading statement; (ii) has omitted any material information that should be included in a prospectus or offer document; or (iii) does not comply with the Securities and Futures Act in any other way. Although the disclosure-based regime under the Securities and Futures Act places responsibility on issuers and their professional advisers to ensure that prospectuses or offer document contain adequate and accurate information for investors, the MAS has the power to issue a stop order if the same is discovered to be deficient after registration.

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Wee Woon Hong is the Principal Partner of Opal Lawyers LLC and her legal practice has focused on the area of corporate finance work. She has more than 16 years of legal experience handling IPO listing work and listing compliance work for Singapore public listed companies. Over the years, she has handled the legal work acting either in the role of Solicitors to the Invitation or Solicitors to the Issue Manager, Underwriter and Placement Agent for the IPO listing of more than 30 companies that were listed on the SGX-ST. In addition, she also handles both private and public M&A, equity capital market transactions and corporate actions of publicly listed companies.

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South Africa

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Introduction

The Johannesburg Stock Exchange (**JSE**) is the largest and oldest stock exchange in Africa, and the exchange of choice for most companies wishing to go public in Africa. Ranked as the 19th largest stock exchange in the world by market capitalisation, most IPOs in Africa are launched on the JSE.

Founded in 1887 during the first South African gold rush, the JSE provides a market where securities can be traded freely in accordance with a well-developed regulatory framework. Since 1931, and until very recently, the JSE has been the only operating stock exchange in South Africa. The JSE operates two principal markets, the Main Board and the Alternative Exchange (also known as AltX). For the purposes of this chapter, references to listing are to a listing on the Main Board of the JSE. Two new, and currently very small, exchanges were launched in 2017, namely the ZAR X and the 4 Africa Exchange. At the time of publication, both ZAR X and the 4 Africa Exchange have four companies listed on their platforms.

The JSE has kept abreast of international trends, introducing in 2013 Real Estate Investment Trusts (**REITs**) and, later that year, Special Purpose Acquisition Companies (**SPACs**). A significant portion of IPOs on the JSE in recent years have been in the property sector, specifically utilising the REIT structure. SPACs have also gained in popularity since their introduction.

2013 saw four Initial Public Offerings (**IPOs**) on the JSE while in 2014, there were nine IPOs. In 2015, there was a record number of 12 IPOs on the JSE. In 2016 there were seven IPOs, while in 2017 there were five IPOs on the JSE (out of 21 new listings in total). Over the last five years, the overall number of IPOs on the JSE has trended both upwards and downwards. Throughout this period, however, listing on the JSE by way of a private placement was consistently more popular than listing on the JSE by way of an IPO.

Over the last 10 years, the number of foreign companies listed on the JSE has increased by approximately 63% (from 46 to 75 companies). The number of domestic companies listed on the JSE over the same period has decreased by approximately 20% (from 379 to 302 companies). Although, over the last 10 years, the overall number of companies listed on the JSE is trending downwards, it may be argued that the remaining companies are a far stronger and more credible group of companies in which to invest.

There are three main considerations that drive companies to go public in South Africa. These are:

1. where funding is required in South Africa, it may be cheaper to raise equity capital by listing than to rely on traditional forms of funding and/or debt funding. There are deep

and liquid pools of institutional capital in South Africa, which are generally available for investment in JSE-listed companies;
2. the rules that govern the JSE and the entities that are listed on the JSE, whilst not immune to criticism, are generally comprehensive, well-structured and not dissimilar to those that apply on the major international stock exchanges. Through these rules and the JSE's practical and efficient enforcement of same, the JSE has established and maintains a reputation for integrity, good corporate governance and of setting the standards for stock exchanges in Africa; and
3. investors can generally take comfort from the sophisticated regulatory framework within which the JSE operates (referred to above) and this, in turn, lends significant credibility to being a JSE-listed company.

The primary rules that govern an IPO and listing on the JSE are the JSE Listings Requirements (**Listings Requirements**). The Listing Requirements prescribe the criteria that a company must meet for an application for listing to be granted, as well as the obligations which a company must comply with in order to maintain its status as a listed company. The JSE is also a member of the World Federation of Exchanges, which results in a constant overview of the Listings Requirements to ensure that they meet or exceed international standards.

Notwithstanding the above, the JSE has identified that strict compliance with the Listings Requirements may not always be appropriate in a developing economy such as South Africa, and the JSE may, in certain circumstances, list companies that do not fully meet its criteria for listing.

The IPO process: steps, timing and parties and market practice

Provided that the applicant company meets the criteria for listing on the JSE as set out in the Listings Requirements, and depending on the size and complexity of the listing and the competence of the professional advisors, it typically takes nine to 13 weeks (from commencement of the preparation stage, referred to below) to obtain a listing by way of an IPO on the JSE.

In South Africa, there are three key stages in the IPO process, namely: (1) the due diligence and preliminary stage; (2) the preparation stage; and (3) the marketing stage.

1. *Due diligence and preliminary stage*
   (a) Although not a legal requirement, due diligence is a necessary preliminary step that is undertaken as a matter of practice and informs the remainder of the IPO process. The due diligence should identify the strengths and weaknesses of the company and any risks that may need to be addressed and/or disclosed; it will also enable proper consideration of the feasibility of undertaking the proposed IPO. In addition, the information obtained will be used in drafting the investment case for potential shareholders, to be published as a prospectus (which is dealt with in more detail under the heading "Disclosure of information").
   (b) Before commencing the preparation stage, the applicant company would typically hold preliminary meetings to discuss the appointment of advisors and to discuss and consider the legal, financial and tax implications, as well as the method, of listing.
   (c) During this time, the accountants would begin preparing the accountant's report and the corporate and legal advisors would begin preparing the listing documentation (which should include, amongst other things, the timetable, application for listing and prospectus).

2. *Preparation stage*
   During the first to the third week of the preparation stage, drafting meetings should be held to finalise the draft documentation. During this period, the accountants should finalise the accountant's report. In the fourth week, the draft documentation would be submitted to both the JSE (for informal comment by the JSE) and, if it is an IPO, the Companies and Intellectual Property Commission (**CIPC**). In the fifth to eighth week, further submissions of the draft documents would be made to the JSE (including, for formal comment by the JSE) and approval, by both the JSE and CIPC, would be obtained. In the ninth to 12th week, the public offer would open and close and in the 13th week, if it is an IPO, the listing would usually commence.
3. *Marketing stage*
   In parallel with the preparation stage, marketing will be conducted by the corporate advisors and sponsor. Various road shows are undertaken to specific potential investors and, on the day prior to listing, an investor presentation is usually given to investors, analysts and the media.

<u>Parties involved in an IPO</u>

The parties commonly involved in an IPO in South Africa include sponsors (or, on AltX, designated advisors), corporate advisors, legal advisors, accountants, technical advisors (if applicable), transfer secretaries and public relations consultants. Each of these advisers and service providers have specific responsibilities, and play an important role in ensuring the success of the proposed IPO.

1. *Sponsor/designated advisor*
   Sponsors act as the JSE's gatekeepers, advising companies on their obligations in relation to the JSE and channelling all communications between the company and the JSE. The appointment of a sponsor is required by the JSE and the JSE communicates with the company only through its sponsor. Sponsors are registered with the JSE and, before submitting the application for listing, must satisfy themselves that the criteria for listing have been met and that the company is suitable to list (on the relevant market of the JSE).
   In addition to the above, a sponsor's obligations include:
   (a) advising the company as to the application of the Listings Requirements;
   (b) advising the company's directors as to the nature of their responsibilities and obligations as directors of a listed company; and
   (c) submitting all relevant company documentation to the JSE.
2. *Corporate advisor*
   The role of a corporate advisor may at times overlap with that of a sponsor, and corporate advisory firms often have sponsor divisions. However, as a general rule, the corporate advisor's role relates more to the presentation of the company's investment case, as opposed to the sponsor's focus on compliance with the Listings Requirements.
   A corporate advisor's obligations include:
   (a) advising on the method of listing, the marketing, the size and terms of the offer and the timing and pricing of the offer;
   (b) advising on market conditions and the potential demand for the applicant company's securities;
   (c) co-ordinating the IPO process with the sponsor;
   (d) drafting the listing documentation, with the assistance of the applicant company and its legal advisors, accountants and sponsor;

(e) approaching the investment community with a view to generating interest in and demand for the applicant company's securities; and
(f) if it is a public offer, underwriting or arranging for the offer to be underwritten. Although it is not a requirement that a public offer be underwritten, an underwriting provides the applicant company with certainty that the desired amount of capital will be raised. In addition, it will enhance the company's investment case if a credible financial institution is prepared to underwrite the offer.

3. *Legal advisor*

In many other jurisdictions, legal advisors fulfil the role that sponsors perform in South Africa. Whilst legal advisors do not fulfil this role in South Africa, they remain important members of the company's team in preparing for an IPO. Whilst sponsors will be familiar with the Listings Requirements, the legal advisor should ensure that all corporate matters, structures and company documentation submitted to the JSE comply with relevant legislation and regulations. In South Africa this would include the *Companies Act, 2008* (**Companies Act**) and exchange control regulations, in addition to the Listings Requirements.

A legal advisor's obligations include:
(a) drafting any corporate restructuring resolutions and agreements, if applicable;
(b) assisting with the drafting of the listing documentation;
(c) preparing a JSE-compliant memorandum of incorporation (constitutional document) for the company;
(d) preparing a JSE-compliant employee share scheme for the company, if applicable; and
(e) drafting the underwriting agreement, if applicable.

4. *Accountant*

The JSE requires an accredited independent accountant (which would be both a registered accountant and an auditor) to report on, amongst other things, the applicant company's profits and financial position over its previous three financial years. This report should be attached to the company's prospectus.

5. *Technical expert*

In certain instances, the JSE requires the applicant company's prospectus to contain a report by a technical expert in relation to the company's investment case. For example, in the case of a mineral company, a competent person's report is required to be attached to the company's prospectus, setting out information on the applicant company's exploration and/or mining activities.

6. *Transfer secretaries*

The mechanics of allocating shares to specific shareholders on the implementation of an IPO is the responsibility of the transfer secretaries.

The transfer secretaries have the following duties:
(a) establishing the applicant company's register of members; and thereafter
(b) registering ownership in its securities;
(c) registering transfers of ownership in its securities; and
(d) mailing company circulars to its securities holders.

7. *Public relations consultant*

The services of a public relations consultant would not always be utilised, but it is usual in an IPO process to engage a public relations consultant to assist with promoting a positive image for the applicant company.

Regulatory architecture: overview of the regulators and key regulations

The regulatory bodies involved in the IPO process are the JSE and the CIPC. Whilst the JSE is empowered to regulate the listing process itself, there are also certain requirements in terms of the Companies Act, which are dealt with by the CIPC.

1. *The JSE as a regulator*

   The JSE has the power to grant, review, suspend or terminate a listing of securities.

   Any listing by the JSE is granted subject to the applicant company and its directors complying with the Listings Requirements. Notwithstanding that an applicant company may meet all of the criteria for listing in the Listings Requirements, the JSE retains a residual discretion as to whether to grant a listing.

   Regardless of the JSE's ability to exercise this discretion, transparency and accountability by regulators is expected in South Africa. Therefore, the Listings Requirements provide for various appeal procedures in terms of which an applicant can engage with the JSE to gain a better understanding of the reasons for the refusal to grant a listing as well as to challenge the decision.

   The key legal documentation applicable to the IPO process in South Africa is the application documentation. This documentation includes 'Part 1 documents', which must be submitted to the JSE before formal approval will be granted and comprise:

   (a) the formal application for listing;

   (b) an explanation of how the required spread of public shareholders is to be achieved;

   (c) the company's prospectus which must be dated and signed by the directors of the company;

   (d) a certificate from the company's legal advisors stating that the requirements of Chapter 4 of the Regulations to the Companies Act have been complied with;

   (e) the company's memorandum of incorporation (which must be JSE-compliant);

   (f) a copy of the share transactions totally electronic (**STRATE**) eligibility statement;[1] and

   (g) a statement as to whether the company's securities are listed on any exchange outside South Africa and particulars of that listing.

   Documents classified as 'Part 2 documents' must be submitted to the JSE at least 48 hours before the date of listing and include:

   (a) a certificate by the company's sponsors that the information published in the prospectus (in full or abridged form) was materially the same as that contained in the signed prospectus approved by the JSE or, if not, then in what material respects it differed;

   (b) a certified copy of any prospectus to be published in connection with the issue, dated and signed by the directors of the company or by person(s) making the offer;

   (c) where an offer is being made in conjunction with the application for listing, the following information must be submitted:

      (i) a list of shareholders;

      (ii) an analysis of shareholders, distinguishing between public and non-public shareholders;

      (iii) the number of securities allotted and the basis of allotment; and

      (iv) confirmation from the sponsor and applicant issuer that the required spread of public shareholders has been achieved.

   On the day prior to listing, the company will also be required to publish an announcement containing either the full prospectus or an abridged prospectus containing certain information, and to distribute a prospectus containing certain information.

2. *The CIPC as a regulator*

 In terms of section 99 (2) of the Companies Act, there may be no IPO unless that offer is accompanied by a registered prospectus. In the case of an IPO by a foreign company, it must also file a copy of its memorandum of incorporation (constitutional document) and a list of the names and addresses of its directors with the CIPC at least 90 days prior to the offer.

 While there is certainly a large degree of overlap, a JSE-compliant prospectus does not automatically meet the requirements of the Companies Act. A separate exercise must be conducted to ensure that all Companies Act requirements are met. Generally, however, a properly drafted prospectus in terms of the JSE Listings Requirements would meet most of Companies Act requirements.

 Notwithstanding that all content requirements are met, a prospectus in terms of the Companies Act must be registered with the CIPC. The registration process typically takes four to six weeks and comments received from the CIPC would usually be of a more administrative nature (for example, that the applicant company's registration number or share capital is incorrectly stated).

Disclosure of information

A key objective of both the Companies Act and the Listings Requirements is to ensure the protection of the investing public. As a consequence, certain information must be disclosed to potential investors before shares are offered to the public. This information, as well as the company's investment case, is made available to potential investors in the prospectus.

The prospectus is the primary document which enables investors to make an informed decision regarding an investment in the company's securities. The prospectus provides potential investors with key information regarding the applicant and its capital, its directors and management and the securities to be listed. The prospectus provides information on the company's (and its group's) activities and its financial position, including its profits and losses and its working capital. The prospectus also provides general information on the company's material contracts and its compliance with corporate governance.

When disclosing information to potential investors (and by extension, the public) it is important to note that the prospectus should provide potential investors with all relevant information to assess the merits of the offer and to make an informed investment decision. While the Listings Requirements contain specific disclosure requirements in relation to certain types of companies – for example, property and investment companies – the Companies Act generally does not distinguish between types of companies (it does, however, set out certain additional requirements for the prospectus of a mining company).

Market practice and changes in the regulatory architecture

As a result of its status as the sole exchange operating in South Africa for so long, market practice in relation to the JSE is largely settled. To the extent that applicant companies have any queries, they may approach the JSE, through their sponsors, at any time.

However, the advent of new exchanges in the market is likely to have a disruptive effect on market practice in the coming years. Not only are the listings requirements of these new exchanges not well-known in the market, for the moment at least, the new exchanges seem to be targeting a different market segment than the JSE. The stated intention of both ZAR X and the 4 Africa Exchange is to broaden the investor base, and to offer a cheaper, less complicated listing option for smaller to mid-sized companies.

Another substantial change in the approach of both ZAR X and the 4 Africa Exchange is the ability of companies to target very specific group of potential investors, which can be particularly important in relation to South African black economic empowerment ownership requirements. When an investor registers on ZAR X, it would complete a questionnaire about itself which, once its responses are verified, would form the basis on which they may be targeted to invest in certain entities. For example, a company could offer its shares only to women from disadvantaged backgrounds living in rural areas, or to persons who qualify as "Historically Disadvantaged South Africans" in terms of mining legislation. The 4 Africa Exchange seeks to achieve the same goal through slightly different mechanisms.

As both ZAR X and the 4 Africa Exchange have only just become operational, it remains to be seen to what extent these new exchanges will be able to challenge the JSE's supremacy in relation to premier listings.

Public company responsibilities

In South Africa, there is a distinction between a public company (which is a company that is entitled to offer its shares to the public) and a listed company (which is a public company that is listed on a stock exchange). Whilst all listed companies are required to be public companies, a public company would not necessarily be listed on a stock exchange.

There are four primary categories of obligations of a public listed company that a private company would not need to comply with. These are:

1. obligations imposed under the Listings Requirements;
2. corporate governance obligations in terms of the King Report on Corporate Governance, 2016 (**King IV**);
3. obligations imposed on public companies in terms of the Companies Act; and
4. reporting obligations in terms of the *Broad Based Black Economic Empowerment Act*, 2013 (**BEE Act**).

<u>Obligations under the Listing Requirements</u>

The Listings Requirements prescribe:

1. the criteria for listing on the JSE;
2. the continuing obligations that must be complied with to maintain such a listing;
3. the disclosures that must be made in a company's financial statements and through announcements; and
4. ancillary matters such as disciplinary procedures and engagement with the JSE.

Continuing obligations include that:

1. the issuer must ensure that all necessary facilities and information required by the shareholders in order to understand and exercise their rights are available;
2. certain material announcements must be made by the issuer company through the Stock Exchange News Service (known as SENS) and, in some instances, also through external press publications;
3. the JSE must be informed of any changes to the auditors of the issuer or to the composition of its board; and
4. the issuer must disclose information regarding proposed transactions (the nature and extent of disclosure dependent on the relative size of the proposed transaction) and proposed related-party transactions to the JSE and its securities holders.

<u>Corporate governance obligations in terms of King IV</u>

King IV is issued by the King Committee on Corporate Governance and is a guidebook on best practice for corporate governance. King IV is non-legislative and is based on principles and best practices both internationally and locally, and is intended to increase corporate transparency and improve business confidence.

Whilst King IV is not, in itself, legally binding, the Listings Requirements provide that all companies listed on the JSE must comply with the key provisions of King IV and must disclose their compliance with those provisions in their annual reports.

King IV was incorporated into the Listings Requirements with effect from 19 June 2017, and replaces the King Report on Corporate Governance, 2009 (King III). The primary distinction between King III and King IV is the obligation on a listed company to implement King IV, and the potential implications of not implementing same. With effect from 19 June 2017, the Listings Requirements include that a listed company must comply with the key provisions of King IV – therefore non-compliance by a listed company with these provisions may constitute non-compliance with the Listings Requirements. The company could therefore be subject to penalties, review procedures and/or have its status as a listed company reviewed.

<u>Reporting obligations in terms of the BEE Act</u>

The BEE Act came into force on 1 May 2015. In terms of the BEE Act, a public company listed on the JSE must submit a compliance report to the BEE Commission (being the regulator of broad-based black economic empowerment in South Africa) every year detailing its compliance with the following elements:

(a) ownership;
(b) management control;
(c) skills development;
(d) enterprise and supplier development;
(e) socio-economic development; and
(f) any other sector-specific element.

The compliance report is also required to demonstrate how the company's compliance with the abovementioned elements has contributed to its BEE scorecard.

The compliance report must be submitted to the BEE Commission within 90 days of the company's financial year end. Where the company has included the compliance report in its audited annual financial statements and annual report, it may file these documents with the BEE Commission within 30 days of the approval of the audited annual financial statements and annual report. As a listed company's audited annual financial statements and annual report are published, the information regarding its BEE status and initiatives will also become public information.

Potential risks, liabilities and pitfalls

Other than the ordinary investment considerations, there are few potential risks, liabilities and pitfalls that are specific to South Africa, as opposed to listing in other jurisdictions. However, as the listed company could be operating in South Africa, it is important to consider the nature of the operations of the company and how those operations are impacted by being in South Africa. For example:

1. the *Constitution of the Republic of South Africa*, 1996 (**SA Constitution**) allows for claims to be filed by third parties against persons or companies that own land. The South African Government is consequently empowered, under certain conditions and for adequate consideration, to take ownership of land and re-distribute it to third parties. This legal mechanism was introduced to address the historical social injustices that existed in South Africa; and
2. as mentioned above, listed companies are subject to compliance with the BEE Act and additional supporting legislation. This legislation was also introduced to address the historical social injustices that existed in South Africa and aims to empower those historically disadvantaged individuals.

In addition, South Africa has a comprehensive system of exchange controls. Known as financial surveillance regulations, exchange control is regulated by the South African Reserve Bank (**SARB**). The SARB delegates certain lower-level decisions to Authorised Dealers, which are commercial banks in South Africa. While exchange controls are not of themselves an impediment to investment, companies must ensure that they understand the regulations applicable to them, and comply with the (largely administrative) requirements and procedures timeously.

Due to the number of companies that have listed on the JSE and the high-quality regulatory framework that surrounds this application, the processes and documentation required to list a company are understood and relatively simple to comply with. The greatest pitfall for an IPO is not following a proper and comprehensive due diligence process. Where the due diligence process is insufficient, there is a greater risk that the information and documentation prepared to support the IPO application is incorrect, and both the company and the directors may be subject to penalties imposed by the JSE or other legal action.

The greatest legal liabilities associated with being listed on the JSE attaches, in the first instance, to the directors of the company and, in the second instance, to the company itself.

1. When a company is applying for a listing on the JSE, the directors of the company stand behind the correctness of the information (i) that is provided to the JSE, and (ii) that is, together with the company, disclosed to investors during the marketing stage.
2. The effect of the non-disclosure and the extent to which the directors and the company can be held liable, would depend on the nature of the non-disclosure and the damage suffered.
   (a) Should a non-disclosure be discovered by the JSE during the application process, the JSE may elect to either refuse the application in the event of a material non-disclosure or, alternatively, in the event of an immaterial non-disclosure, request clarification and confirmation of the non-disclosure.
   (b) Should the non-disclosure be discovered by the JSE after the company has been listed, the JSE may take a number of remedial actions, including a warning, imposing a penalty, or removal of the company from being listed on the JSE.
   (c) Should the non-disclosure be discovered by a third person after the company has been listed, which is most commonly due to the comparatively extensive information that a public company is required to disclose, the third person would either (i) raise the issue with the company itself, or (ii) approach the JSE with the issue. The consequences would depend on which approach is adopted.
   (d) The extent to which directors of the listed company and/or the company itself can be held liable will depend on the nature of the non-disclosure and the damage suffered by the affected person. Whilst South African law does allow for class actions (i.e. where large groups of persons are party to the same court application), it does not ordinarily allow for punitive damages (i.e. where the value of the order is not proportional to the damage suffered but is instead of a value that is punitive).

* * *

Endnote

1. The electronic settlement system used on the JSE is implemented through STRATE Limited. An applicant company must be approved as STRATE-eligible in terms of the central securities depository rules, for ownership in dematerialised shares to be registered and transferred.

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Alastair combines considerable M&A and Equity Capital Markets expertise. His work highlights over the last five years include advising:

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- HBW Group Proprietary Limited on its restructuring and proposed listing, through a REIT, on the JSE, Sirius Real Estate Limited on its fast track secondary listing on the JSE and Barclays plc on the disposal of a 33% stake in Barclays Africa Group Limited, through the largest book build in South African history.

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Her major clients include Exxaro Resources Limited and World Bank-affiliated International Finance Corporation. She also advises Rio Tinto plc, Neotel Proprietary Limited and the World Platinum Investment Council.
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Amber has general commercial experience, including corporate restructures, broad-based black economic empowerment (**BEE**) focusing on fronting investigations and engagements with the BEE Commission, establishment of a business presence in South Africa, establishment and operation of trusts and gambling regulatory advice and license applications.
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Introduction

There is a wide spectrum of listing alternatives and venues in Sweden for companies looking to commence an initial public offering ("IPO"). The Stockholm stock exchange has a long history that dates back to 1863. Over the years, the Stockholm Fondbörs was merged with several Nordic and Baltic stock markets, creating OMX, which offered partially harmonised legislative frameworks across the member markets. In 2007, Nasdaq Group Inc. acquired OMX and the latter thereafter became known as Nasdaq Group. The largest stock exchange operator in Sweden thereby became Nasdaq Stockholm. There are two equity markets operated by Nasdaq Stockholm:

- The Main Market, or Nasdaq Stockholm, which is intended for companies that can adhere to the highest standard for reporting, transparency and accountability, and follows the standards for a regulated market. Accordingly, its listing requirements are based on applicable EU regulation for this type of market. Nasdaq Stockholm is divided into segments based on factors such as market capitalisation and turnover: Small cap; Mid cap; and Large cap.
- First North, which is a multilateral trading facility ("MTF"), is also under EU legislation but with lighter rules and regulations than those that apply to the Main Market. First North is normally suited to small, young or growth companies and is often seen as a stop towards listing on the Main Market. First North also hosts the First North Premier segment, applicable for companies with higher listing requirements, mainly related to information disclosure and accounting standards, and is similar to the Main Market.

In addition to Nasdaq Stockholm, the second-largest marketplace is Nordic Growth Market Stock Exchange ("NGM"), which has been operating since 2003. NGM has similar rules and regulations for its listed companies as the Nasdaq Stockholm and hosts the regulated market NGM Equity and an MTF called NGM Nordic MTF.

The third market for equities in Sweden is AktieTorget, which is an MTF operated by ATS Finans AB.

<u>Market activity</u>

Like the global IPO market, the Swedish market showed a decline in both the number of deals and the capital raised in 2016. Compared to 2015, there were a total of 55 (68) IPOs on regulated markets and MTFs. Capital raised dropped significantly, to US$2.8bn (US$5.9bn). The decline is to be seen against the backdrop of local and global political and economic uncertainty affecting investors' risk appetite. Despite the lower figures, Sweden asserted its position as the leading market for IPOs in the Nordics. Also, the Swedish listing marketplaces again proved attractive to foreign companies, with eight foreign issuers listing on First North. Another positive trend is that healthcare, technology and industrials remain at the forefront, representing 64% of total IPOs, which is similar to the previous year.

In 2017, global markets saw the highest number of IPOs since 2007. The beginning of the listing year was somewhat slow; showing, however, high activity in the Nordics during the rest of the year. With equity index performance and valuations trending upward, and volatility being low, Swedish investor appetite is returning and provides a solid foundation for high IPO activity. Sweden remains a leader in the Nordic countries, featuring 64 IPOs for the third quarter of 2017 compared to 42 IPOs for the same period in the previous year.

Furthermore, foreign attraction remains strong. Thus, the Swedish marketplaces seem set to continue to dominate the Nordic markets in coming years.

The IPO process: Steps, timing and parties and market practice

Admission requirements

In order for a company to be admitted for listing on a regulated market in Sweden, several requirements must be met. The requirements are intended to make sure that the listing company is well organised, and to fulfil the expectations of the market.

Requirements regarding the shares

For a company with only one share class, the listing must cover all of the existing shares in the company and the shares must be freely transferable. A company with multiple share classes may decide to list only one share class. Further, the company is required to dematerialise its shares (any physical share certificates issued must be terminated before listing) and delegate the keeping of the share ledger to Euroclear Sweden AB, which is a central security depository, also known as a CSD.

Free float requirements and market cap

In order to obtain sound pricing of the shares, the exchange has free float requirements. Nasdaq Stockholm requires that at least 25% of the shares admitted to trading are owned by the public, but may grant exemptions from this. NGM Equity requires that at least 10% of the shares admitted to trading are owned by the public, and that at least 300 of these shareholders own shares for a value of approximately SEK 5,000 or more. It may be noted that shares held by the "public" refers to shares held by any person who directly or indirectly owns less than 10% of the number of votes and is not part of the company's board of directors.

Further, the expected total market value of the shares must be at least €1m.

Requirements regarding reporting and financial history

Nasdaq Stockholm requires a company to present financial statements for at least three years. For companies that lack three years of operating history, exemptions may be available. The basis for exemption may be if the company makes sufficient information available in a different way. Such information must be of such quality that the stock market, as well as the investor, may be able to assess the development of the business and thus be able to make a well-founded assessment of the company and the financial instruments as an investment.

In addition, Nasdaq Stockholm requires the financial statements to demonstrate that the company has sufficient capacity to generate profits and, when applicable, this requirement must also be met at a group level. As a general rule, such information must be available for at least the past financial year. In cases where this information is not documented in the financial statements, the company may instead demonstrate that it has sufficient financial resources to be able to operate as scheduled for at least one year following the first day of trading.

Similarly to Nasdaq Stockholm, NGM Equity requires the company to demonstrate that it has sufficient capacity to generate profits and if it lacks such capacity, the company must instead demonstrate that it has adequate financial resources to proceed with its scheduled operations for at least one year following the first day of trading.

Suitable board and management

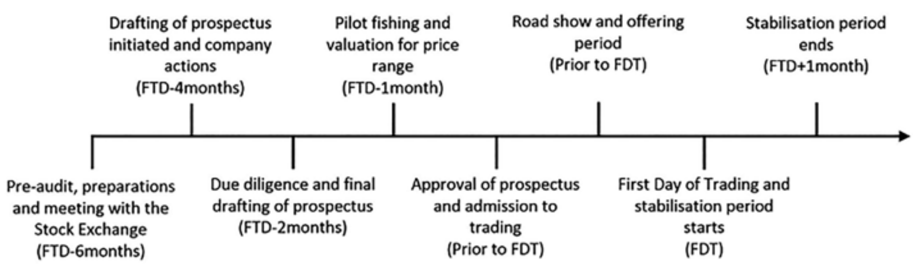
The board jointly is required to have sufficient experience and skills to govern the company and to comply with the listing requirements. Each individual director of the board must be familiar with the company's operations and should have knowledge about the company and its organisation.

A director would not be eligible if his or her background would risk harm to the trust of the company and the stock market. This could be the case if the director has a criminal record, in particular with respect to financial crimes, or has been convicted for tax evasion.

Suitable organisation for information disclosure and internal control

In addition to the requirements above, the company is required to prepare certain routines and systems regarding disclosure of inside information. The company is also required to adopt corporate governance structures and policies which, for example, may specify the company's investor relations person, what type of information shall be disclosed, how and when information shall be disclosed, and routines for information disclosure in case of a crisis.

<u>IPO timeline</u>



The timetable for an IPO in Sweden may vary depending on numerous factors, such as the listing venue, the offering structure and the complexity of the company's business. The IPO is often combined with an offering of newly issued shares, and the timetable below is based on that. The IPO process described below covers a listing on Nasdaq Stockholm, which could be expected to be completed within six months. Moreover, Nasdaq Stockholm has a fast-track process intended for well-prepared companies that already have the admission requirements fulfilled. In such fast-track process, the timeline may be shortened to five weeks in total.

Pre-audit and preparations

The IPO process typically starts six months before the intended first day of trading, with the appointment of legal and financial advisers. They will assist the company in the general work relating to the IPO process, such as outlining the terms of the offering, organisation restructuring, and drafting initial legal documents. The company may also appoint an auditor to review the reporting, corporate governance and general market compliance in order to commence a pre-audit – the main purpose being to identify needs for conversion of financial reporting, composition of the board of directors, and the capacity to meet market standards for information disclosure and internal control. The conversion of the company's financial history is commenced, if needed. It is not unusual for companies to also appoint PR advisers to prepare investors and the public for the upcoming offering.

The next step is often that a meeting is held with the stock exchange and the exchange appoints an auditor of its choice to review the company (the "Stock Exchange Auditor"), the financial reporting and its general suitability for an IPO. In the event of an IPO at an MTF, an auditor is not appointed by the stock exchange. Instead a Mentor, or Certified Adviser, is contracted by the company.

Company actions

When approximately four months remain until completion, changes to the board of directors, if any, in relation to the listing, are made. A presentation of each director of the board, including information about their competence, experience and other relevant background information, is required in the prospectus.

In relation to reporting, the company should adopt adequate corporate governance structures and policies prior to listing. This may be done approximately three months before completion and is required when listing on a regulated market.

Due diligence

Prior to a listing on Nasdaq Stockholm or NGM Equity, the company is required to undergo a due diligence, which may take place two months before completion. The due diligence exercise is typically carried out by the legal advisers to the company, with the purpose of ensuring that the company is qualified for listing. When the due diligence is completed, the report is handed over to the Stock Exchange Auditor and is part of the Stock Exchange Auditor's assessment of the company.

Drafting of prospectus

Since the work regarding the prospectus is comprehensive, the drafting of the document may be commenced as early as four months before completion. The drafting typically involves legal and financial advisers as well as the company's auditors. The prospectus is required to be approved by the Swedish Financial Supervisory Authority (the "SFSA") no later than the day before the offering period starts. The SFSA requires 20 business days to review the prospectus, and may extend the review time if the initial filing is deemed to be incomplete.

Pricing, offering period and allocation

In the early stages of the IPO process, the financial advisers often provide an indicative valuation of the company, which has been derived using conventional valuation models, as discounted cash flow valuation and peer-based valuation (e.g. benchmarking performance or enterprise valuation multiples in relation to similar companies). Later in the process, before the offering period starts, a price range is resolved upon (or, alternatively, a fixed price). The price range (or the fixed price) is typically set based on the initial valuation and subsequent pilot fishing/pre-soundings made by financial advisers.

The offering period, which normally is open for two to three weeks, may not commence until the prospectus has been approved by the SFSA. When the offering period has started, the marketing of the offering reaches its most active phase. The company, together with the financial advisers, book meetings and presentations with investors. This activity is often referred to as the "road show".

In the event the offering has been made with a price range, the final price of the new shares is determined and announced upon the lapse of the offering period. Further, at this time, the board of directors resolves on allocation of shares to the investors.

Approval of listing

The company is required to submit a formal application for listing, which needs to be approved by the exchange's Listing Committee before the first day of trading. The Listing Committee meets monthly and requires the application five business days before its meeting. The Listing Committee may approve the application, conditioned upon the company submitting the approved prospectus, and a statement to the effect that the company meets the free float requirements (which normally cannot be issued before the new shares have been allocated to the participants in the offering), no later than the day before the first day of trading.

Completion day

On completion day, the first trades in the share are made on the exchange. The settlement date often occurs two business days after completion and the buyers legally become the owner of the shares. Meanwhile, shares may be delivered by constructing share loans, meaning that shares are borrowed from existing majority owners in order to facilitate the investors' possibility of trading already from the completion day. Further, if stabilisation arrangements by the underwriters are in place, the stabilisation period begins. The stabilisation period normally ends one month after completion.

<u>Parties commonly involved and their respective roles and responsibilities</u>

In addition to the issuer itself and the market place, there are often a number of other parties involved in an IPO, as set out in the following.

Investment banks may engage in an IPO process as bookrunners, underwriters or co-ordinators and general financial advisers. The book of demand for the offered shares is maintained by an investment bank and may involve several investment banks, depending on the magnitude of the IPO. Investment banks may underwrite the offering, but more often the shares are placed on a best effort basis. General co-ordination of the offering is maintained by investment banks, and these may also advise the issuer on general financial matters related to the offering.

The role of the lawyers is to advise the issuer as well as any underwriter and financial adviser. The issuer's lawyers' main responsibilities consist of legal due diligence, preparing and verifying the prospectus, preparing required corporate documentation, and negotiating the underwriting or placing agreement. Lawyers working for the underwriters primarily focus on advising on matters regarding the legal due diligence, negotiating the underwriting or placing agreement, and assisting in verifying the prospectus.

The company may also appoint an external auditor to review the reporting, corporate governance and general market compliance in order to commence a pre-audit – the main purpose being to identify needs for conversion of financial reporting, composition of the board of directors and the capacity to meet the market standards for information disclosure and internal control. The conversion of the company's financials may also be required, as well as establishing a scheme for complex financial history.

The company's auditors are often consulted in the work with the prospectus. PR consultants may also have a part in the process when it comes to advising on communicating with media and prospective shareholders. This may particularly have an impact when dealing with companies within politically sensitive industries.

When listing on First North, a Certified Adviser must also be appointed and approved by Nasdaq Stockholm. This adviser's role is to guide the company during and after the IPO process. Companies listed on Nordic MTF are required to have a Mentor approved by NGM. The Mentor has a similar role as the Certified Adviser.

Regulatory architecture: overview of the regulators and key regulations

Regulatory body

Sweden's competent authority, for the purpose of ensuring that Directive 2004/39/EC on the markets in financial instruments ("MiFID") is being complied with, is the SFSA. The SFSA's key role is to supervise exchanges and monitor companies operating on the Swedish financial markets. In addition, the SFSA issues regulations and guidelines relating to the financial markets and the stakeholders operating on them.

The Swedish Companies Registration Office is the competent authority regarding registration of company and share-specific information, such as company name, type and identification number, elected board of directors, elected auditor, share capital and authorised signatories.

The stock exchanges issue their own set of rules and listing requirements. In addition to rules issued by the stock exchanges, the Swedish Corporate Governance Board has issued a code for corporate governance applicable for companies listed on a regulated market, i.e. Nasdaq Stockholm or NGM Equity, the Swedish Corporate Governance Code (the "Code").

The Swedish Securities Council ("SSC") issues guidelines with respect to good practices on the Swedish stock market. The SSC also evaluates listed companies with respect to such good practices and may issue statements on its own or after a petition. To contribute to the development of good practices on the stock market, the SSC releases its statements publicly, unless a specific case must be kept confidential for certain reasons.

Key regulations

As a member of the European Union, Sweden is obliged to implement and comply with relevant directives and regulations. The following EU acts are of relevance for an IPO: Directive 2003/71/EC ("Prospectus Directive"), as amended by Directive 2010/73/EC, on prospectuses to be published when securities are for sale to the public or admitted to trading; Commission Regulation (EC) No 809/2004 ("Prospectus Regulation") implementing the Prospectus Directive, as amended by Regulation (EU) No 862/2012, on establishment of prospectuses and dissemination of advertisements; and Regulation (EU) No 596/2014 on market abuse ("MAR"), as amended by Regulation (EU) 2016/522 and 2016/957, on information disclosure duties and restrictions on trading.

The aforementioned regulations have been implemented in Sweden through the Securities Market Act (2007:528) as well as the Financial Instruments Trading Act (1991:980). Furthermore, equity offerings must comply with the Swedish Companies Act (2005:551), SFSA Regulations (2007:17) governing operations on trading venues (Chapter 10) and the relevant stock exchanges' rules; for example, the Rulebook for Issuers published by Nasdaq Stockholm, or the Rules for NGM Equity.

The Code sets out self-regulating rules for corporate governance, with the principle of comply or explain. Thus, companies are not obliged to follow the rules set out in the Code, but must explain any deviation made from the rules in order to either be encouraged to adopt the rules, or justify such deviation transparently to the market. The Code regulates the board's tasks, board procedures and the size and composition of the board of directors. As an example, the Code sets out rules for the composition of the board of directors, with respect to, *inter alia*, independence in relation to shareholders and management.

Prospectus requirements

The rules set out in the Financial Instruments Trading Act and the Prospectus Regulation oblige companies to prepare a prospectus when shares are to be admitted for trading on a regulated market, i.e. Nasdaq Stockholm or NGM Equity. A prospectus must also be prepared if shares are offered to the general public or to a group of 150 investors or more, which could be the case when a share offering is carried out in connection with an IPO. Approval of a prospectus will be granted by the SFSA if the prospectus is complete, internally consistent and comprehensible.

In addition, there are special requirements set out in the Prospectus Regulation for dissemination of advertisements pertaining to prospectuses and which must be considered by the company.

The SFSA shall within 20 days after an application of the prospectus issue a decision on approval. However, if the application is incomplete, the turnaround time may be extended.

Once approved, the prospectus must be made available to the public by the issuer or offeror as soon as practicable and in any case, at a reasonable time in advance of, or at the latest at the beginning of, the day of the offer to the public or the admission for trading of the securities involved. The prospectus must be published not later than six business days before the end of the offer.

The SFSA makes the approved prospectus available on its website, in a searchable and public register. Publication of the prospectus is typically also made by the participating investment banks and other advisers, on an optional basis.

Purpose of a prospectus

The overriding obligation of disclosure of a prospectus is to provide all information concerning the company and the transferable securities in question that is necessary to enable investors to make informed assessments of assets and liabilities, financial position, results, prospects and the instruments that are listed.

Furthermore, the prospectus must also contain a business and market description, and information about risk factors, organisational structure, intellectual property rights, the board, employees, shareholder structure, financial position and earnings as well as financial history.

The information provided in the prospectus must be written in such a way that it is easy to analyse and understand for investors.

Requirements for financial information

The financial information included in a prospectus must be prepared in accordance with the IFRS/IAS, or Swedish GAAP if applicable, and include consolidated accounts. When commencing an IPO on a regulated market, the company must disclose audited financial information for the past three financial years together with auditors' reports for the same period. Interim financial statements, which have been published by the company after the last audited financial reports, must also be included. In the case of a company that has not been in business for more than three years, the financial history shall instead include the period starting from the company's founding. Also, if a company has been in business for less than a year, audited financial information for the period that a company has been active must be submitted.

Regarding the audited financial information for the past two years, the information shall be prepared and presented in a manner that is accurate in accordance with the last published annual report and with regard to accounting standards, policies and applicable legislation. This is particularly important if a company has altered its accounting standards, or plans to replace the standard for the next annual report. Furthermore, companies with complex financial history, for example due to significant acquisitions, or which have recently formed a holding company, have special requirements for preparation of historical financial information. In addition, the Prospectus Regulation enforces requirements that a prospectus must include certain financial information for cases involving a significant gross change (i.e. 25% of one or more indicators of the size of the company's operations as a result of a particular transaction) in a company, or if there are any pending legal processes which might affect the company. *Pro forma* calculations are often compiled in such cases, and may require an audit of the compilation.

A prospectus should be prepared in Swedish, although there is room for exemptions, as could be the case when a company is both incorporated and has its shares primarily listed in a regulated market outside the EEA. In those circumstances, the SFSA has the authority to require that only the summary of the prospectus shall be translated into Swedish.

Impact of proposed and implemented changes to the Swedish regulatory architecture

MAR, as presented above, aims to safeguard the integrity of the financial markets and improve investors' protection on, and trust in, the markets. The regulation sets forth rules for persons and entities trading in, or issuing financial instruments on, a regulated market or MTF. With the recent amendment of Commission Delegated Regulation (EU) 2016/956, the Swedish stock exchanges and their operators have been focusing on interpreting and implementing MAR. The amending regulation further refines the definitions presented in MAR, with more extensive explanations of the types of prohibited transactions, including transactions in emission allowances, how to assess the prohibition to withdraw or change an order already made, as well as clarifying the reduction of the period within which insider trading is to be reported. In addition, the amending regulation further clarifies the definition of the "closed period", which is the prohibition on trading during the 30 calendar days prior to the publication of an interim financial report. MAR is still to be evaluated by the operators covered by the regulation. With the lack of standards and guidelines pertaining to MAR, listed companies and companies commencing an IPO should tread lightly when interpreting the regulation.

On 14 March 2017, the European Parliament voted on the proposed shareholders' rights directive, and the final adoption step will shortly take place in the European Council. The directive will thereafter enter into force two years after its publication in the official journal. In brief, the proposed directive intends to grant stronger shareholders' rights by the facilitation of cross-border voting, long-term engagement of institutional investors and asset managers, more transparency regarding proxy advisers, new rules on related party transactions, and increased transparency and accountability of directors' remuneration (the so-called "say on pay rule"). The impact of the final implementation will be limited for the Swedish market, due to the self-regulation having addressed the majority of these issues already.

Public company responsibilities

Financial reporting

A listed company has a duty to disclose interim financial reports, including, *inter alia*, income statements, balance sheets and cash flow statements. Regarding companies listed on an MTF, the requirement is to publish half-yearly financial reports. Companies listed on a regulated market must publish quarterly financial reports, whereof the second and fourth quarterly reports shall follow the standards of IAS 34. All listed companies have a duty to publish year-end reports.

In addition to the financial reporting, other documents are disclosed by the company on its website. These include the articles of association, notices to general meetings, various minutes, presentation of the board of directors, auditors and management, and all press releases published by the company.

Public disclosures

Listed companies are required to continuously disclose certain kinds of information to the market. In general, information of a precise nature, which has not been made public and would likely have a significant effect on the price of the financial instruments, is covered by that requirement, and known as inside information. For example, decisions made by or facts about the company may be regarded as insider information. However, an overall judgement must be made in order to evaluate whether or not certain information is regarded as insider information. Therefore, it is not possible to construct a general rule to ascertain if certain information is deemed to be inside information; rather, it must be evaluated on a case-by-case basis with the principle of the rational investor test. In the case of uncertainty, the company may further be guided by the principle that all participants on the market should have the same access to all insider information about the company and its transferable securities.

Insider information must be disclosed to the market by a press release as soon as possible and prior to a press release; the issuer must also ensure that the information is kept confidential.

Insider list

In accordance with MAR, a listed company is required to keep a list of all employees and advisers that have access to insider information, in other words inside information, regarding the company. The list is known as an insider list and it must be provided to the SFSA upon request. Persons with inside information are not allowed to trade in the company's securities, or to unlawfully disclose the inside information. The crimes are punishable by prison sentences under Swedish law.

Transaction reporting and closed period

In contrast to the above, certain individuals are, under some circumstances, required to notify the SFSA of transactions made with the transferable securities of the company. Persons with managerial responsibilities, such as directors of the board and the CEO, must notify the SFSA of transactions they themselves make within three business days of the transaction. The same obligation applies to closely associated persons. For the reporting duty to apply, a transaction amount threshold of €5,000 needs to be exceeded within a 12-month period.

Persons with managerial responsibilities are also not permitted to trade in the securities of the company within a closed period of 30 calendar days before the announcement of an interim financial report.

In addition, an individual shareholder who possesses shares in a company on a regulated market must notify the SFSA and the company if its holding exceeds or falls below 5%, 10%, 15%, 20%, 25%, 30%, 50%, 66.67% and 90% of all votes or shares in the company.

Swedish Code of Corporate Governance

For companies with shares listed on a regulated market, the Code, as described under "*Regulatory architecture…*", applies. In general, the Code has a significant impact on the flexibility and ability to elect directors of the board, in contrast to election within private companies.

Exemptions from the duty to disclose information

The SFSA can determine that some information is not relevant to the company's line of business, legal form or to those transferable securities to which the prospectus relates. The SFSA may grant exemptions from the duty of certain disclosures and allow companies to omit information that is otherwise required under the Prospectus Regulation. Such exemptions from the duty of disclosure may be approved by the SFSA when publication of the information would be seriously detrimental to the company and the omission of the information would not mislead the public, or the information is of minor importance and would not influence the assessment of the financial position and prospects of the company, offeror or any guarantor.

Exemptions from the duty to disclose information should be interpreted strictly and only be used when deemed necessary.

Potential risks, liabilities and pitfalls

An IPO is a milestone for a company, its board of directors and its management. It may be a foreign concept for company representatives and employees to account for public disclosures and restrictions on trading and, particularly, restrictions on leaking insider information to relatives and partners. To safeguard the functions of the financial markets, it is of great importance to adapt to the public environment and provide a policy for transparent, accessible and timely disclosure routines. This mindset must be clear and in place when the IPO process begins, or it may put the company reputation and its shareholders' value at risk. Well-established routines and policies, together with customised education for the board of directors, management and other employees, will considerably mitigate this risk. In many cases, reorganisation and staffing may be necessary to facilitate trust in the company representatives and management among the potential shareholders.

The rules for listed companies, much related to shareholders' protection and safeguarding of the financial markets, may be perceived to be complex and onerous to navigate. This could create a compliance risk and further limit the company's scope of action, in the long run putting pressure on the company value. For this purpose, the company should engage an adequate set of legal and financial advisers, to contribute their expertise on capital market-specific issues.

The prospectus and offering constitutes a legal document, with liability attached to information disclosures and valuation parameters. Even though the responsibility of preparing a prospectus usually rests with the company, it is normally prepared by the company's legal adviser and the engaged investment bank(s). The board of directors is responsible for the contents of the prospectus and must give assurances that it has taken all reasonable care to ensure that the provided information in a prospectus is, to the best of the board's knowledge, in accordance with the facts and contains no omission likely to affect a prospectus.

Under Swedish law, only directors of the board have statutory liabilities for flaws and omissions in a prospectus. Nevertheless, this does not exclude liability for other stakeholders. Persons acting for the company as a seller of shares in the offering could potentially risk being held liable in their capacity as a seller because of contractual relations between the buyer and the seller. Liability could also be possible under general tort rules on damages in non-contractual relations, where the damages have been caused by a criminal offence, such as fraud or undue market manipulation.

In relation to the company, there are no explicit rules for liability to pay damages to shareholders if the claim is related to the subscription or acquisition of securities issued by the company. Because of the divided stance in legal doctrine as well as the fact that shareholder litigation is unusual, resulting in very scarce case law on the matter, it is uncertain whether a company could be held liable to pay damages to its shareholders if the claim is related to a prospectus.

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Switzerland

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Introduction

Switzerland is a competitive, innovative and thriving environment for companies looking to go public. While there are other options for an IPO in Switzerland, the SIX Swiss Exchange is the largest Swiss stock exchange and the place where most of the Swiss listed companies are listed. It was founded in 1995 through a merger of Switzerland's three stock exchanges in Basle, Geneva and Zurich. In the following years, numerous IPOs were conducted, with a record-setting feat of 28 IPOs in the year 2000. Even though these numbers have lowered, Switzerland remains an attractive place for companies to accomplish an IPO and the average number of companies going public has been stable over the last few years. In the first half of 2018, the number of IPOs has significantly picked up again, reflecting both the increased economic growth as well as the attractiveness of Switzerland as a place to go public and being listed.

As to *why* a company would choose Switzerland to go public, three main reasons can be mentioned:

First, Switzerland has a strong and international economy, which regularly ranks amongst the most competitive economies in the world. Key attributes are its solid reputation as an international capital market with global networking power and the strong expertise of Swiss financial service providers. Switzerland is, and for the foreseeable future will remain, the largest cross-border private banking market in the world, ensuring that issuers have access to a sophisticated investor base.

Second, the national securities exchange legislation is company- and investor-friendly. SIX Swiss Exchange is empowered with self-regulatory authority and therefore has optimal flexibility to combine a high level of investor protection with regulatory conditions that are attractive from a listed company's point of view.

Third, the SIX Swiss Exchange is currently the largest stock exchange group in Europe and amongst the largest by free float market capitalisation of its listed companies. This combination of a thriving financial centre and a powerful stock exchange makes Switzerland an attractive location for companies looking to go public.

Adding to the aforementioned, the current regulatory scheme and the market practices in Switzerland are conducive to going public, because regulations in Switzerland are "lighter" compared to other jurisdictions, in particular regarding prospectus requirements, the prospectus review by the authorities and also regarding the maintenance criteria for listed companies. While the scope of the listing prospectus is comparable to the requirements of the European Union, obtaining an approval for an IPO is less difficult in Switzerland than it is in the European Union (or the United States); approval is given by the SIX Swiss

Exchange based on its regulatory competences (see below) and not by a federal authority. Furthermore, the SIX Swiss Exchange is well versed and rather uncomplicated in dealing with newly listed companies.

Regarding particular types of industries that choose to go public in Switzerland, there has been an observable tendency towards real estate companies lately, probably due to the fact that the Swiss real estate market is booming at the moment. Also, Switzerland has seen a growing number of biotech and medtech companies going public at the SIX Swiss Exchange.

The IPO process: steps, timing and parties and market practice

(i) Typically, it takes about four to six months to go public in Switzerland, subject to the condition that the company preparing the IPO complies with certain structural requirements for a publicly listed company. Usually there is a rise in IPOs in the second and fourth quarter of the year, since the issuer is required to include the latest financial figures in the prospectus. As to the steps for the IPO, there are two main phases in the process of going public: (i) the preparation phase; and (ii) the marketing phase.

In the *preparation phase*, a "readiness check" is carried out by an investment bank, which looks at a range of factors which play a decisive role in an IPO such as the business, the prospects, the corporate structure, the corporate governance including the composition of the corporate bodies. After the readiness check, expert advisors in various fields (investment banking, legal, tax, auditing, communications) are selected, which will assist the company through the process of going public. The selection process is followed by a formal kick-off meeting where the company and all advisors meet. At said meeting, the timetable is set and the role of each party (incl. legal counsels, auditors, banks, etc.) is clarified (for the parties, see below). Key issues and next steps are identified. After the kick-off meeting, the due diligence process begins. The process is divided into a business, financial and legal due diligence and ensures that all material information about the company is appropriately disclosed in the prospectus as a basis for the investment decisions. The timeframe for the due diligence depends on the company that is being examined and the complexity of its business, but a good benchmark would be about 12 weeks. Research and publicity guidelines are agreed upon, which ensure that any communication made by the company as well as any research reports published by the syndicate banks are prepared and distributed in accordance with applicable (Swiss and foreign) securities laws. In Switzerland, any communication by the prospective issuer or its affiliates in connection with the offering is considered a prospectus-like document which could potentially trigger prospectus liability.

The due diligence results are then reflected in the offering prospectus, which must include all facts, opportunities and risks that are relevant to an investor's decision as to whether or not to invest in the company's shares. The prospectus also serves as a protection for the company's management and the syndicate banks from potential investor claims. The prospectus requirements follow the SIX Swiss Exchange listing requirements, the Swiss Code of Obligations (CO), international market practice and the targeted investor base. SIX Exchange Regulation will review the application to go public, including the prospectus and other documents to be submitted. After the submission of all necessary documents, the Regulatory Board takes about four weeks to decide on the listing of the company. Following the approval by the Regulatory Board, the marketing phase can begin.

It is important to differentiate between the terms "issue prospectus", "listing prospectus" and "prospectus liability". While the *issue prospectus* is required by statutory law in case new shares are issued by the company (*i.e.* in case of any primary offering), the *listing prospectus* is a requirement of the SIX Swiss Exchange, which companies need to comply with in order to get listed. The *prospectus liability* could kick in when an issue prospectus is published and goes even further: according to Article 752 CO, anyone involved in disseminating a prospectus or a prospectus-like document containing incorrect, incomplete or misleading information in connection with an IPO is liable to the investors for any damage that has been negligently or wilfully caused. Legal doctrine extends the prospectus liability also to the listing prospectus.

The underwriting agreement with the lead manager and the other banks in the syndicate is negotiated in the preparation phase, and the investment case is finalised. As a last step in the preparation phase, the investment case is presented to the syndicate banks' analysts, who will then draw up their research reports and evaluate the given information.

(ii) In the marketing phase, the company and the syndicate banks conduct a "premarketing" roadshow. The goal is to raise awareness about the IPO and to discuss the investment case with a selected group of potential investors, commonly also known as "pilot fishing". The feedback received serves to set the price range for the shares for purposes of the bookbuilding process.

Following the official announcement of the IPO, the management goes on a "roadshow" for about two weeks to present the company to potential investors. The management of the company meets one-on-one with key investors and holds group presentations for others to present the investment opportunity. Simultaneously, the syndicated banks start with the bookbuilding process. During the bookbuilding, institutional investors can submit price offers which are collected in the order book of the syndicate banks. Following the end of the offer period, the order book is closed and the syndicated banks, together with the company, determine the issue price for the shares taking into account the offers received during the bookbuilding and the future investor base of the issuer.

In parallel, the underwriting agreement is signed. The shares are allocated to the investors recorded in the order book according to the Swiss Bankers Association's Allocation Directives and other criteria such as shareholders' structure, investor quality, etc. The goal is to ensure a strong aftermarket performance while pricing the IPO in the upper half of the price range set before. To ensure the stability of the market price following the IPO, the syndicated banks usually have a "greenshoe" or over-allotment option in the amount of 10–15% of the planned issue volume to cover over-allotments. The capital increase (in case of any primary offering) is usually effected one business day prior to the first trading day.

A number of professional partners advise the company going public. First, there is a lead manager which will be the key contact for the company in connection with the IPO. It selects and heads the consortium of banks and coordinates the whole process of going public. In the end, it allocates the shares to the investors and the other syndicated banks.

The lawyers are responsible for the legal due diligence, the drafting of the prospectus and the drafting of the necessary legal framework for the company (articles, insider and disclosure policies, capital increase documentation, etc.). The legal due diligence covers contracts, intangible assets, litigation, etc. The goal is to establish and document legal risks. The prospectus is prepared by the lawyers of the issuer in cooperation with and the issuer itself and the other advisors (in particular the investment banks, their lawyers and the auditors). The entire communication of the company and other parties involved in the transaction is subjected to a preliminary legal analysis as such communication could be seen as a prospectus-like document potentially triggering prospectus liability.

The prospectus includes audited financial statements for the past three years. Accordingly, the auditors' involvement in the IPO process is key. The auditors also help to prepare any interim financial statements (if required) and provide the bank syndicate with a comfort letter as part of the due diligence. The auditors must fulfil the requirements of the Federal Act on the Licensing and Oversight of Auditors, i.e. they are subject to governmental supervision.

IR/PR agencies familiar with financial marketing can be a useful support for companies looking to go public. Such an agency is responsible for the preparation of the communication in connection with the capital market. The main areas of work are the organisation of analyst and media conferences, communication with investors and shareholders and to increase the visibility of the company in the market.

Lastly, the stock exchange of choice – in Switzerland, the SIX Swiss Exchange – is also an important partner in the process of going public.

Regulatory architecture: overview of the regulators and key regulations

It is important to note that stock exchanges in Switzerland need to establish their own appropriate regulatory and supervisory organisation. This organisation, which issues the stock exchange's rules and regulations and is in charge of the supervision of the stock exchange, is in turn supervised by the Financial Market Supervisory Authority FINMA which is Switzerland's regulatory authority for the financial markets. In case of the SIX Swiss Exchange, the self-regulation unit is called SIX Exchange Regulation, which is responsible for implementing and enforcing rules and regulations. It is separated from the operating business of the SIX Swiss Exchange and reports directly to the Chairman of the Board of Directors of the SIX.

In order to go public on the SIX Swiss Exchange, a company must comply with certain requirements which include, among others, the following:

(i) incorporation in accordance with the law of the domicile of the issuer;
(ii) a track record of at least three years;
(iii) annual financial statements prepared in accordance with recognised reporting standards for at least three years (including audit reports);
(iv) auditors subject to governmental supervision; and
(v) equity capital of at least CHF 2.5 million.

Furthermore, if a company intends to list its equity securities, there must be a free float of 20% following the IPO. The market capitalisation of the free float must amount to at least CHF 25 million. There are certain other requirements, including requirements as to clearing and settlement or a paying agent.

As for documentation, a company wishing to perform a primary listing of equity securities must submit to the SIX Swiss Exchange: (i) a listing application; (ii) a listing prospectus (including audited annual financial statements for the last three years and interim financial statements, if required); (iii) an issuer declaration and declaration of approval, according to Article 45 of the SIX Swiss Exchange's listing rules; (iv) a declaration of the lead manager regarding distribution (free float) of the securities; (v) an extract from the commercial register of the company; (vi) articles of incorporation of the company; and (vii) a declaration that the printing regulations of the SIX SIS Ltd. have been complied with (and if applicable), or a copy of the global certificate (or sufficient evidence as to the creation of book entry securities).

With respect to the disclosure for prospective investors in an IPO, the SIX Swiss Exchange sets out the following prospectus requirements:

Generally, the listing prospectus has to contain sufficient information for competent investors to reach an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the company, as well as of the rights attached to the securities (Article 27 para. 1 of the SIX Swiss Exchange's listing rules). According to Article 27 para. 2 of the SIX Swiss Exchange's listing rules, specific mention must be made of any special risks. In practice, this means the following:

(i) The listing prospectus shall include risk factors, *i.e.* factors that are of key importance in assessing the market risk attached to the company, its sector and the securities that are being offered and/or to be admitted to trading. The risk factors need to be presented in a prominent place under a specific heading.
(ii) Information about the company. This section contains a comprehensive overview which includes general information about the company (name, location, legal form, etc.), information on administrative, management and audit bodies (composition, auditors, employee participation schemes, key aspects of corporate governance, etc.), information on business activities (principal activities, net turnover, patents and licences, etc.), information about investments, information about capital and voting rights, information policy, financial statements and dividends and financial results.
(iii) Information on the securities. This section encompasses all aspects of the securities which are offered, such as the nature of the issue (primary and/or secondary offering, fixed underwriting or best efforts placement), the legal basis, the number, type and par value of the securities, rights, restrictions on transferability and tradability, net proceeds, form of securities and other subjects.
(iv) The last section shall inform the prospective investors about the responsibility for the listing prospectus. The company has to state name and position of the relevant persons or companies and declarations by these individuals or companies that the information is correct to the best of their knowledge and that no material facts or circumstances have been omitted.

In addition, there are two Directives of the SIX Swiss Exchange, which further specify the financial disclosure. These are the following:

(i) Directive Financial Reporting (DFR); and
(ii) Directive Complex Financial History (DCFH).

The DCFH is particularly relevant, in case a company has to prepare *pro forma* financial statements, e.g. as a result of a pre-IPO merger or other type of corporate restructuring.

Last but not least, in case of a primary offering, the Swiss Code of Obligations (Article 652a CO) sets out a few additional prospectus requirements, which have to be complied with.

Generally speaking, the rules and regulations for an IPO on the SIX Swiss Exchange apply to all companies looking to go public. Special rules apply, among others, for investment and real estate companies as well as for collective investment schemes. In some cases, exceptions from certain requirements can be granted, e.g. for young companies who do not have a track record of three years.

It is important to note that the regulation outlined above is currently under review. The Financial Services Act, which is expected to enter into force at the beginning of 2019, will set out new prospectus rules similar to the EU Prospectus Directive requirements. From a formal perspective, this means that prospectus requirements will be regulated by federal law and no longer by the SIX Swiss Exchange regulation. From a material perspective, there won't be much of a change since the SIX Swiss Exchange will most likely continue to be responsible for the prospectus review and the admission of IPO candidates. With the entry into legal force of the Financial Services Act, the prospectus liability extends to mere listing prospectuses as well (in case of pure secondary offerings).

IPOs are usually conducted in an international context, meaning that shares are simultaneously offered in Switzerland and placed with qualified investors in the EU and/or the USA. In such a case, the company will also have to consider the rules and regulations of the relevant jurisdictions.

As to market practices concerning IPOs, most of the events happening during the marketing phase, such as the pilot fishing and the roadshow, are not regulated in a formal way but rather guided by market practice (contrary to other jurisdictions which regulate these activities in a more detailed manner).

Public company responsibilities

Public companies are subject to a wide range of obligations, some of which are recurring while others are event-driven. There are three recurring obligations:

(i) *Financial reporting*: the annual and semi-annual financial statements provide information on the assets and liabilities as well as the earnings and cash flows of listed companies with the objective of giving a true and fair view of the financial situation of the company. The financial information includes an annual report which needs to be published within four months after the end of the financial year. Furthermore, the company must publish an interim report within three months after the end of the financial half-year. There is no requirement to publish quarterly financial statements. The reporting requirements depend on the listing standard of the company.

(ii) *Corporate governance reporting*: the second recurring obligation for listed companies is to publish details of key aspects of their corporate governance structure, in particular on their board of directors or senior management. This includes information on the group's organisational structure, the composition of the board of directors and the executive management, the shareholders' participation rights, auditing, information policy, etc. In 2013, Switzerland approved a popular initiative imposing restrictions on executive compensation in listed companies. The initiative was transposed into legislation (VegüV) and introduces governance-related changes, the most far-reaching being the mandatory vote of the general meeting on the compensation of the board of directors, the executive management and (if existing) the advisory board. It is a particular feature of Swiss law and it needs to be taken into account when a Swiss company is considering going public in Switzerland or abroad. While this seems (and is) quite far-reaching, Switzerland has been traditionally more liberal in other areas, in particular with respect to shares with privileged voting rights. There are many issuers listed on the SIX Swiss Exchange which have two share classes.

(iii) *Regular reporting obligations*: these obligations are intended to ensure that technical and administrative information on listed securities is made available to the market participants in time and in an appropriate manner. Such obligations encompass information on dividends, changes to the capital structure, general meetings, name changes and a link to the company's corporate calendar.

On the other hand, there is a set of event-driven obligations:

(i) *Ad hoc publicity*: listed companies are obliged to publish potentially price-sensitive facts that have arisen in their sphere of activity but are not publicly known. In such an event, at least two electronic news providers, two major Swiss daily newspapers and the SIX Exchange Regulation, need to be informed. The information must be distributed to investors who have registered with the company (push system) and be uploaded on the company's website (pull system). A sensitive fact could be anything from takeover offers, restructurings or merger projects. Under certain circumstances, the issuer can benefit from the postponement regime allowing the delay of the publication.

(ii) *Management transactions*: members of the board of directors and the executive management must report all relevant transactions on the exchange to the company within two trading days. The company has to inform the SIX Exchange Regulation, which in turn publishes a report on the exchange website.

(iii) *Disclosure of significant participations*: within four trading days upon transaction execution, shareholders must disclose their holdings in listed companies if they attain, exceed or fall below the thresholds of the voting rights of a company of 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% or 66⅔%. While this disclosure obligation applies to the respective shareholders, the company must publish the information within two trading days of receiving the notice on the electronic publication platform operated by the SIX Swiss Exchange's Disclosure Office.

For the sake of completeness and even though it is not an obligation of the company but rather of its significant shareholders, Swiss law requires parties who acquire equity securities directly, indirectly or acting in concert with third parties and who exceed the threshold of 33⅓% of the voting rights of a target company (in addition to equity securities already owned and calculated based on the total number of voting rights registered in the commercial register) to make an offer to acquire all listed equity securities of that company. Following the launch of a public tender offer for the shares of the target company, the target company itself is subject to certain obligations. In particular, it must as a general rule abstain from any defence measures. Furthermore, the board of directors must publish an opinion and/or recommendation for the attention of the target's shareholders. In case of competing bids, the board of directors must treat all offerors equally. The process is governed in detail by the Takeover Ordinance issued by the Swiss Takeover Board. The latter has ample competencies in connection with public offers. In particular, it approves the offer prospectus and ensures that the limitations set forth in the law (e.g. minimum price, best price rule, disclosure of transactions) are complied with.

Potential risks, liabilities and pitfalls

The key factor concerning legal liabilities and penalties associated with going public in Switzerland is what is called "prospectus liability" according to Article 752 CO. The prospectus liability shall ensure that all information published in connection with the issuance of any securities is complete, correct and not misleading. If this is not the case, and investors suffer a damage, they have recourse against the parties involved in the preparation and dissemination of the information, provided such parties have acted negligently or fraudulently (wilful misconduct). According to the Swiss legal doctrine, prospectus liability also applies in case of secondary offerings. With the entry into legal force of the FSA, this will be the case anyway.

Although there is no class action as it is known in the American legal system in Switzerland, prospectus liability claims may be brought by each investor individually against the company, the directors, the senior managers, the underwriting banks, auditors, legal advisors and other experts who are jointly and severally liable to the extent that damage can be attributed to them. Because of the prospectus liability, all persons involved in the IPO must ensure that the prospectus and all other communication (press releases, roadshow presentations, etc.) do not contain any materially untrue or misleading statements and do not omit a material fact or are otherwise misleading. If this were the case, involved individuals can still escape liability by proving that they acted diligently – which is determined by analysing the due diligence that was conducted by said individuals. As there are no official due diligence guidelines, most of the due diligence processes are based on transactional experience or market practice. This is of importance because the required standard of care, by which potentially liable individuals are measured, is based on an objective test which recognises market practice. For the banks involved in the IPO, the underwriting agreement provides as a matter of standard practice that the underwriting banks must be indemnified and held harmless by the company and/or the selling shareholders for any losses, claims and damages to which the banks may be subject as a result of prospectus liability. The banks are usually also to be held harmless in case of a breach of the underwriting agreement by the company.

Concerning the liability of the directors and senior managers of a company, there is not only the prospectus liability, which addresses damage caused by deliberate, negligent or misleading communication in relation to the IPO, but also the liability for a violation of (fiduciary) duties of the management and the directors (Article 754 CO). Under Swiss law, directors and senior managers of a Swiss corporation can be held liable for damage caused by intentional or negligent violations of their duties. While the shareholders may bring a claim at any time, creditors may only file a lawsuit on the grounds of directors' liability if and when the company is declared bankrupt. As Swiss law on directors' responsibility may not be changed by an agreement between the relevant parties, a company may only indemnify and hold harmless a director or senior manager from and against all damages, liabilities and expenses suffered, if said person is not found to have committed an intentional or grossly negligent breach of his or her duties. As a result, directors and senior managers will normally want to rely on a Directors' and Officers' Liability Insurance which is taken out by the company on their behalf.

The greatest pitfall during the IPO process is certainly insufficient due diligence and, as a result thereof, an incomplete, incorrect or misleading offering prospectus, which can lead to liability of the involved parties as described above. Another material risk lies in the communication before, during and immediately after the IPO, which explains the importance of publicity and research guidelines. The greatest pitfall after becoming a public company is communication that does not comply with the rules on *ad hoc* reporting.

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Introduction

Public offering can be defined as the sale of shares of a joint stock company through call and announcement to a large number of previously unknown investors. Methods of offering to the public may vary depending on different conditions. Under Turkish law, public offering involves either (i) public offering of shares of a non-publicly held joint stock company ("issuer") in the primary market by the issuer itself ("initial public offering-IPO"), or (ii) sale of shares by an existing shareholder(s) of the company ("secondary public offering"). Alternatively, (iii) these two methods may be combined, and the issuer can undertake a capital increase while an existing shareholder(s) of the issuer proceeds to sell all or part of its/their shares to the public.

In Turkey, the Borsa Istanbul (the "BIST") is the sole exchange entity, which is comprised of the former Istanbul Stock Exchange, Istanbul Gold Exchange and the Derivatives Exchange of Turkey. Each of the previous exchanges constitutes a separate market in the BIST. The Capital Markets Board of Turkey (the "CMB"), the BIST and the Central Registry Agency are the main rulemaking and enforcing authorities on IPOs. The joint stock company should apply to CMB to receive approval of prospectus, and at the same time apply to the BIST to be listed on the relevant market. In this regard, companies amend their articles of association in order to comply with the capital market regulation. If public offering is done through capital increase, the General Assembly may limit the pre-emptive purchase rights of its existing shareholders.

<u>Reasons for going public</u>

The main purpose of public offerings is to provide financing to joint stock companies. By public offerings, joint stock companies can provide liquidity inexpensively. Furthermore, public offering also offers many advantages to companies such as source of financing, credibility, liquidity, global recognition, institutionalisation and secondary offerings.

To begin with, public offering enables companies to benefit from capital through a reliable organised transparent market structure. Also, companies may obtain credits and issue debt securities after they are opened to the public and shares start to be traded on the Exchange by using their shares as a guarantee. Listing their shares on the Exchange, companies increase their credibility in the banking and money market, which enables them to obtain loans cheaper and more easily. By trading on the BIST market, companies become subject to media news and analysis, as well as investment reports from investment institutions. In the framework of the transparency principle of the stock market and its function of public disclosure, detailed information about listed companies is distributed to domestic and foreign investors through exchange bulletins, data broadcasting companies, media organisations and the public disclosure platform. Companies' financial and other important data can be tracked by investors as well as creditors, suppliers and business partners. Reliable, regular and ongoing information about the company will increase the recognition of the company in the financial market and in its sector. Listing becomes beneficial for financing, marketing and selling products or services, providing qualified human resources and establishing business partnerships.

On the other hand, the shares offered to the public can be bought and sold in a transparent manner at the prices determined according to the market supply and demand at an arbitrary time, liquidity is provided to the shares and an important opportunity is provided to existing shareholders. On this basis, the shareholders of the company can also use the shares traded on the stock exchange as collateral in their credit transactions and convert this idle asset into a financing creation tool. The formation of the company's share price in the market creates a reference to the value of the company in merger, acquisition or secondary offering activities.

Within the framework of the advantages gained by global recognition, it becomes possible to easily cooperate with companies operating in the domestic and foreign countries from the same sector and to work in similar fields by forming joint ventures.

Companies can create financing opportunities not only with the primary public offering but also with "Secondary Public Offerings" according to the resource requirements arising from their investment and similar needs while restricting the pre-emptive rights of existing partners. The inadequacy of capital accumulation in developing countries affects the economic development process of those countries in a negative way. In this context, companies are struggling to find the capital needed to grow, develop, invest and compete with their competitors in the globalising world.

Recent developments in IPO practice and market trends in Turkey

After the 2008 financial crisis that severely affected both the international and local capital markets as well as the global financial sector, it became crucial to strengthen the Turkish capital markets system if Turkey wanted to remain a sustainable emerging market investment destination. Prior to such date, there were a minimal number of public offerings. The IPO Campaign initiated in 2008, followed by the establishment of the Emerging Companies Market (the "ECM") in 2011, has started to trigger increased public offerings. Accordingly, the regulatory framework for Turkish capital markets has undergone major changes in recent years. These were designed to facilitate the IPO process, achieve harmonisation with the European Union legislation, encourage companies to go public, and boost the number of IPOs and secondary offerings, thus ensuring robust growth for the Turkish capital markets. Following such amendments, not only has interest in IPOs significantly grown, but it has also become possible to trade foreign capital market instruments in the Turkish capital markets. This is considered a breakthrough for Turkey in terms of its efforts to integrate into the global markets. Although the IPO procedure seems complex, CMB legislation has enabled joint stock companies to go public in typically around six (6) months.

As of March 2018, 430 companies are listed on the Equity Market of BIST, as follows:
- Stars Market: 144 companies.
- Main Market: 162 companies.
- Other markets: 127 companies.

In terms of numbers of companies listing in 2018, 181 of the BIST companies are categorised in the "manufacturing industry" and the top three sectors are manufacturing, financial institutions and wholesale and retail trade, hotels and restaurants.

The number of successful IPOs in Turkey on the regulated market has varied over the years. Accordingly, IPOs in Tukey followed an upward trend between 2010 and 2013. Official figures show that the number of IPOs peaked at 79 in 2013. However, this trend has not continued after 2013 and the number of companies going public has gradually decreased. In 2017, only six companies went public. As for the 2018 period, BIST is expecting large-scale public offerings, especially in the energy and healthcare sectors. At present, 10 companies with leading and well-known brands in Turkey have applied for their shares to be traded on the stock exchange.

The IPO process: steps, timing and parties and market practice

Timeframe

Many factors affect the public offering timeframe, such as the size of the Issuer Company, the industry in which it operates and its structure, the method used and market conditions, so it is almost impossible to create a "One Size Fits All"-type timeframe. Below is an approximation.

Timeframe	Week 1					Week 2					Week 3					Week 4					Week 5					Week 6				
	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
Application to the CMB and Borsa Istanbul	■																													
Investigations of the CMB and Borsa Istanbul		■	■	■	■	■	■	■	■	■	■	■	■																	
Decision of the Borsa Istanbul Board														■																
The CMB Prospectus approval																			■											
Disclosure of the prospectus and the sales announcement to the account owners																				■										
Public offering materialised																					■	■	■							
Sales results are reported to Borsa Istanbul																								■						
Trading begins																										■				

Public offer preparation

The shares of a company will be traded in the relevant market of the BIST if the prospectus detailing the offering is approved by the CMB of Turkey, and its shares are listed or registered with the relevant BIST market.

Preliminary preparations required by the BIST Exchange and the CMB may be outlined as follows:

1. *Constitution of an internal working group*
   In order to carry out public offering applications, an internal working group shall be constituted within the company. The respective group should be comprised of experts from finance and public relations divisions and other relevant mid-level managers of the company. The working group defines a detailed procedure list prior to officially applying to the CMB and the BIST.

2. *Selection of intermediary institution – market advisory agreement*
   The Issuer Company must appoint a brokerage/investment house(s) which is authorised by the CMB. The agreement between a company and brokerage/investment house(s) typically includes the rights and responsibilities of parties, whether or not there will be an undertaking option and how it will be carried out, as well as the IPO method and other relevant fundamentals. For an IPO process, brokerage/investment houses practice one of the following methods:
   2.1. Best effort
   2.2. Broker undertaking
      a) Undertaking of the remaining balance.
      b) Undertaking of the entire balance.
      c) Partial undertaking of the remaining balance.
      d) Partial undertaking of the entire balance.
   According to the Article 5/7 of the CMB Communiqué No: VII-128.1, a brokerage/investment house has to assure that it shall undertake:
   a) The entire unsold amount, if the market value of the shares offered is below TRL 22,000,000.
   b) The entire unsold amount up to TRL 22,000,000 and half of the remaining unsold amount, if the market value of shares offered is between TRL 22,000,000 and TRL 44,000,000, assessed using the initial public offer price. If the total value of publicly offered shares is above TRL 44,000,000, then the brokerage/investment house(s) is/are not subject to obligation of undertaking.
3. *Preparation of financial statements and the selection of an independent auditor*
   The Issuer Company is required to prepare their financial statements audited by independent audit firms selected from the CMB's authorised list in accordance with capital markets regulations.
4. *Ordinance of the General Assembly and amendment of the Articles of Association*
   The Issuer Company must amend their Articles of Association ("AoA") to comply with the capital market legislation and submit these *pro forma* amendments to the CMB. Any provision in the AoA that limits the circulation and transfer of shares traded in the Exchange and prevents shareholders from exercising their rights must be removed by this amendment.
   In case an IPO is commenced via an increase in capital, the General Assembly of the company should ratify a decision stating that the company will increase its capital and limit the pre-emptive purchase rights of its existing shareholders via an ordinance in order to comply with the Turkish Commercial Code.
5. *IPO price determination*
   One of the most crucial stages in an IPO application is the "price determination process". The IPO price is affected by external conditions and dependent on the internal dynamics of the company. The offer price is determined by the brokerage/investment house(s) and neither the BIST nor the CMB intervene in the price determination process.
   A "Price Evaluation Report" which includes the price and the calculation methodologies of company shares prepared by the active brokerage/investment house(s) should be published on the Public Disclosure Platform ("PDP") website (https://www.kap.org.tr/en/) at least three days before the inception date of the public offering. This report could be examined by other brokerage/investment houses and their findings/analyses could also be published on the PDP website.

6. *Preparation of required documents for the application*
   The Issuer Company and/or the brokerage/investment house commissioned by the Issuer Company begins to negotiate with the relevant authorities of the BIST and the CMB in the preliminary phases of the IPO process and deliver detailed information about the procedure. Depending on the capital market instrument and issuance type, the Issuer Company must supply required documents to the BIST within its application. All the documents required by the Exchange are listed in the relevant clause of the BIST Listing regulations. In addition, supplementary documentation may be requested depending on its business activities and industry. All pertinent documents submitted shall be furnished with the official stamp/seal of the issuing entity.

<u>IPO stages</u>

1. *Applications to the BIST and the CMB*
   In order to receive approval for its prospectus, the Issuer Company shall apply to the CMB, and also the BIST to be listed in the relevant market of the Exchange. The applications shall be filed by the Issuer Company or on its behalf by the authorised brokerage/investment house. A simultaneous filing to the CMB and the BIST is preferred in order to reduce processing times.
   Moreover, the scope of the Public Relations (PR) efforts of the IPO campaign shall be defined at this step. The PR efforts may include executive statements dwelling upon the company's intention to proceed with an IPO, and often press publishing or other visual communication methods that touch on the company's core business activities could be utilised. Additionally, an international PR campaign may be launched depending on the target investor base and the magnitude of the IPO.
2. *Investigation of the company by the CMB and BIST experts (preparing a due diligence report by CMB)*
   After filing all required documentation, experts from both the CMB and the BIST shall perform an on-site investigation at the company's headquarters and production facilities. Although there are certain differences in these investigations based on the kind of corporation and business sector, the following matters receive high emphasis in general (the CMB conducts a due diligence by taking into following matters).
   - Qualitative investigations

     The company's business operations, services provided, manufacturing process, ongoing or planned investment projects, raw material procurement efforts, sales, quality of its human resources, relations with its subsidiaries/partnerships, legal matters, licences, know-how agreements, brands and patents held, company and industry insights, government licences and other certifications, real estate holdings as well as leasing transactions, etc. are the subjects of qualitative investigations.
   - Quantitative investigations

     The most recent and previous financial statements and their footnotes audited by the independent auditors are examined during the quantitative investigations. Furthermore, the trial balance sheet of the company, as well as its secondary books are examined, static and dynamic fiscal analyses and the analysis of the key financial ratios are performed in order to evaluate the financial well-being of the company.
3. *Applications to Takasbank and CRA*
   The Issuer Company shall obtain an ISIN Code (International Securities Identification Number) defined by the International Organization for Standardization (Standard

no: 6166) to create a uniform exchange and custody process to ensure smoother transactions. Takasbank is the official numeration entity that undertakes the assignment of the ISIN code procedure in Turkey. All the ISIN numbers are assigned by Takasbank and distributed/declared worldwide.

The Issuer Company shall submit the AoA, securities and issuer information forms to Takasbank. In order to retrieve these forms, the Issuer Company shall demand them from Takasbank to obtain the ISIN code(s) for the Issuer Company's securities. Pursuant to the CMB legislation, all issuers with registered securities are required to be the member of Central Registry Agency (the "CRA"). Hence, all issuers, whose shares are expected to be traded in the BIST markets, should apply to the CRA for membership prior to the trading date in order to satisfy the terms of the relevant legislation. A membership is granted subsequently to the issuer's submission of the online membership application form, which is accessed via the CRA website (www.mkk.com.tr).

Furthermore, membership to the Public Disclosure Platform ("PDP") is obligatory for companies whose capital markets instruments are to be traded in the Exchange. PDP is an electronic platform, utilised by the traded companies to announce their material disclosures using digital signatures. Within the framework of the CMB's decision on January 14, 2014 (Decision no: 41), PDP is conveyed to the CRA. Therefore, PDP membership applications shall be submitted to the CRA. Procedures regarding the applications could be reached via PDP website (www.kap.org.tr/en).

4. *Designation of the trading market*

   The market in which the issuer's shares shall be traded are determined by the decision of the BIST Board after the Exchange experts complete their investigation. BIST mainly consists of four markets, which are the Equity Market, Debt Securities Market, Derivatives Market and Precious Metals and Diamond Markets. The Equity Market of the BIST, on which publicly held companies from various sectors are traded, are made of the following sub-markets: Star Market; Main Market; Emerging Companies Market; Watchlist Market; Collective and Structured Products Market; Equity Market for Qualified Investors; and Pre-Market Trading Platform.

5. *Approval of the prospectus*

   The CMB examines the IPO prospectus from a public disclosure standpoint and once the prospectus is seen fit for purpose, it is approved to grant permission to the public offering.

6. *Public offering and reporting the sales results*

   The shares are offered to the public via an investment/brokerage house or a consortium of investment/brokerage houses within the dates and principles stated at the prospectus and/or the sales announcement in the case that the IPO application satisfies the requirements of the CMB regulations. Once the sales results are finalised, the investment/brokerage house publishes the figures at the Public Disclosure Platform and also sends the results to the CMB and the BIST.

7. *Listing and the inception of trading in the Exchange*

   After a final evaluation regarding whether the sales results satisfy the terms of the BIST, an IPO approval decision, rendered during the fourth IPO step and therefore disclosed in the prospectus, is carried out by the Board of the BIST. Subsequently, following the announcement by the BIST, shares begin trading in the related market. An opening bell ceremony is held at the inception of the first trading day, depending on the company's request.

Regulatory architecture: overview of the regulators and key regulations

The governmental bodies, self-regulatory organisations and public stock exchanges responsible for regulating IPOs

The Capital Markets Board of Turkey is the main regulatory and supervisory authority in charge of the security markets in Turkey. Empowered by the CML, which was enacted in 1981, the CMB has been making detailed regulations for organising the markets and developing capital market instruments and institutions in Turkey. The CMB is supported by following regulatory bodies:

- **The Borsa Istanbul ("BIST")** is subject to private law and is a self-regulatory entity.
- **Istanbul Clearing, Settlement and Custody Bank A.S.** ("*Takasbank*" in Turkish).
- **Central Registry Agency** ("*Merkezi Kayit Kurulusu*" – MKK in Turkish).
- **Public Disclosure Platform** ("*Kamuyu Aydınlatma Platformu*" – KAP in Turkish) is an electronic system which disclose the notices to the public electronically signed in accordance with Capital Markets and Stock Exchange legislation.

The key rules and regulations applicable to the IPO process

- Legislative framework:
  - Turkish Commercial Code No. 6102.
  - Capital Markets Law No. 6362.
  - Borsa Istanbul Listing Directive.
  - Tariff of Fares of Listing (regulated by BIST).
  - CMB Communiqué No. VII-128.1 (Communiqué on Equity).
  - CMB Communiqué No. II-5.1 (Communiqué on Prospectus and Export Document).
  - CMB Communiqué No. II-5.2 (Communiqué on Capital Market Instruments Sale).
  - CMB Communiqué No. II-14.1 (Communiqué on Principles of Financial Reporting in Capital Markets).
  - CMB Communiqué No. II-15.1 (Communiqué on Material Events).
  - CMB Communiqué No. II-16.1 (Communiqué on Principles Pertaining to Removal of Corporations from the Scope of Law and Obligation of Trading of Shares on Exchange).
  - CMB Communiqué No. II-17.1 (Communiqué on Corporate Governance).
- Key IPO documents:
  - AoA of the Issuer Company.
  - Prospectus (draft and/or approved by the CMB).
  - Within the scope of Communiqué No. II-5.1, information should provide sufficient details about the issuer; should be complete, current and comply with the standards determined by the CMB. A prospectus relating to an equity offering should include risk factors, Issuer Company's prospects and business activities, financial statements for the most recent three years and for the relevant interim period, as well as audited and/or limited review statements (if any).
  - Financial Statements and Independently Audited Financial Statements of the Company.
  - Signature Circular of the Issuer Company.
  - Brokerage Agreement.
  - Price Determination Report.

Type and extent of disclosure presented to prospective investors in connection with an IPO

Pursuant to the CMB Communiqué No. II-14.1, the Issuer Company should prepare financial reports. Companies whose shares are traded publicly are required to be transparent in all their affairs and transactions. In this respect, listed companies are required to regularly disclose their financial statements prepared in line with the international financial reporting standards or the principles mandated by the CMB, alongside independent audit reports prepared by unrelated licensed professionals via the Public Disclosure Platform.

Furthermore, the CMB Communiqué No. 15.1 sets out the principles and procedures that apply to material event disclosure requirements which serve to maintain transparency and protect the interests of the investors by ensuring that they are kept informed about all significant matters that may affect their investment decisions. The Communiqué makes a distinction between insider information and continuous information. Insider information that must be disclosed to the public is not listed in the Communiqué, but the CMB expects companies to disclose insider information on a case-by-case basis. Continuous information includes but is not limited to: board of directors' resolutions on the issuance of new shares; information on the exercise of the right to attend general assembly meetings, and total voting rights; and certain transactions executed by persons with managerial responsibility and related persons such as transactions regarding the issuer's securities (other than its shares offered to public) when the total value of the transactions executed within a calendar year exceeds TRL 250,000, and all transactions relating to shares and other securities when the total value of the transactions executed within a calendar year is TRL 250,000 or higher.

The rules and regulations are not applied uniformly to all IPOs.

In the Turkish legal system, the rules and regulations differ depending on the market in which the issuer's shares are to be traded are determined. In general, to be listed on BIST, a company should have been incorporated for at least two (2) calendar years; the financial situation of the Issuer Company should enable it to carry out its business operations in a sound matter, the Issuer Company's operations should not have been suspended for more than three months during the last two years, and the company must not be involved in any form of liquidation, composition or suspension of bankruptcy, and any other similar proceedings as determined by BIST. Accordingly, as per the Borsa Istanbul Listing Directive, please find below an example of the minimum size requirement of Stars Market Group 1 & 2 and Main Market Group 1 & 2.

	Stars Market Group 1	Stars Market Group 2	Main Market Group 1	Main Market Group 2
Market Value of Publicly Offered Shares	Minimum TRL 250,000,000	Minimum TRL 100,000,000	Minimum TRL 50,000,000	Minimum TRL 25,000,000
Total Market Value	Minimum TRL 1,000,000,000	Minimum TRL 400,000,000	-	-
Independently Audited Financial Statements which show that the Period Income is Received	Last 2 years	Last 2 years	Last 2 years	Last 2 years
Minimum Ratio of Nominal Value of Pertaining to Publicly Offered Shares to Capital	5%	10%	15%	25%

	Stars Market Group 1	Stars Market Group 2	Main Market Group 1	Main Market Group 2
Shareholders' Equity/ Capital Ratio in the latest Independently Audited Financial Statements	Greater than 0.75	Greater than 1	Greater than 1	Greater than 1.25

Recent regulatory changes to the Turkish legislative system

Significant recent amendments that have recently been made to Turkish legislation are:

1. On December 1, 2017, Article 18/4 of the CMB Communiqué No. II-5.2 was amended by the CMB.

   Amendment to Article 18/5: in the previous version of Article 18/4 of the Communiqué, Minimum Domestic Allocation was stipulated as 30%, with 10% being allocated to Turkish retail investors and 20% to Turkish institutional investors. With the amendment of this Communiqué, the Minimum Domestic Allocation has been reduced to 20% (with a minimum of 10% to be allocated to Turkish institutional investors and 10% to Turkish retail investors). Moreover, under such rules it is possible for the issuer to apply to the CMB for a reduction of the Minimum Domestic Allocation (potentially to zero) in advance of the start of book-building. When doing so, the CMB aimed to prevent public offerings from overseas.
2. On January 26, 2018, Article 5/2 of the CMB Communiqué No. VII-128.1 was amended by the CMB.

   Amendment to Article 5/2: In the previous version of Article 5/2 of the Equity Communiqué, it was stipulated that companies – save for investment partnerships whose shares will be offered to the public or traded in the stock exchange for the first time – must not fall into the following categories envisaged under Article 8/1 of the CMB Communiqué No. II-16.1, any of which may lead to the removal of such company from the scope of the CML. In accordance with Article 8/1 of Communiqué No. II-16.1, corporations:

   a. the total sum of whose assets is less than ten million Turkish Lira (TRL 10,000,000); or
   b. the total sum of whose other revenues, excluding net sales revenues, and net sales revenues, are together less than five million Turkish Lira (TRL 5,000,000); or
   c. the total sum of whose registered capital and legal reserves is completely unreciprocated,

   according to their financial statements of the last two (2) years prior to the date of application, which are prepared in accordance with the pertinent regulations of the Board and subject to special independent audit, are excluded from the scope of the Law upon an application to the Board, on condition that their application is found acceptable by the Board.

   With the amendment of this Communiqué, the reference to sub-paragraph (c) of Article 8/1 is removed from Article 5/2. This amendment aims to support companies in financial difficulty raise funds for their business by way of public offering and also increase the volume of public offering for the liquidity of Turkish capital markets.
3. On February 13, 2018, Article 12/7 and Article 27 of the CMB Communiqué No. VII-128.1 was abolished. Accordingly, please find below the related recent amendments:

   Amendment to Article 12/7 of the same Communiqué, which grants sell-out rights to shareholders in case the shares of a public company are offered to the public via a capital increase and where the aggregate debt average of such company due to the non-cash assets transferred from the Related Parties is more than 20% of the total assets average of the company – excluding the aforementioned debts – as per the financial tables of the last 4 (four) accounting periods prior to the capital increase (although the increased amount will not be used for the satisfaction of company debts to the related parties) has been annulled. Given this, such companies in the aforementioned case will no longer be required to grant sell-out rights to their shareholders and complete the sell-out process prior to submitting the capital increase prospectus to the approval of the CMB.

Amendment to Article 27: Article 27 of the same Communiqué requiring the controlling shareholders of listed public companies who are planning to sell their shares exceeding 10% of their share capital for the last 12-month period or 50% of the nominal value of their free float shares in the stock change, to provide and submit an information form to the CMB has been annulled. Given this, such shareholders in the aforementioned case are no longer required to submit the information forms to the CMB.

4. On February 13, 2018, subparagraph 4 was added to Article 12 of the CMB Communiqué No. II-15.1 by the CMB.

   The additional sub-paragraph 4 added to Article 12 is as follows: If and when shares of a real person or legal entity or of real persons/legal entities acting together with such persons in the capital of a publicly traded Issuer Company exceed or fall under 5%, 10%, 15%, 20%, 25%, 33%, 50%, 67% or 95% of the share capital, CRA shall be liable for disclosing "material transactions" under PDP. It is worth noting that the disclosure liability of CRA is separate from the disclosure liability of the real persons or legal entities pursuant to Article 12/a of the same Communiqué (if and when direct or indirect shares or voting rights of a real person or legal entity or of real persons/legal entities in the capital of a publicly traded Issuer Company exceed or fall below the aforementioned specific ratio, such persons shall disclose this information under PDP) which is still in effect.

Public company responsibilities

According to Law No. 6362 on Capital Market Law, there are certain responsibilities which may apply to public companies in Turkey.

Public company responsibilities regarding public offerings are listed as follows:

1. Periodic financial and general reporting

   Companies whose equities are traded on our Exchange have to send their independently audited annual and semi-annual financial statements and footnotes as well as the interim financial statements and footnotes within the determined time periods following the end of each such term for purposes of disclosure to the public. Unless such obligation is fulfilled, or an extension is not obtained from the CMB, the trading symbol of the company will be closed.

2. Public disclosure

   Public companies are under an obligation to disclose all information which may affect investors' decisions in a timely manner and report information to the public simultaneously. The main rule is to inform investors about any information that may affect the price or cause substantial alteration to the corporate financial condition. The Communiqué on Material Events Disclosure (Series: VIII, No. II-15.1) sets out the material circumstances to be disclosed in the case of important events and developments which may impact the value of BIST-traded capital market instruments, or be influential on the investment decisions of, or the exercise of the rights by the investors, and determines the disclosure principles of such circumstances.

3. Dividend distributions
   The dividend distribution principles for public joint stock corporations are regulated by the CMB's Communiqué on Dividends (No. II-19.1). Hence, public joint stock corporations distribute dividends in accordance with the regulations and via the decision of their respective General Assemblies.
   Within the framework of their dividend distribution policies, corporations are obliged to at least include the following fundamental considerations:
   a. Whether an actual dividend distribution will be materialised or not, and the dividend distribution rate for the common partners and other people, which bears the legal right to take part in a dividend distribution, should such a distribution be realised.
   b. The date of the actual dividend distribution, with the condition that the distribution will be commenced at the General Assembly, which convenes after the end of the last fiscal year.
   c. Form of payment of the dividend (i.e. in cash, shares or both in predetermined proportions).
   d. Whether an advance payment of the dividend distribution will be carried out or not, and the principles of such a distribution, should there be any.
4. Related party transactions and corporate governance
   The Communiqué on Corporate Governance No. II-17.1 sets out the principles and procedures that apply to related party transactions of public companies. The board of directors should pass a resolution approving the transaction between the company and any related party.
   Transactions representing 5% to 10% of the total equity or total gross sale revenues of the company. The company should obtain a valuation report for the transaction from an institution designated by the CMB.
   Transactions representing more than 10% of the total equity or total gross sale revenues of the company. In addition to a valuation report, the company should obtain the approval of a majority of the independent board members. Members of the board of directors who are related to the transaction cannot cast a vote.
   If a majority of the independent board members do not approve the transaction, this should be disclosed on the Public Disclosure Platform and include a satisfactory explanation. The transaction should then be submitted to the approval of the shareholders' General Assembly. The parties to the transaction and the persons related to the transaction cannot vote at the General Assembly meeting. There is no quorum requirement for the General Assembly meeting. The resolution must be passed by a simple majority of the shareholders present with voting rights.
5. Significant transactions
   Significant transactions require the approval of the shareholders' General Assembly. Under the Communiqué on Common Principles Regarding Significant Transactions and Exit Right No. II-23.1, the following acts and transactions constitute significant transactions, provided that the significance criteria set out in the Communiqué are met:
   - Mergers, de-mergers, liquidation and changes of legal form.
   - Disposal, lease or establishment of rights *in rem* over the whole or a substantial part of the company's assets.
   - Changes in the scope of the company's activity, wholly or to a considerable extent.
   - Creation of new preferred stock categories or changes to the scope or subject matter of existing preferred stocks.

- De-listing.
- Acquiring or renting a considerable amount of assets from related parties.
- Where the amount of a capital increase exceeds the amount of the current share capital, and the capital increase amount is to be used for the partial or full payment of due obligations arising from the acquisition of non-cash assets from related parties (as defined in the relevant CMB regulations).

In addition, the CMB can consider that the following constitute significant transactions:

- Any act or transaction that leads to considerable changes in relation to promises or commitments made, or material circumstances observed before the public offering.
- Even if there is no promise or commitment, any act or transaction that may have a considerable effect on the activities and commercial life of the company.

Significant transactions should be approved by at least two-thirds of the voting shares represented at the General Assembly meeting, unless the Articles of Association of the company provide otherwise.

Potential risks, liabilities and pitfalls

The disadvantage of IPOs for companies is the necessity of being liable to the provisions of Capital Markets Law.

The fact that a company is liable to the Capital Markets Law accompanies several new costs, burdens, accountability obligations and an obligation to comply with the CMB rules.

As an example, public companies must:

- comply with the CMB's accounting and financial standards;
- have independent audits (audit expenses);
- declare financial statements (declaration expenses);
- pay registration fees (two per thousand of the capital amount and a quarter of this amount for contribution to education); and
- comply with dividend and bonus share distributions principles and all other rules arising from CMB.

The company officials should not forget that being a public company accompanies tax advantages as well as obligations of being liable to CMB.

In case of a public offering, the issuer is primarily liable for a prospectus relating to equity securities. In addition to the issuer, the underwriters and guarantors (if any) are also liable for the certainty and completeness of the information provided to the investors.

Intermediary institutions, those conducting the public offering, guarantors (if any) and board members of the issuer who have acted without due diligence will be held responsible for the part of the loss that cannot be indemnified by the issuer. Their liability is secondary and based on negligence.

Furthermore, an issuer and/or underwriters and guarantors involved in the equity offering will also be liable to investors in contract or tort. If the prospectus contained any misleading or inaccurate information or failed to disclose any material information, any persons, specifically investors, may claim compensation for their losses as a result of such untrue aforementioned information. Fraud is the only criminal liability for the relevant parties in an IPO process.

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Introduction

An initial public offering ("**IPO**") is a process by which a company offers its shares, for the first time, to the public by virtue of drafting and publishing a prospectus on the company and carrying out a public subscription of its shares, after submitting required documentation to the relevant governmental authorities and obtaining their approvals in relation thereto.

Under the laws and regulations of the United Arab Emirates ("**UAE**"), in order for a company to offer its shares to the public, the said company must be or take up the legal form of a public joint stock company. Accordingly, a company wishing to execute an IPO will be either a newly incorporated public joint stock company, or a company assuming the legal form of a private joint stock company or a limited liability company that undergoes a conversion process to become a public joint stock company.

Introducing a brief on the history of IPOs in the UAE, there have only been a few IPOs in the past few years, only two of which have been executed in 2017 after the issuance of the new UAE Federal Law No. 2 of 2015 concerning Commercial Companies ("**Companies Law**"). We envisage that, in 2018, the market appetite will uphold the trend of one to two IPOs a year.

It is also worth noting in this regard that the companies that have undergone IPOs in the period between 2014 until 2017 operated in fundamental yet diversified industries such as the real estate, investment, leisure and entertainment, and oil and gas sectors.

Generally speaking, companies that choose to go public in the UAE and offer their shares in an IPO usually seek to raise their capital in global markets. This is supported and facilitated by the local regulators and the regulatory schemes set by the governmental authorities.

It should be noted that, for the purposes of this chapter, any reference to the UAE (which includes the Emirates of Abu Dhabi, Dubai and the five other emirates making up the UAE) excludes the geographical areas of the Dubai International Financial Centre ("**DIFC**") and the Abu Dhabi General Market ("**ADGM**"). The civil and commercial laws of the UAE (including the UAE's securities market laws and regulations discussed in this chapter) are not applicable to the DIFC or ADGM and *vice versa*.

In the UAE, there are three financial exchange markets, two of which are onshore, being the Abu Dhabi Securities Exchange ("**ADX**") and Dubai Financial Market ("**DFM**"), while the third financial market is located within the jurisdiction of the DIFC, being NASDAQ Dubai. ADX and DFM are subject to the supervisory authority of the UAE Securities and Commodities Authority ("**SCA**"), while the Dubai Financial Supervisory Authority regulates NASDAQ Dubai in its capacity as the securities supervisory authority within the DIFC. As at the time of writing, there is no financial market that is located in the ADGM.

This chapter excludes any regulations applicable to NASDAQ Dubai and any of the below regulations are applicable only to ADX and DFM where the text allows for the same.

ADX and DFM are governed and regulated by SCA, which has the authority to impose laws, regulations and standards with which both ADX and DFM must comply. ADX and DFM work proactively with SCA to protect investors and provide optimum trading platforms for securities trading.

Both ADX and DFM operate as a securities exchange market for trading securities including shares issued by public joint stock companies.

The IPO process: steps, timing and parties and market practice

Despite the fact that an IPO is a process carried out in a very similar manner across the globe, the mechanics of such procedure differ from one country to another in terms of the applicable laws and regulations, required documentation, governmental approvals, and timeline of its procedures.

The IPO process in the UAE slightly varies according to the business and structure of the company undergoing the IPO process, i.e. whether the company is a newly established public joint stock company or a company undergoing a conversion process to become a public joint stock company, in which emirate the company has its place of business and on which market the company will be listed. Accordingly, we have set out below two different procedures and series of steps for each company structure as detailed hereunder.

<u>Newly established public joint stock company</u>

First stage: initial approvals

Generally, greenfield (i.e. newly established) public joint stock companies require additional approvals from SCA to go through the route of the IPO. Some of these requirements include: (i) a special approval from the board of directors of SCA for incorporating the greenfield company; (ii) there is sufficient working capital for the twelve (12) months post the incorporation; and (iii) the offered shares are limited to qualified institutional investors and high-net-worth individuals for amounts that are no less than AED 5 million.

The founders committee of the new company (to be established) must refer to the Department of Economic Development ("**DED**") to obtain initial approval to establish the company as a public joint stock company in accordance with the provisions of Article (113) of the Companies Law.

After obtaining the approval of the DED, the founders committee must apply for the preliminary approval of SCA for the establishment of the public joint stock company, accompanied by all the necessary documents; namely, the memorandum of association ("**MoA**"), articles of association ("**AoA**"), an economic feasibility study for the venture, the SCA application form requesting incorporation of a public joint stock company, a draft prospectus, a subscription application form, and evidence of payment in respect of subscription.

If the company has shares issued in-kind, the value of the in-kind shares will be assessed by one or more financial advisors chosen by SCA from those accredited by it, or those with technical and financial expertise in the subject of evaluation who are approved by SCA. SCA then considers the application for incorporation and notifies the founders committee of its observations within ten (10) working days from the date of submission of the application in full.

The founders committee completes any deficiencies or makes the amendments deemed necessary by SCA to complete the application for incorporation within fifteen (15) working days from the date of notification. Otherwise, SCA may consider this a waiver of the application for incorporation.

SCA sends a copy of the documents to the DED after they have been completed. (The period of SCA's review is ten (10) working days from the date of completing the application.)

A meeting is then held between SCA and the DED to study the application for incorporation and its documents. The meeting must be held within ten (10) working days from the date of the submission of documents by SCA to the DED.

In case there are any comments made by the DED, SCA informs the founders committee. The amendments are be made within ten (10) working days from the date of informing the founders committee.

SCA ensures that the application and all documents and observations are completed and that the amended versions are sent to the DED. No particulars may be amended in the application after submitting it to the DED during any stage of incorporation either in respect of the capital of the company or its objectives or the names of its founders or any other data in the application for incorporation.

On approval of the incorporation application, the DED then issues a decision to license the incorporation of the company, which is announced in the official gazette at the expense of the founders.

Second stage: pre-subscription period

The founders committee attest the MoA and AoA before a notary public.

Third stage: public subscription/public offering

The founders committee must then commence the subscription process, as per the template provided by SCA, for the shares within fifteen (15) days from the date of issuance of the above-mentioned decision. The founders shall subscribe for not less than thirty percent (30%) and not more than seventy percent (70%) of the issued capital of the company, prior to the invitation to public subscription and offering for the remaining percentage of the share capital. In this regard, the founders may not subscribe to the shares offered for public subscription.

N.B.: Prior to such step, the founders committee must provide SCA and the DED with a bank certificate evidencing payment of the value of their shares in accordance with the above-prescribed percentages. Additionally, they must submit an undertaking, as per the template provided by SCA, to deposit the proceeds generated from the subscription of the total shares to the account of the company under incorporation as well as refunding the surplus funds to subscribers within fifteen (15) days from the date of the subscription closure, if any.

Once SCA's approval of the prospectus is obtained, the prospectus is then published in two local Arabic daily newspapers at least five (5) days prior to commencement of the subscription. This is the invitation to the public offering.

The subscription must be kept open for no less than ten (10) days and no more than thirty (30) days, open to extension by an additional period of ten (10) days subject to SCA and the DED's approvals.

A company issuing its shares in accordance with the share book-building mechanism shall enter into a contract with a financial advisor in order to carry out the IPO and for them to supervise the same. Such financial advisor shall have a number of roles, including presenting the company's business to investors and ultimately setting the price of shares in the final prospectus after analysing the data from the book-building.

Companies issuing shares in an IPO process, and wishing to use the book-building process, must comply with the following:

- An application will be submitted to SCA using the form prepared for such purpose in order to obtain approval on book-building.
- The company shall neither announce nor disclose, by any means whatsoever, its intention to issue or sell shares through the book-building process before obtaining SCA's approval.
- Not less than twenty percent (20%) of the subscription shares shall be offered to retail investors, and not less than sixty percent (60%) shall be offered to qualified investors, excluding newly established companies, in which case the subscription is restricted to qualified investors only.
- Allocate to qualified investors, based upon the subscription applications submitted by them, any shares not subscribed by retail investors.

The price set for retail investors may be discounted compared to the one set for qualified investors in accordance with disclosures made in the final prospectus.

Retail investors shall pay the full value of their subscribed shares upon subscription. Qualified investors may pay the value of their subscribed shares after allocation.

The allotment of shares and refund of the surplus funds must be made within five (5) working days from the date of the subscription. In the event that the subscription applications exceed the number of shares offered, the shares shall be distributed to subscribers proportionally to their subscribed amounts or as determined in the prospectus and approved by SCA, and the distribution shall be made to the nearest whole share.

After the allocation has been made, the company must send the shareholders register to the UAE financial market (i.e. ADX or DFM) on which the shares will be listed.

The entities receiving the subscription keep the payments made by subscribers; in this regard any returns gained in relation thereto are for the account of the company under incorporation. The receiving entities will not deliver such amounts to the board of directors until the incorporation certificate has been issued and the company is registered before the commercial registrar at the DED.

Fourth stage: incorporation announcement

The company must announce an invitation to the subscribers to attend the constitutive general assembly meeting (after obtaining approval of SCA) to be held within fifteen (15) days from the date of the subscription closure. The agenda of the first constitutive general assembly must include certain matters prescribed by the SCA.

If a quorum has not been met at the first meeting, the meeting must be held within five (5) to fifteen (15) days from the date of the first meeting, and the second meeting will be deemed to satisfy the legal quorum regardless of the number of the attendees.

Within ten (10) days from the date of the constitutive general assembly, the founders will submit an application to SCA, for issue of the incorporation certificate, and will enclose the documents stipulated under Article (133) of the Companies Law.

Afterwards, SCA issues the incorporation certificate within five (5) working days.

Fifth stage: registration before the competent authorities and SCA

- The board of directors of the newly incorporated company must complete the registration procedures before DED in anticipation of its listing in the financial market within ten (10) days from the date of issuance of the incorporation certificate.
- The DED must then register the company before the commercial registrar and issue the company's trade licence within five (5) working days.

- Afterwards, the chairman of the board of directors of the newly incorporated company must, within five (5) working days from the date of issuance of the company's trade licence, provide the AoA, MoA and company licence to the company registrar to register the company in the companies register.

Sixth stage: listing on UAE financial markets

The board of directors of the newly incorporated company must, within fifteen (15) working days from the date of the company's registration before the commercial registrar, list its shares on any of the UAE financial markets (i.e. ADX or DFM) and revert to such financial market with a listing request in accordance with the listing regulations adopted by SCA and the financial market on which the shares will be listed.

<u>Newly converted public joint stock company</u>

Existing companies wishing to convert into public joint stock companies follow the same rules and steps applicable to newly established public joint stock companies except in relation to the following:

- Companies wishing to convert into a public joint stock company are required to fulfil, amongst others, the following requirements:
  - the value of the issued shares of the company wishing to convert has been paid in full;
  - the completion of at least two fiscal years prior to the application;
  - the company has realised, within the two financial years preceding the approval on the conversion application, net operational profits that are distributable to shareholders of no less than ten percent (10%) of the company's capital as an average; and
  - a special resolution (depending on the legal form of the company and its constitutional documents, this should be passed by no less than three quarters of either: (i) the share capital of the company; or (ii) the shares being represented in a general assembly meeting) issued by the shareholders of the company approving its conversion into a public joint stock company.
- The founders may sell by way of IPO up to thirty percent (30%) of its share capital. In this regard, the founders may not subscribe to the shares offered for public subscription.
- The founders committee (to be established by way of a shareholders' resolution) of the existing company that wishes to convert to a public joint stock company must draft a letter to SCA requesting a listing window reservation and confirming eligibility.
- Afterwards, the founders committee applies to SCA for a public joint stock conversion accompanied by its shareholders' resolution approving such conversion.
- Simultaneously, the said company appoints, approves and forms the said founders committee.
- Subsequently, the founders committee files with SCA the first draft of the local prospectus as well as the shareholders' resolution of the existing company approving the conversion, a final draft of the IPO MoA and AoA, a business plan review, and a final real estate valuation report.
- SCA will examine the conversion application and filed documents and produce a decision on the request within a period of ten (10) working days.
- In case of approval of the conversion by SCA, the founders committee must announce the conversion and notify its shareholders and creditors (if any) of such conversion via written notice within a period of five (5) working days from the date of SCA's approval.
- Shareholders and/or creditors of the company are given a period of fifteen (15) working days to object to the conversion.

- Afterwards, the company files with SCA a copy of the resolution and confirmation that the opposition period has expired. SCA forms a committee to evaluate the company assets. The process of this evaluation process is thirty (30) working days.
- A meeting between SCA and the DED is then held to examine the conversion application and its documents. The time for such procedure is five (5) working days.
- In case of final approval of the conversion application, SCA issues a licence to the company and such licensing decision is then published in the official gazette at the expense of the company founders.
- The company then proceeds with the IPO and listing in the same manner as a newly established public joint stock company.

Regulatory architecture: overview of the regulators and key regulations

The key regulators in the UAE in respect of the IPO process are the Securities and Commodities Authority (SCA) and the Department of Economic Development (DED). Additionally, and depending on the nature of the company's business, the company may be required to obtain the approval of other relevant governmental authorities or regulators such as the Central Bank or the Insurance Authority in the UAE.

Other than the key regulators mentioned above and as part of the IPO process, the company is required to liaise with ADX or DFM for the listing of its shares and their offering to the public.

In addition to the Companies Law, one of the important regulations in respect of an IPO are the Companies Law, and the Chairman of SCA's Resolution No. (11/R.M.) of 2016 governing public offering and issuance of shares of public joint stock companies.

Public company responsibilities

Public joint stock companies are subject to a more refined governing structure in comparison to other legal forms of companies. The main differences manifest in the 'corporate governance' and the 'disclosure and transparency' regulations applicable to public joint stock companies.

<u>Disclosure and transparency regulations</u>

Post the IPO, the company and its shareholders have additional disclosure and transparency obligations, which include restrictions on dealing with the securities of the company, notification obligations in relation to material developments affecting the company, restrictions on publishing certain data relating to the company and to provide SCA with copies of certain documents including financial reports, and details of general assemblies and resolutions.

<u>Corporate governance regulations</u>

Public joint stock companies are obliged to follow separate regulations for corporate governance in addition to those specified in the Companies Law. Such set of corporate governance regulations can be found in SCA's Resolution No. (7/R.M.) of 2016 concerning the standards of institutional discipline and governance of public joint stock companies ("**CGR**"). These include, amongst other obligations (i) that the company is obliged to obtain approval from its shareholders and maintain records of transactions that take place with related parties, (ii) all shares issued in the company must be in the same class with equal rights attached to them, (iii) the AoA and internal by-laws of the company should include controls to protect shareholders' rights, and (iv) the company must have internal control systems to ensure compliance with corporate governance rules.

The company is also obliged to issue a 'Corporate Governance Report', which has to provide details of all remuneration and compensation paid to the board; such report must be available to the shareholders prior to the annual general meeting.

Potential risks, liabilities and pitfalls

Given that the IPO is a simple and straightforward process, there should be no potential legal risks, liabilities or pitfalls with regards to undertaking the IPO process should the above-mentioned procedures be thoroughly followed and all governmental approvals obtained. This is notwithstanding any risks, liabilities and pitfalls related to the business of the company itself or any market risks occurring during the IPO process. However, any negligence on the part of the company or its advisors may expose the company and its founders to risk. The IPO is a lengthy and detailed process that needs to be dealt with by advisors who are experienced in the field of IPOs, in order for them to handle the requirements and ensure compliance with all regulations in an efficient manner and minimise any risk to the company and its founders.

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Introduction

The decision for a private company to 'go public' may be based on a number of factors. An initial public offering ("IPO") is likely to provide a private company with enhanced access to capital and liquidity and increase its public profile. It will also create an acquisition currency for the company to use in future transactions, which is an increasingly important consideration for companies as they look to accelerate growth through M&A. From a shareholder perspective, an IPO provides major shareholders with the opportunity to realise their investment by selling part (or potentially all) of their stake through the IPO.

Once a company has decided to conduct an IPO, it will be faced with the decision of where to list. London has long been considered one of the pre-eminent locations for a company considering listing its shares on a public market. Its deep and knowledgeable pool of institutional investors and stable and developed legal environment have laid the foundations for London's IPO market to flourish. This has been supported by a group of internationally recognised advisers and other service providers.

London's equity markets are relatively sector-agnostic and attract companies from a broad range of industries. In 2017, IPOs, or introductions without a fundraising, were completed on the Main Market by companies in the financial, consumer services, consumer goods, healthcare, real estate, industrials and technology sectors. The most common sector for Main Market IPOs in each of the last three years has been financials, with consumer goods and services, healthcare and industrials also performing strongly. On the AIM, the same sectors have shown high levels of activity in recent years along with the technology sector, which is consistent with AIM's positioning as an exchange for high growth and developing companies.

Recent developments in the London IPO market have included an increase in the proportion of companies carrying out IPOs on the Main Market who are well-established, large in scale and later in their life cycle than the traditional IPO candidate. This appears to be driven by two factors: (i) larger scale companies may reach a point where they are unable to satisfy their current funding needs through private finance, and looking forward they are attracted by the funding opportunities that follow-on/secondary offerings will provide in the future; and (ii) conversely, some larger scale companies are driven not by financing needs but by the strategic opportunity that an IPO presents to raise public profile and help penetrate new markets by listing overseas.

Another notable recent trend in the London market, as with other jurisdictions, is that it has become common for financial sponsors of portfolio companies to run 'dual track' processes whereby work on an IPO will be undertaken alongside an auction sale of the asset, giving owners visibility on which process will garner the highest valuation.

Equity markets were robust during 2017; however, at the time of writing they are undergoing a correction and period of volatility not seen since 2015. This underlines that it is imperative for companies to be fully prepared, with any necessary structuring and key documentation sufficiently advanced, in order to launch their IPO in a relatively short space of time while market conditions permit.

The IPO process: steps, timing and parties and market practice

The first step for a company considering listing in London will be to determine which market is right for it. By far the most commonly used markets are those of the London Stock Exchange ("LSE"), although a very small number of companies have in recent years listed on Euronext London, in particular companies who are conducting a dual IPO on one of Euronext's other European exchanges. Given the prevalence of the LSE, however, the procedures and regulations described below assume a listing on one of the LSE's markets.

The LSE operates two principal markets: the Main Market; and AIM. The Main Market is the LSE's flagship market, and a 'regulated market' for the purposes of the EU Directive on markets in financial instruments (No. 2014/65/EC). This means that companies who are also seeking admission to the 'Official List' (the list maintained by the Financial Conduct Authority ("FCA") of securities that are officially listed in the UK) can conduct their IPO on the Main Market and become eligible for admission to the Official List. This attracts larger companies, and certain institutions will have investment policies that restrict them from investing in London listed companies unless they are admitted to the Official List (and they may indeed be limited further to investing in companies with a 'premium' listing).

AIM is the preferred London market for smaller and/or growth companies.[1] It operates a less prescriptive regulatory and governance regime than applies to companies admitted to trading on the Main Market, which is considered to be more appropriate for the stage of development of these types of companies. It will also be more attractive for companies that will have a small free float as there is no formal minimum free float requirement on AIM, whereas companies seeking admission to the Main Market will ordinarily need at least a 25% free float.

A company seeking admission to the Official List will need to decide early in the process whether to seek admission to the 'premium' listing segment of the Official List or to the 'standard' listing segment. Both segments are available to UK and non-UK incorporated companies; however, a 'premium' listing will require the company to adhere to the UK's highest standards of regulation and governance, both in terms of eligibility criteria and continuing obligations, as described below. A premium listing is, however, one of the criteria for inclusion in the FTSE UK indices, which may be an important consideration for the company. In addition to having a premium listing, the company will need to be admitted to trading on the LSE and allocated UK nationality by FTSE. The latter nationality test will be significantly easier to satisfy if the company is UK incorporated, and non-UK incorporated companies would need to have a 50% free float. If the UK nationality requirement prevents FTSE inclusion, a premium listing may have little additional value for the company over a standard listing.

A standard listing may also be an attractive option for certain overseas companies looking to access the London markets as it is possible to list depositary receipts (also known as 'global depositary receipts' ("GDRs")) on the standard listing segment, whereas the premium listing segment is reserved only for equity shares issued by trading companies or closed or open ended investment funds. Depositary receipts are tradable securities representing the underlying shares of the issuer. The benefit for companies incorporated in certain emerging market jurisdictions is that whereas it may be challenging to market shares of a company in their jurisdiction to international investors, due to the additional cost and complexity that may be involved with owning such shares and the associated exchange rate risks, the same issues do not apply for depositary receipts. Under a GDR structure, the shares of the company will be held by a depositary bank, who will then issue GDRs representing those shares to investors and exercise its voting rights in accordance with instructions provided by the respective GDR holders. The Listing Rules contain a separate section for GDRs in Chapter 18, which modify some of the requirements that apply to a standard listing of equity shares; however the main eligibility requirements and continuing obligations are substantively the same. However, under the requirements of the Prospectus Rules, a GDR issuer will not be required to include a working capital statement in their prospectus.

In July 2017, the FCA launched a consultation on adding new premium listing categories for shares and depositary receipts of sovereign-controlled companies, meaning companies with a shareholder that controls at least 30% of voting rights and is either a sovereign or head of a state that is recognised by the UK (acting in his or her public capacity), the government of that state, a state department or an agency or SPV of that state. This would allow such companies to obtain a premium listing without having to comply with the rules on related party transactions and controlling shareholders, which currently apply to all premium listed companies as discussed below. At the time of writing, no final decision has been reached by the FCA on whether this new listing category will be introduced.

In deciding which market to pursue its IPO on, a company will need to engage with its legal and financial advisers at an early stage to determine if it will satisfy the eligibility criteria of its chosen market. The advisory team will consist of at least the following:

- **Sponsor/Nominated Adviser/financial adviser**: For companies seeking a premium listing on the Main Market, they will need to appoint an investment bank or other institution authorised by the FCA to act as the company's sponsor (the "Sponsor") in accordance with the Listing Rules published by the FCA (acting in its capacity as the UK Listing Authority (the "UKLA")) (the "Listing Rules"). The Sponsor's role is to advise the company on the application of the Listing Rules and the Prospectus Rules published by the UKLA (the "Prospectus Rules"), and to make a declaration to the UKLA shortly before admission confirming that all applicable requirements have been satisfied. The company will be required to appoint a Sponsor after it has been admitted to trading in relation to certain transactions and other matters where the application of the Listing Rules needs to be taken into consideration.

  The Nominated Adviser, or 'Nomad', is broadly the equivalent of a sponsor on AIM; however the key difference is that a Nomad's appointment is full time, acting as an interface between the LSE and the AIM company and providing regulatory advice to the company on an ongoing, rather than *ad hoc*, basis.

  Companies seeking a standard listing on the Main Market will not be required to appoint a Sponsor or Nomad, but will ordinarily appoint a financial adviser to assist them with matters such as structuring, valuation, marketing and transaction management.
- **Underwriters**: The company will appoint at least one bank, who may also be the Sponsor, to lead the offering of shares to investors (known as the 'global coordinator'). A wider syndicate of banks may then be appointed by the company and the global coordinator to implement the offering.
- **Reporting accountants**: The accountants will assist with ensuring that the company has sufficient and up-to-date financial information to meet the requirements of the

Prospectus Rules and Listing Rules, in the case of a Main Market IPO, or the AIM Rules for Companies, in the case of an AIM IPO. Other key work streams for the reporting accounts will be preparing a detailed due diligence report on the financial position of the company's group (known as the 'long form report'), confirming that there has been no significant change in the financial position of the company since the date of its most recently audited accounts, preparing reports on the adequacy of the company's working capital and, in the case of a premium listing, the directors' ability to make proper judgments on an ongoing basis as to the financial position and prospects of the company's group and the capitalisation and indebtedness of the company's group.

- **Legal advisers**: The company's legal advisers will assist with the structuring of the group, detailed legal due diligence and the preparation of relevant disclosure, advising on the corporate governance for the group, advising on the implications of the Listing Rules, Prospectus Rules and other relevant laws and regulations to the IPO and preparing the principal transaction documentation, including the prospectus.

Once the advisory team has been appointed, the company and its advisers will focus initially on structuring, preliminary documentation and due diligence. This phase will normally last between six and 12 weeks.

Other factors for the company to consider at an early stage will be the composition of the board and, for companies seeking a premium listing, whether it will be able to comply with the UK Corporate Governance Code (see further below). The company will also spend considerable time with the underwriters reviewing the equity story of the company, which will be a key factor to determining the success of the transaction.

The initial documentation that the company and its advisers will need to progress will include guidelines on the publication of analysts research (if relevant) and information concerning the company and/or the IPO more generally. The research guidelines will be adopted by the company and all members of the underwriting syndicate, will set out the key requirements for the contents of any research reports from analysts and establish restrictions on the dissemination of such reports in line with relevant regulatory provisions (both in the United Kingdom and the United States).

Similarly, the publicity guidelines will seek to address the regulatory risk resulting from:

(i) the prohibition on communications, in the course of business, which invite or induce the engagement of investment activity (a 'financial promotion') by anyone other than a person authorised by the FCA, unless the financial promotion is either approved by such authorised person or is covered by an appropriate exemption;

(ii) the requirements of the Prospectus Rules in relation to announcements or documents that could be considered an 'advertisement' under those rules; and

(iii) statements being made which differ from those made in the prospectus, which could potentially call into question the adequacy of disclosure made in the prospectus and increase potential for claims being made by disgruntled investors,

and will set out the process that must be followed before information can be released by or on behalf of the issuer (including the vetting of certain communications by the company's legal and financial advisers).

Work will also commence on the key transaction documents; namely the prospectus (or admission document for an AIM IPO) and the underwriting agreement. The prospectus will contain comprehensive information on the issuer, its business and its management and the risks of investing, each as required by the Prospectus Rules and the Financial Services and Markets Act 2000 ("FSMA"). It is the primary marketing document for the IPO, and will form the basis for an investor's decision to participate in the offering or not. It will therefore also need to contain details of the offer and its timetable. The FCA will review advanced drafts of the prospectus prior to granting its approval. It will provide comments to the advisory team during this vetting process to ensure that the document meets the requirements of the Prospectus Rules and the Listing Rules. Further detail on the key disclosure requirements of the prospectus is included below. If a book-building process is conducted (as discussed below), an earlier version of the prospectus may be distributed to potential investors. This may either be a 'pathfinder' prospectus (i.e. an advanced draft of the prospectus which does not contain details of the offer price or size and has not been approved by the FCA (and will therefore only be distributed to institutional investors)) and/or a 'price range' prospectus (a finalised prospectus that has been approved by the FCA and includes a specified range within which the shares are expected to be priced).

The underwriting agreement will, as on any IPO, set out the agreement between the issuer, the directors, the selling shareholder(s) (if any) and the underwriters as to the terms on which the offering of shares in the IPO will be conducted, the mechanics for placing and settling shares with investors and the process for admission. It will contain, amongst other things, extensive termination rights for the underwriters (e.g. if there is a material adverse change in circumstances or a *force majeure*) and representations and warranties from the company and its directors which are designed to support the due diligence exercise by eliciting information that may need to be disclosed in the prospectus. The underwriting agreement may also include lock-ups on the company, its directors and any selling shareholders, although separate lock-up agreements may be entered into, including with any other significant shareholders. On an AIM IPO, lock-ups are required under Rule 7 of the AIM Rules for Companies, for a 12-month period from admission, from any 10% shareholder or any director, and their respective associates, if an applicant for listing has not been independent and earning revenues for at least two years.

Ordinarily, a UK IPO will be underwritten on a 'reasonable endeavours' basis, whereby the banks agree to use reasonable endeavours to procure placees for the shares being offered. If, however, the banks are unable to procure placees, they will have no obligation to take up the shares themselves. As most UK IPOs are also conducted on a book-built basis, where investor appetite for the offering is gauged before pricing is confirmed, the banks will 'build the book' prior to signing the underwriting agreement, giving the banks and company clarity on how many shares will be taken up. It will be a matter between the company and the banks whether the banks bear the credit risk of placees failing to pay for their shares.

As mentioned above, the legal advisers and reporting accountants will conduct a thorough due diligence review of the legal and financial affairs of the company and its group. This should identify early in the process if there are any issues which could potentially prevent the IPO from proceeding. It will also assist the Sponsor in confirming the company's suitability for listing, and the legal advisers in identifying what disclosures need to be made, and what risk factors need to be identified, in the prospectus or admission document. In making such assessment, the legal advisers will consider whether a potential investor would expect to be provided with such information and whether their investment decision could be influenced by such information.

The due diligence review will also help to determine whether any pre-IPO restructuring will be necessary; for example the transferring of assets between group companies to ensure that the listed group holds all necessary assets to carry on its business, as identified in the prospectus.

In the case of certain companies operating in specialised industries, additional specialist reports may be required. For example, real estate companies may need to obtain updated property valuation reports, and mining or oil & gas companies will need to obtain reports from technical experts on their assets (as discussed further below).

Once initial structuring, due diligence and documentation matters have been completed, the company will begin investor education and the marketing of the IPO. Typically investor education, which is limited to institutions and involves the publication of research reports, will begin approximately four weeks prior to pricing, with formal marketing through the publication of a 'pathfinder' prospectus and management presentations on an investor roadshow, taking place in the final two weeks prior to pricing. As mentioned above, however, there are proposed reforms to the marketing process for London IPOs which may affect this 'typical' timetable. This is discussed in further detail below.

All further documentation will need to be completed while investor education progresses. For a company seeking a premium listing on the Main Market, this will include a relationship agreement with any 'controlling shareholders', meaning any person who exercises or controls, on their own or together with any person with whom they are acting in concert, 30% or more of the votes able to be cast on all or substantially all matters at general meetings of the company. The relationship agreement will govern dealings between the company and its controlling shareholder(s) and is aimed to ensure that the company is able to operate its business independently and that all transactions with the controlling shareholder are on arm's-length terms. The agreement will, at a minimum, need to contain undertakings that: (i) transactions and arrangements with the controlling shareholder (or any of its associates) will be conducted at arm's length and on normal commercial terms; (ii) neither the controlling shareholder nor any of its associates will take any action that would have the effect of preventing the company from complying with its obligations under the Listing Rules; and (iii) neither the controlling shareholder nor any of its associates will propose or procure the proposal of a shareholder resolution which is intended or appears to be intended to circumvent the proper application of the Listing Rules. It is also accepted market practice, but not a requirement, that a relationship agreement will be put in place by an AIM company with a 30% (or larger) shareholder.

Connected to the requirement to have a relationship agreement, the Listing Rules also require that the articles of association of a company seeking a premium listing on the Main Market must permit a two-step election/re-election process for independent directors whereby such appointments need to be approved by both the shareholders of the company and independent shareholders excluding the controlling shareholder(s), or, if approval from both groups is not obtained, by the shareholders of the company in a second resolution passed between 90 and 120 days from the date of the original vote.

Other important documentation that will need to be prepared includes the sponsor agreement (for a Main Market listing) or nominated adviser agreement (for an AIM admission), setting out the terms of the Sponsor or Nomad's engagement with the company and placing certain obligations on the company which aim to ensure that the Sponsor or Nomad are able to comply with their regulatory obligations. The suite of comfort letters mentioned below will also be a focus for the Sponsor or Nomad, as will director and officer questionnaires used to confirm certain key information on the company's management, the presentation to be used on the marketing roadshow and the company's intention to float announcement.

At the final stage of the IPO process, the company will follow the formal admission requirements set out in the London Stock Exchange's Admission and Disclosure Standards

("ADSs") and either Chapter 3 of the Listing Rules, in the case of a Main Market IPO, or Rules 2 to 6 of the AIM Rules for Companies, in the case of an AIM IPO.

The ADSs require that an issuer contacts the LSE no later than 10 business days before the application for admission is to be considered, using a prescribed form titled 'Form 1' and accompanied by a draft copy of the prospectus. The application will, however, be considered as provisional at this stage and will only be deemed to be a formal application once the prospectus has been approved by the FCA. The formal application and the final prospectus must be submitted to the LSE by no later than midday at least two business days prior to the consideration of the application for admission. Written confirmation of the number of securities to be allotted must also be provided by no later than 16:00 on the day before admission is expected to become effective, unless the LSE has agreed in advance to extend this to no later than 07:00 on the day of admission.

The requirements of Chapter 3 of the Listing Rules include submitting certain documents by midday two days before the FCA is to consider the application for admission (the "48 hour documents"). These include a prescribed form of application for admission and a copy of the prospectus that has been approved by the FCA (or another relevant authority in the company's 'home member state' (ordinarily the member state of the European Economic Area in which the company has its registered office), in which case a certificate of approval from such authority and a translation of the summary of the prospectus will be required) and written confirmation of the number of shares to be allotted. In addition, a prescribed Shareholder Statement, confirming the number of shares to be admitted and the number of those shares which are in public hands, and a prescribed Pricing Statement, confirming the pricing of the new shares being issued, will need to be signed by the Sponsor and submitted to the FCA on the day of admission.

For a Main Market IPO, in accordance with Listing Rule 8.4.3 the company's Sponsor will also need to make a declaration to the FCA in the prescribed form (the "Sponsor Declaration") either on the day the FCA is to consider the application for approving the company's prospectus (prior to its approval) or at another time agreed with the FCA in certain circumstances. The Sponsor Declaration will, among other things, confirm that: (i) the sponsor has taken reasonable steps to satisfy themselves that the directors of the company understand their responsibilities and obligations under the Listing Rules and the Disclosure and Transparency Rules ("DTRs"); (ii) the company has satisfied all requirements of the Listing Rules relevant to an application for listing; (iii) that the applicant has satisfied all applicable requirements set out in the Prospectus Rules; (iv) the directors have established procedures which will enable the company to comply with the Listing Rules and the DTRs on an ongoing basis; (v) the directors have established procedures which will provide a reasonable basis for them to make proper judgments on an ongoing basis as to the financial position and prospects of the company and its group; and (vi) the directors of the company have a reasonable basis on which to make the required working capital statement. In order to support this declaration, the sponsor will require the reporting accountants and the legal advisers to provide it with various comfort letters (which will also be addressed to the company) on the matters covered by the Sponsor Declaration.

Rules 2 to 6 of the AIM Rules for Companies require that the company provides the LSE with certain information at least 10 business days before the expected date of admission. This covers similar information to that required by Form 1 for a Main Market IPO but also includes additional information such as a brief description of the business, the names and functions of directors and proposed directors and details, insofar as they are known, of any significant shareholders (i.e. holding 3% or more of any class of shares in the company). At least three business days prior to admission, the company must submit a completed application for admission, in the LSE's prescribed form, and an electronic copy of its admission document. These final documents must be accompanied by a declaration from the company's Nomad ("Nomad Declaration"), similar to a Sponsor Declaration, confirming matters such as the company's appropriateness for listing on AIM and that the AIM Rules for Companies and the AIM Rules for Nominated Advisers have been complied with, in particular that the admission document complies with the content requirements set out in Schedule 2 of the AIM Rules for Companies. As with the Sponsor Declaration, the Nomad will obtain comfort letters from the reporting accountants and the legal advisers to support its declaration.

In the case of either a Main Market IPO or AIM IPO, admission to trading will only become effective once the LSE has announced this on a regulatory information service.

Regulatory architecture: overview of the regulators and key regulations

As noted above, the regulatory requirements for a London IPO will depend on the market that is chosen. For Official List (i.e. Main Market) IPOs, the legislative and regulatory framework is principally contained in the FSMA, the Listing Rules, the Prospectus Rules and the ADSs. The Listing Rules set out the eligibility criteria for applicants and the continuing obligations that they will need to comply with on an ongoing basis, once listed. The key differences in the eligibility criteria for a premium listing and a standard listing are that:

- the date of the latest audited financials for a premium listing is not more than six months before the prospectus (or nine months before admission), whereas for a standard listing it is 18 months before the prospectus if audited interims are included, or 15 months if unaudited interims are included;
- a premium listing ordinarily requires a three-year track record to be demonstrated, whereby the financial information for such period must represent at least 75% of the applicant's business;
- an applicant for a premium listing must be able to demonstrate that it will be carrying on an independent business as its main activity;
- the constitutional documents of a non-UK applicant for a premium listing must provide shareholders with pre-emption rights if the laws of its country of incorporation do not provide such rights;
- an applicant for premium listing must have a relationship agreement in place with any controlling shareholders (see further below); and
- an applicant for a premium listing must appoint a Sponsor for the listing.

The UKLA regulates the admission of securities to the Official List. In doing so, it is also responsible for making, reviewing and amending the Listing Rules, enforcing compliance with the Listing Rules, dealing with listing applications and generally reviewing and enforcing Listing Rules matters. It is also the 'competent authority' in the UK for reviewing and approving prospectuses. The LSE regulates the admission of securities to trading on the Main Market, and in doing so it is responsible for publishing the ADSs. These set out the LSE's rules and requirements in relation to a company's admission to trading and ongoing disclosure obligations on any of the LSE's markets other than AIM.

In the case of an AIM IPO, FSMA will apply; however the Listing Rules and the ADSs will not be applicable. Instead, applicants will be required to comply with the AIM Rules for Companies published by the LSE. The Prospectus Rules may not apply to an AIM

IPO, as a prospectus will not be required unless the IPO constitutes an 'offer to the public' under FSMA. Ordinarily, however, AIM IPOs are structured to avoid this by limiting the offering to institutional investors, meaning that an exemption from the 'offer to the public' test can be relied upon.[2] The eligibility criteria for an AIM admission are similar to those for a standard listing on the Main Market; however, as mentioned above there is no formal minimum free float for an AIM admission.

The disclosure obligations for a company seeking to list in London are set out in the Prospectus Rules, in the case of a company seeking admission to the Main Market and in which case the key disclosure document is a prospectus, or the AIM Rules for Companies, in the case of a company seeking admission to AIM (assuming, as mentioned above, that they do not conduct an 'offer to the public') and in which case the key disclosure document is an 'admission document'.

Some of the key information the Prospectus Rules require to be included in a prospectus are:

- risk factors informing potential investors of the material risks to the issuer, its industry and the securities being offered. These should be particular to the issuer, deal with specific risk and not conflict with the issuer's working capital statement;
- the last three years' audited financial information prepared in accordance with IFRS or, in the case of a non-EEA issuer, in accordance with national accounting standards where these standards are considered equivalent to IFRS, such as US GAAP;
- details of any significant changes in the financial or trading position of the company since the date of the latest published audited or interim financial information included in the prospectus;
- a working capital statement covering the 12-month period from the date of the prospectus, although in practice the company and its Sponsor will normally ask the reporting accountants to cover a period of 18 to 24 months in its working capital exercise as a precaution;
- an operating and financial review ("OFR") describing the company's financial condition, changes in financial condition and results of operations for the periods covered by the historical financial information included in the prospectus. This is similar to, but not quite as broad as, the management discussion and analysis ("MD&A") required in a US IPO;
- summaries of material contracts entered into outside of the ordinary course of business by the company's group in the past two years (or longer if material obligations or entitlements remain outstanding);
- details of any significant shareholders of the issuer, whose interest is notifiable under the issuer's national laws;
- details of any related party transactions that the company has entered into during the period covered by the historical financial information and up to the date of the prospectus;
- details of any legal proceedings that the company has been party to in the last year;
- prescribed information on the company's directors and senior management, including remuneration, benefits and interests in the shares of the company (including share options); and
- responsibility statements from the company, the directors and any proposed directors, confirming that they accept responsibility for the information contained in the prospectus and that to the best of their knowledge (having taken all reasonable care to ensure that such is the case) such information is in accordance with the facts and contains no omission likely to affect its import.

A supplementary prospectus will need to be published if any significant new factor, material mistake or inaccuracy relating to the information included in the original prospectus arises during the period after publication of the original prospectus but before the later of the securities being admitted to trading and the closing of the offer to the public. Significantly, the issuance of a supplementary prospectus triggers withdrawal rights for any investor who had previously agreed to purchase shares in the offering. Such rights are exercisable before the end of the second working day after the day on which the supplementary prospectus was published.

Additional disclosure obligations apply to mineral companies[3] and scientific research-based companies, and also property companies and shipping companies,[4] as 'Specialist Issuers' under the European Securities and Markets Authority's update of the CESR recommendations on the consistent implementation of Commission Regulation (EC) No 809/2004 implementing the Prospectus Directive (ESMA/2013/319) (the "ESMA Recommendations"). The aim of the ESMA Recommendations is to provide advice on the interpretation of the Prospectus Directive and ensure there are a common set of standards for the preparation of prospectuses across the EU. The ESMA Recommendations are applied by ESMA members on a voluntary basis; however, under Prospectus Rule 1.1.8G, when determining whether a company has complied with those rules and the requirements of Part 6 of FSMA, the FCA considers whether the ESMA Recommendations have been followed and they therefore form an integral part of the prospectus regulation in the UK. For example, a mineral company will ordinarily be required to include a 'competent person's report' ("CPR"), dated not more than six months from the date of the prospectus and prepared by a qualified person, reporting on the mineral projects of the company. This will need to include, at a minimum, the information set out in Appendix II (for mining companies) or Appendix III (for oil and gas companies) of the ESMA Recommendations, such as a legal and geological overview of the company, data on its resources and/or reserves, a valuation of reserves (if applicable), an assessment of environmental liabilities, a selection of historic production statistics and operating expenditure, a discussion of the projects' infrastructure, maps of the projects and any other relevant special factors. In addition, the CPR must be drawn up in accordance with one or more of the reporting standards set out in Appendix I to the ESMA Recommendations.

The Listing Rules also contain a small number of variations for mineral companies and scientific research-based companies[5] from the normal eligibility requirements of a premium listing. Such companies will not be required to produce three years of historical financial information if they have been operating for a shorter period,[6] in which case the three-year track record requirement referred to above will be reduced to the period for which the mineral company has published financial information. A mineral company which does not hold controlling interests in a majority (by value) of the assets will also be required to demonstrate that it has a reasonable spread of direct interests in mineral resources and has rights to participate actively in their extraction, whether by voting or by other rights which give it influence in its decisions over the timing and method of extraction of the resources.

Although there are no formal requirements on the due diligence to be carried out on a mineral company under the Listing Rules, it is common practice on the London IPO of a mineral company that a legal opinion will be obtained from a law firm qualified in the jurisdiction in which the company's mineral assets are located confirming the title to such assets and other matters relating to the legal regime governing mineral rights in that jurisdiction. This additional step is taken as the value of a mineral company will be based almost entirely on the validity of its right to explore and exploit minerals and such value could be wiped out if such rights are lost.

For companies seeking admission to AIM, the content requirements for their admission document are set out in Schedule Two of the AIM Rules for Companies, which are based on the contents requirements for a prospectus but with certain variations. For example, an OFR will not be required, but a prescribed disclaimer on the nature of AIM being a market for emerging or smaller companies will. Schedule Two also contains a general disclosure requirement that the company includes any other information which it reasonably considers necessary to enable investors to form a full understanding of the assets and liabilities, financial position, profits and losses, and prospects of the applicant and its securities for which admission is being sought, the rights attaching to those securities and any other matter contained in the admission document.

On 23 October 2017, the FCA published Policy Statement 17/23 confirming that it would implement various changes regarding the availability of information during the IPO process, which it had proposed in March 2017 through Consultation Paper 17/5. These changes take effect from 1 July 2018 and include two significant amendments to the FCA's Conduct of Business Sourcebook aimed at encouraging more independent pre-IPO analyst research and requiring earlier publication of a largely complete prospectus than had previously been the normal practice.

Prior to these changes, the key information opportunities for potential investors in UK IPOs have been the publication of:

- analyst research on the issuer – this has virtually always been produced by 'connected analysts' (i.e. analysts from the banking syndicate engaged to market the IPO);
- the issuer's detailed 'Intention to Float' announcement, which then starts a 'black-out' period of (typically) two weeks during which no further information (including a draft prospectus) about the IPO is published; and
- a price-range/pathfinder prospectus following expiry of the 'blackout' period and the running of the management roadshows and start of the book-building exercise.

This long-established process has led to concerns that that: (i) there is a marked lack of independent analyst research, when compared to 'connected analyst' research, during the initial investor education phase; and (ii) there is information asymmetry that favours the issuer and sell-side firms, at the expense of investors who do not get access to detailed information about the issuer and the IPO proposition as early in the IPO process.

From 1 July 2018, these concerns will be addressed by requiring that:

- connected and unconnected or independent analysts are in effect treated equally by the issuer and its advisers, in order to facilitate the publication of more unconnected research and to enable this to be published at the same time as connected research. This will either involve unconnected analysts being granted access to the issuer's management either alongside connected analysts or under a separate track; and
- either the approved prospectus or an approved 'registration document' component of the prospectus (i.e. setting out the disclosure information on the company but not the details of the offering)[7] is published at least:
  - one day (if unconnected analysts are offered access to the issuer's management alongside connected analysts); or
  - seven days (if they are offered access under the separate track),

before any connected research is released.

Respondents to the FCA's March 2017 consultation noted that their expectation was that, due to confidentiality concerns, issuers will want to provide unconnected analysts with management access separately from connected analysts (most likely immediately after the prospectus or registration document has been published), meaning that the seven-day gap between prospectus/registration document and connected research would apply. This has been seen as potentially increasing the execution risks involved. However, it has also been suggested that this will help bring the UK IPO process more into line with the US IPO process, where a draft registration statement is published relatively early on in the IPO process, and may give issuers flexibility to take a decision on whether or not to pursue an IPO at short notice.

Public company responsibilities

A company considering an IPO will need to be mindful of the continuing obligations that will apply to it as a publicly listed company. For a company with a premium listing on the Main Market, this will include either complying with the UK Corporate Governance Code (which is expected by the investor community) or, alternatively, explaining in its annual report why it does not comply. The UK Corporate Governance Code covers matters such as the composition and responsibilities of the board and its committees and executive remuneration. The UK Corporate Governance Code does not apply to companies with a standard listing or companies admitted to trading on AIM; however, they are still required to make disclosures about the corporate governance regime they follow. These companies may choose to follow a corporate governance code voluntarily, as investors will often expect them to do so. For example, AIM companies often follow the Corporate Governance Guidelines for Small and Mid-size Quoted Companies published by the Quoted Companies Alliance.

Companies with premium listings in London will also need to obtain shareholder approval for certain transactions. This includes reverse takeovers, and for companies with a premium listing will also apply to certain related party transactions and significant transactions that are classified as 'Class 1' transactions. Broadly, these are transactions that, when applying a gross asset, profit, consideration or gross capital test, have a transactional value (in relation to the company) of 25% or more.[8] Companies admitted to trading on the Main Market will also need to issue a prospectus if they conduct a public offering or if they issue shares in any 12-month period representing 20% or more of its share capital at the start of such period. The requirement to issue a prospectus will only apply to companies admitted to trading on AIM if they make a public offering.

However, the most significant change for a listed company (or an AIM-traded company) is likely to be its increased disclosure obligations and the control of 'inside information'. These obligations are primarily governed by the EU's Market Abuse Regulation ("MAR"). Among other things, MAR:

- prohibits dealings in securities while in possession of inside information concerning those securities;
- requires disclosure 'as soon as possible' by an issuer of 'inside information' which directly concerns that issuer, subject to certain limited exceptions under which disclosure may be delayed, in which case records must be kept which include how the MAR conditions for delaying public disclosure of inside information are being satisfied and who was responsible for deciding to delay disclosure;
- prohibits the selective disclosure of 'inside information' (e.g. the disclosure of inside information to certain potential investors or counterparties to transactions), except in very limited circumstances. These limited exceptions include disclosures to persons made 'in the normal exercise of an employment, profession or duties' and a 'safe

harbour' in respect of 'market sounding' activities subject to following detailed record-keeping and other requirements with respect to the 'safe harbour';
- requires records, known as 'insider lists', to be kept of who 'inside information' has been provided to; and
- contains detailed disclosure obligations in relation to any dealings in securities of the company by persons discharging managerial responsibilities and their closely associated persons, and restricts such persons from dealing during a 'closed period' of 30 days prior to annual and interim financial reports/results announcements.

AIM-traded companies are subject to an additional 'price-sensitive information' disclosure obligation that overlaps with their MAR disclosure obligation.

Listed (or AIM-traded) companies will also need to produce additional financial information as they are required to publish half yearly accounts, as opposed to annual accounts only. Furthermore, any non-UK company who is intending to incorporate a UK company as its IPO vehicle should be mindful that all UK incorporated companies, other than certain small companies who are exempt, are required to include a standalone strategic report in their annual report which sets out a fair review of the company's business and a description of the principal risks and uncertainties facing the company, illustrated with the use of KPI analysis if necessary. UK companies who are admitted to the Official List must also produce an annual directors' remuneration report, containing detailed disclosure of each directors' remuneration and benefits, which will be subject to a non-binding advisory vote by shareholders, and this must include a forward-looking policy on directors' remuneration which at least once every three years (and sooner if any change is proposed to be made to it) will be subject to a binding vote by shareholders.

Potential risks, liabilities and pitfalls

The decision to conduct an IPO is a significant step for any company, and requires careful planning and diligent execution in order to minimise the potential risks and liabilities that could arise from the IPO process and subsequently from the company's new status as a listed company.

Firstly, the company and all of its directors, including those being appointed as part of the IPO and identified in the prospectus or admission document, are responsible for the contents of the prospectus or admission document and could therefore have liability if it fails to meet the applicable contents standards. The general obligation is that the document contains information necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the company and the rights attaching to the shares being listed. If this standard is not met, the company and its directors may be liable to compensate investors who relied on the prospectus or admission document and suffered loss as a result. Those persons responsible could also face criminal sanctions if the document is false or misleading as a result of their dishonesty or recklessness.

In order to protect against any such civil or criminal liability, a thorough legal and financial due diligence exercise will be conducted, as referred to above. In addition, in the UK it is usual practice to carry out a verification process on the prospectus or admission document. This involves checking that each statement contained therein is corroborated by reference to underlying independent documentation. The exercise is typically managed by the company's legal advisers, who will liaise with the company's directors and other nominated officers. It has become increasingly common for this exercise to be limited to key/material disclosures, as the historic 'line-by-line' verification process is considered to involve disproportionate time and cost. The results of the verification process will be documented in formal notes that are signed by the directors of the company. This differs from US practice where no such formal verification process is recorded.

Once listed, the company must comply with its obligations under the Listing Rules or the AIM Rules, as applicable. The Listing Rules (and the AIM Rules) require companies to have in place adequate (or sufficient) procedures, systems and controls to enable them to comply with their obligations under those Rules. A failure to comply with Listing Rules' or AIM Rules' obligations can result in the FCA or the LSE, respectively, invoking their powers to publicly censure and/or fine the company or to suspend, or in exceptional cases cancel, the listing or trading of its securities. Furthermore, for companies on the Main Market, the FCA has power to publicly censure and/or fine a director of the company who was knowingly concerned in the breach.

In addition, the listed company will need to ensure it meets its ongoing obligations under MAR, as a breach of MAR by an individual or legal person is a civil offence punishable by a fine and administrative sanction. Furthermore, certain conduct that amounts to a breach of MAR is potentially also a criminal offence under the UK Criminal Justice Act 1993 which prohibits individuals from dealing in price-affected securities when in possession of inside information, encouraging another to deal in price-affected securities and disclosing inside information otherwise than in the proper performance of their employment, office or profession.

Accordingly, it is imperative that a company pursuing a listing obtains appropriate advice to mitigate these risks both during and following the listing process, and adopts suitable internal procedures and governance checklists to ensure that the benefits of conducting its IPO are not tarnished by avoidable pitfalls once it is listed.

* * *

Endnotes

1. The LSE also launched the High Growth Segment in 2013, which is a segment of the Main Market for EEA incorporated, mid-sized high growth companies that require access to capital and a public platform to continue their growth. However, only a very limited number of companies (two as at the time of writing) have listed on it since then.
2. Broadly speaking, a prospectus will be required in the UK (subject to certain limited exceptions) if a company is: (i) seeking admission of its securities to trading on a regulated market in the UK; or (ii) making an offer 'to the public' (defined broadly) in the UK.
3. Under the FCA's Handbook containing the Listing Rules and the Prospectus Rules, a mineral company is a company or group whose principal activity is, or is planned to be, the extraction of mineral resources (which may or may not include exploration for mineral resources). Mineral resources include metallic and non-metallic ores, mineral concentrates, industrial minerals, construction aggregates, mineral oils, natural gases, hydrocarbons and solid fuels including coal.
4. The ESMA recommendations also cover 'start-ups', meaning companies that have been in operation for less than three years; however such companies will not satisfy the three-year financial track record requirements of the Listing Rules.

5. Under the FCA Handbook, a scientific research-based company is a company primarily involved in laboratory research and development of chemical or biological products or processes or any other similar innovative science-based company.
6. Additional requirements apply, however, to a scientific research-based company in such circumstances concerning the funding, research history and reasons for the listing of such company.
7. If an issuer chooses to publish a registration document rather than a full prospectus, it will need to publish either: (i) an approved 'securities note' and prospectus summary; or (ii) an approved full prospectus, later in the process.
8. Amendments to the Listing Rules which became effective on 1 January 2018 allow a premium listed issuer to: (i) disregard an anomalous profit test result of 25% or more when all other applicable class test results are below 5%, and the transaction is not a related party transaction; and (ii) in certain circumstances make specified adjustments to the figures used in calculating the profit test, if the transaction's classification would otherwise be anomalous or above 25%.

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