## PRIVATE COMPANY BOARD GOVERNANCE 11:15 AM

Steve Cruise, UBS Securities LLC

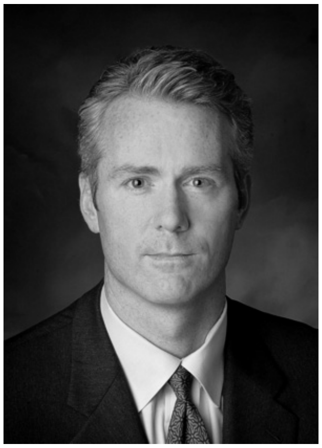
Glen Hackmann, Robert W. Baird & Co., Inc.

Jeff Klein, Equity Group Investments, LLC

William Kunkler, CC Industries, Inc.

Edwin Mason, Foley & Lardner LLP

William Mynatt, Dovenmuehle Mortgage, Inc.



**STEPHEN A. CRUISE**
MANAGING DIRECTOR,
INVESTMENT BANKING
UBS SECURITIES LLC

Stephen A. Cruise, based in Chicago, is a Managing Director in the Investment Banking Division of UBS and a founding member of UBS' Midwest Office. He is responsible for the Firm's investment banking coverage of a wide array of manufacturing and services clients, including many of the Firm's most important relationships in the Midwest. Steve also sits on the UBS Investment Banking Equity Commitment Committee.

With 15 years of financial advisory experience, Steve has executed a range of capital raising transactions, including: initial public offerings, follow-on common-stock offerings, convertible debt offerings, leveraged loan syndications, investment grade and high yield bond offerings, and private placements of debt and equity. His strategic advisory experience includes many corporate acquisitions, mergers, restructurings and divestitures.

Prior to joining UBS in April 2004, Mr. Cruise was a Director in the Global Industrial and Services Group at Credit Suisse First Boston, based in Chicago. Steve began his investment banking career with Lehman Brothers, first in New York and then in Chicago.
Mr. Cruise holds an M.B.A. in Finance and International Business from The Graduate School of Business at the University of Chicago and a B.S. in Finance and Accounting from Michigan State University. Steve sits on the following boards; The Chicago Public Education Fund, the Harris Theater for Music and Dance, the University of Chicago GSB Global Advisory Board and the Michigan State University Eli Broad College of Business. He has been a Chartered Financial Analyst (CFA) since 1995.

**GLEN HACKMANN**
MANAGING DIRECTOR &
GENERAL COUNSEL
ROBERT W. BAIRD & CO.,
INC.

Glen F. Hackmann is a Managing Director as well as the General Counsel and Secretary for Robert W. Baird & Co. Incorporated. He is also a member of the Board of Directors of Robert W. Baird Group Limited, Baird's European operation. In addition, he is Director of Risk Management, as well as Chairman of Baird's Audit Committee and Risk Management Committee. Prior to joining Baird in 1984, Glen was Chief Counsel for ContiCommodity Services, Inc. in Chicago, Illinois, and prior to that was General Counsel of Reinholdt & Gardner in St. Louis, Missouri. Glen is a former member of the District 8 Committee of the NASD. He is also a former member of the Executive Committee of the SIA's Legal & Compliance Division, as well as the former Chairman of the SIA's State Regulation & Legislation Committee. Glen graduated with an AB in English Literature from the University of Missouri and received his JD from the University of Missouri. He was Chairman of the Board of Directors for the United Performing Arts Fund of Greater Milwaukee between June 2004 and October 2006. He was the recipient of the 2005 Michael Newton Award presented by Americans for the Arts which recognized him for active, innovative and creative fund-raising techniques, distinctive management style and his commitment and dedication to the united arts fund movement. Glen is former President of the Florentine Opera Company and a member of its Board of Directors. Glen is also a former member of the Board of Directors of the Milwaukee Ballet Company.

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**JEFFREY KLEIN**
MANAGING DIRECTOR
EQUITY GROUP INVESTMENTS, LLC

Jeffrey Klein is a Managing Director at Equity Group Investments, LLC, a private investment company, where he has worked since 1996. Mr. Klein serves on a number of private boards of Equity's portfolio companies and has also served on public boards of portfolio companies. Before joining the firm, Mr. Klein headed the Chicago-based loan structuring and syndication unit of Citicorp Securities, Inc., where he underwrote and arranged bank debt for investment and non-investment-grade borrowers. Mr. Klein joined Citicorp in 1987 as a member of its leveraged capital group, which was responsible for marketing and transacting all the leveraged financing activity of the bank. Mr. Klein's career began with Mellon Bank and included involvement in its energy lending division and its private placement group. Mr. Klein attended Georgetown University, where he received a bachelor's degree in finance.

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**WILLIAM KUNKLER**
EXECUTIVE VICE-PRESIDENT
CC INDUSTRIES, INC.

William Kunkler is currently Executive Vice President - COO for CC Industries, Inc. (CCI), a private equity firm focused on manufacturing companies and real estate investments. He is also Vice President of Henry Crown and Company, the parent company of CCI.

Mr. Kunkler has over 25 years of manufacturing company experience. He is responsible for general operating issues at each of CCI's companies and serves as a director of several of the companies. Prior to joining CCI in 1994, he was Executive Vice President for Marblehead Lime Company, a subsidiary of General Dynamics Corporation. Mr. Kunkler began his career at USG Corporation in 1979 as a project engineer.

In addition to his responsibilities at CCI, Mr. Kunkler is a director of Envestnet Asset Management Inc., a financial services company based in Chicago, and NIBCO Inc., a manufacturer of valves and fittings based in Elkhart, Indiana. He is a director of The Northwestern Memorial Foundation, a trustee of Brookfield Zoo and The Field Museum of Natural History, a regent of Loyola University Chicago, and a member of the Yale Development Board.

Mr. Kunkler received his Bachelor of Science degree in Mechanical Engineering from Yale University and his Master of Management degree from Kellogg Graduate School of Management, Northwestern University.

**EDWIN D. MASON**
PARTNER
FOLEY & LARDNER LLP

Edwin D. Mason is a partner and co-chair of Foley's Chicago office Business Law Department. A member of the Transactional & Securities and Private Equity & Venture Capital Practices, he has over 25 years of experience representing clients in complex business transactions.

Mr. Mason's practice is focused principally in the areas of mergers, acquisitions, and public and private capital formation transactions. His clients include both public and privately held companies. He represents clients across a range of industries, including financial services, technology, and manufacturing.

In his mergers and acquisitions practice, Mr. Mason represents both buyers and sellers in transactions ranging in value up to and exceeding $1 billion. Transactions on which Mr. Mason has worked include mergers of public and private companies, stock and asset purchases, and joint ventures.

In his capital formation transaction practice, Mr. Mason has represented businesses from start-ups to public companies. This practice includes work on private offerings, venture capital, joint ventures, and public offerings.

Mr. Mason's practice also includes general business-law representation of a number of entrepreneurial clients, including counseling on corporate governance issues, establishment of equity incentive plans, and contract review and negotiation.

Mr. Mason received his law degree, *cum laude*, from the University of Michigan Law School in 1980 and earned his undergraduate degree, *summa cum laude*, at the University of Illinois in 1977. He has practiced in Chicago since 1980 and is involved in a number of civic and charitable organizations.

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**William Mynatt**
Chairman, President, & CEO
Dovenmuehle Mortgage, Inc.

Mr. Mynatt is the Chairman, President and Chief Executive Officer of Dovenmuehle Mortgage, Inc.  Dovenmuehle, founded in 1844, is one of the oldest mortgage companies in the United States.  Representing approximately 150 financial institutions, Dovenmuehle, the largest residential mortgage loan subservicing company in the United States, subservices approximately $60 billion of residential mortgage loans.  In 1991, Mr. Mynatt led an investor group in the purchase of the Dovenmuehle from Westinghouse Financial Services.

Mr. Mynatt received a B.A. from the University of North Carolina and an M.B.A. from the Columbia University Graduate School of Business.  Mr. Mynatt is a Director of Junior Achievement of Chicago and a member of the Chicago Commonwealth Club, The Economic Club of Chicago and World Presidents' Organization

# Sarbanes-Oxley for Private Companies

## A Compliance Guide Tailored Towards the Growth of Your Company

BY
GABOR GARAI,
BETH J. FELDER
AND
DAVID W. KANTAROS

In July 2002 Congress passed the Sarbanes-Oxley Act ("SOX") in response to widespread concerns regarding corporate governance in light of the Enron and WorldCom financial scandals. SOX was intended to make the financial reporting of public companies more transparent for investors and to add layers of checks and balances within company management aimed at avoiding these types of scandals in the future. While the provisions of SOX are intended to mainly apply to public companies, SOX has had the unintended effect of becoming the standard of "best practices" for all companies, public or private. As a result, more and more private companies are becoming, to some extent, SOX-compliant.

The cost of compliance, however, is not always easily absorbed by a private company, particularly those private companies in a start-up stage. Nor is the cost easily measured. Yet, any private company that believes its future growth scenario involves a merger or sale with a public company or an initial public offering must be SOX-compliant by the time of such transaction. This would likely include most companies with venture capital investors. Additionally, many lenders and insurers are now requiring some level of SOX compliance for financing transactions and obtaining insurance, particularly D&O liability insurance. This has created a tension for start-up or early-stage companies: When does the company need to comply with SOX and with which portions? Not all SOX provisions need to be complied with at once. What follows is a discussion of the various SOX requirements and a suggested framework for their adoption by start-up and early-stage venture-backed companies.

### SOX Applies to Everyone

Many business people are surprised to learn that certain SOX provisions apply to all companies. Section 1107

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***Beth J. Felder*** *is senior counsel in Foley & Lardner LLP's Boston office and is a member of the firm's Private Equity & Venture Capital Team. Her practice focuses primarily on middle market mergers and acquisitions, venture capital investments, private equity and debt offerings, intellectual property issues, and general business planning.*

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establishes criminal penalties for retaliation against a person who provides information regarding a federal offense or potential federal offense to a law enforcement officer and Section 806 of SOX provides protection for employees who disclose information about fraudulent activities within his or her employer. Additionally, the statute of limitations for securities fraud was extended to five years under SOX and any liabilities associated with securities fraud violations cannot be discharged in bankruptcy. Section 802 of SOX provides criminal sanctions for private companies engaged in illegal destruction of documents prior to the commencement of litigation. Clearly, all companies need to be SOX-compliant to some extent.

## Basic Provisions of SOX for Public Companies

Most of the provisions of SOX, however, are directly applicable to public companies only and are quite broad in scope. These provisions include those affecting business conduct and ethics, composition of the board of directors, loans to officer and directors, and financial reporting and controls.

## Code of Business Conduct and Ethics

Under Section 406 of SOX, public companies are required to adopt a Code of Business Conduct and Ethics that will apply to the company's chief executive officer and all senior financial officers. This code should provide standards that promote honest and ethical conduct; full, fair, accurate, timely, and understandable disclosure in the periodic reports the company files with the SEC; protection for whistleblowers; and compliance with all applicable laws, rules, and regulations. A company must affirmatively disclose if it has adopted such a code and make the code available for distribution. If a company does not have a code of ethics, it must explain why not.

The requirement that a company adopt a written code and disclose its content to its shareholders is intended to encourage each company to carefully consider the ethical and operational standards that it wants to live by. These address, among other things, the specific steps to be taken by employees when handling conflicts of interest, financial reporting, and compliance with laws. It sets the tone for the company's management.

Unfortunately, many companies have adopted a standard, "off the shelf" code of ethics, without reflecting on its appropriateness and applicability to the culture and personality of the company's own business. At times, this decision has had dire consequences, as unnecessarily sweeping ethical standards were violated by the very executives who adopted them — resulting in their own embarrassment, discipline or, even, termination.

In today's litigious world, directors, and especially financial experts, are highly sensitive to the risks they take by becoming board members, and for the most part, tend to limit that risk by only agreeing to be nominated for boards of highly established companies with extensive and sophisticated Sarbanes-Oxley compliance procedures.

## Composition of Board of Directors

Section 301 of SOX emphasizes the role of independent directors on the board, requiring at least one member of the board of directors to be an independent director with financial expertise and all members of the audit committee to be independent directors. The role of the audit committee was enhanced under the new SOX rules and it now serves as the principal liaison between the company's independent accountants and the full board of directors. An outside director with financial expertise must serve as the chair of the audit committee, and such director's presence on the board needs to be separately disclosed in financial reports filed with the SEC. Additionally, SOX encourages the various stock exchanges to require that the majority of a company's board of directors be independent, a requirement that has been adopted by the New York Stock Exchange and NASDAQ. While each listing stock exchange may differ slightly in the particulars of board and committee compositions, they all require public companies to have at least three separate committees: compensation, nominating/corporate governance, and audit committees. The audit committee must be comprised of at least three outside directors and, with limited exceptions, NASDAQ and the New York Stock Exchange require that all members of the three mentioned committees be independent.

The emphasis on independent outside directors is a direct response to the WorldCom and Enron financial scandals and assumes that independent directors will act objectively and serve as a shield between a run-away management and the stockholder/investor. There are obvious gains to be had for a company with outside director involvement. With the right directors, a company can gain valuable insight from a seasoned executive who has seen it all before and perhaps avoid common pitfalls with creative solutions the executive has used previously. There are costs associated with this experience, however, as these outside board members will likely require payment for their services (and payment with equity could jeopardize their independence) and they will surely require the company to obtain and maintain directors and officers liability ("D&O") insurance, which has become significantly more expensive in recent years. Also, there is no assurance that an outside director will actually help avoid an Enron-type scandal; in fact, Enron had experienced outside directors on its board. Lastly, it may be difficult for companies to secure financial experts to serve as outside directors as these financial experts are becoming a valuable and rare asset in the business world.

Eligible director candidates and, especially, financial expert candidates, are quite cognizant of the risks involved in serving on boards. They gravitate toward the least risky and most remunerative situations — perceived as those companies that have elaborate Sarbanes-Oxley infrastructures: dedicated personnel, sophisticated tracking software, and the like. This puts smaller and emerging public companies at a disadvantage. Inevitably, they do not have the resources committed to SOX compliance that a larger company can — and does — afford.

## Loans to Directors or Officers

Under Section 402 of SOX, public companies may not make any loans, or arrange for the extension of credit, to any of its officers or directors. Loans in existence prior to July 20, 2002 were grandfathered in, as long as the loan was not renewed or there were no material changes to the terms of the loan. This rule aids in the transparency of a company's financial statements and the compensation packages made available to the executives and avoids any conflicts between the company's best interests and those of management.

## Financial Reporting and Controls

The most sweeping changes under the SOX rules are those related to a company's financial reporting and internal financial controls. These are the SOX requirements that are the most costly to comply with as well. Under Sections 302 and 906 of SOX, for each annual and quarterly report filed by a public company, its chief executive officer and chief financial officer must personally certify (1) the compliance of the company's financial statements with the Securities and Exchange Act of 1934 as amended (the "34 Act"); (2) that the financial statements fairly and accurately present, in all material respects, the financial results and operating condition of the company; (3) that there are no untrue statements or omissions of a material fact in the reports; and (4) as to the efficacy of the company's internal financial controls. Further, under Section 404 of SOX, a public company's independent accountants must certify as to the management's assessment of its company's internal financial controls. This certification is filed annually with the company's Form 10-K reports.

Since a company's principal executives must vouch for the accuracy of their company's financial statements, they are forced to bear some risk for ensuring the accuracy of these statements. With the certification, it is thought that the executives will be less likely to overstate results and ask the necessary questions to ensure the accuracy of the statements. In fact, there may be some inclination to follow a more conservative approach and understate results, which would not achieve the goal of the SOX requirements. Nevertheless, there is no harm in causing the company's executives to review the financial statements, ask questions, and then certify that the statements are accurate.

## SOX for Private Companies

While most of the costly aspects of SOX compliance are not directly applicable to private companies, any early-stage or start-up company, particularly one backed by venture capital, has a growth strategy for the future. If this strategy includes taking financing in the future, whether by going public, seeking a merger or acquisition partner, or obtaining further equity or debt financing, the company will need to move towards SOX compliance.

*Continued on page 30*

creditor claims, monetizing assets, release of any liens, insurance matters (including a director and officer "tail" policy), dissolution of the corporate entity, distributions to stockholders and related stockholder issues, and responding to other matters affecting the company.

Outside professional firms can provide the experience and detachment necessary to negotiate with creditors and resolve outstanding company obligations firmly and promptly, and are conversant with the matters to be attended to by outside accountants and legal counsel during this period. They also bring to bear their considerable experience in addressing and resolving the issues facing insolvent companies and can do so on a cost efficient basis. Such firms must, however, be supervised by the board or the officers, as appropriate.

### 10. When Dissolving the Company, Retain Assets for Administrative Expenses and Unforeseen Liabilities

When implementing a wind-down and subsequent dissolution of a company, directors must ensure that any distributions to stockholders are effected at a time and in a manner consistent with the company's prior obligations to creditors. In the course of a liquidation and dissolution, stockholders may attempt to pressure venture-backed companies to distribute assets prematurely. Directors must to ensure that, before any amounts are distributed to stockholders, all corporate liabilities have been paid or adequate funds have been reserved to satisfy them, and that a reasonable reserve has been established to cover unforeseen liabilities and the expenses that will be incurred as part of the dissolution process. If a court were to later conclude that a reasonable reserve to cover such amounts was not set aside by the directors, both the directors and the stockholders receiving the improper distribution could be liable to creditors for the amounts distributed to stockholders. One way to minimize this risk is to make a partial distribution to stockholders once directors are confident that most known corporate liabilities have surfaced and have been satisfied, to be followed by a final distribution at the end of the dissolution process when directors have more confidence that all unforeseen liabilities have emerged and have been satisfied. ◎

## Sarbanes-Oxley for Private Companies

*Continued from page 9*

In fact, many venture capitalists are insisting on some level of compliance from the earliest points of investment both to facilitate a liquidity scenario at a later date and to ensure that the company is managed in accordance with what are fast becoming the "best practices" standards for corporate governance. In a recent survey by Foley & Lardner LLP of 9,000 private companies, 78 percent indicated that they have adopted some self-imposed SOX compliance. The reasons given by respondents for adopting these standards range from preparation for future events (such as an IPO or sale of the company) to a determination that a world-class organization should follow the best practices whenever possible.

### When and How the Early-Stage Company Should Be SOX-Compliant

There is a wide range of SOX regulations and full compliance with some of the SOX provisions is costly, both in time and money. There are many other SOX provisions, however, where compliance is not costly and helps investors and business partners feel more confident about the management of the company. While a private company may not become fully SOX-compliant with the internal control audit provisions of SOX (which are the most costly of the regulations to comply with), meeting the intent of SOX can be done from the beginning of the business and increase over time as funds are more readily available.

### From the Beginning…

Since SOX rules related to document retention and whistleblower protection apply to all companies, every business, public or private, should adopt policies relating to these rules from the beginning. The document retention policy needs to articulate clear procedures for when to retain documents and what types of documents must be retained, even in the period prior to the commencement of a lawsuit or other proceeding. A company must also adopt a written policy for how employees may report wrongdoings within the company. The whistleblower policy should provide an avenue for reporting the activity to an independent person not directly related to management, such as a designated outside director, the company's independent accountants, or an independent compliance phone hotline. Due to attorney-client privilege issues, the company's counsel should not serve as the designated person for the whistleblower. The adoption of these policies is not a costly requirement for any company, including a start-up.

While the SOX rules regarding the adoption of a Code of Business Conduct and Ethics applies only to public companies, private companies should adopt one from the outset as well. The adoption of such a policy is an inexpensive way to provide comfort to the business world, including venture funds, that the start-up company is being operated in accordance with the best business practices and with the intent of complying with SOX, even if the company cannot afford to comply to the letter with all SOX rules. The Code of Business Conduct and Ethics should be a written policy stating the standards of the company and the steps to follow in certain situations, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships; full, fair, accurate, timely, and understandable disclosure in financial reports; and compliance with applicable laws, rules and regulations.

The SOX prohibition on loans or arrangement of credit to or for a company's officers and directors should also be adopted by private companies at the beginning of operations. Like the adoption of the Code of Business Conduct and Ethics, adherence by a start-up company to this SOX provision is not costly and sends the appropriate compliance message to the investment community. Since this provision technically applies to IPO candidates at the time of filing their initial S-1 with the SEC, which is before their registration statement is declared effective and they are deemed "public" in the eyes of the investment community, failure to address these issues early on could delay a public offering. For example, companies that permit insiders to purchase restricted stock with promissory notes may be forced to either forgive these loans or delay their IPO filings until these insiders obtain the resources to make repayments in full.

Lastly, the private company should engage independent accountants for the preparation of its financial reports as early as possible. While many start-ups simply cannot afford the costs associated with, and may not feel the need for, audited financial statements at this early stage of its business, the independent accountants should, at a minimum, review and compile the company's financial reports and aid the company in establishing the financial systems the company will need as it grows and a plan for implementing those financial systems over time.

Undoubtedly, an emerging company cannot afford a "Big Four" accounting firm. In fact, such a firm may not be the most appropriate for auditing a small company. There are, however, many firms in the next tier: local and regional firms with 10 to 100 professionals who focus on the emerging and middle markets. Some of these firms serve as auditors for emerging technology companies and middle market business; many continue to represent some of these companies after an IPO. Ideally, it is these types of firms that would best service any emerging company desirous of adopting SOX-type "best practices."

### As Funding Increases…

One of the changes with SOX is an emphasis on an independent outside board of directors. This can be a difficult requirement for an early-stage company as it rarely has the money to pay an outside director for his or her time, and even less money to pay for the D&O liability insurance that an outside director will surely insist upon. Further, in a first round of equity financing, a board member will likely want to receive an equity stake in the company to enjoy the increase in value for the company. This equity stake, however, may render the director an insider, or at least disqualify such person from benefiting from certain safe harbors applicable to the SEC's independence standards. While the ownership of a significant amount of stock does not, in itself, render a director an insider, the ability to control the voting power of the company, together with other operational approvals and consents, may render it difficult for the director to exercise independent judgment in carrying out his or her duties as a director. The SEC and the exchanges have detailed standards of "independence" that public companies need to follow; however, the inability to exercise such independent judgment, or the existence of a "material relationship" is a common standard for determining if a director is an insider. As a result, a representative of a venture investor who sits on a company's board may be considered an insider, particularly in the very early stages of the business where the venture investor has significant control and input regarding the company's operations.

As a company enters its second or third round of financing, however, the company should give serious thought and effort towards engaging outside independent directors with appropriate financial expertise and industry experience. First, there is no harm in obtaining an experienced outsider's input into the management of a company, whether private or public. Second, as a company obtains more funding and continues to grow, there will be more pressure placed upon it to comply with corporate "best practices," which include the retention of independent directors. Third, the company's independent accountants will want the company to establish an audit committee to act as a liaison between the accountants and the full board. At the time the audit committee is established, the company's board should also form a compensation committee. Each committee should have its own written, board-approved charter and meet at least quarterly.

At this stage, when outside directors join the board, the company should consider having the independent accountants prepare audited financial statements if they aren't doing so already. It is also likely that the outside directors will insist upon audited financial statements to ensure the company's compliance with generally accepted accounting principles. Certainly, the financial statements will need to be audited within a year prior to either an initial public offering or acquisition by a public company, if either of these are likely liquidity scenarios. If they are not likely liquidity scenarios, then audited financial statements can wait until a third or fourth round of financing.

## Late Stage...

If a company's financial statements are not yet audited, they should be at this point. A seasoned company with several rounds of financing should comply with the SOX financial reporting requirements to ensure that accurate and fair financial disclosure is made to its investors/stockholders. Additionally, if the company is contemplating an acquisition strategy (where the company could be the acquired entity) or an initial public offering, the company will need to have an internal control audit by its independent accountants and be fully SOX-compliant for the year prior to such transaction. If neither of these transactions are remotely possible, a company does not need full SOX compliance with the internal controls audit provisions, although such internal controls, even if not audited, are becoming a "best practices" standard and, over time, may be required by a company's investors and business partners.

## Conclusion

While much of the SOX rules and regulations do not apply to private companies, there is a range of SOX requirements that apply to public companies that are being adopted in the private sector as the "best practices" standard. Many of these provisions do not require a company to expend much in order to comply and yet compliance sends a strong message to the investment community regarding the financial and ethical position of the company. As the company grows and obtains further funding, the extent of compliance can be increased and tailored to match the company's available funds. ◎

UBS Investment Bank

STRICTLY CONFIDENTIAL

# 2007 National Directors Institute

## Rule 144A Exemption and Private-for-Life Bonds

March 2007

# Rule 144A Exemption of the 1933 Act

## Issuers are increasingly offering securities under an exemption from the registration requirements, called Rule 144A

- Rule 144A, adopted by the SEC in 1990, allows for the sale of securities in the United States without registration under the Securities Act
  - are often in size comparable to public offerings, but without the need to negotiate the offering with the SEC and the resulting reporting requirements
  - under 144A, an issuer will sell its securities to one or more investment banking firms who will then resell the securities, but can only sell the securities to qualified institutional buyers (“QIBs”)
  - the way in which Rule 144A placements are conducted, from an issuer’s standpoint, is very similar to traditional underwritten public offerings and allows for expedited execution process (typically 6-8 weeks vs. more time-consuming public securities review and issuance period)
- A “Qualified Institutional Buyer”is any entity included within one of the categories of “accredited investor” defined in Rule 501 of Regulation D of the 1933 Act, acting for its own account or the accounts of other QIBs, that in the aggregate owns and invests on a discretionary basis at least $100 million in securities of issuers not affiliated with the entity ($10 million for a broker-dealer)
- The debt securities are typically registered with the SEC following the Rule 144A offering
  - QIBs must be informed in advance if the issuer of the 144A offering does not intend to ultimately register the securities
  - QIBs will demand a premium (i.e. will demand a higher coupon) if the deal is not going to be registered, as it creates illiquidity in the securities
    - can only sell securities to other QIBs through the 144A secondary trading market, called PORTAL
    - in addition, certain state and federal laws prohibit mutual funds and insurance companies from investing more than a certain percentage of their assets in restricted securities. Thus, absent an issuer’s agreement to register Rule 144A securities, these entities would be severely limited in their ability to purchase securities in Rule 144A transactions
- PORTAL stands for "Private Offerings, Resale and Trading through Automated Linkages” and is Nasdaq's screen-based automated trading system
  - PORTAL was created for use in secondary trading of unregistered securities in transactions exempt from the registration and prospectus delivery requirements of the 1933 Act pursuant to Rule 144A, and for primary placement of Rule 144A securities

**Rule 144A allows the issuer to receive the proceeds of the securities offering BEFORE commencing the review period with the SEC and completing the registration process**

# Rule 144A Exemption of the 1933 Act

## Generally, the Rule 144A offering process mimics the public offering process

The features of the process include:

- Solicitation of orders using a "red herring" or preliminary offering memorandum;
- Confirmation of orders using a final offering memorandum;
- Execution of purchase agreement at pricing;
- Delivery of comfort letter from accountants at pricing;
- Delivery of legal opinions and other closing documents at closing; and
- Closing three to five days after pricing

# Info Requirements for Registration Statements and 144A Offerings

- Audited balance sheets as of the end of the 2 most recent fiscal years
- Audited statements of income, cash flow and shareholders' equity for 3 most recent fiscal years
- Unaudited balance sheet as of the end of the most recent quarter
- Unaudited interim statements of income, cash flow and shareholders' equity for 3, 6 or 9 months, plus prior year comparison
- For debt and preferred stock offerings, fixed charge coverage ratios for last 5 years plus latest interim period
- Pro forma data - one year plus interim period income statements (prior interim is optional); latest interim balance sheet; prior historical periods impermissible
- "Recent developments" disclosure not required but may be advisable
- Separately captioned section of MD&A disclosing material off-balance sheet arrangements
- Detailed disclosure requirements
  - Nature and purpose of arrangements
  - Nature and amounts of interests retained
  - Known events or trends
- Must include a table of contractual obligations showing:
  - Long-term debt
  - Capital (finance) lease obligations
  - Operating lease obligations
  - Purchase obligations
  - Other long-term liabilities
- Must include a table of total obligations for less than 1 year, 1-3 years, 3-5 years, more than 5 years

# Key Documentation in a 144A Offering

| Documentation | Description |
|---|---|
| Offering Memorandum | ♦ Information included is usually substantially equivalent to the information that would be disclosed in a prospectus used in a registered public offering<br>♦ Contains information relating to the securities being offered, the use of proceeds, the issuer's business, operations, prospects, management, capital structure and financial performance (including financial statements), the issuer's business environment, the market for the issuer's securities (including the home or any other stock exchange), the arrangements for the purchase and sale of the offered securities, relevant risk factors (including a description of relevant country risk considerations) and any other relevant matters<br>♦ Because the offering memorandum is not subject to the detailed requirements of U.S. securities laws, the content of the offering memorandum will generally be dictated by anti-fraud considerations, market practice and marketing concerns |
| Purchase Agreement | ♦ Between the issuer and the initial purchasers (i.e. broker-dealer)<br>♦ UBS (or another securities firm) will act as the initial purchaser of the security and will then sell the issuance to QIBs |
| Registration Rights Agreement | ♦ Formed between the issuer and the initial purchasers<br>♦ Spells out when deal will be registered with the SEC and imposes penalty fees if the issuer fails to meet the timeline |
| Legal Opinions | ♦ Delivered by counsel stating that nothing in the document is materially untrue or leaves out any material information |

# Key Documentation in a 144A Offering

| Documentation | Description |
|---|---|
| **Comfort Letter** | ♦ In a standard comfort letter, an accounting firm provides a level of comfort on financial and accounting data that varies with the nature and source of the financial data appearing in the offering document, including:<br>– *Annual financial statements*: accounting firm indicates that it has audited the annual financial statements included in the offering document. Non-experts, such as underwriters and initial purchasers, are not liable with respect to audited financial information if they had no reasonable grounds to believe and did not believe that such information was misleading<br>– *Interim financial statements*: Investment banks ask accountants to perform a SAS 71 review of the unaudited financial interim financial statements. Accounting firm indicates that it has performed a SAS 71 review and that nothing came to their attention during that review process that caused them to believe that any material modifications should be made to the interim financial statements in order for them to be in conformity with GAAP<br>– *Negative assurances*: These assurances address whether, in the course of performing certain specified procedures, the accounting firm has become aware of (1) any changes in specified balance sheet items (long-term debt, stockholders' equity, net current assets) since the most recent balance sheet included in the offering document or (2) any changes in specified income statement items (revenues, operating profit, net income, income per share) during the period between the end of the most recent income statement included in the offering document and the date of the comfort letter compared to the corresponding period of the prior year (sometimes called the "change period")<br>– *Tick mark procedures*: Finally, a standard comfort letter will include a section reciting the handful of agreed upon procedures that have been performed by the accounting firm to verify individual financial numbers that appear in the text of the disclosure document, most notably in the "MD&A" section of the document. These agreed upon procedures are usually indicated by a series of "tick marks" noted on the pages of the disclosure document that are attached to the comfort letter as exhibits. They constitute evidence that the underwriters or initial purchasers conducted a reasonable investigation as to each of the numbers covered by the agreed procedures |

# 144A Private-for-Life Bonds

- The predominant method issuers have utilized to tap the bond market is the Rule 144A exemption adopted by the SEC in 1990
  - Allows issuers to expedite issuance by avoiding public securities review and issuance period so long as the securities are sold to investment banks and re-sold to Qualified Institutional Buyers ("QIBs")
- Although issuers have always maintained the right to not register the bonds with the SEC, in effect becoming 'private-for-life,' this was historically a relatively rare occurrence as QIB demand for this paper was limited and potentially required a significant premium to execute. However:
  - Real or perceived liquidity constraints in trading by QIBs have diminished as the high yield market has become deeper both in $ size and number of QIBs
  - The "premium" demanded by QIBs for a private-for-life deal has diminished substantially and arguably disappeared
  - Issuers have issued all types of securities and with ratings that have spanned the non-investment grade ratings spectrum
  - We believe this trend will continue as issuers look to avoid public filing due to SOX costs, a desire to limit information provided to competitors and customers, etc.
- Market data strongly supports this notion of increased liquidity in the private-for-life market
  - In 2004, 8 private-life-for-life deals were issued for $2.8 billion. This increased to 31 deals for $8.0 billion in 2005 and 38 deals in 2006 for $10.0 billion
  - UBS has bookrun 8 private-for-life deals since 2005 for $2.1 billion

UBS Investment Bank

CONFIDENTIAL

# 2007 National Directors Institute

## Detailed Overview of IPO Process and IPO Preparation

March 2007

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SECTION 1

# Pre-IPO Preparation

UBS Investment Bank

# Considerations Related to an IPO

## Why pursue an Initial Public Offering?

### Advantages

- Facilitates future access to world-wide equity and debt capital markets
- Increases employee commitment and recruiting ability (employee incentive plans)
- Provides liquidity for shareholders
- Listed shares can be used as acquisition currency
- Establishes definitive valuation benchmark
- Complements product marketing through increased brand recognition
- Public company is viewed as stable/successful
- Increases equity base to finance growth
- Enhances profile of company through free publicity (media more likely to report on public companies)
- Increases investor confidence in company's reports and financial statements

### Disadvantages

- Continuous SEC reporting (e.g., proxy statements, Forms 10-K and 10-Q)
- Sarbanes-Oxley requirements
- Reporting requirements for officers, directors and principal stockholders
- Loss of privacy (sharing information with competitors and regulators)
- Impact of stock price on management decisions (short-term vs long-term focus)
- Time consuming process that can distract management
- More susceptible to take-over once public
- One-time and ongoing costs (e.g., legal, accounting, printing and underwriting)
- May need to hire additional personnel to handle expanded reporting, investor relations and other public company obligations

# Considerations Related to an IPO

## Key questions

### When is a Company Ready to Go Public?

- Execution of business plan
- Use of proceeds
- Management team in place
- Solid historical financial performance
- Strong growth prospects
- Financial controls in place

### What Makes for a Successful IPO?

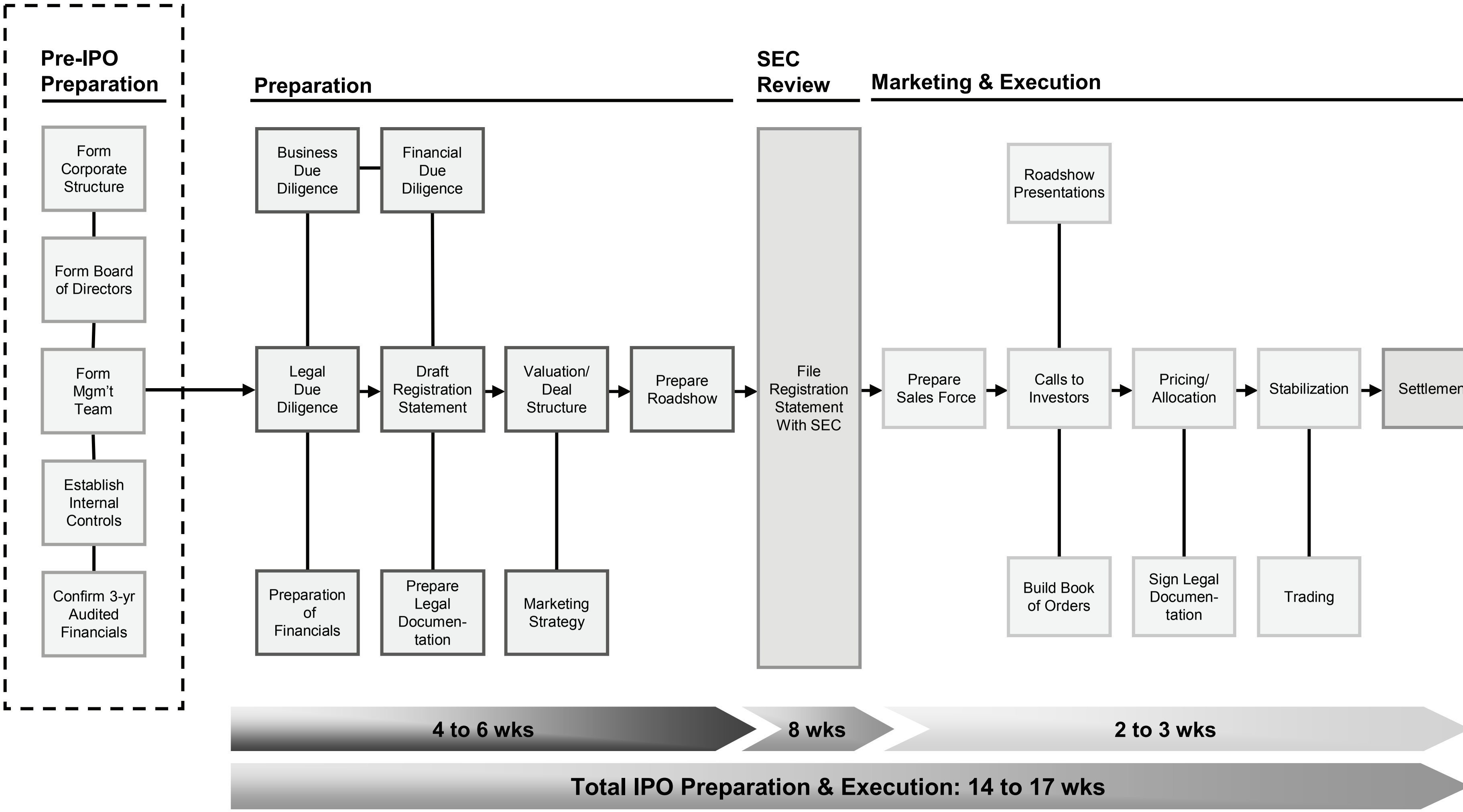
- Participant in large and growing industry
- Scale and leadership position
- Good top and bottom line growth
- Strong management team
- Proprietary characteristics
- Diverse customer base

### How Do We Prepare for an IPO?

- Prepare audited financial statements
- Develop financial projections
- Consider management compensation and stock options programs
- Select Board of Directors and appoint head of committees
- Establish controls and procedures for compliance with Sarbanes-Oxley

# Overview of the IPO Process

**Generally, an IPO can be completed in 14 to 17 weeks assuming the corporate structure is in place, although the SEC review period may extend beyond the initial timeline**



# Pre-IPO Preparation

## The pre-IPO preparation phase is typically focused on clarifying four core issues

### Organizational Structure

- Create corporate structure
- Corporate organization and capital structure
  - convertible securities
  - authorized equity capital
  - recapitalization adjustments
  - registration rights
  - pre-IPO securities
  - stock option plans
- Establish appropriate management structure

### Accounting Issues

- Build out financial controls
- Common accounting pitfalls
  - "cheap stock" issues
  - acquisition accounting
  - segment data reporting
  - revenue recognition
- Select public accounting firm
- Preparation of US GAAP financial statements required in the S-1

### Sarbanes-Oxley Compliance

- Select Board of Directors ("BoD")
- Establish appropriate committees of the BoD
- Increased liability issues due to the requirements of the Sarbanes-Oxley Act of 2002 ("SOX Act") and subsequent Nasdaq and NYSE additions
- D&O insurance and indemnification

### Legal Issues

- Create articles of incorporation and by-laws
- Negotiate inter-company agreements, if necessary
- Anti-takeover provisions
- Company contracts
- Due diligence preparation

SECTION 1.A

# Pre-IPO Preparation

## Organizational Issues

# Corporate Organization and Capital Structure

## Investors typically favor a relatively easy to understand corporate structure. Complex structures may result in a valuation discount for the offering

**Create Corporate Structure**

- Most companies are structured as C corporations
- Issuers should consult counsel on corporate structure
- State of incorporation is an important consideration.  Delaware incorporation is often used due to favorable corporate laws

**Convertible Securities**

- Complex equity structures are usually the result of initial rounds of private equity and venture capital financing
- Convertible preferred stock or convertible debt instruments that contain special voting rights, anti-dilution clauses and redemption rights are typically unsuitable for public companies
- These securities may not automatically convert into common stock in an IPO. The company will need to negotiate with the stockholders prior to the IPO in order to convert these securities to common stock
- Remember to focus on converting “pre-emptive” rights

**Authorized Equity Capital**

- A company should adjust its authorized equity capital to permit the number of shares of common stock required for:
  - the IPO
  - converting employee options and issuance into employee stock plans
  - converting outstanding warrants, options and convertible securities
  - future stock splits, capital raising, shareholder rights plans or acquisitions
  - an appropriate per share dollar range for the IPO
- Post-IPO, increasing the authorized number of shares requires shareholder approval which can be a lengthy process for the public company

# Corporate Organization and Capital Structure

**Recapitalization Adjustments**

- The NYSE and NASDAQ have strict eligibility standards for listing with a minimum share price and a minimum number of shares outstanding
- Pre-IPO companies typically either engage in stock splits or reverse stock splits both to meet exchange eligibility standards and to target an appropriate per share price
- Recapitalizations are executed after the valuation of the company is finalized so that the correct share split results in the target share price
- Typical per share prices are in the mid-teens (i.e., $14-$16)

**Registration Rights**

- Insiders, existing owners, venture capital firms, or private investors will typically require a company to give them registration rights in relation to a public offering
- Registration rights give these investors a mechanism whereby, over time, they can sell their shares in an orderly fashion
- Piggy-back registration rights give investors the right to “piggy back” on a registration statement filed by the company to raise capital for itself
- A securities offering with a secondary offering component is more common and accepted by the market than in previous years
- A shareholder agreement might be typical between the company and its investors or the company and its subsidiaries where the subsidiaries hold stock in the company

# Corporate Organization and Capital Structure

**Pre-IPO Private Securities**

- Pre-IPO sales of the company's stock are complex in the context of an IPO. In general, the SEC focuses on transactions occurring within six to twelve months prior to filing the IPO
- There is a requirement that the issuer disclose its private securities transactions in the S-1 for the past three years
- The timing of these private sales of securities is very important. The closer the private transaction is to the filing of the IPO, the greater the risks of integration
- The specific risk of integration is that the private sale of securities may be deemed to be a public offering of securities and this violates the 1933 Act
- Pre-IPO transactions also raise the issue of "cheap stock" with the SEC. "Cheap stock" issues can delay the IPO as the SEC will generate many questions for the issuer including valuation discounts, timing and granting of stock to employees

**Stock Option Plans**

- Stock option plans are useful and effective compensation mechanisms
- These option plans are best put into place before the issuer is public as the creation and initiation of stock option plans require full stockholder approval
- Pre-IPO companies typically have fewer shareholders than post-IPO companies; it is much easier to gain approval from fewer shareholders pre-IPO
- Companies sometimes establish stock option plans before going public but do not allocate or issue the options to their employees until some time after the IPO. The existence of an option plan that is not allocated is preferable to trying to establish an option plan post-IPO

# Corporate Organization and Capital Structure

**Establish Appropriate Management Structure**

- Establishing a clear management structure is necessary for public companies
- Management structure needs to be finalized before the launch of the roadshow
- Structure should be developed to be aligned with underlying operations and stockholder value
- CEO and CFO positions hold a great amount of responsibilities in public companies.  CEOs and CFOs take on legal liabilities
- The executive search process may take a considerable amount of time

SECTION 1.B

# Pre-IPO Preparation

## Accounting Issues

# Accounting Issues

**Auditors, the SEC, the underwriters and their counsel and potential buyers of the securities focus carefully on a company's financial and accounting issues. A few examples of some of the more common accounting issues:**

**Build out Financial Controls**

- Investors and the SEC are focused on a company's internal control systems
- A public company is required to provide timely, accurate and reliable financial information to investors
- There are legal liabilities for false or misleading reporting, which have been further highlighted and increased by the SOX Act
- Once a company is public, there are many ongoing periodic reporting requirements that will require it to have controls and systems in place
- The SEC is focused on internal financial control and disclosure and has mandated that all companies must have adequately documented internal control, which must be attested to by the auditors. This is commonly referred to as SOX 404. Companies which are accelerated filers are currently reporting their SOX 404 results
- Underwriters and their counsel will spend a great deal of time conducting due diligence on a company's internal control

**Cheap Stock**

- Cheap stock is the term for stock options issued to employees for less than fair market value. These options are treated as employee compensation. This compensation expense flows through the income statement and has a direct impact on net income and earnings per share
- The SEC focuses on stock and option grants to employees in the period leading up to an IPO. The SEC wants companies to justify the fair market value at the time of the option or stock grant
- Companies typically hire an outside valuation firm to justify the valuation of the stock and option grants
- Since the granting of options and stock affects the financial statements, issuers need to consult with their auditors as to the fair market value of these stock and options
- The time horizon that the SEC focuses on is typically up to 18 months before an IPO
- The SEC is focused on companies taking an adequate compensation change that is commensurate with the company's valuation at the time of the option grant

# Accounting Issues

**Acquisition Accounting**

- Acquisitions either associated with an IPO or taking place before an IPO will add additional financial statement requirements to the IPO when the acquired company is significant as compared to the IPO candidate
- Significance of the acquisition is based on assets, operating income or purchase price. Comparison is performed on the acquirer versus the target
- Significant acquisitions require that the acquired company present separate standalone audited financials and pro forma combined financials in the prospectus
- Companies and accountants need substantial time to create and audit these separate financial statements. It is important to identify and address this issue early in the IPO process

**Segment Data Reporting**

- The SEC requires that companies report specific segment data that is consistent with how management evaluates company performance internally and externally
- This typical pitfall can occur when the company unintentionally presents itself as having different reporting segments than those presented in the prospectus
- The SEC frequently requests that companies segment report even when the issuer may not have audited its financial statements in segments
- Auditors are in the best position to suggest the best method to report revenues and expenses before the company files with the SEC so as to minimize the requirement to report in segments

**Revenue Recognition**

- Revenue recognition is a focus of the SEC
- The SEC is generally guided by Staff Accounting Bulletin No. 101
- The SEC will frequently question a company's revenue recognition methods

**Backdating of Options**

- The SEC and the public have recently focused on this issue
- The issue arises when companies backdate options to a low point in the stock price, which immediately increases the value of the options

# Accounting Issues

**Company's Public Accounting Firm**

- Accounting issues and audits are complex and time consuming.  When a Big Six accounting firm is not already auditing a company, it should consider retaining one
- The accounting firm must be registered with the Public Company Accounting Oversight Board ("PCAOB")
- The accounting firm is prohibited from performing non-audit services for the company and has to be independent
- Nationally recognized accountants lend a great deal of credibility and authority to the offering and the company.  A nationally recognized auditor should audit the financial statements for at least three and ideally five years prior to the offering

**Typical Financial Statements to be Made Public in the S-1 Registration Statement (Exceptions are Rare)**

- Three years of audited financial statements, consisting of:
  - audited statements of income, cash flows and shareholders' equity for each of the last three fiscal years
  - audited balance sheets as of the end of each of the last two fiscal years
- Unaudited interim statements (quarterly financials)
- Five-year historical summary selected financial data
- Pro forma financial statements and financials of recently acquired company(ies), if relevant
- Predecessor financial statements may be required even if the company was recently founded. The process for determining the need for predecessor company financials is complex and requires consultation with the company's accountants

**Quarterly Financial Statement Requirements after IPO**

- Beginning with the first fiscal quarter following the most recent fiscal year included in the registration statement or the first fiscal quarter subsequent to the quarter reported in the registration statement, the company must file a quarterly report on Form 10-Q
- The 10-Q must be filed within 45 days after the effectiveness of the registration statement or 45 days after the end of the first fiscal quarter to be reported, whichever is later

SECTION 1.C

# Pre-IPO Preparation

## Sarbanes–Oxley Overview and Checklist

# Sarbanes-Oxley Checklist

## The Sarbanes-Oxley Act and the passage of additional requirements by the NYSE and NASDAQ have gone through several iterations over the last two years. What follows is the current set of SOX-related requirements for companies undertaking an IPO

| Event | Requirements |
|---|---|
| Upon Filing S-1 | Comply with new disclosure requirements related to non-GAAP financial measures, off-balance sheet arrangements and contractual obligations in registration statement |
| | Confirm no loans to directors or executive officers |
| | Review independence of auditor, including establishing pre-approval policies and procedures as necessary and hiring policies |
| | Adopt procedures for internal compliance with SEC attorney conduct rules |
| Prior to IPO Pricing | Establish disclosure controls and procedures, including a disclosure committee and adoption of a disclosure committee charter. Be ready to provide CEO/CFO certifications in periodic reports (i.e., first 10Q or 10K after IPO) |
| | Establish procedures to ensure periodic reporting and other disclosure obligations, including Section 16 reporting, can be satisfied within required time frames |
| | Have at least **one** independent member on the audit committee and, as applicable, the nominating and compensation committees |
| | Comply with SEC rules regarding audit committee responsibilities, including direct oversight of accountants and establishment of complaint procedures related to accounting or audit matters |
| | NYSE listed companies only: Adopt corporate governance guidelines and a code of business conduct and ethics for directors, officers and employees |
| | Nasdaq listed companies only: Adopt a code of conduct for directors, officers and employees |
| | Nasdaq listed companies only: Upon listing, ensure that all related party transactions will be approved by the audit committee or a comparable independent body |

# Sarbanes-Oxley Checklist

| Event | Requirements |
|---|---|
| Within 90 Days after IPO Pricing | Have at least a **majority** of independent members on the audit committee and, as applicable, the nominating and compensation committees |
| Within One Year after IPO Pricing | Ensure that the Board of Directors has a majority of independent directors. If the company is to be listed on the NYSE, establish procedures for interested parties to communicate directly with the non-management directors<br><br>Ensure that the audit committee and, as applicable, the nominating and the compensation committees, consists **entirely** of independent directors and adopt appropriate charters |
| Prior to Filing the First Annual Report | Adopt a code of ethics for the CEO and senior financial officers in accordance with SEC rules<br><br>Determine whether the company has or will have an audit committee financial expert |
| Filing of the Second Annual Report – SOX 404 | On Form 10-K, provide management report on internal control over financial reporting and auditor attestation of such report (SOX 404)<br><br>The SEC has recently proposed less stringent implementation of SOX 404. See “SOX Guidelines – Internal Control over Financial Reporting” |
| Controlled Company Exceptions | If a majority (50%+) of the voting power of a listed company is held by an individual, group or another entity, the listed company is considered a controlled company and exempt from the following SOX requirements:<br>– A majority of independent members on the Board of Directors<br>– Independent compensation committee<br>– Independent nomination committee<br>A fully independent audit committee is still **required** for controlled companies |

# NYSE & NASDAQ Guidelines—Independent Directors

**NYSE & NASDAQ Requirements**

- NYSE and NASDAQ standards require that the Board of Directors of a listed company consists of a majority of independent directors within 12 months of the listing
- The definition of “independent director” established by the NYSE and NASDAQ differ in several respects, however, both require that the Board of Directors make an affirmative determination of independence
- In addition, both the NYSE and NASDAQ list categories of individuals and their relationships with the listed company which would make them not independent

**Additional NYSE-Specific Requirements**

- Non-management directors must hold regularly scheduled “executive sessions” without management
- A method for “interested parties” to communicate directly with the non-management directors as a group must also be established and disclosed

**Additional NASDAQ-Specific Requirements**

- Independent directors must have regularly scheduled meetings at which only independent directors are present

**Exceptions**

- Both the NYSE and NASDAQ standards provide that if a majority (50%+) of the voting power of a listed company is held by an individual, group or another entity, the company is exempt from the above requirements
- The NYSE requires a foreign private issuer to disclose a brief, general summary of any significant ways in which the company’s corporate governance practices differ from those followed by domestic companies
- The NASDAQ allows foreign private issuers to request exemptions from the NASDAQ corporate governance standards by demonstrating that the provisions of these standards are contrary to law, rule or regulation of any public authority exercising jurisdiction over the issuer or contrary to generally accepted business practices in the issuer’s country of domicile.  The exemption must be disclosed annually in the company’s 20-F and the registration statement

# Director Independence Definition - NYSE

## A director is ***not*** independent if:

**Employment**

- The director is, or has been within the last three years, an employee of the listed company, or an immediate family member is, or has been within the last three years, an executive officer of the listed company

**Compensation**

- The director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than $100,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service)

**Relationship with Audit Firm**

- (A) The director or an immediate family member is a current partner of a firm that is the company's internal or external auditor;
- (B) The director is a current employee of such a firm;
- (C) The director has an immediate family member who is a current employee of such a firm and who participates in the firm's audit, assurance or tax compliance (but not tax planning) practice; or
- (D) The director or an immediate family member was within the last three years (but is no longer) a partner or employee of such a firm and personally worked on the listed company's audit within that time

**Affiliation with Current D&Os**

- The director or an immediate family member is, or has been within the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee

**Related Party Transactions**

- The director is a current employee, or has an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of $1 million, or 2% of such other company's consolidated gross revenues

# Director Independence Definition – NASDAQ

## A director is *not* independent if:

| | |
|---|---|
| Employment | ♦ A director who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company or who is a family member of an individual who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company as an executive officer |
| Compensation | ♦ A director who accepted or who has a family member who accepted any compensation from the company or any parent or subsidiary of the company in excess of $60,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than compensation for board or committee service, payments arising solely from investments in the company's securities, compensation paid to a family member who is a non-executive employee of the company or a parent or subsidiary of the company, retirement plans or non-discretionary compensation |
| Relationship with Audit Firm | ♦ A director who is, or has a family member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor who worked on the company's audit at any time during any of the past three years |
| Affiliation with Current D&Os | ♦ A director of the issuer who is, or has a family member who is, employed as an executive officer of another entity where at any time during the past three years any of the executive officers of the issuer has served on the compensation committee of such other entity |
| Related Party Transactions | ♦ A director who is, or has a family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more, other than the following:<br>– payments arising solely from investments in the company's securities; or<br>– payments under non-discretionary charitable contribution matching programs |

# Director Independence - NYSE vs. NASDAQ

## The key differences in the director independence rules are laid out below:

| Topic | Difference |
|---|---|
| Role of Independent Director | Substantially the same |
| General Test of Independence | ➢ NYSE rules differ in that they permit no material relationship between the director and the company; as opposed to allowing a relationship to exist so long as it would not interfere with the exercise of the director's judgment<br>➢ NYSE rules require disclosure of the basis of independence judgments, unlike the NASDAQ |
| Employment, Compensation and Related Party Transactions (Special Relationships) | Substantially the same, with the exception of the numerical thresholds used:<br>- NYSE sets a \$100,000 compensation cap; whereas NASDAQ sets a \$60,000 cap<br>- NYSE uses a 2% / \$1mm cap on payments to or from entities which are affiliated with a director, while NASDAQ uses a 5% / \$200k cap |
| Audit Committee | ➢ Minor differences regarding the financial competence of members<br>➢ NASDAQ rules allow non-independent directors to serve under limited circumstances<br>➢ NYSE prohibits a director from serving on more than three audit committees unless he/she receives board approval; no such limitation with the NASDAQ |
| Nominating Committee | ➢ NASDAQ does not necessarily require a nominating committee, only that director nominations are made by a majority of independent directors. NYSE requires a nominating committee<br>➢ NASDAQ rules allow non-independent directors to serve under limited circumstances |
| Compensation Committee | ➢ NASDAQ does not necessarily require a compensation committee, only that CEO and other executive compensation determinations are made by a majority of independent directors. NYSE requires a compensation committee<br>➢ NASDAQ rules allow non-independent directors to serve under limited circumstances |

# SOX Guidelines—Executive Compensation

**NYSE-Specific Requirements**

- Within 12 months of the listing, NYSE-listed companies must have a compensation committee consisting entirely of independent directors that would be responsible for determining compensation for the CEO and recommending the compensation of the other executive officers. The compensation committee must have one independent director at the time of listing and a majority of independent directors within 90 days of listing. The compensation committee must have a written charter containing certain specified provisions

**NASDAQ-Specific Requirements**

- Compensation of the CEO and other executive officers must be determined either by a majority of independent directors or by a compensation committee comprised solely of independent directors within 12 months of the listing
- Under some limited circumstances, one member of the compensation committee may be a director who is not independent; such member may not serve for more than two years

**Exceptions**

- Both the NYSE and NASDAQ standards provide that if a majority of the voting power of a listed company is held by an individual, group or another entity, the company is exempt from the above requirements
- The NYSE requires a foreign private issuer to disclose a brief, general summary of any significant ways in which the company's corporate governance practices differ from those followed by domestic companies
- The NASDAQ allows foreign private issuers to request exemptions from the NASDAQ corporate governance standards by demonstrating that the provisions of these standards are contrary to law, rule or regulation of any public authority exercising jurisdiction over the issuer or contrary to generally accepted business practices in the issuer's country of domicile. The exemption must be disclosed annually in the company's 20-F

# SOX Guidelines—Director Nominations

**NYSE-Specific Requirements**

- Within 12 months of listing, NYSE-listed companies must have a nominating/corporate governance committee consisting entirely of independent directors that would be responsible for director and board committee nominations, developing and overseeing corporate governance policies and other specified matters. The nominating/corporate governance committee must have one independent director at the time of listing and a majority of independent directors within 90 days of listing
- The nominating/corporate governance committee must have a written charter containing certain specified provisions

**NASDAQ-Specific Requirements**

- Nominations of directors must be determined either by a majority of independent directors or by a nominating committee comprised solely of independent directors
- If there is a committee, a written charter or board resolution is required
- Under some limited circumstances, one member of the nominating committee may be a director who is not independent; such member may not serve for more than two years

**Exceptions**

- Under both the NYSE and NASDAQ standards, if a company is legally required by contract or otherwise to provide third parties with the ability to nominate directors (e.g., pursuant to a shareholders' agreement), the selection and nomination of such directors need not be subject to the independent nomination process
- Both the NYSE and NASDAQ standards provide that if a majority of the voting power of a listed company is held by an individual, group or another entity, the company is exempt from all the above requirements
- The NYSE requires a foreign private issuer to disclose a brief, general summary of any significant ways in which the company's corporate governance practices differ from those followed by domestic companies
- The NASDAQ allows foreign private issuers to request exemptions from the NASDAQ corporate governance standards by demonstrating that the provisions of these standards are contrary to law, rule or regulation of any public authority exercising jurisdiction over the issuer or contrary to generally accepted business practices in the issuer's country of domicile. The exemption must be disclosed annually in the company's 20-F

# SOX Guidelines—Audit Committee

| | |
|---|---|
| Audit Committee Independence | ♦ The NYSE and NASDAQ standards provide that companies must have an audit committee consisting entirely of independent directors within 12 months of listing, meeting both the NYSE/ NASDAQ and SOX standards of independence for audit committee members. The audit committee must have one independent director at the time of listing and a majority of independent directors within 90 days of listing. There are certain limited exemptions for foreign private issuers that have audit committee structures governed by local law |
| Written Charter | ♦ Both the NYSE and NASDAQ require that the audit committee have a written charter containing certain specified provisions<br>♦ The NYSE in particular requires the charter to address a lengthy list of duties and responsibilities<br>♦ SEC rules also specify certain responsibilities of audit committees, including having direct responsibility for any accountant providing audit, review and attest services to the company and establishing procedures for the receipt, retention and treatment of complaints related to accounting and auditing matters |
| Inclusion of Financial Experts | ♦ Both the NYSE and NASDAQ have certain specified standards related to audit committee financial literacy or expertise<br>♦ SEC rules require a company to disclose in its annual report whether the board has determined that the company has at least one financial expert (as defined) serving on its audit committee. If a company does not have a financial expert on its audit committee, it must disclose why it does not |
| NYSE-Specific Requirements | ♦ If a member of the audit committee serves on audit committees of more than three public companies, the board would be required to determine whether this impairs such member's ability to effectively serve and make certain disclosures<br>♦ A listed company must have an internal audit function (i.e., an appropriate control process for reviewing and approving internal transactions and accounting) |
| Nasdaq-Specific Requirements | ♦ Under some limited circumstances, one member of the audit committee may be a director who is not independent. However, such member must nonetheless meet the SEC's independence requirements and may not serve for more than two years and may not chair the audit committee |

# Audit Committee Financial Expert Definition

## The definition of a "financial expert" is provided under Section 407 of the Sarbanes-Oxley Act

**Necessary Attributes**

- An understanding of generally accepted accounting principles and financial statements
- The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves
- Experience in preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the registrant's financial statements, or experience actively supervising one or more persons engaged in such activities
- An understanding of internal controls and procedures for financial reporting
- An understanding of audit committee functions

**One or More Methods through which Such Attributes Must be Acquired**

- Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;
- Experience in actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;
- Experience in overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or
- Other relevant experience

# SOX Guidelines—Code of Conduct

**Code of Ethics**

- For both NYSE and NASDAQ companies, new SEC rules require that a company disclose whether or not it has adopted a code of ethics for the CEO and senior financial officers
- The code of ethics must be reasonably designed to deter wrongdoing and to promote, among other things, honest and ethical conduct, full, fair and timely disclosure, compliance with laws and prompt internal reporting of violations
- If a company has not adopted such a code, it must explain why it has not
- The code of ethics, and any amendments to or waivers from any of its provisions, must be disclosed publicly

**NYSE-Specific Requirements**

- Listed companies must adopt and disclose corporate governance guidelines addressing matters such as standards of director qualification, responsibilities of directors, director compensation, director orientation and continuing education, management succession and annual performance review of the board of directors
- A listed company must adopt and disclose a code of business conduct and ethics for directors, officers and employees which should address matters such as conflicts of interest, corporate opportunities, confidentiality, fair dealing, protection and proper use of assets, compliance with laws, and encouraging reports of illegal or unethical behavior. Any amendments to, or waivers from, any of the code's provisions must be disclosed

**NASDAQ-Specific Requirements**

- Listed companies must adopt a code of conduct for all directors, officers and employees addressing issues of conflicts of interest and compliance with laws and regulations. Any amendments to, or waivers from, any of the code's provisions must be disclosed

# SOX Guidelines—Other Corporate Governance Issues

| | |
|---|---|
| Equity Compensation Plans | ♦ Subject to certain limited exceptions, both the NYSE and NASDAQ rules require that equity compensation plans be subject to shareholder approval |
| Related Party Transactions | ♦ NASDAQ standards require that all related party transactions be approved by the audit committee or a comparable independent body of the board of directors |
| Going Concern Opinion | ♦ Pursuant to the NASDAQ standards, if a listed company receives an audit opinion containing a going concern qualification, it must make a public announcement through the news media disclosing the receipt of such opinion |
| Effectiveness for New Rules | ♦ The NYSE and NASDAQ requirements of having a majority of independent directors will not be effective for newly listed companies until 12 months after listing. For IPO companies, audit committees and nominating and compensation committees (if applicable) must have one independent member at the time of listing, a majority of independent members within 90 days after listing, and full independence within one year after listing<br>♦ The NYSE requires a foreign private issuer to disclose a brief, general summary of any significant ways in which the company's corporate governance practices differ from those followed by domestic companies<br>♦ The NASDAQ allows foreign private issuers to request exemptions from the NASDAQ corporate governance standards by demonstrating that the provisions of these standards are contrary to law, rule or regulation of any public authority exercising jurisdiction over the issuer or contrary to generally accepted business practices in the issuer's country of domicile.  The exemption must be disclosed annually in the company's 20-F |

# SOX Guidelines—Disclosure Controls and Procedures

**Definition**

- Disclosure controls and procedures refers to the controls and other procedures of a company designed to ensure that information to be disclosed in such company's periodic filings is accurate and reported within the time periods required by the SEC
- However, the SEC does not specify the disclosure controls and procedures that should be implemented by a company

**Disclosure Committee**

- It is suggested that a disclosure committee be formed to perform risk assessment, establish control activities and communication, and be responsible to ensure timely and accurate disclosure
- The disclosure committee should include the principal accounting officer or controller, the general counsel or another senior legal officer, the principal risk management officer, the chief investor relations officer and other officers or employees as the company deems appropriate
- A written charter should be adopted setting out the purpose of the disclosure committee
- The CEO and/or the CFO should participate in disclosure committee meetings at which critical decisions are being made
- Having effective disclosure controls and procedures is key as they support the CEO/CFO certifications

**Evaluation of Effectiveness**

- The effectiveness of the company's disclosure controls and procedures must be evaluated on a quarterly basis
- It is suggested that this evaluation be planned in advance, be conducted by employees that understand the disclosure controls being used, take into account any personnel, organizational or regulatory changes since the last evaluation, and test whether the controls are operating properly through interviews and document review

# SOX Guidelines—Internal Control over Financial Reporting

**Internal Control Reporting Requirements**

- SEC rules require a company to include an internal control report stating
  - management's responsibilities for establishing and maintaining adequate internal control over financial reporting
  - management's conclusions about the effectiveness of internal control
  - auditor attestation to management's evaluation of internal control
- The CEO and the CFO are also required to certify the effectiveness of internal control over financial reporting as part of the CEO/CFO certification (Section 302)

**SOX 404 Auditor Attestation Compliance Deadlines**

- Domestic companies:
  - accelerated (S-3 eligible and market capitalization between $75mm and $700mm) and large accelerated filers (S-3 eligible and market capitalization of $700mm or more) must include auditor attestation in future annual reports
  - non-accelerated filers (not S-3 eligible or market capitalization of $75mm or less) must include auditor attestation in annual reports for fiscal years ending **on or after December 15, 2008**
- Foreign companies:
  - large accelerated filers must include auditor attestation in future annual reports
  - accelerated filers must include auditor attestation in annual reports for fiscal years ending **on or after July 15, 2007**
  - Non-accelerated filers must include auditor attestation in annual reports for fiscal years ending **on or after December 15, 2008**

**SOX 404 Management Assessment of Internal Controls Compliance Deadlines**

- Domestic and Foreign companies:
  - accelerated and large accelerated filers must include management assessment in future annual reports
  - non-accelerated filers must include management assessment in annual reports for fiscal years ending **on or after December 15, 2007**

**Compliance for Newly Public Companies**

- Newly public companies need not comply with Section 404 until after its first SEC annual report
  - management assessment of internal control and auditor attestation must be included in the second annual report
  - changes in internal controls must be disclosed in the first 10-Q after the first 10-K or the second 20-F

# SOX Guidelines—Internal Control over Financial Reporting

Interpretive Guidance for SOX 404 Implementation, Proposed on Dec. 13, 2006

- The new proposed interpretive guidance on management's SOX 404 implementation will allow all companies to implement SOX 404 more effectively and efficiently and allow smaller companies to scale and tailor their implementation to fit their particular circumstances
- This guidance is based on two basic principles, materiality and risk
  - Management should evaluate the design of the implemented controls to determine whether there is a reasonable possibility that a material misstatement in the financial statements would not be prevented or detected in a timely manner
    - The purpose of this guidance is to allow management to focus primarily on those controls that are implemented to prevent or detect material misstatements in the financial statements
  - Management should collect and analyze evidence about the operation of the controls being evaluated based on its assessment of the risk associated with those controls
    - This guidance allows management to structure its evaluation to focus on those areas that pose the greatest risks to reliable financial reporting
- Subsequent year evaluations should focus on changes in risks and controls rather than on all risks and related controls. Evidence for subsequent assessments need only update previous evaluation
- The guidance reiterates that the objective of management's evaluation of internal control is to provide "reasonable assurance regarding the reliability of financial reporting" and not "absolute assurance"

# SOX Guidelines—Internal Control over Financial Reporting

Interpretive Guidance for SOX 404 Implementation, Proposed on Dec. 13, 2006 (Cont.)

- The guidance proposes specific interpretation in four areas of SOX 404 implementation to limit excessive testing and documentation and to allow for scalability for smaller companies:
  - **Identification of material risks to reliable financial reporting and the related controls that management has implemented to address those risks**. Management should only identify areas that pose material risks and the associated controls rather than every control in a process. Judgment is a key principle
  - **Evaluation of the operating effectiveness of controls**. The evaluation process should be a risk-based approach that requires the use of judgment to concentrate management's evaluation on those areas identified as posing the greatest risk to reliable financial reporting based on the company's unique circumstances
  - **Reporting the overall results of management's evaluation**. This guidance provides management with a framework outside of accounting literature for making judgments on whether the identified deficiencies are material weaknesses
    - This guidance describes the factors that management should consider to evaluate the severity of a deficiency
    - If management discovers a material weakness, it must conclude that internal control over financial reporting is not effective and fulfill reporting responsibilities surrounding that material weakness
    - Additionally, the guidance addresses the disclosure requirements for internal control reports in situations such as scope limitations and restatements
  - **Documentation**. The SEC proposed additional clarification on the nature and extent of evidential matter that management must obtain to support its assessment. This guidance gave management greater flexibility in documentation
    - Documentation and presentation of evidence may take many forms
    - Documentation does not need to include all controls within a process that impact financial reporting
    - Methods and procedures used to gather and evaluate evidence and the basis for conclusions on internal controls related to individual financial reporting elements are also considered evidential matter
    - In situations when management relies on daily interaction with its controls as a basis for its assessment, limited documentation can be created specifically regarding how the interaction provided management with sufficient evidence

# SOX Guidelines—Internal Control over Financial Reporting

## In coordination with the SEC proposed guidance on SOX 404 implementation, the PCAOB proposed a revised auditing standard on internal control

Revised Auditing Standard on Internal Control, Proposed on Dec. 19, 2006

- The PCAOB proposed a new principle and risk based auditing standard to replace Auditing Standard No. 2
- The new standard is designed to focus auditors on the most important areas of financial reporting and to increase the likelihood of identifying material weaknesses. It will also help to eliminate unnecessary audit requirements, simplify and shorten the existing standard, and allow for scalability for smaller companies
- Among other things, the proposed standard will:
  - Direct the auditor to the most important controls and emphasize the importance of risk assessment
  - Revise the definitions of significant deficiency and material weakness, as well as the "strong indicators" of a material weakness
  - Clarify the role of materiality, including interim materiality, in the audit

# SOX Guidelines—Auditor Independence

**Auditor Requirements**

- The audit committee must pre-approve audit and non-audit services to be provided by the auditor, which can be accomplished through pre-approval policies and procedures
- The prohibitions on the provision of non-audit services by the auditor have been expanded
- Auditors must make certain communications to a company's audit committee regarding critical accounting policies and other matters
- Certain audit partners must be rotated periodically
- There is a required cooling-off period before the company may employ a former partner, principal, shareholder or professional employee of an auditor
- Audit partners may not earn or receive compensation based on their procuring non-audit services
- The annual disclosure requirements relating to fees paid to auditors have been expanded

# SOX Guidelines—Miscellaneous Items

**Insider Loans**

- The Sarbanes-Oxley Act prohibits a company from extending or maintaining credit, arranging for the extension of credit, or renewing credit in the form of a personal loan to or for any director or executive officer of the company
- Loans outstanding as of July 30, 2002 are grandfathered, but any material modification or renewal of such loans is prohibited
- This prohibition becomes effective upon the filing of a registration statement. The scope of this prohibition is somewhat unclear and difficult issues are raised by various arrangements such as cashless stock option exercise programs and perquisite programs for executives
- Such arrangements should be analyzed on a case-by-case basis for compliance with the Sarbanes-Oxley Act

**Attorney Conduct Rules**

- The SEC has issued rules to regulate the conduct of attorneys who appear or practice before the SEC and impose “up the ladder” reporting requirements
- The rules apply to internal and outside counsel
- The “up the ladder” reporting requirements require that evidence of a material violation of securities laws, material breach of fiduciary duty or similar violation be reported to the chief legal officer of the company or a qualified legal compliance committee
- If the company has not established a qualified legal compliance committee, the attorney may be required to report such evidence further up the ladder to the board if an appropriate response is not received from the chief legal officer within a reasonable time
- Companies are responsible for ensuring internal compliance with these rules. There are certain provisions dealing with attorneys who are supervisory or subordinate attorneys which would not require immediate up the ladder reporting

# SOX Guidelines—Miscellaneous Items

**Increased Disclosure Requirements**

- The Sarbanes-Oxley Act and new SEC rules have also made various changes to the information that must be publicly disclosed by companies and the timing of such disclosure
- These include:
  - accelerating periodic reporting requirements for certain companies deemed “accelerated filers”
  - more comprehensive MD&A disclosure with respect to contractual obligations and off-balance sheet arrangements
  - disclosure relating to non-GAAP financial measures and the reconciliation of such measures to GAAP as well as the prohibition on the use of certain non-GAAP measures in SEC filings
  - providing earnings releases on Form 8-K
  - CEO and CFO certifications
  - accelerated Section 16 beneficial ownership reporting requirements
  - additional Form 8-K disclosure requirements and accelerated filing of Form 8-Ks

**Investigations**

- Prohibits document alteration or destruction with intent to impede investigations or proceedings, and trading by insiders during certain pension fund blackout periods
- Also provides protection for whistle blowers (in the form of civil rights protection and a prohibition on retaliation)

SECTION 1.D

# Pre-IPO Preparation

## Legal Issues

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# Legal Issues

## Articles of incorporation & by-laws

- The articles and by-laws of a private company may contain provisions which are not suitable for a public company
- Examples of such provisions include:
  - preemptive right to purchase equity
  - requirements of supermajority approval
  - unconventional quorums
  - board compositions such as a staggered board
- It is easier to obtain a stockholder vote to amend the articles of incorporation or to reincorporate prior to going public when there is a small group of stockholders that has a majority interest
- If a company is currently incorporated in a state in which the laws are not flexible in terms of corporate governance or do not insulate officers and directors from liability, the company may want to reincorporate in a state with more favorable laws

# Legal Issues

## Anti-takeover provisions

- Companies should consider their defense mechanisms and status for unsolicited takeover attempts
- Prior to going public, a company's options are broader than following the IPO
- A number of mechanisms exists for maximizing continued control over the company by the existing shareholders, including:
  - dual class voting stock structures
  - voting agreements among pre-IPO shareholders
  - supermajority vote provisions for significant corporate actions
  - a "staggered" board of directors
  - removing the right of shareholders to act by written consent
  - removing the right of shareholders to call special meetings
  - limiting the right of shareholders to amend by-laws
  - requiring that directors can be removed only for cause
  - requiring advance notice of matters to be brought forth before a shareholder's meeting
  - adopting a shareholder protection rights plan ("poison pill")
- Many of the above mechanisms may adversely impact the marketing of an IPO (e.g., dual class voting structures, staggered board). Institutional stockholders generally view anti-takeover measures as a negative factor

# Legal Issues

## Company contracts

- A company should review its existing contracts in the context of an IPO to ensure that it has not made any promises conflicting with its ability to conduct an IPO
- A company is required to file “all material” agreements with its IPO registration statement. However each material agreement will be available to everyone, including competitors
- The contract review should include identification of contracts, where:
  - the counterparty’s consent is required before publicly filing the contract or
  - sensitive information would be disclosed as a result of the offering
- A company may request confidential treatment of certain portions of its contracts with the SEC. However, typically the SEC only grants confidential treatment if the request is limited in scope and duration
- As a result, sensitive contract information will likely only be protected for a limited amount of time

# Legal Issues

## Due diligence preparation

**Prior to commencing the IPO process, a company should prepare a data room to facilitate review by the underwriters and legal counsel**

**Typical items included are:**

- Corporate structure
- Organizational charts
- Articles of incorporation and by-laws
- Board and stockholder meeting minutes
- Business plans, budgets, operating reports, etc
- Debt instruments, indentures and loan documents
- Leases
- Title to real property
- Title insurance
- Other insurance policies (including D&O insurance)
- Patents, copyrights, trademarks and other documentation evidencing intangible property
- Licenses relating to intellectual property
- Labor agreements
- Employment and consulting agreements
- Joint venture and partnership agreements
- Supplier, vendor, distributor, material contracts
- Employee benefit plans
- Key licenses and permits
- Record of prior issuances of securities and stockholder lists
- Documentation regarding repurchases of stock
- Pending or threatened litigation
- Accountant's letters to management or Board communications
- Recent press releases
- Historical audit reports and financial statements
- Regulatory correspondence (i.e., FDA, SEC)

SECTION 2

# IPO Preparation Process

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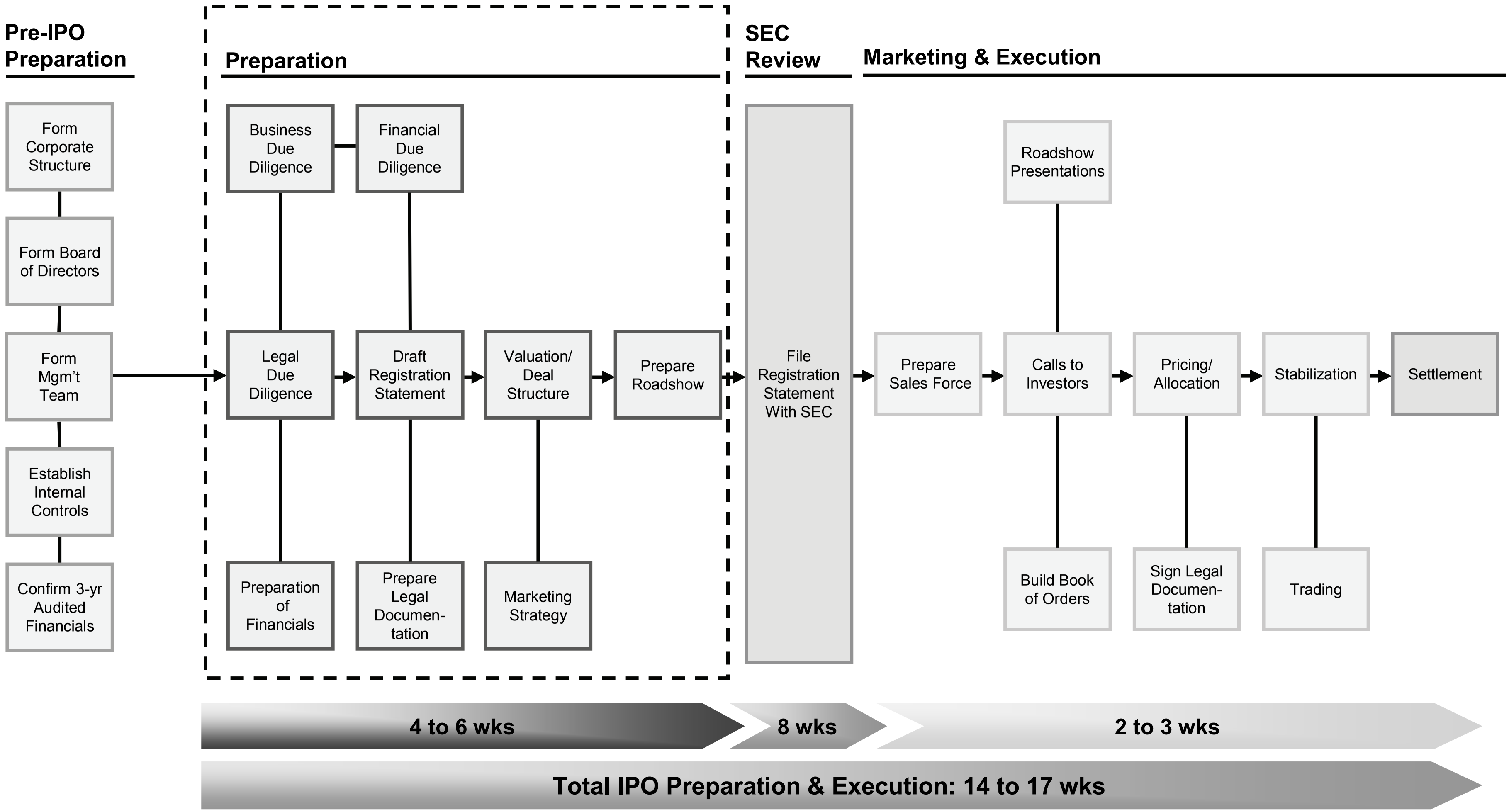
# Overview of the IPO Process

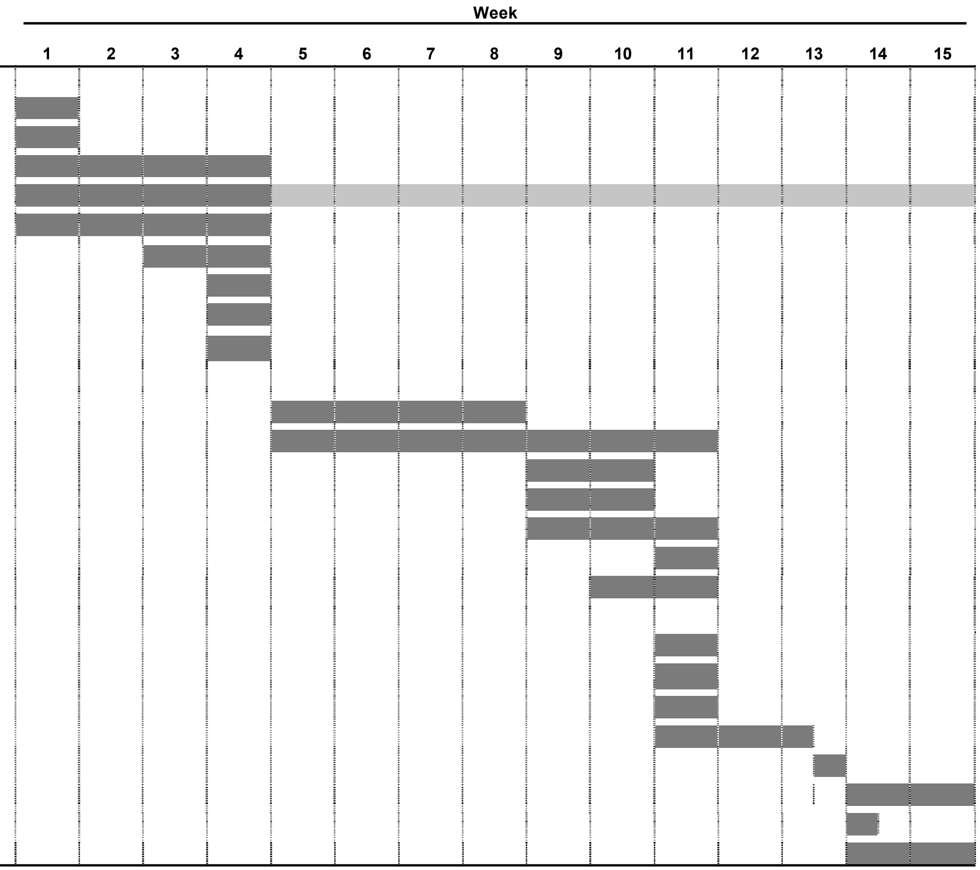
**Generally, an IPO can be completed in 14 to 17 weeks assuming the corporate structure is in place, although the SEC review period may extend beyond the initial timeline**



# Illustrative IPO Timetable—Three Phases

## Generally, an IPO can be completed in 14 to 17 weeks

| Responsiblities | | | |
|---|---|---|---|
| UW | CO | CC | |
| | | | **Phase I—Preparation** |
| ✓ | | | Prepare organizational book |
| ✓ | ✓ | ✓ | Organizational meeting and due diligence |
| ✓ | | ✓ | Prepare underwriting agreement, NASD application, exchange listing |
| ✓ | ✓ | ✓ | Ongoing financial, business, accounting and legal due diligence [1] |
| ✓ | ✓ | ✓ | Drafting sessions |
| ✓ | ✓ | | Modeling and projections |
| ✓ | | | Internal approvals |
| | | ✓ | File registration statement |
| | | ✓ | File with NASD and relevant exchange |
| | | | **Phase II—SEC Review and Pre-marketing** |
| | | | SEC initial review period |
| ✓ | ✓ | | Prepare roadshow presentation |
| ✓ | ✓ | ✓ | Receive and respond to 1st round of SEC comments |
| ✓ | | | Internal approvals—Valuation and price range |
| ✓ | ✓ | | Finalize roadshow presentation and rehearse management |
| ✓ | ✓ | ✓ | Receive and respond to 2nd round of SEC comments |
| ✓ | | ✓ | Finalize underwriting agreement, legal opinions and comfort letter |
| | | | **Phase III—Marketing** |
| ✓ | | ✓ | Print and distribute Red Herring (including electronic versions) |
| ✓ | ✓ | | Analyst Teach-in (1 Day) |
| ✓ | ✓ | | Management presentation to sales force (1 Day) |
| ✓ | ✓ | | Roadshow presentations (10–13 Days) |
| ✓ | ✓ | | Pricing |
| ✓ | | | Stabilization |
| ✓ | ✓ | ✓ | Closing |
| ✓ | ✓ | ✓ | Exercise Greenshoe and second closing |




Note:
1 Incremental due diligence, including bring down due diligence, often continues after filing and up until the closing

Legend: UW = Underwriters; CO= Company; CC= Company Counsel

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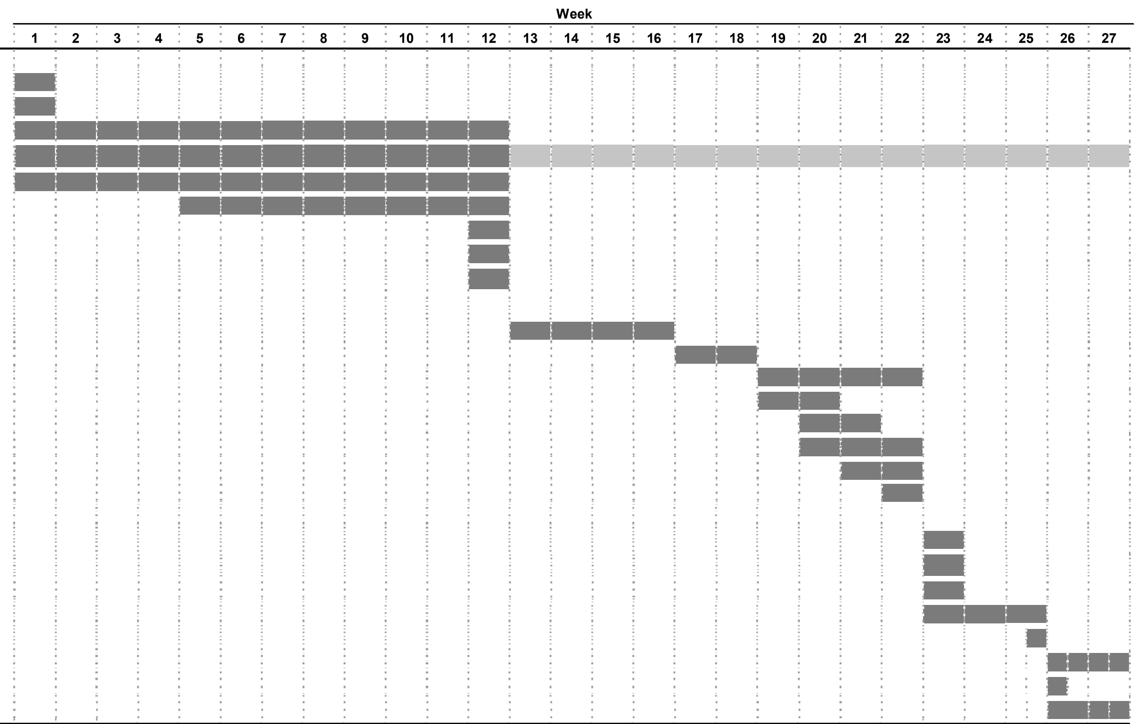
# Illustrative IPO Timetable—Three Phases

## For mega-IPOs, the preparation of financials, the drafting of the registration statement, and the SEC review process may extend beyond the initial timeline

| Responsibilities | | | |
|---|---|---|---|
| UW | CO | CC | |
| | | | **Phase I—Preparation** |
| ✓ | | | Prepare organizational book |
| ✓ | ✓ | ✓ | Organizational meeting and due diligence |
| ✓ | | ✓ | Prepare underwriting agreement, NASD application, exchange listing |
| ✓ | ✓ | ✓ | Ongoing financial, business, accounting and legal due diligence |
| ✓ | ✓ | ✓ | Drafting sessions |
| ✓ | ✓ | | Modeling and projections |
| ✓ | | | Internal approvals |
| | | ✓ | File registration statement |
| | | ✓ | File with NASD and relevant exchange |
| | | | **Phase II—SEC Review and Pre-marketing** |
| | | | SEC initial review period |
| ✓ | ✓ | ✓ | Receive and respond to 1st round of SEC comments |
| ✓ | ✓ | | Prepare roadshow presentation |
| ✓ | ✓ | ✓ | Receive and respond to 2nd round of SEC comments |
| ✓ | | | Internal approvals—Valuation and price range |
| ✓ | | ✓ | Finalize underwriting agreement, legal opinions and comfort letter |
| ✓ | ✓ | | Finalize roadshow presentation and rehearse management |
| ✓ | ✓ | ✓ | Receive and respond to 3rd round of SEC comments |
| | | | **Phase III—Marketing** |
| ✓ | | ✓ | Print and distribute Red Herring (including electronic versions) |
| ✓ | ✓ | | Analyst Teach-in (1 Day) |
| ✓ | ✓ | | Management presentation to sales force (1 Day) |
| ✓ | ✓ | | Roadshow presentations (15 Days) |
| ✓ | ✓ | | Pricing |
| ✓ | | | Stabilization |
| ✓ | ✓ | ✓ | Closing |
| ✓ | ✓ | ✓ | Exercise Greenshoe and second closing |




Legend: UW = Underwriters; CO= Company; CC= Company Counsel

# Tasks and Responsibilities

## The IPO process requires the coordination of multiple constituents

### Company

- Due diligence
- Support preparation of prospectus
- Capital structure
- Corporate actions (e.g. stock split, share capital increases, etc.)
- Roadshow presentation
- Communication strategy

### Bookrunning Manager(s)

- Project management
- Transaction structure
- Valuation
- Coordination of due diligence
- Coordination of prospectus
- Coordination/preparation of roadshow/marketing/PR
- Syndicate management
- Pricing/trading/settlement/stabilization
- Underwriting and other relevant legal agreements

### Co-Managers/Other Underwriters

- Support transaction structure and valuation
- Participate in due diligence and drafting process
- Retail distribution

### Company Counsel

- Corporate and regulatory actions
- Drafting of prospectus
- Due diligence
- Publicity guidelines
- Review underwriting and other relevant legal agreements
- Legal opinion 10b(5)

### Underwriters' Counsel

- Review and contribute to prospectus
- Due diligence
- Review and input into publicity guidelines
- Research guidelines
- Underwriting agreements and other relevant legal agreements
- Legal opinion 10b(5)

### Auditor(s)

- Audit financials
- Financial due diligence
- Review financial disclosure
- General advisory to parties on accounting and disclosure issues
- Comfort letters
- Stock Exchange comfort

### Public Relations Firm

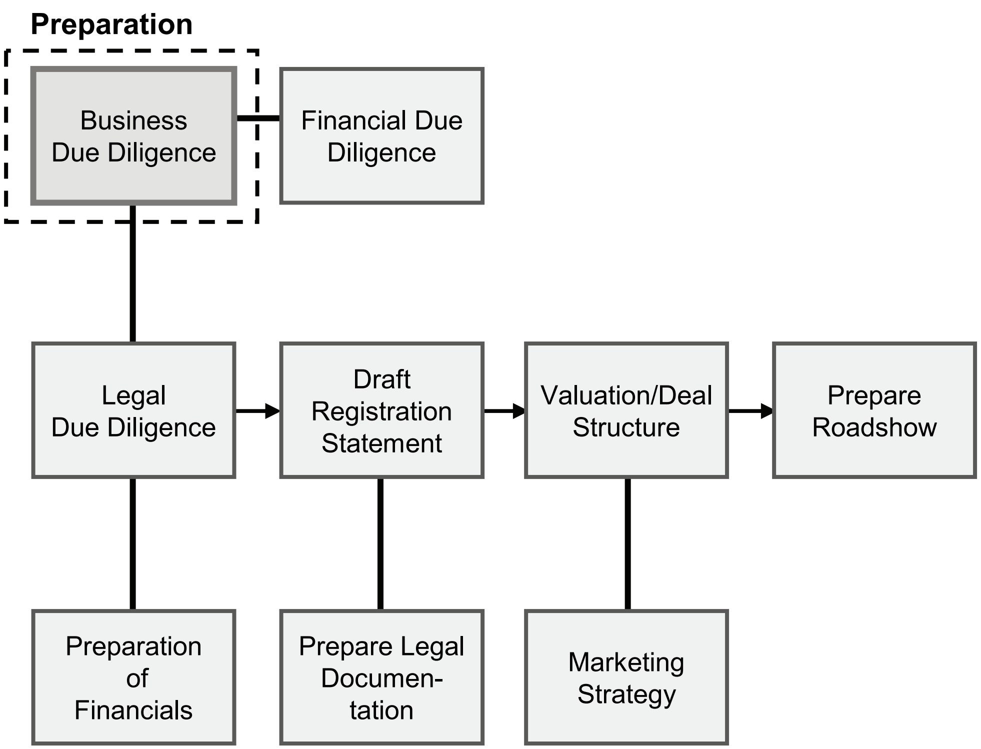
- Manage the public relations and media in connection with the Initial Public Offering ("IPO") and the ongoing investor relations activities

### Printers

- Process editing changes in subsequent versions of prospectus and distribute new drafts
- Print prospectus

# Business Due Diligence

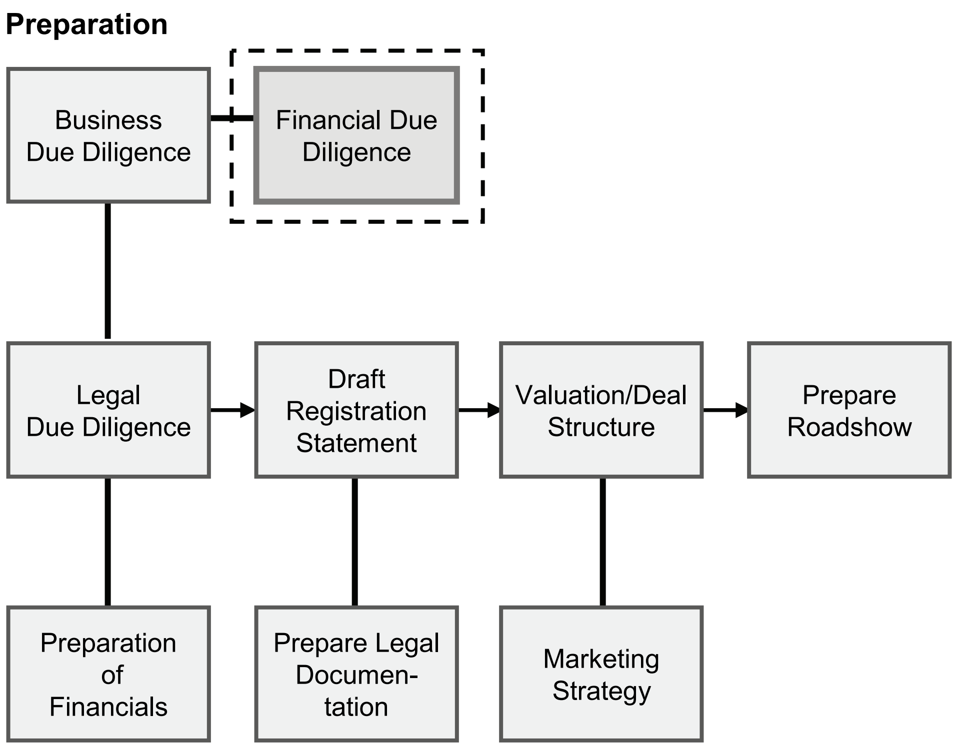
## The process of confirming the company's business strategy and understanding its future potentials




- Overall business strategy
- Macroeconomic trends
- Industry trends
- Pricing structure
- Operating results
- Manufacturing
- Products, markets and customers
- Marketing and distribution
- Management strategy
- Facilities
- Competition
- Management systems
- Management structure
- Reference checks

# Financial Due Diligence

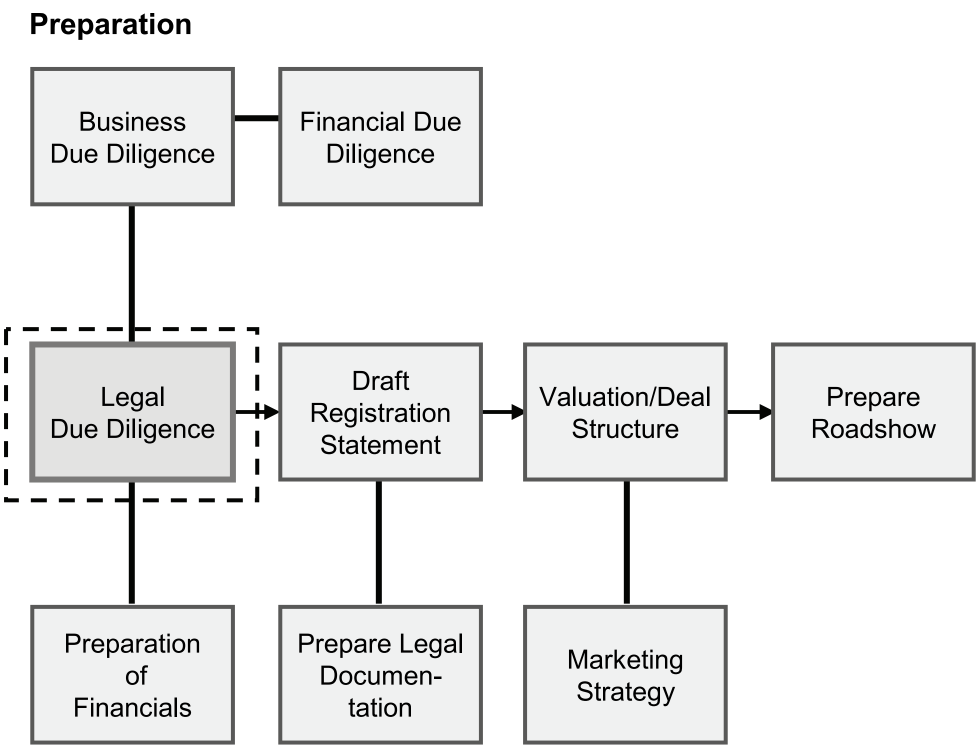
## The process of confirming the company's historical financial results and understanding its future operational and financial prospects




- Audited financial statements
- Capital structure
- Breakdown of historical revenues and operating profits by segment
- Detailed monthly (12 months) and quarterly (8 quarters) budget versus actuals
- Projections (2-5 years)
- Audit committee
- SOX and financial controls
- Accounting policies and auditor management letters to the Board of Directors
- Meeting with auditors and audit committee chairman

# Legal Due Diligence

## The process of confirming the company's legal history

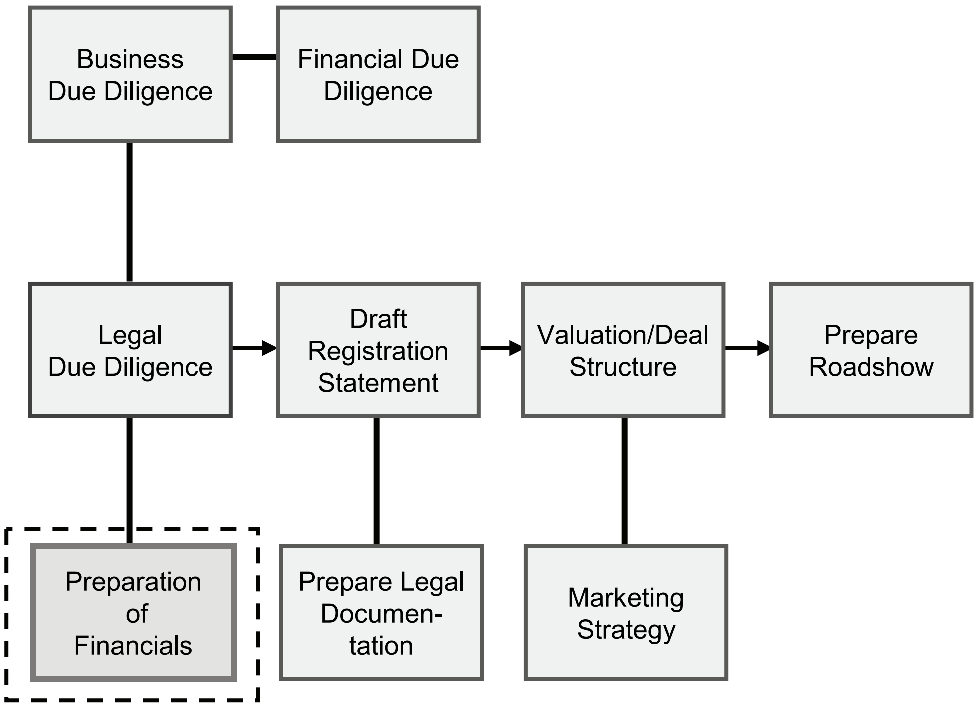



- Corporate structure
- Litigation
- Compliance with local, state and national laws and regulations
- Debt covenants
- Intellectual property
- Material contracts and agreements review
- Environmental issues
- Key licenses and permits
- Employment agreements
- Related party transactions

# Preparation of Financials

## Working with the auditors, the company completes audited financials for a minimum of the past three years

**Preparation**

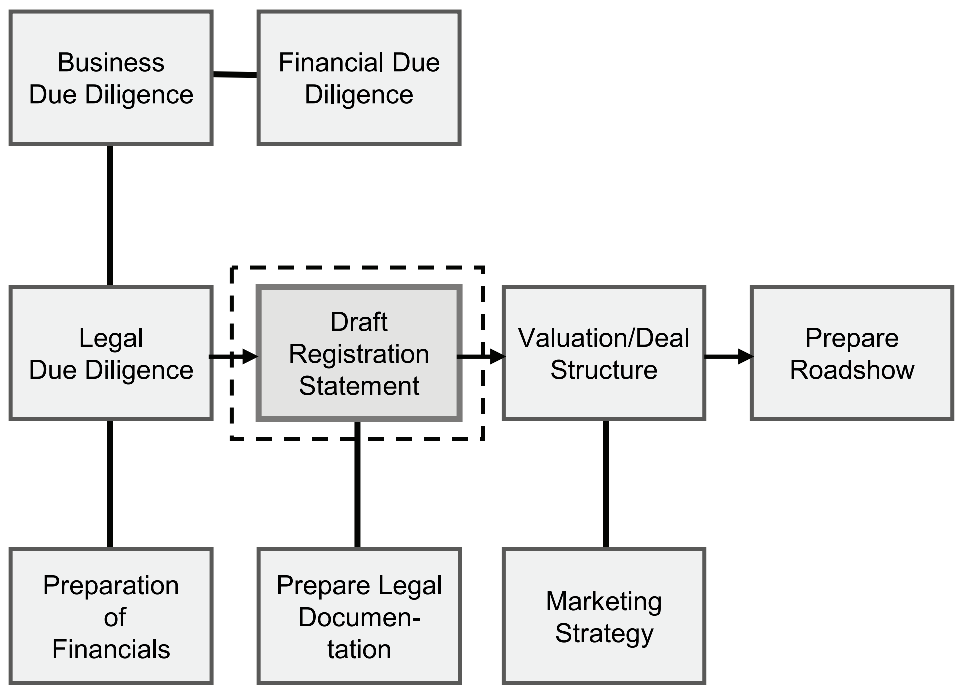



- Discuss with auditors and lawyers required company financials and predecessor financials
- Identify critical accounting policies
- Prepare unqualified historical financials based on US GAAP
- Prepare financial projections (2-5 years)
- Actual vs. budget analysis
- Summary and selected financial tables (3 years summary, 5 years selected)
- Segment reporting
- MD&A preparation

# Drafting the Registration Statement

**Based on the financials and due diligence work, the company management, underwriters, their respective counsels and accountants work together to draft the prospectus**

**Preparation**

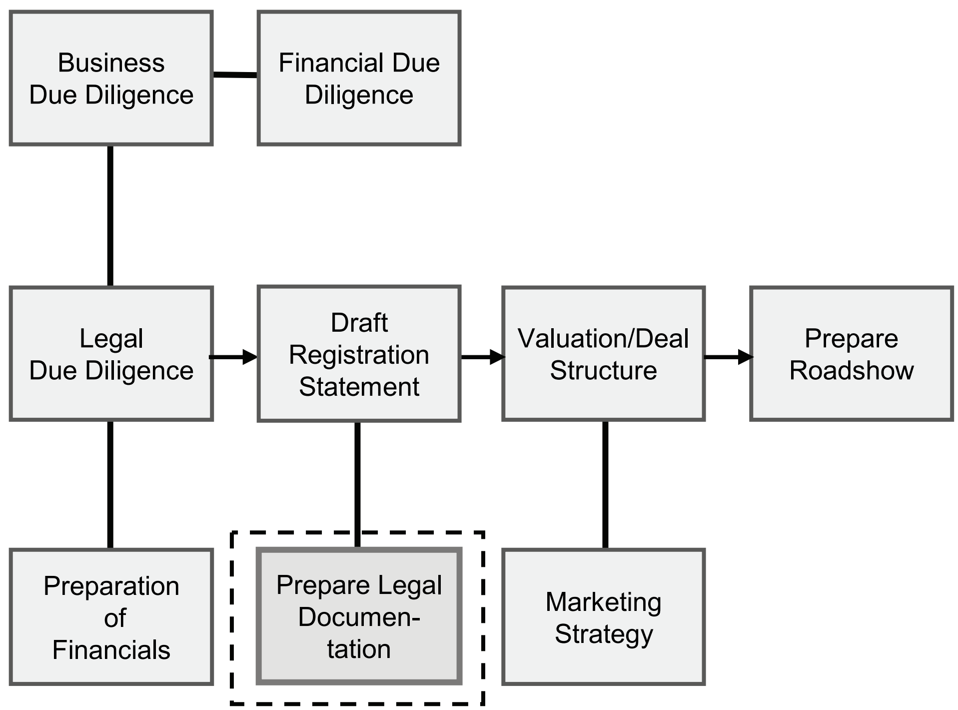



- Prospectus summary
- Risk factors
- Description of company and business
- Use of proceeds
- Capitalization
- Selected financial data
- Management’s discussion and analysis of results
- Compensation discussion and analysis
- Description of security
- Underwriting
- Taxation
- Ownership and selling shareholders
- Pending litigation and materiality
- Audited financial statements

# Preparing Legal Documentation

## The company's management, underwriters, their respective legal counsels work together to draft the necessary legal documentation

**Preparation**

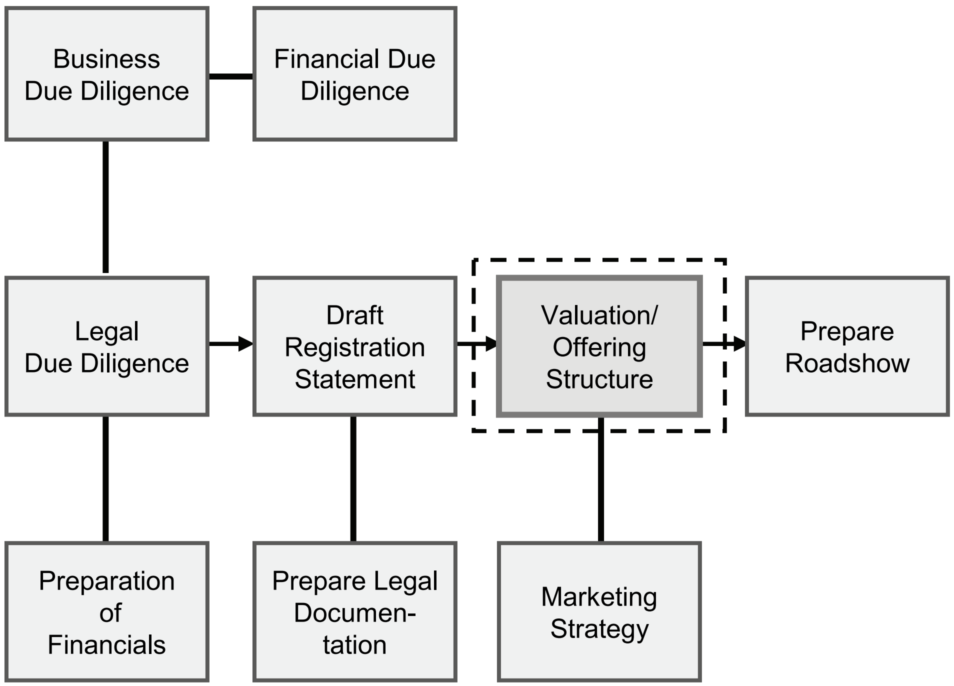



- Underwriting agreement
  - Representations and warranties
  - Governing law/jurisdiction
  - Indemnities
- Legal opinions (10b(5), IP, regulatory, litigation)
- Comfort letter
- Lock-up agreements
- Agreement among underwriters
- Blue Sky review

# Valuation/Offering Structure

## Knowledge gained from due diligence and drafting, along with feedback from capital markets, is used to revise the company's valuation and offering structure

**Preparation**

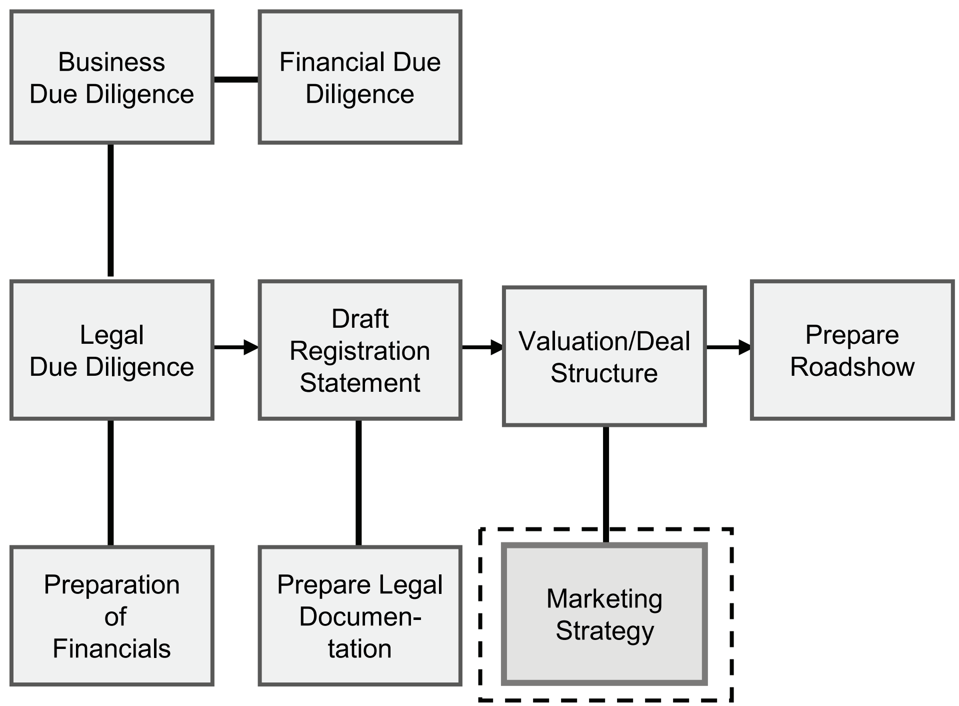



- Value analysis
  - appropriate methodologies
  - definition of comparable companies
- Determine size of transaction
  - issuer objectives
  - market requirements
- Target markets and potential demand
- Retail versus institutional investors
- Syndicate structure and management
- Structure of offering

# Marketing Strategy

**As the structure is refined, the underwriter establishes a comprehensive marketing strategy incorporating: investment themes, specific targeted investors, roadshow schedule and a syndication strategy**

**Preparation**

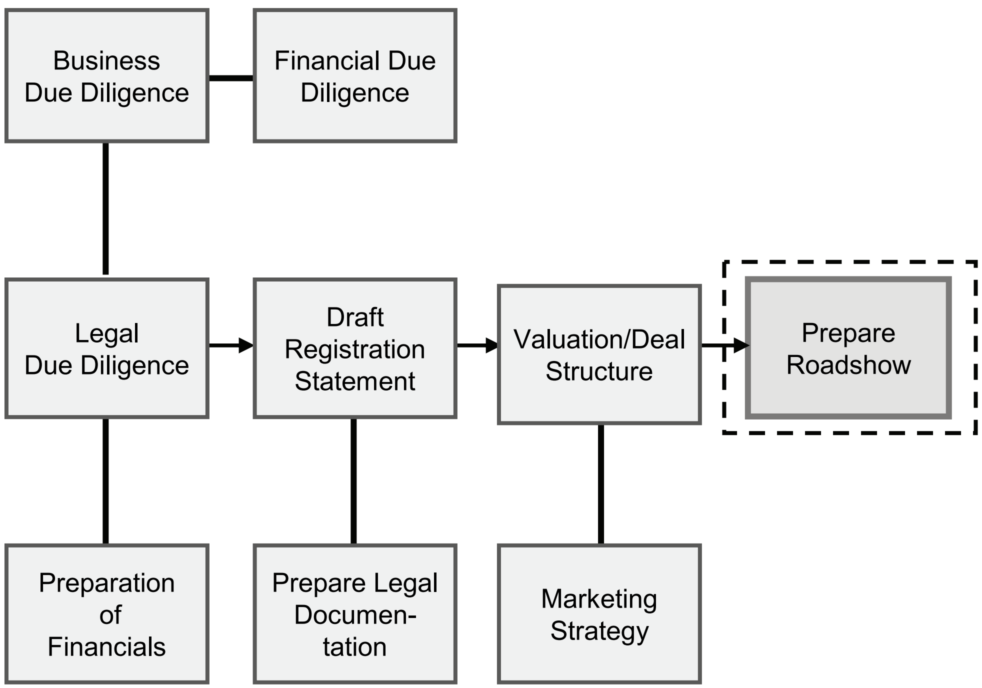



- Develop investment case
- Define target investors
- Prepare syndicate/pricing strategy
- Prepare information for sales force

# Preparing the Roadshow

**Based on the prospectus, the roadshow slide presentation presents the key themes and information investors need to evaluate a potential investment within a 20–45 minute period**

**Preparation**




- Prepare roadshow slide presentation
- Rehearse roadshow slide presentation
- Prepare sales force education/information
  - internal marketing document
  - management presentation
- Determine roadshow itinerary
- Target investors for one-on-one meetings
- Arrange roadshow logistics

# SEC Review Process

## Based on all the preliminary work done, the company files with the SEC

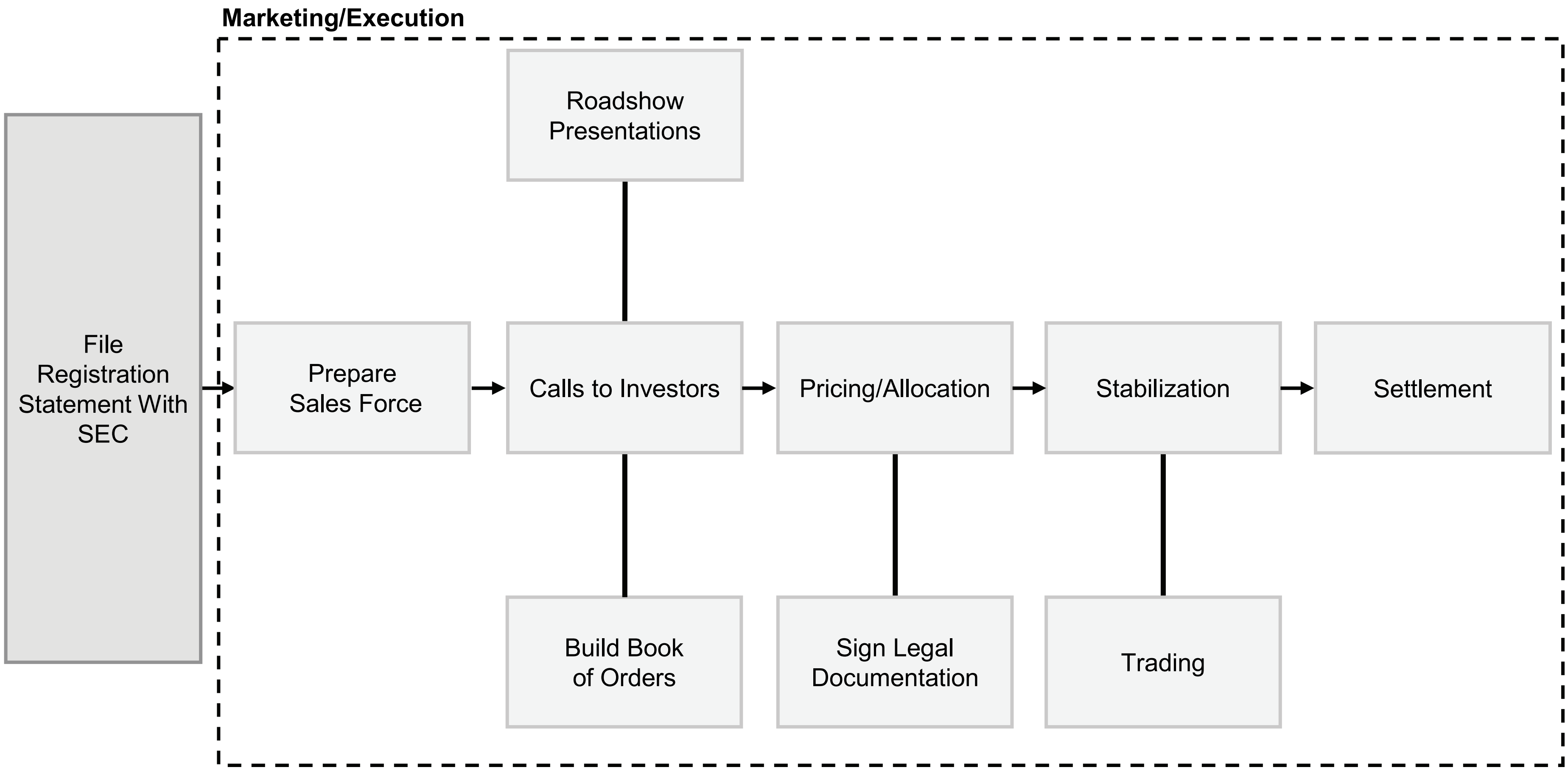
- The company files the Form S-1 or registration statement with the SEC
- The SEC will review the initial filing for a minimum 30-day period
- The SEC division of Corporate Finance reviews the registration statement and communicates to the issuer any comments
- Several rounds of comments from the SEC and amendments to the registration statement ensue
- When all of the comments from the SEC are “cleared,” the company begins the marketing process
- SEC declares the statement “effective” under the 1933 Act
- Sale of stock is allowed following effectiveness

SECTION 3

# Marketing & Execution

# Marketing and Execution

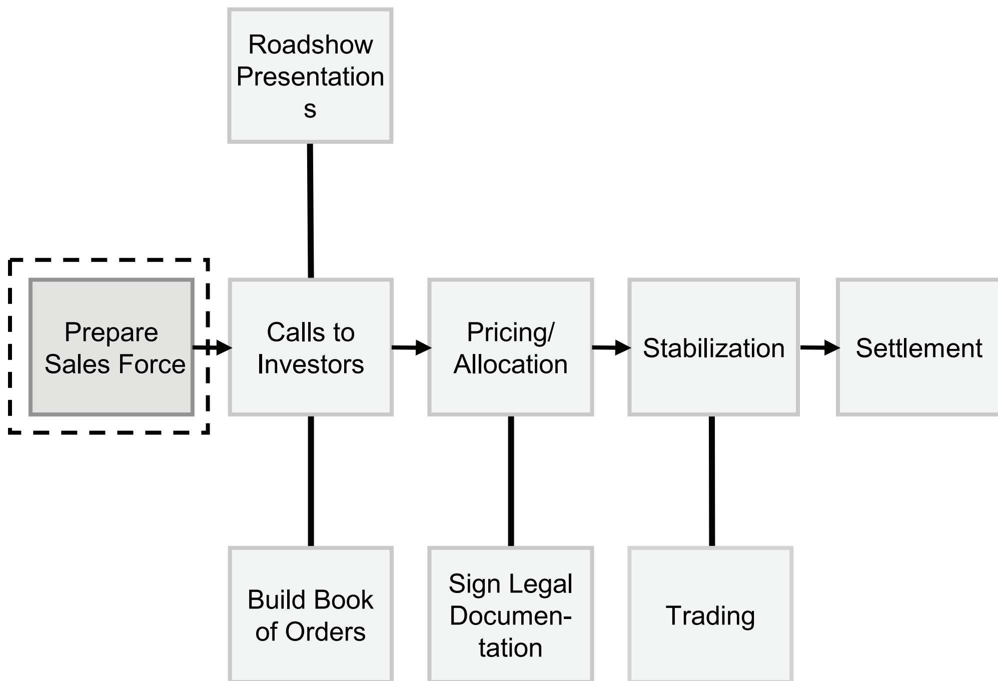
**Following the Registration Statement's filing, the financing process shifts from preparation to marketing and execution**



# Preparing the Sales Force

## This is a critical marketing element as the sales force will be crucial in selling the IPO to key investors

**Marketing/Execution**

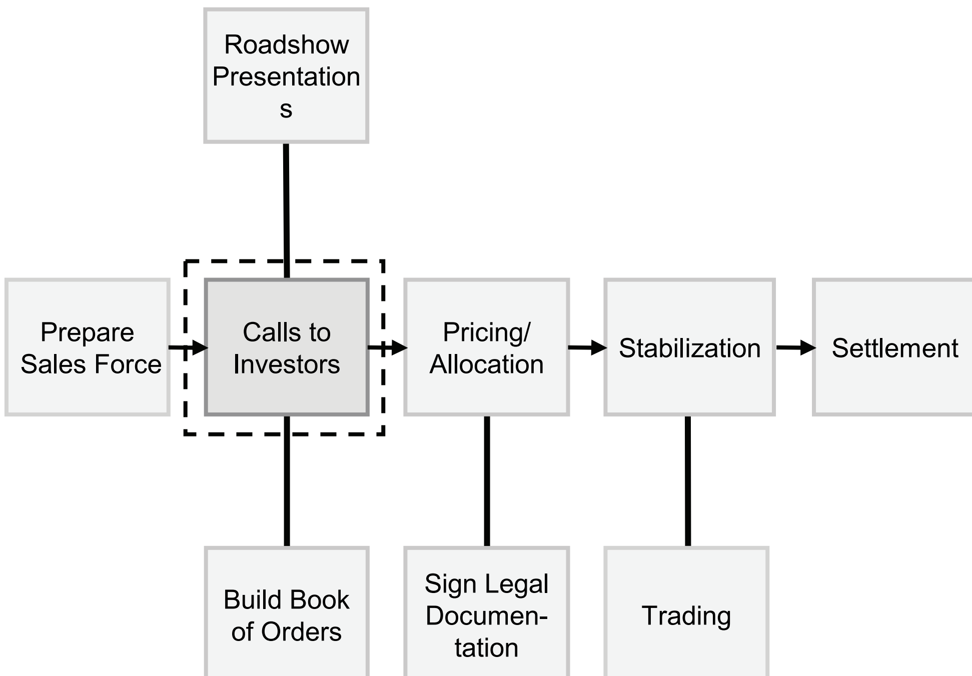



- Sales strategy meeting
- Pre-offering build-up
- Prospectus distributed to all salespeople and all prospective investors
  - only a preliminary prospectus can be delivered to potential investors
- Sales memo distributed to all salespeople
- Banker presentations
- Internal management presentation

# Calls to Investors

## Through their sales forces, the underwriters begin to contact appropriate investors, educate them about the company and set up meetings for the investors with management

**Marketing/Execution**

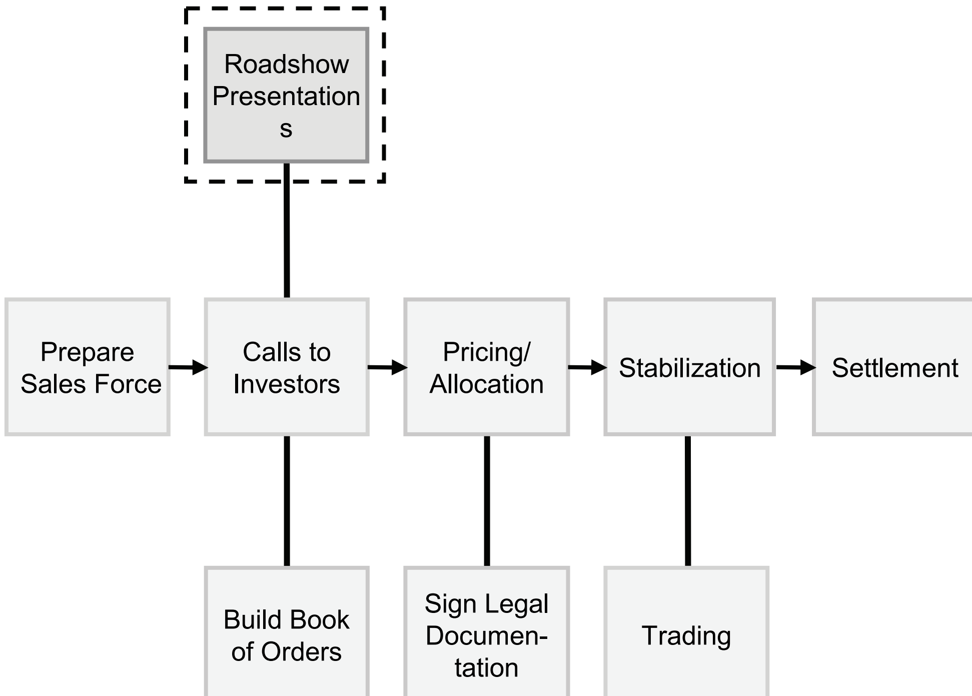



- Contact target accounts
- Continuous calling effort by sales forces
- Invitations to roadshow
- Receive one-on-one requests
- Daily syndicate review
- Sales force updates by syndicate

# Roadshow Presentation

## To market the transaction effectively, the underwriters will set up private one on one and group meetings between the company management and institutional investors

**Marketing/Execution**

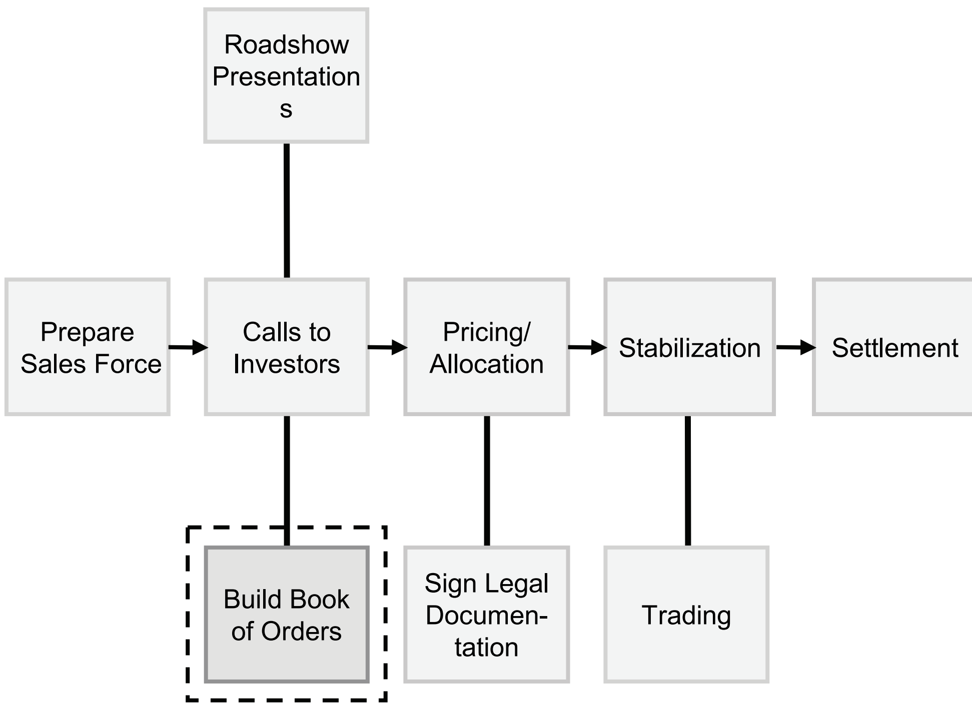



- Breakfasts, luncheons and one-on-ones
- Multimedia/slide presentations
- Focused and concise 25 minute presentation based on investment themes
- The issuer and underwriters visit major US and international cities to convey investment case
- Approximately 100 meetings scheduled over a two or three week period
- Group conference calls by the company management are placed to institutional investors only

# Building a Book of Orders

## After the company files with the SEC, only “indications of interest” can be accepted (i.e., no firm sales of stock until issues become effective)

**Marketing/Execution**

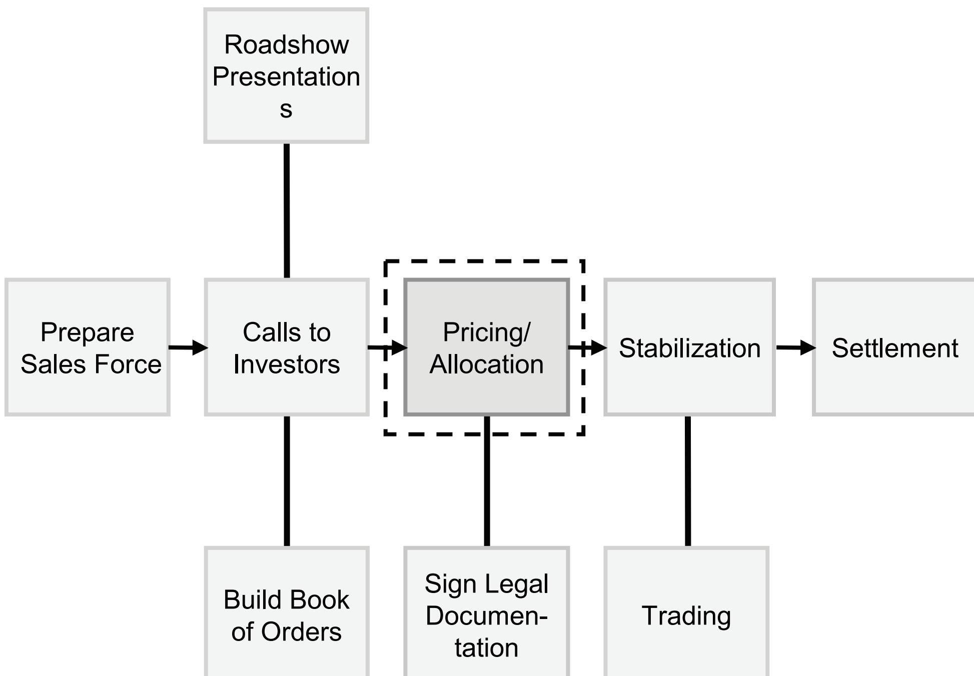



- Compile indications of interest, no firm sale of stock is allowed until issue becomes effective
- Assess demand (institutional, retail and syndicate)
  - quality of investor
  - size of order
  - timing of order
  - price parameters

# Pricing/Allocation

## Working with the company's management and feedback from accounts, Equity Capital Markets Group determines the price at which the offering will be offered to the market

**Marketing/Execution**

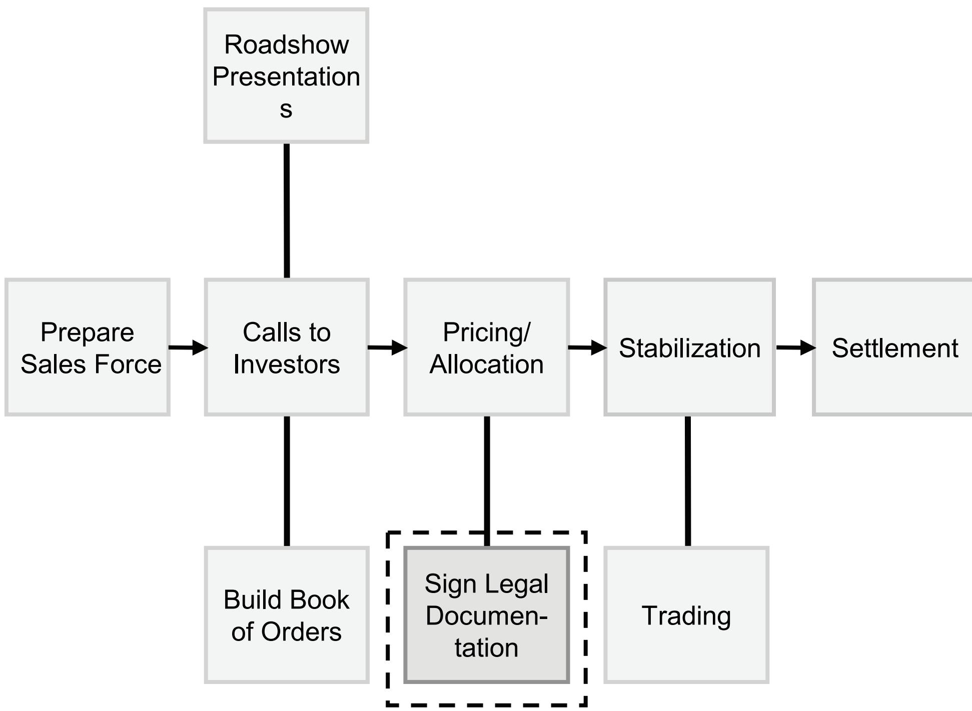



- Pre-pricing discussions with the issuer
- Stock usually priced after the close of the market on the day the registration statement becomes effective
- Pricing meeting run by Bookrunners, attended by capital markets professionals, investment bankers, and the company's management
- Price proposal submitted by bookrunners
- Price accepted by the issuer

# Execute/Sign Legal Documentation

## The company and UBS Investment Bank execute the underwriting agreement

**Marketing/Execution**

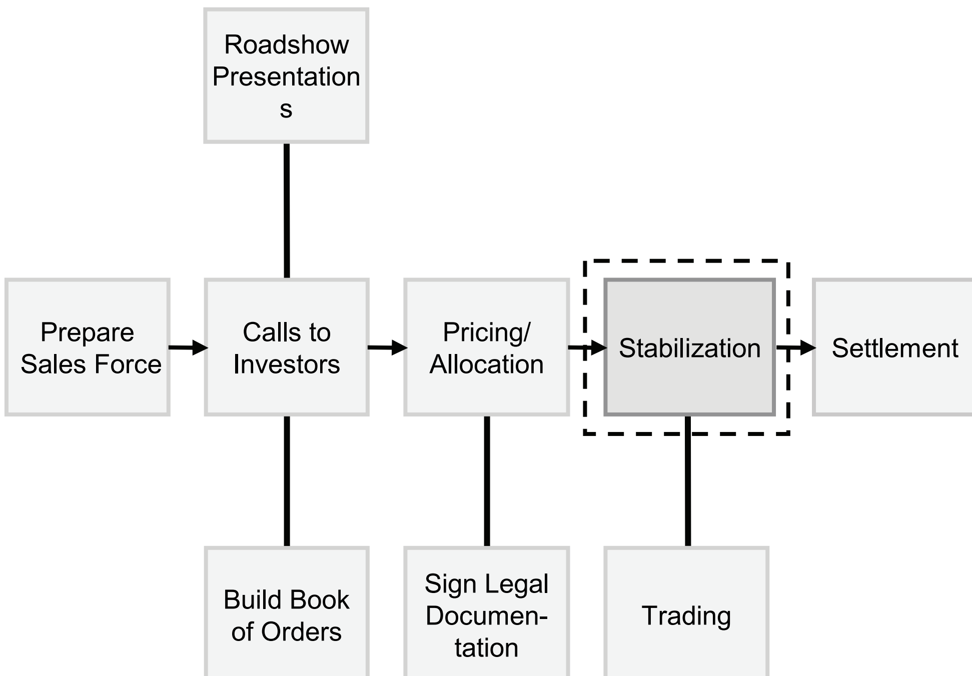



- Sign underwriting agreement
  - right not to close in the event of specified adverse developments prior to closing date
  - compliance by issuer and any selling shareholders with their respective representatives and warrants
  - receipt of opinions of counsel and a comfort letter from issuer's accountants
  - agreements by the issuer and selling shareholder to indemnify the underwriters against liabilities arising from the offering
- Sign agreement among underwriters

# Stabilization

## Underwriters use the overallotment option or "Green Shoe" to support the stock in the aftermarket and ensure optimal trading

**Marketing/Execution**




- Greenshoe limited to 15% of deal size
- Short position created through the allotment process establishes syndicated buying (stabilization) power
- Overallotment option available through exercise of "Green Shoe"

# Greenshoe Overview

## What is the Greenshoe? Also known as the overallotment option...

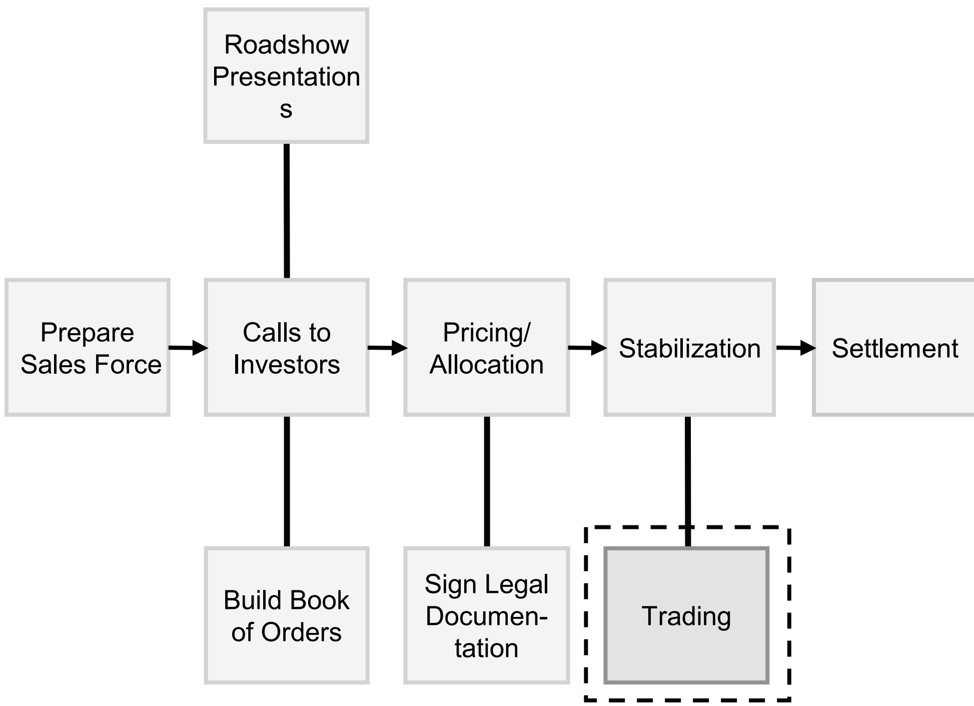
- Since first used for the Green Shoe Company in 1963, this option has become a standard and necessary feature
- Underwriters' option to purchase from the issuer a specified number of additional shares beyond the number on the cover of the prospectus. The option is exercisable within a maximum of 30 calendar days following the trade date of the offering and is a maximum of 15% of the offering size
- ***Primary purpose is to stabilize the stock price during the initial days of trading***

| | Exercise: Strong Aftermarket Performance | | No Exercise: Weak Aftermarket Performance |
|---|---|---|---|
| Offering size: Offering price per share: | 1,150,000 shares<br>$10 = $115mm deal size | Different size offerings | 1,000,000 shares<br>$10 = $100mm deal size |
| Number of shares actually allocated on pricing date: | 1m + 15% greenshoe = 1.15m shares | Same amount of shares allocated by underwriters. With the supply being only 100% of the deal size (until the greenshoe is exercised) a natural short position is created | 1m + 15% greenshoe = 1.15m shares |
| Market environment/ deal tone: | The market is stable and the deal is trading well. Natural buyers are buying the stock, supporting or increasing the IPO stock price | Very different market environment following the offering | The market is unstable, making many buyers in the offering skittish. As a result investors begin selling shares they received in the IPO. If buyers don't emerge, the stock can fall below the IPO price |
| Action taken by underwriters: | None—the stock is trading well on its own | Very different action taken by underwriters | Underwriters "stabilize" the stock by purchasing shares on the open market at issue price. This gives investors confidence and prevents negative sentiment and momentum from hurting the stock price |
| | Institutions and retail bought deal size +15%. Issuer receives incremental proceeds from sale of greenshoe at issue price less the full gross spread. Short position is covered with greenshoe shares | | Institutions and retail bought deal size +15%. Issuer receives no incremental proceeds. Syndicate sold greenshoe at issue and buys back 15% of deal size in secondary market. Short is covered with shares purchased in aftermarket |
| | Float = deal size + 15% | Different number of shares | Float = deal size |

# Trading

## Even though the offering has priced, it is the underwriters' responsibility to make sure the offering trades well in the aftermarket

**Marketing/Execution**

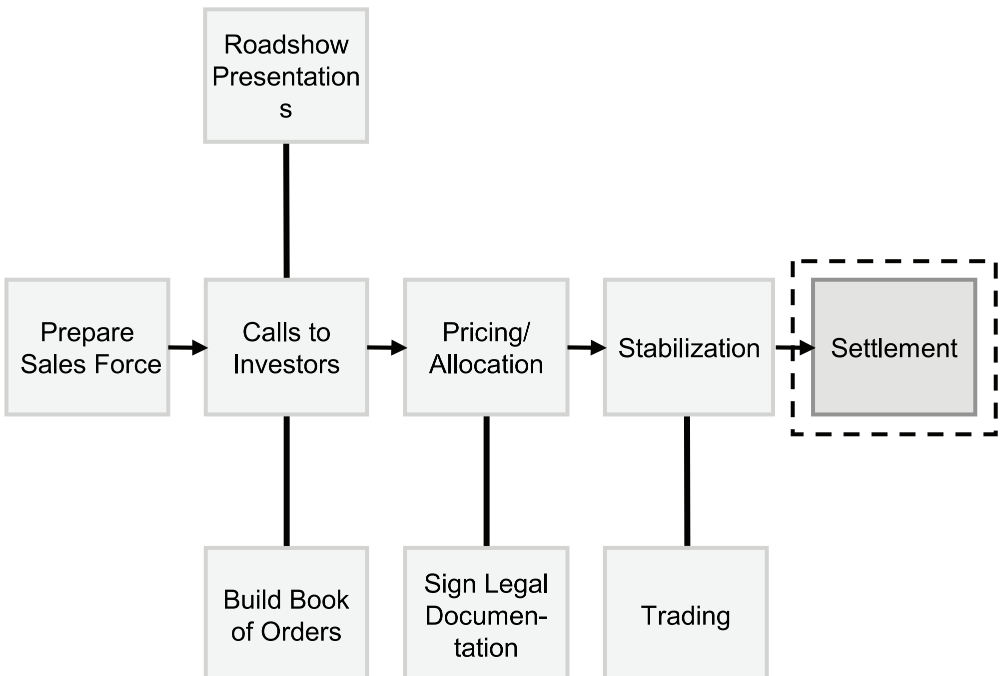



- Bookrunners to
  - create active market in company shares
  - facilitate trading of company shares through commitment of capital
  - provide liquidity to investors
- Real-time market information flow

# Settlement

## The process by which the shares are distributed to investors and the company receives its money

**Marketing/Execution**




- Three business days after trade date
- Clearance
- Cusip number
- Payment to the company
- Registration of certificates
  - coordination with Transfer Agent
- Final distribution of fees

SECTION 4

# Recent Developments

# SEC Securities Offering Reforms

| | |
|---|---|
| **General** | ♦ New rules effective Dec. 1, 2005<br>♦ Focus on communications during registration process, streamlined shelf registration, and timely distribution of information to investors |
| **Issuer Categories** | ♦ **Well-Known Seasoned Issuer ("WKSI"):** S-3 or F-3 eligible issuers with either (a) worldwide non-affiliate public float of at least $700mm [1, 2] or (b) issued $1bn or more registered non-convertible debt for cash in the last 3 years<br>♦ **Seasoned Issuer:** S-3 or F-3 eligible and timely filer (i.e., 10-K/10-Qs or 20-F/6-Ks) for last 12 months<br>♦ **Unseasoned Issuer:** Not an S-3 or F-3 filer, but required to file periodic reports (i.e., public company for less than 12 months)<br>♦ **Non-Reporting Issuer:** Not yet required to file periodic reports (i.e., IPO candidates and voluntary filers) |
| **Liberalized Shelf Rules (Seasoned Issuers Only)** | ♦ Shelf life extended to 3 years from 2 years<br>♦ No size limit (i.e., 2 year issuance expectation); however, shelf size and types of securities must be specified and registration fees are payable upfront<br>♦ Remains subject to SEC review and declaration of effectiveness<br>♦ Immediate takedowns permitted upon effectiveness—convenient shelf rules eliminated<br>♦ New flexibility on base shelf registration statement—certain changes can be made through prospectus supplement or incorporated by reference, instead of post-effective amendment that would be subject to further SEC review<br>– modifications to plan of distribution<br>– additions/replacements of selling security holders<br>♦ Restrictions on at-the-market equity offerings eliminated—10% of public float volume limit and identity of underwriter(s)<br>♦ Pre-existing shelf filings—remain effective until Dec. 1, 2008 (3rd anniversary of effective date of new rules) with up to a 6-month extension to allow for SEC review if a new shelf is filed but not yet effective. New rules apply to pre-existing shelf filings |
| **Liberalized Shelf Rules (WKSIs Only)** | ♦ Automatically effective at filing: immediate takedowns possible—no SEC review, no need to register amounts initially, no issuance limits, 3-year life, and pay-as-you-go registration fees<br>♦ Flexibility on base shelf registration statement—most items may be satisfied via prospectus supplement, incorporation by reference or post effective amendment, such as:<br>– primary/secondary split, selling security holder<br>– risk factors<br>– plan of distribution<br>– description of securities<br>♦ More comprehensive base upfront provides the greatest flexibility for timely takedowns<br>♦ Pre-existing shelf filings do not benefit from new rules —eligible issuers should file new shelf registration statement (no upfront fees, minimal legal costs) as appropriate |

Notes:
1 The determination date for WKSI status is the latest of (i) the time of filing of the issuer's most recent shelf registration statement and (ii) the time of the issuer's most recent annual amendment to a shelf registration statement, which typically occurs at the time of filing the issuer's most recent annual report
2 Public float is defined as the largest share count during the 60 day look back period prior to the determination date multiplied by the highest closing price or the average of the bid and asked prices for any day in the 60 day period. Share count and share price do not have to be from the same day for public float determination

# SEC Securities Offering Reforms

| | |
|---|---|
| **Free Writing Prospectus** | ♦ New category of written communications—selling documents beyond prospectus permitted for use at any time, subject to applicable conditions<br>♦ Examples: media interviews and articles, term sheets, advertisements, underwriter communications<br>♦ Subject to Section 12a(2) and 10b(5) liability (material misstatements and omissions)<br>♦ No cross-liability among participants<br>♦ Limited usage expected at this stage |
| **Roadshows & Other Communications** | ♦ Live roadshows (or electronic roadshows that originate live) are not considered free writing prospectuses as long as materials cannot be separately downloaded or copied<br>♦ Registration statement must be on file prior to use<br>♦ **Non-reporting issuers:** Filing of presentation required (i.e., for IPOs) unless made available to unrestricted audience—use of institutional and retail versions of electronic roadshows expected. Hyperlink to prospectus required |
| **Other Significant Changes[1]** | ♦ "Quiet period" commences 30 days prior to filing (instead of organizational meeting)<br>♦ "Gun-jumping" issue can be avoided by filing item as free writing prospectus<br>♦ Liability at "time of sale" instead of final prospectus—material updates required prior to confirmation of sale; increases emphasis on accuracy and completeness of preliminary prospectus<br>♦ Final prospectus considered delivered when filed (access=delivery)—no need to distribute unless requested by investors, estimated potential savings of $130 mm in printing costs in the US annually<br>– market approach TBD |
| **Impact on Offering Related Documents[1]** | ♦ Underwriting Agreement - reps and warranties to cover WKSI qualification, agreed upon "disclosure package"[2] at time of sale, and free writing prospectuses; form and timing of delivery of legal opinions and comfort letters<br>♦ Method of conveying final terms at time of sale TBD (e.g., term sheet, press release, e-mail, etc.); may need to be filed as a free writing prospectus<br>♦ Establish procedures and restrictions related to free writing prospectuses |
| **Organizational Issues & Considerations** | ♦ Issuer category eligibility<br>♦ Timing and content of filings (base and prospectus supplement)<br>♦ Quiet period and permissible communications<br>♦ Procedures and restrictions on use of free writing prospectuses<br>♦ Changes to standard underwriting agreement<br>♦ Timing and method of communicating final terms before time of sale |

Notes:

1 Applicable to all issuers (i.e. WKSIs, seasoned, unseasoned, and non-reporting)

2 Disclosure package or record refers to all disclosure conveyed to investors when the oral sale is made, including the preliminary/prospectus supplement, documents incorporated by reference, pricing information, etc.

# SEC Securities Offering Reforms

## Sample outline for base shelf registration statement and prospectus supplement

### Base Shelf Registration Statement

**Minimum Requirements**

- Available Information
- Incorporation of Certain Information by Reference
- Experts

**Requirements That May Be Satisfied in Prospectus Supplement or Incorporated by Reference**

- Description of Securities We May Offer[1]
  - Senior Debt Securities
  - Subordinated Debt Securities
  - Preferred Stock
  - Common Stock
  - Warrants
  - Purchase Contracts
  - Depositary Shares
  - Units
- Plan of Distribution
- Selling Security Holders
- Legal Ownership and Book-Entry Issuance
- Ratio of Earnings to Fixed Charges
- Use of Proceeds
- Legal Matters

**Other Base Shelf Registration Filing Requirements**

- Corporate Authorizations for Filing
- Auditor Consents
- Opinion of Counsel
- Signatures of Officers and Directors

### Prospectus Supplement

- Offering Information
- Available Information
- Summary
- Risk Factors
- Use of Proceeds
- Capitalization
- Supplemental Description of Securities
- Supplemental Plan of Distribution
- Legal Matters
- Experts

Note:
1 Recommended to be included in Base Shelf Registration Statement to maximize timely issuances

# Recent Selected Updates to Financial Statements and Disclosure

## Definitions

**Large Accelerated Filer**

- A large accelerated filer is an issuer that has an aggregate worldwide public common equity market capitalization of $700 million or more, has been filing Exchange Act reports for at least one year, has previously filed at least one annual report, and is not eligible to use Form 10-KSB or Form 10-QSB

**Accelerated Filer**

- An accelerated filer is an issuer that has an aggregate worldwide public common equity market capitalization of at least $75 million but less than $700 million, has been filing Exchange Act reports for at least one year, has previously filed at least one annual report, and is not eligible to use Form 10-KSB or Form 10-QSB

## Deadlines for 10-K's

**Large Accelerated Filer**

- Required to file 10-K's within 60 days of fiscal year-end (i.e., March 1 for calendar year-end companies)

**Accelerated Filers**

- Required to file 10-K's within 75 days of fiscal year-end (i.e., March 16 for calendar year-end companies)

**Non - Accelerated Filers**

- Required to file 10-K's within 90 days of fiscal year-end (i.e., March 31 for calendar year-end companies)

## Disclosure Items

**Risk Factor Disclosure**

- All issuers are now required to include plain English risk factor disclosures in their annual reports on Form 10-K, "where appropriate"

**Unresolved SEC Staff Comments**

- Large accelerated and accelerated filers are now required to disclose in their annual reports on Form 10-K written comments made by the SEC staff in connection with a review of the issuer's Exchange Act reports if the issuer believes the comments are material, remain unresolved as of the date of the filing of the issuer's 10-K, and were issued more than 180 days before the end of the fiscal year covered by the annual report

SECTION 5

# Foreign Private Issuer Considerations

UBS Investment Bank

# Foreign Private Issuer Considerations

## Key issues for foreign private issuers regarding US offerings

| | |
|---|---|
| **Definition** | ♦ Any foreign issuer other than a foreign government, except for an issuer meeting the following conditions:<br>– more than 50% of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States **and**<br>– any of the following:<br>  – the majority of the executive officers or directors are United States citizens or residents;<br>  – more than 50% of the assets of the issuer are located in the United States; or<br>  – the business of the issuer is administered principally in the United States |
| **US GAAP Reconciliation** | ♦ For IPOs, a minimum of the two latest years of financial statements, plus interim periods, must be reconciled to US GAAP. For ongoing SEC reporting, annual audited financial statements must be filed and reconciled to US GAAP for every subsequent year. Although not required unless filed locally, interim periods on Form 6-K do not require reconciliation. Most foreign private issuers however reconcile interim periods on a semi-annual basis. Issuers may also elect to report financials using US GAAP |
| **Confidential Filing** | ♦ Foreign private issuers who are first time registrants with the SEC have the option to submit registration statements to the SEC for review on a confidential basis. Confidentiality gives foreign private issuers the advantage of being able to complete the SEC review process outside of public view |
| **Corporate Governance** | ♦ A fully independent audit committee is always required. Exemptions from other US corporate governance rules are permitted as long as the relevant US rule is contradictory to local law, rule, or regulation. These differences in corporate governance practices must be disclosed to investors |
| **Periodic Reporting** | ♦ Annual reports on Form 20-F must be filed within six months after the end of each fiscal year. Interim material information that has been made public pursuant to the laws of the home country, has been filed with a stock exchange and has been made public, or has been distributed to security holders must be furnished on Form 6-K. Most foreign private issuers file quarterly reports |
| **SOX 404 Auditor Attestation** | ♦ Foreign large accelerated filers (worldwide market cap equal to or greater than \$700mm) must include auditor attestation in future annual reports<br>♦ Foreign accelerated filers (worldwide market cap of \$75mm – \$700mm) must include auditor attestation in annual reports for fiscal years ending **on or after July 15, 2007**<br>♦ Foreign non-accelerated filers must include auditor attestation in annual reports for fiscal years ending **on or after December 15, 2008** |

# Foreign Private Issuer Considerations

## Key issues for foreign private issuers regarding US offerings

**Required Financial Statements**

- Three years of audited financial statements are generally required. However, if financial statements are presented in US GAAP for an IPO, only two years of audited financials are required
- The requirement for interim period financials is determined by SEC and auditor comfort staleness dates