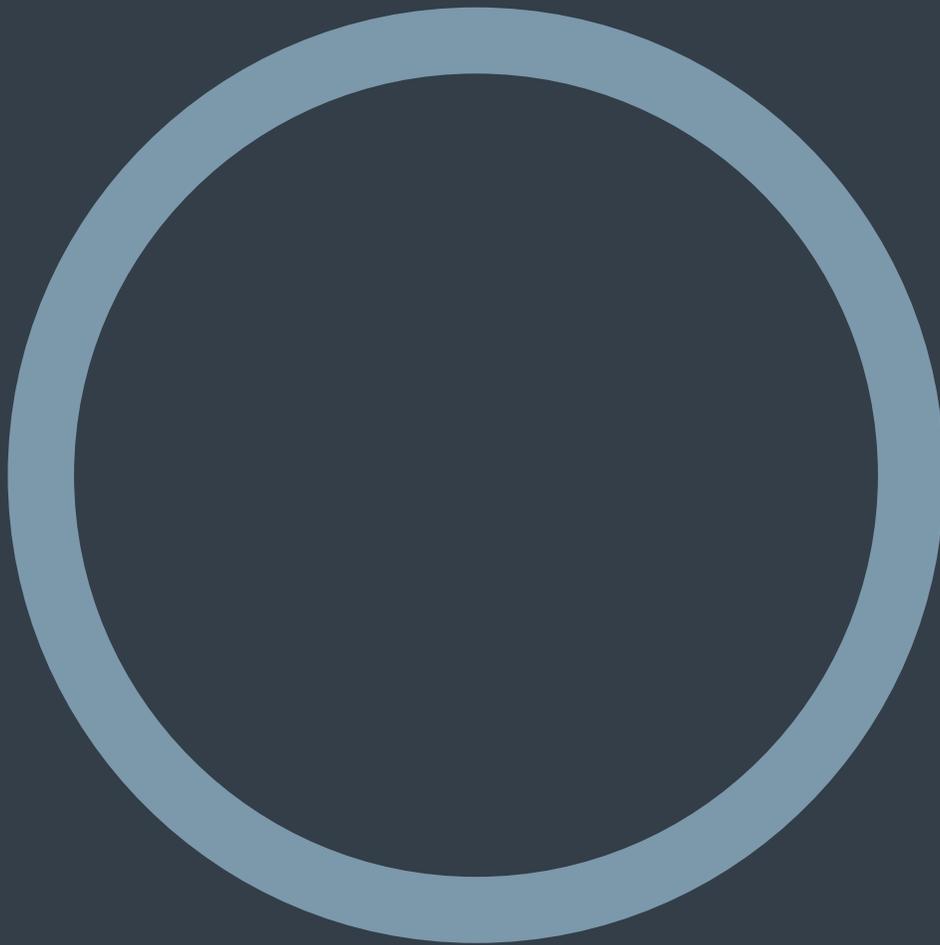


Technology IPO Insights

Q2 2015



ORRICK

Market Recap



After a slow start to initial public offerings in the first quarter of 2015, overall IPO activity began to pick up in the second quarter. However, concerns about turmoil in Greece, market declines in China and questions about what the Federal Reserve will do with interest rates conspired to limit the gains as the quarter progressed.

There were a number of significant internet and technology company IPOs in 1H 2015, including Box (finally, after a long delay), Etsy, Shopify and FitBit. While 1H 2015 generated about half the number of deals as 1H 2014, dollars raised declined by about 30%, reflecting the larger size of some of the 2015 transactions that did manage to get priced.

The initial public offering markets continue to be volatile, which led a number of companies to push to price in the first part of the third quarter in an effort to get out before further issues in Greece could derail the markets. We believe that the third quarter will likely have at least the same level of priced deals as the second quarter, based on both the strong activity in July and the backlog of deals at the SEC. Entering the traditional August slowdown, September has the potential to be a strong month. Overall, economic activity appears strong to most economists, leading to optimism that the remaining half of this year will continue to present IPO opportunities. There is, however,

significant uncertainty in the global economy, which may lead to continued volatility in the markets.

We also need to acknowledge the continued impact of the private funding markets, where significant valuations and large rounds have caused some of the most high-profile IPO candidates to delay the IPO process in favor of staying private. It remains to be seen how long this trend will continue and what the ultimate impact will be on the IPO market over the coming months.

We are excited to present our editorial content this month, which acknowledges the combination of volatility and potential strength in the IPO pipeline. The following pages discuss the steps that aspiring IPO candidates should be taking now in order to be fully prepared to take advantage of favorable market openings. We look forward to continuing the discussion over the coming months.

U.S. Tech IPOs

January - June 2015



NUMBER OF IPOs

1H 2014

1H 2015



\$3.9 billion capital raised



\$2.7 billion capital raised

EXCHANGE SELECTION

NASDAQ



10



7

NYSE



13

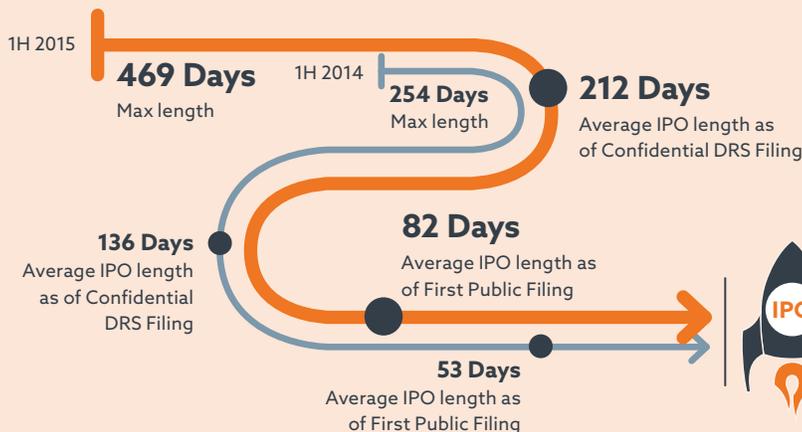


5

1H 2014

1H 2015

LENGTH OF IPO PROCESS



COMMON STOCK PRICE

Above or within initial range

1H 2014

83%

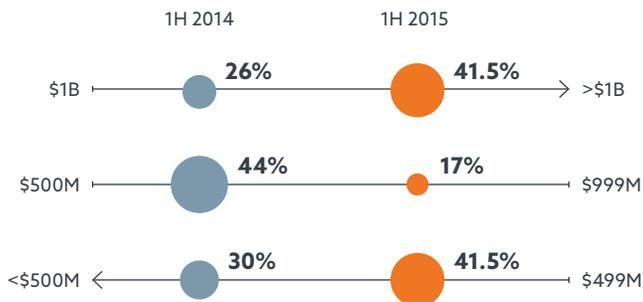
1H 2015

92%

HQs



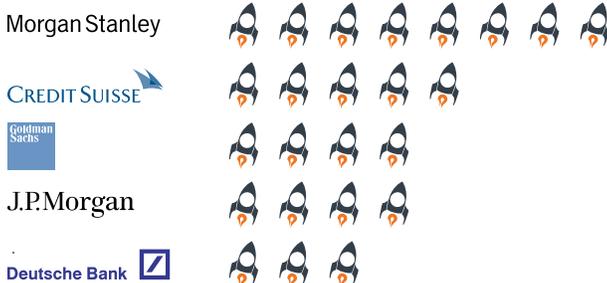
POST-MONEY VALUATIONS



IPO Companies - 1H 2015

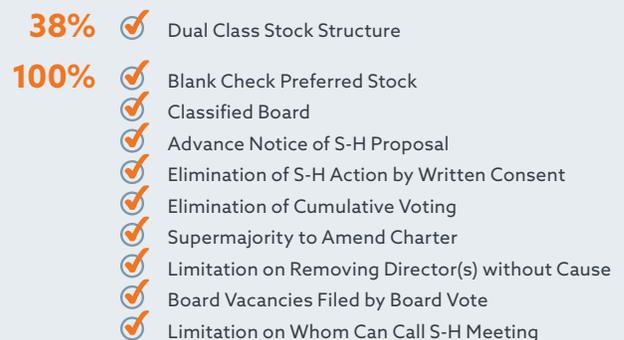


TOP BOOKRUNNERS*



* For IPOs with more than one bookrunner, credit was given to each joint bookrunner.

ANTI-TAKEOVER DEFENSES



Data includes U.S. technology companies with principal executive offices in the U.S. and was gathered leveraging public resources such as the U.S. Securities and Exchange Commission website, press articles and market information.

8 Steps to Prevent IPO Delays

Advance Planning Will Significantly Improve Your IPO Process

By Brian B. Margolis and Stephen C. Ashley

The process of conducting an initial public offering (“IPO”), from the initial planning until the first sale of shares to the public, is lengthier than many would expect. Companies considering an IPO should begin planning months in advance, as several steps need to be taken well ahead of the completion of the IPO.

This article highlights certain aspects of the IPO process that can result in significant delays or surprises if not managed properly. It is not intended to provide you with an exhaustive or definitive list of the issues facing a company that is considering an IPO in the next few years. Rather, the following tips are intended to give you a better understanding of the IPO process and explain why it is critical to begin considering these issues as far in advance of a proposed IPO as possible.

SELECT AUDITORS AND PREPARE FINANCIAL STATEMENTS

Pre-IPO companies whose auditors are not one of the “Big 4” firms are often advised by underwriters to change accounting firms. Due to the cost and time involved, companies may mistakenly seek to delay this transition. However, delays related to the audit process are possibly the biggest and most preventable in the IPO process.

Regardless of prior experience in the relevant industry, new auditors will require time to work their way through a



Delays related to the audit process are possibly the biggest and most preventable in the IPO process.

At a glance

8 Tips to Prevent IPO Delays

-  Do not delay retention of new auditors (if change is advised) or underestimate the time needed to prepare audited or interim financial statements.
-  Assemble board and management teams prior to launching the IPO process.
-  Commence due diligence process with company counsel before IPO kickoff with underwriters.
-  Review corporate documents and contracts early to identify and resolve issues.
-  Obtain frequent 409A valuations to avoid “cheap stock” issues.
-  Start acting like a public company well in advance of launching the IPO.
-  Plan for significant developments or transactions that could take place during the IPO process.
-  Determine anti-takeover measures that should be adopted before becoming a public company.

company's financial statements. It usually takes longer to generate public company audited financials than people expect. It may be necessary for the new firm to re-audit prior years, and issues are commonly identified that can result in adjustments or even restated financials. Many private companies do not obtain a SAS 100 review of quarterly financials, which can sometimes be as time-consuming as an audit. Most underwriters will require eight quarters of reviewed financials. If the issuer has completed acquisitions of a significant nature, the preparation of pro forma financials or financial statements of the acquired businesses can also be a time-consuming process.

While prompt engagement of a new accounting firm will help keep the work streams above moving as close to the desired timetable as possible, there are other benefits to involving new auditors early in the process. Particularly for leanly staffed companies, auditing firms can provide assistance with preparing certain portions of the prospectus, including the Management's Discussion and Analysis of Financial Condition, or MD&A. Pre-IPO companies often have one or more material weaknesses or significant deficiencies in their internal controls and the auditors can advise on remedial plans that will reassure the underwriters in their due diligence process, as well as prospective investors in the IPO.

ASSEMBLE A MANAGEMENT TEAM AND BOARD OF DIRECTORS

Many companies will have their post-IPO management team in place far in advance, with clean background checks in hand to ensure no surprises. Others will be lacking individuals for key positions, most commonly a chief financial officer or other principal accounting officer. Delaying the appointment of certain officers in an attempt to reduce costs may result in setbacks that hinder primary objectives. It can take time for new officers to get up to speed, reducing their contribution to the IPO process. Companies are often short on staff in the accounting and internal control areas as they make the transition to public reporting, but it is important to have the resources in place to ensure that the company is not late in filing its initial periodic report as a public company.

Delaying the appointment of certain officers in an attempt to reduce costs may result in setbacks that hinder primary objectives.



Likewise, consideration must be given to changes to the board of directors. People typically look for new directors with pertinent industry or accounting expertise, but often have unrealistic expectations of the likelihood of securing desired candidates and underestimate how long the search can take. Although there are transitional periods for compliance with certain NYSE/NASDAQ independence standards, it can be beneficial to create a timeline that will help you meet those requirements on time. Candidates for the audit committee cannot have connections with current or prior auditors that would violate independence tests.

BEGIN THE DUE DILIGENCE PROCESS

Many companies wait for the underwriters and their counsel to circulate a due diligence request list following the IPO kickoff meeting to begin organizing a data room. This will often result in surprises materializing while the prospectus is being drafted. The quality of early disclosure drafting can suffer when there is such a reactionary diligence process, and the need to resolve certain issues may lead to delays. It can be much more efficient for a company to have its counsel begin the due diligence process and assist in organizing a data room well in advance of the kickoff meeting. Not only will that provide the underwriters and their counsel materials to begin reviewing immediately upon their engagement, but company counsel may be able to identify and resolve issues earlier in the process. Company counsel will also have a better understanding of the company and its business, which can improve the quality and precision of initial drafting and allow them to field certain inquiries from underwriters' counsel directly, both of which can save management time.

REVIEW CORPORATE DOCUMENTS AND CONTRACTS

A company's capitalization records must, of course, reflect all shares of capital stock that have been issued to date, including issuances of warrants, options or convertible securities and reflecting any exercises, transfers or cancellations. In addition, each of the charter, bylaws and other equity-related documents need to be reviewed to identify parties with special rights, including registration rights, approval rights, voting rights and rights of first refusal—rights that will, at a minimum, require disclosure or otherwise need to be waived or relinquished in order to proceed with the transition to a public company. The conversion terms of any preferred stock need to be reviewed to determine if such conversion is automatic or may require negotiation. Underwriters will require all (or close to all) stockholders and option holders to agree to 180-day "lock-ups" in connection with the IPO, so the existence of market "stand-off" agreements with such holders should be confirmed early on. Revisions to the charter and bylaws are likely to be needed to authorize more shares of common stock and implement other changes to make those documents appropriate for a public company.

Attention should also be paid to the company's material contracts, which will need to be filed as exhibits to the registration statement. There is a process for requesting confidential treatment of certain sensitive information in such contracts, but there are strict limits to what can be protected and such requests must be carefully prepared. Companies need to be aware of information that they may need to release to ensure that no competitive harm will result. It is also important to note that confidentiality provisions in contracts do not trump disclosure obligations,

which can necessitate discussions with counterparties. Companies should draft confidentiality provisions so they permit disclosure if required by law.

AVOID CHEAP STOCK ISSUES

"Cheap stock" is an issue that gets a lot of attention from the U.S. Securities and Exchange Commission ("SEC"). If the SEC determines in retrospect that a company has issued options or equity grants below the fair value of its stock, it will require the company to take a charge for such deemed expense. Having a dispute with the SEC on past valuations is time consuming, and the financial impact of being required to incur such expenses can hurt a company's appeal to investors. The Internal Revenue Service has also indicated that it may target companies with cheap stock charges disclosed in their public filings for Section 409A enforcement.

To avoid encountering such setbacks, a pre-IPO company should start getting frequent 409A valuations (quarterly or, in certain circumstances, more often) as the IPO approaches and work with its auditors to ensure that the valuations of its equity issuances are acceptable for accounting purposes. Also, valuation experts need to be consulted regarding their willingness to be named in public filings.

Start getting frequent 409A valuations quarterly or, in certain circumstances, more often.

THINK AND ACT LIKE A PUBLIC COMPANY

There are many compliance requirements that come into effect when a company becomes public, or even as it enters the IPO process. For those standards that may not yet apply, it can be beneficial for a company to adopt certain changes in advance to essentially learn how to think and act like a public company. New corporate governance policies can be established in advance and communicated to employees. The company's website will need to be reviewed and updated to be consistent with the registration statement, with any unsubstantiated claims removed. A roadmap for making the transition to becoming compliant with internal controls testing under Section 404 of the Sarbanes-Oxley Act should be identified, including the engagement of an accounting firm as a consultant if needed. There are rules relating to public communications once a company is in the registration process with the SEC. To ensure that there are





no “gun jumping” issues in the middle of the IPO process, company counsel should be asked to advise on publicity guidelines, as well as any interview or public speaking opportunities. Policies for use of social media are a much bigger concern these days as well. The SEC is on alert for potential gun jumping violations, which can result in significant delays or undesired disclosures.

Think and act like a public company before you are one.

PLAN FOR MATERIAL BUSINESS DEVELOPMENTS

Due to the length of the IPO process and the fact that business does not come to a stop during that time, it is important that companies plan as far ahead as possible regarding major business developments and transactions. For example, consummation of an acquisition of another company or business that exceeds certain materiality thresholds will require that separate audited financial statements for the target be included in the registration statement. If the target does not have audited financial

statements available, or is a business within another company and will need to develop “carve-out” financial statements, this will result in a significant delay. If an acquisition opportunity materializes once the IPO process has begun, management and the board will need to consider the extent of the delay that could result.

The company’s underwriters may advocate the completion of certain actions before launching the IPO, such as release of a new product, entry into a material contract or settlement of material litigation, but such events can pose challenges in terms of the IPO schedule. A new product launch may not have enough performance history for a company to be able to make the types of disclosure the underwriters would prefer in the registration statement. Counterparties to material contracts may object to information being disclosed or contracts being publicly filed. Additionally, parties to legal proceedings may try to leverage knowledge of the IPO process or any initial disclosure that may have been made with respect to reserves for such disputes to extract more favorable terms.

CONSIDER ANTI-TAKEOVER MEASURES

A company will be more vulnerable to a hostile takeover attempt once it becomes publicly traded. The board of directors and management of the company must decide whether the additional risk makes it worthwhile to adopt certain anti-takeover strategies, which are easier to implement while the company is still privately held. Company counsel can advise on what is typical in this situation.

Anti-takeover strategies are easier to implement while the company is still privately held.

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Mr. Ashley has represented companies covering many industries, including the information technology, software, media, telecommunications, retail, finance, biotechnology, life sciences, pharmaceuticals, energy, infrastructure, industrial, manufacturing and transportation sectors.

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