



# Life as a Newly Public Company

What the First Year Holds



September 2017

**EXPECT EXCELLENCE®**

# Agenda

- Periodic/current reporting
- Public disclosures/Regulation FD
- Annual meeting/shareholder engagement
- Corporate governance
- Publicly traded equity and insider trading
- Follow-on financings

# Periodic/Current Reporting

# Categories of Issuers

- Non-accelerated, accelerated and large accelerated filers
- Smaller reporting companies
- Emerging growth companies

# Quarterly Report on Form 10-Q

- Provides an update to the Form S-1 (and, going forward, the Form 10-K)
- Initially due 45 days after the end of the quarter (may vary for the first Form 10-Q depending on effective date of the Form S-1)
- Unlike Form S-1:
  - Required to include CEO/CFO certifications
  - XBRL applies

# Annual Report on Form 10-K

- Covers substantially same information as the Form S-1
  - Business description
  - Risk factors
  - Financial information/internal controls
  - Management/corporate governance (can be incorporated by reference from the proxy statement)
- Unlike Form S-1:
  - Required to include CEO/CFO certifications
  - XBRL applies
- Initially due 90 days after fiscal year end



# Disclosure Controls/Internal Controls

- Must maintain disclosure controls and procedures and internal control over financial reporting
- Management must make a formal assessment of ICFR in its second Form 10-K after going public

# Auditor Attestation—SOX 404

- Auditor must audit the issuer's internal control over financial reporting
- Only applies once management assessment is required
- But is not required for:
  - Emerging growth companies
  - Non-accelerated filers



# Form 8-K—Background

- Generally due within 4 business days following trigger event
- Failure to file can lead to loss of Form S-3 eligibility (though there are safe harbors)
- Ensure key personnel have received Form 8-K training to be aware of potential triggering events

# Form 8-K—Triggering Events

- Common Form 8-K Triggers:
  - Entry into or termination of a material definitive agreement
  - Acquisition or disposition of a significant amount of assets
  - Announcement of annual or quarterly results (e.g., earnings releases)
  - Entry into, or acceleration or increase of, a material direct financial obligation
  - Unregistered sales of equity securities
  - Changes in independent auditor
  - Appointments, elections and departures of directors and certain executive officers
  - Compensatory arrangements with named executive officers
  - Amendment of organizational documents
  - Shareholder votes
  - Certain other significant events and transactions

# Public Disclosure/ Regulation FD

# Public Disclosures Under a Microscope

- Accuracy, accuracy, accuracy
- Cross-platform consistency:
  - Social media
  - Press releases
  - SEC filings
  - Interviews with media
  - Company website

# Duty to Disclose

- Generally no legal obligation to disclose material nonpublic information
- Exceptions where:
  - Company or insiders are trading
  - Information has been selectively disclosed inadvertently to the public
  - Correcting a prior public statement
  - Required by applicable reporting requirements (e.g., Form 8-K)
  - When information is so significant to operations that management has a fiduciary duty to disclose
- NYSE and Nasdaq have prompt release requirements, but they do not have the force of law

# Regulation FD

- Prohibits the selective disclosure of material nonpublic information to brokers, dealers, investment advisers, institutional investment managers, investment companies, holders of the company's securities (if it is reasonably foreseeable that the person will purchase or sell the securities) and certain persons affiliated or associated with the foregoing, with certain exceptions
- If issuer decides to disclose material nonpublic information to such persons, it must do so in a manner that provides simultaneous general public disclosure
- Press releases, Form 8-K filings and webcasts (with appropriate prior notice) are often used to disclose information pursuant to Regulation FD



# Non-GAAP Financial Measures

- Definition: A financial measure that includes amounts that are excluded, or excludes amounts that are included, in the most comparable measure presented in accordance with GAAP, or is subject to adjustments having those effects
- All public disclosures with non-GAAP measures must include:
  - Presentation of most comparable GAAP measure; and
  - Reconciliation to the most comparable GAAP measure

## Private Securities Litigation Reform Act—Safe Harbor for Forward-Looking Statements

- PSLRA provides public companies with protections for certain forward-looking statements
- To invoke the safe harbor, the statement must be:
  - Identified as a forward-looking statement; and
  - Accompanied by meaningful cautionary statements that alert investors to the facts that could cause actual results to vary
- Does not protect forward-looking statements included in financial statements

# Best Practices for Disclosure of Material Nonpublic Information

- Safeguard material nonpublic information so that the company can control disclosure
- Limit number of company spokespersons
- Always invoke the PSLRA safe harbor
- Avoid entanglement with analysts and establish standard procedures for analyst communications
- Consider updating predictive disclosure
- Tell the truth
- Know your audience

# Earnings Guidance

- Earnings guidance not required, but most companies provide some form of financial guidance
- Company should have a carefully considered policy

# Earnings Guidance—Considerations

- Quarterly, annually, not at all?
- Affirmative obligation to update?
- Revenue, EBITDA, operating income, etc.?
- Deliver in a controlled setting—e.g., earnings release/earnings call

# Annual Meeting/ Shareholder Engagement



# Proxy Statement

- For routine meetings, generally very similar to management information required in a Form S-1 filing
- Coordinate timing with:
  - 120-day incorporation-by-reference requirement
  - State law and bylaw notice requirements
  - Need for a preliminary proxy statement
  - Notice and access determination

# Proxy Statement Content

- Election of directors
- Ratification of auditors
- Other proposals (stock option plan)
- Executive compensation disclosure
- Corporate governance items

# Shareholder Engagement

- Increasingly important in an era of activist investors
- Not just applicable to large public companies anymore
- Tips
  - Focus on engagement before issues arise
  - Identify the correct person(s) to talk to
  - So-called “passive investors” may not be passive
  - Send the right people (depending on the issue/shareholder, may be some combination of IR, CFO, CEO board)

# Preparing for the Annual Meeting

- Annual Report
- Deciding on distribution method
- Preparing for the event
  - Site reservation
  - Script
  - Rules/procedures
  - Security
  - Inspector of elections
  - Confirming quorum

# Corporate Governance

# IPO Governance Structure Springs to Life

- Corporate governance structure and processes sprung into life at the effectiveness of the IPO
- Company must now live out those requirements in practice



# Practical Tips—Corporate Governance

- Create a comprehensive board and committee calendar
  - Schedule meetings around SEC filings and the annual meeting
  - Create a comprehensive checklist to ensure all of the requirements in the charters and corporate governance guidelines are covered
  - Integrate SEC, state law and stock exchange requirements
- Ensure directors receive materials with sufficient advance notice
  - Consider using a board portal
- If relying on transition rules, manage transition to ensure compliance and maintain control
- Use D&O questionnaires to confirm independence
- Establish procedures to adhere to governance policies

# Public Equity and Insider Trading

# Expiration of Lock-ups

- Lock-ups will generally expire 180 days after effectiveness of the IPO
- Stockholders may be chomping at the bit to trade
- Be prepared:
  - Coordinate with transfer agent on legend removals
  - Implement processes for handling trading requests (including by affiliates)
  - Implement option exercise platforms for coordination with brokers
  - Review 10b5-1 plans (depending on terms of lock-up, may be able to enter into these before lock-up expires)
  - Coordinate Section 16 filings (e.g., 10b5-1 plan should require broker to notify company; outside counsel can assist with making filings)

# Sales Require Compliance with the Securities Act

- Sales of shares require registration or an exemption
- Post lock-up:
  - Shares acquired pre-IPO can be sold on the market using SEC Rule 144
  - Shares acquired upon exercise of options should have been registered on Form S-8 following IPO and can be sold into the market
- But restrictions on affiliates continue

# Insider Trading—Background

- Trading while in possession of material nonpublic information is prohibited by federal securities laws
- Disclosing material nonpublic information to others who then trade while aware of that information (“tipping”) is also a violation
  - Both “tipper” and “tippee” (and any downstream tippee) can be liable
- Potential penalties for violations
  - Imprisonment for up to 20 years
  - Large civil and criminal fines
  - Company-imposed sanctions

# Insider Trading Policy

- Designed to ensure compliance with laws prohibiting insider trading
- Generally will include the following provisions:
  - Applies to directors, officers, employees and their immediate family members and entities that they may control
  - Pre-clearance of trades by CFO or GC
  - Regular quarterly “blackout” periods when trades are not permitted
  - Ability for company to impose blackout periods at other times for particular events



# Insider Trading—Training

- All company employees should receive training on insider trading
- Ensure that employees:
  - Understand the insider trading policy and the consequences for engaging in insider trading
  - Assume that all nonpublic information is material
  - Treat material nonpublic information with care and only disclose if authorized (and then only under a CDA)
  - Refer questions to appropriate company personnel

# Follow-on Financings

# Primary v. Secondary

- Primary: Additional capital to be raised by company
- Secondary: Pre-IPO stockholders looking for resale opportunities under registration rights agreement
  - Practice pointer: Pre-IPO, ensure that the registration rights agreement leaves the company sufficient capability to cut back secondary offerings in the event the company needs to raise money

# Form Eligibility and Planning

## Form S-1

- Available immediately
- More suited for specific offerings
- Backward incorporation by reference permitted
- Forward incorporation only permitted for SRCs
- Can be used even if late on a Form 8-K filing
- No public float limits
- Subject to SEC review prior to being declared effective

## Form S-3

- Must be public for 12 cal. months
- Facilitates shelf registrations
- Backward incorporation by reference permitted
- Forward incorporation permitted for all issuers
- Issuer is ineligible if late on certain Form 8-K filings
- Limits if public float < \$75 million
- Subject to SEC review prior to being declared effective (unless issuer is a well-known seasoned issuer (WKSI))

# Planning Considerations

- Disclosure
- Participation from existing stockholders
- Listing exchange requirements
- Transfer agent requirements

# Preparing for Unexpected Volatility

- Having a back-up plan
- Having good communication channels
- Controlling messaging



# Key Takeaways

- Plan for post-public life before completing IPO
- Be organized—create processes and schedules and stick with them
- Assemble the right team—management, board and advisors with public company experience
- Train your officers, directors and employees on the implications of being public and hold them accountable

# Additional Questions and Discussion

# Thank You

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