

Initial Public Offerings 2022

Contributing editors

Joshua Ford Bonnie and Kevin P Kennedy

Simpson Thacher & Bartlett LLP





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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Initial Public Offerings*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapters on New Zealand and Turkey.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Joshua Ford Bonnie and Kevin P Kennedy of Simpson Thacher & Bartlett LLP, for their continued assistance with this volume.



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United States

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MARKET OVERVIEW

Size of market

- 1 | What is the size of the market for initial public offerings (IPOs) in your jurisdiction?

The size of the IPO market in the United States can vary significantly from year to year based on market conditions and other factors. The US IPO market in 2020 had a stellar year despite the global covid-19 pandemic. In 2020, 218 companies went public, with total proceeds of US\$78.2 billion, a year-over-year increase of 36 per cent in the number of companies completing IPOs and 69 per cent in IPO proceeds. These figures exclude the 248 initial public offerings by blank check companies (or SPACs) that raised US\$75.5 billion in aggregate proceeds.

Year	Proceeds (US\$ billions)	Number of IPOs
2010	38.7	153
2011	36.3	125
2012	42.7	128
2013	54.9	222
2014	85.3	275
2015	30.0	170
2016	18.8	105
2017	35.5	160
2018	46.9	192
2019	46.3	160
2020	78.2	218

Issuers

- 2 | Who are the issuers in the IPO market? Do domestic companies tend to list at home or overseas? Do overseas companies list in your market?

The US IPO market includes companies from nearly every sector of the economy, including healthcare, financial services, energy and power, and technology and media companies. In addition, the US IPO market includes large companies raising well in excess of US\$1 billion and smaller companies raising under US\$100 million. Non-US companies also avail themselves of the US capital markets; in fact, non-US companies accounted for 28 per cent of the IPOs listed on the US exchanges in 2020.

Primary exchanges

- 3 | What are the primary exchanges for IPOs? How do they differ?

Companies normally apply to list their securities on either the New York Stock Exchange (NYSE) or the Nasdaq Stock Market (Nasdaq). Generally, the two exchanges are quite similar, although historically the NYSE had stricter quantitative requirements such as earnings and market cap tests. In addition, Nasdaq has traditionally attracted more technology and biotechnology issuers while the NYSE found itself home to more financial, industrial and energy companies. These lines have blurred significantly over the years, but smaller technology companies still tend to gravitate towards the Nasdaq while larger financial services firms are almost all found on the NYSE. Also, while each exchange has its own corporate governance requirements, such requirements have converged over the years and are now fairly similar.

REGULATION

Regulators

- 4 | Which bodies are responsible for rulemaking and enforcing the rules on IPOs?

The Securities and Exchange Commission (SEC) is the primary regulator for the US securities markets and, as discussed below, its staff will review a company's registration statement in connection with such company's IPO.

Further, the activities of underwriters in connection with an IPO are regulated by the Financial Industry Regulatory Authority (FINRA). While FINRA technically has no jurisdiction over non-members, its ability to control the activities of underwriters gives it influence over the conduct of an IPO – from the disclosure that must be made as to potential conflicts of interest relating to the underwriters to the appropriate amount of compensation the underwriters may be paid for their services. While each state also has its own set of securities laws, known colloquially as 'blue sky laws', which regulate both the offer and sale of securities in such state, for an IPO registered with the SEC and listed on a national securities exchange, registration requirements under federal securities laws will generally pre-empt state-level securities registration requirements and, as a result, state-level registration is typically not required.

Authorisation for listing

- 5 | Must issuers seek authorisation for a listing? What information must issuers provide to the listing authority and how is it assessed?

Yes. Registration statements for IPOs are subject to review by the SEC's staff and must be declared effective by the SEC prior to proceeding with an IPO. In such reviews, the SEC generally seeks to ensure that

the company's disclosures comply with SEC rules and that its financial statements comply with SEC requirements and generally accepted accounting principles (GAAP). Primary areas of disclosure within the registration statement for an IPO include:

- audited financial statements and a discussion and analysis of the company's results of operations and financial condition;
- a description of the company's business;
- disclosure regarding the material risks relating to the company's business and an investment in its stock; and
- information relating to the company's directors and executive officers and significant stockholders.

The SEC review process in an IPO almost always results in revisions to the initial version of the registration statement submitted to the SEC. It is, however, important to note that the review process is not a guarantee that a company's disclosure is complete or accurate and the SEC does not evaluate the merits of any IPO or determine whether an investment is appropriate for any investor. Rather, responsibility for compliance with applicable disclosure requirements lies with the company and others involved in the preparation of the company's registration statement and prospectus.

In addition to the SEC review process, a company must apply to the US securities exchange (eg, the New York Stock Exchange (NYSE) or the Nasdaq) on which it wishes to list its securities. In the listing process, the company will need to meet certain basic financial requirements that are set by the exchange where the company expects to list. For example, the NYSE and Nasdaq will require that an IPO company satisfy certain earnings, income or market-value tests. Unlike in many other jurisdictions, however, the securities exchange does not typically require substantive revisions to the company's registration statement.

Finally, the underwriters must file specified information and documents with FINRA relating to the underwriting terms and arrangements, which FINRA must approve prior to the completion of any IPO.

Prospectus

6 | What information must be made available to prospective investors and how must it be presented?

An offering document known as a prospectus, which describes the company, the terms of the offering and other information and which must be compliant with section 10 of the US Securities Act of 1933, as amended (the Securities Act), is used by the company to solicit investors.

The prospectus is the most important part of a registration statement, which the company must file with the SEC prior to a company's shares being publicly distributed in the US for the first time. US companies generally file registration statements on Form S-1. Most non-Canadian foreign private issuers use registration statements on Form F-1, although other forms may be available. There are special forms available to certain Canadian companies. The applicable SEC form for the registration statement outlines the information that must be included in the registration statement and the prospectus. This form will generally reference the requirements of Regulation S-K and Regulation S-X that provide instructions on what information to present, and in some instances what format, to prospective investors.

Publicity and marketing

7 | What restrictions on publicity and marketing apply during the IPO process?

Restrictions on publicity in connection with an IPO generally divide into three time periods:

- the period beginning when the issuer reaches an understanding with an underwriter or underwriters to pursue an IPO and

ending upon the filing of the registration statement with the SEC, commonly referred to as the 'pre-filing period';

- the period between the filing of the registration statement and the time that the registration statement is declared effective by the SEC, commonly referred to as the 'waiting period'; and
- the period beginning when the registration statement is declared effective by the SEC and ending 25 days later, commonly referred to as the 'post-effectiveness period'.

The period before the filing of the registration statement

Under the Securities Act an issuer is generally not allowed to 'offer to sell' any of its securities before filing a registration statement. The SEC construes an 'offer to sell' broadly. The phrase includes the publication of information and publicity efforts made in advance of a proposed offering that have the effect of 'conditioning the public mind' or 'arousing public interest' in the issuer or in its securities. The SEC may construe a communication as an 'offer to sell' even if it does not make reference to the securities being offered or the offering. Unauthorised efforts to offer securities before filing are generally labelled 'gun jumping'. Among other things, gun jumping may cause the SEC to delay the effectiveness of the registration statement, thereby creating practical marketing problems and delaying the transaction. In addition, the SEC will occasionally respond to gun jumping by forcing the company to add disclosure to its prospectus, stating that investors in the IPO may have a rescission right against the company, whereby they can force the company to repurchase whatever securities the investors bought in the offering at the IPO price for up to a year after the offering.

While the SEC's rules permit an issuer, subject to a number of significant limitations, to continue to release factual (but not forward-looking) information about its business in a manner consistent with past practice to persons (such as customers) other than in their capacities as investors or potential investors in the issuer's securities, issuers are advised to take steps during the pre-filing period to ensure that their public relations and other departments do not inadvertently issue announcements, releases or other information that the SEC might construe as an attempt to stimulate the market for the issuer's stock. Communications by an issuer made more than 30 days prior to filing the registration statement that do not reference the proposed offering are generally permissible, provided that the issuer takes reasonable steps to prevent further distribution or publication of the communication within this 30-day period. During the pre-filing period issuers may also issue a very limited press release regarding the proposed offering (a rule 135 release) stating only the approximate size, purpose and timing of the issuer's plans to go public (and not naming any potential underwriters). Commencing 30 days prior to the initial filing of the registration statement, communications must be more limited. Issuers may continue to advertise their products and services, but they should carefully avoid any publicity that might be construed as gun jumping. For example, a company extolling the virtues of its latest product in a way to stimulate demand for that product where the audience consists of potential customers is generally permissible as long as these efforts are consistent with the issuer's prior operating conduct. Conversely, an issuer giving interviews talking about how much revenue it will generate or the margins it will achieve from its new product may be problematic, since this is information of more interest to an investor than a customer.

There is a limited exception to these gun-jumping rules permitting emerging growth companies (EGCs) since 2012 and non-EGCs since 2019 and their representatives to communicate with certain institutional investors, either prior to or following the date of filing of the registration statement, in order to determine whether such investors might have an interest in a contemplated securities offering. Any such testing the waters should be carefully vetted in advance by counsel. The anti-fraud provisions of the federal securities laws apply to the content

of testing-the-waters communications. As with traditional roadshow materials, any testing-the-waters communications should be reviewed to ensure consistency with the contents of the registration statement. Testing-the-waters communications are subject to review by SEC staff.

The period between the filing of the registration statement and its effectiveness

During the waiting period, the same principles discussed above generally continue to apply, with some exceptions. Most importantly, written offers may be made, but through the use of the preliminary (or red herring) prospectus only. (While SEC rules permit written offers other than the traditional prospectus, referred to as 'free-writing prospectuses', in certain circumstances, IPO issuers are subject to significant constraints on the use of these non-traditional offering documents and counsel should be consulted if consideration is being given to the use of any such documents.) In contrast to the general rule applicable to the pre-filing period, oral offers can be made during the waiting period. In addition, indications of interest may be solicited from prospective purchasers, provided specified conditions are met. However, an offer cannot be accepted until after the registration statement becomes effective. In addition, issuers may issue a somewhat more detailed press release during this period (which must contain an SEC-mandated legend) that names the underwriters and provides more information about the offering (a rule 134 release). It is important to note that any communications regarding the issuer or the offering, oral or written, during this period should be consistent with the information disclosed in the prospectus.

The period after effectiveness of the registration statement

Generally, for 25 days after the pricing of an IPO, securities dealers are required to deliver a prospectus in connection with any trades they make in the issuer's common equity. The issuer will have an obligation under the underwriting agreement to update the IPO prospectus for any material developments occurring while securities dealers are subject to this prospectus delivery requirement. Accordingly, during this period, many issuers take a conservative approach and limit publicity during this period to ordinary-course business activities, consistent with past practice.

Enforcement

8 | What sanctions can public enforcers impose for breach of IPO rules? On whom?

Liability under the US securities laws in connection with an IPO primarily arises under the Securities Act and the US Securities Exchange Act of 1934, as amended (the Exchange Act). The SEC has broad powers to investigate public companies and their directors and officers and to bring civil enforcement proceedings that could result in fines and monetary penalties or other sanctions, such as a bar from serving as a director or officer of a public company. In addition, a public company and its directors and officers could also become subject to criminal liability for, among other things, wilful violations of US securities laws or interference with a government investigation. Finally, many of the provisions of the US securities laws also provide for private rights of action in which investors individually or as representatives of a class can bring a lawsuit against the company and its directors and officers. These private class action lawsuits are the most common proceeding to which companies and their directors and officers are subject for alleged misstatements or omissions in connection with US-registered securities offerings.

Securities Act, section 11 liability

Under section 11, the issuer, its directors, its principal executive, financial and accounting officers, its underwriters and a foreign issuer's authorised US representative can be liable for material misstatements or omissions in the issuer's registration statement. 'Experts', such as

the issuer's accountants, can also be held responsible and sued directly for misrepresentations made on their authority. Section 11 entitles a purchaser of securities in a registered offering, or whose securities are 'traceable' to those distributed in such offering, to obtain damages for a violation. While the issuer is subject to strict liability for material misstatements and omissions in its registration statement, non-issuer defendants (ie, all defendants, other than the issuer itself) are afforded, among other defences, an affirmative 'due diligence' defence if they can show that 'after reasonable investigation, [they had] reasonable ground to believe and did believe' that statements made in the registration statements were not misleading.

Securities Act, section 12 liability

Under section 12(a)(2), the issuer, its officers and directors, its underwriters and other persons can be liable if they sell or solicit the sale of a security by means of a prospectus or an oral communication containing a material misstatement or omission. Section 12(a)(2) permits a purchaser of securities in a registered offering, or whose securities are 'traceable' to those distributed in such offering, to obtain rescission of the sale, or damages in certain circumstances. Non-issuer defendants similarly have an affirmative defence if they 'did not know, and in the exercise of reasonable care could not have known,' of the misrepresentation.

Securities Act, section 15 liability

Under section 15, any person who 'controls' a primary violator of section 11 or 12 can also be held liable under a theory of secondary liability. 'Control' exists if the defendant has the direct or indirect power 'to direct or cause the direction of the management and policies' of the primary violator (typically the issuer) through stock ownership, contract or other means. Control person claims are frequently asserted against officers and directors of issuers and can be brought against a controlling shareholder or group of shareholders, in connection with section 11 and 12 lawsuits. Defendants have an affirmative defence if they 'had no knowledge of or reasonable ground to' know the facts underlying the violation.

Exchange Act, section 10(b) and rule 10b-5

A section 10(b) and SEC rule 10b-5 claim is the most commonly asserted claim against public companies, officers and directors, underwriters and accountants and other persons. A claim can be brought for use of 'any device, scheme or artifice to defraud', any material misstatement or omission, or 'any act, practice, or course of business' that deceives in connection with the purchase or sale of securities. A claim can be brought concerning statements made in connection with a public offering or with secondary market trading based on misstatements made in press releases, officer or director communications and periodic reporting, among other things. Unlike the Securities Act claims discussed above, however, in order to establish a violation of section 10(b) a defendant must be shown to have had 'scienter' – an intent to defraud or otherwise engage in reckless conduct. The plaintiff must also demonstrate 'loss causation' – a connection between the defendant's alleged misconduct and the economic harm suffered.

Exchange Act, section 20(a)

Similar to section 15 of the Securities Act discussed above, section 20(a) of the Exchange Act provides for secondary liability of any person who 'controls' a primary violator of section 10(b) or rule 10b-5 can also be held liable under a theory of secondary liability. Section 20(a) provides an affirmative defence for persons who acted 'in good faith and did not directly or indirectly induce [. . .] the violation'.

As mentioned above, section 11 of the Securities Act provides non-issuer defendants (including directors, officers and underwriters) with an affirmative 'due diligence' defence if they can show that 'after

reasonable investigation, [they had] reasonable ground to believe and did believe' that statements made in the registration statement were not misleading. Similarly, non-issuer defendants have an affirmative defence to a claim under section 12 of the Securities Act if they 'did not know, and in the exercise of reasonable care could not have known' of the alleged misrepresentation. Defendants in a Securities Act, section 15 or an Exchange Act, section 20 'control person' claim have an affirmative defence if they 'had no knowledge of or reasonable ground to' know the facts underlying the violation or acted in 'good faith', respectively. A defendant in an Exchange Act, section 10(b) or a rule 10b-5 claim must be shown to have had an intent to defraud or been reckless. A non-issuer defendant that is able to establish that he or she or it performed a reasonable investigation sufficient to establish an affirmative defence under section 11 will typically also be thereby able to defeat claims under each of the other provisions as well. It is for the purposes of establishing such a defence under section 11 and these other provisions that underwriters and other offering participants engage in extensive due diligence on the issuer and its business in connection with an IPO. It should be noted that, as a procedural matter, the affirmative due diligence defence, typically, is not available at the incipient 'motion to dismiss' stage of a securities litigation (when a plaintiff's allegations must be assumed to be true), but rather only after discovery has been taken and the defendant moves for 'summary judgment'. An issuer arriving at this later stage of a securities litigation will typically have already incurred significant expense, and companies accordingly have a significant incentive to settle these actions.

TIMETABLE AND COSTS

Timetable

9 | Describe the timetable of a typical IPO and stock exchange listing in your jurisdiction.

An IPO timetable may be thought of as having several phases. Initially, from six to 18 or even 24 months or more prior to making an initial submission of a registration statement to the Securities and Exchange Commission (SEC), the IPO issuer will typically evaluate the decision to proceed and prepare itself for life as a public company, including by developing the internal capabilities to produce SEC-compliant financial reporting on a timely and recurring basis going forward. Commencing two to six months prior to the initial submission of the IPO registration statement to the SEC, the issuer will typically engage underwriters and commence preparing the registration statement itself, including developing and refining the investment thesis for the offering. The preparation of the registration statement is a major undertaking, entailing a cooperative effort by the company and its counsel and its auditors working with the lead underwriters and their counsel. Once the registration statement is in a form appropriate for SEC review, the issuer will submit it to the SEC – this submission may be confidential. Once the SEC review process starts, the SEC staff will take approximately 30 days to perform their initial review of the registration statement and issue their initial comment letter. During this 30-day initial review period, the issuer and its underwriters (and their respective counsel) will typically work on the roadshow presentation and finalise the underwriting agreement and other required documentation, including revisions to the issuer's organisational documents appropriate for a public company. During this time period the issuer will also typically prepare and submit its listing application to the relevant stock exchange, with the listing process thereafter proceeding in parallel with the SEC review process. Following receipt of the initial SEC staff comment letter, the issuer will respond by resubmitting the registration statement, revised to reflect the SEC staff's comments and accompanied by its own letter explaining its responses to each of the staff's comments. In an IPO, there will

typically be several rounds of SEC staff comments and resubmissions of the registration statement in response thereto, with the overall time required for this phase taking from two to four months, or even longer if problematic SEC staff comments are encountered or if the issuer takes additional time in moving forward. Once the issuer has largely (if not entirely) cleared the SEC staff comments, it is in a position to commence the active marketing of the IPO, which may be informed by previous 'testing-the-waters' meetings with investors and typically starts with 'kick-off' meetings with the sales forces of the lead underwriters. These kick-off meetings are followed by at least a week-and-a-half roadshow where company management (typically including the chief executive officer and the chief financial officer), accompanied by the lead underwriters, meet with prospective investors in cities throughout the US and also sometimes internationally. A recorded version of the roadshow presentation is also ordinarily made publicly available on the internet on specialised third-party websites that have bells and whistles that enable them to comply with the applicable SEC rules requiring broad access to the public and that the issuer's roadshow be accompanied by the statutory prospectus. Note that if the issuer has availed itself of the ability to submit its registration statement to the SEC staff on a confidential basis, the registration statement must have been publicly filed at least 15 days prior to the commencement of the roadshow. Typically, on the day that the roadshow concludes, the issuer's counsel arranges for the registration statement to be declared 'effective' by the SEC and, after the market close on such date, the IPO will be priced and the issuer will enter into the underwriting agreement with the underwriters. On the following trading day, the company's stock will open for trading on the relevant stock exchange and its life as a public company will begin. Several trading days thereafter the IPO will 'close', with the stock being delivered to the underwriters in exchange for the offering proceeds, net of underwriting discounts.

Costs

10 | What are the usual costs and fees for conducting an IPO?

IPOs in the US are expensive. There are significant costs relating to the transaction itself, as well as incremental costs to operate as a public company going forward. The largest offering cost is typically the underwriting discount received by the underwriters, which is almost always calculated as a percentage of the gross proceeds and typically ranges from 4 per cent to 7 per cent but may be a lower percentage in the case of large offerings. The most significant other offering expenses tend to be the cost of the company's outside counsel, its auditors and the cost of the financial printer. The issuer will also be required to pay a registration fee to the SEC, which is calculated based on the offering size and varies from year to year based on the funding requirements of the SEC, as well as fees to the relevant stock exchange. A number of third parties make publicly available annual surveys of these other expenses that are gleaned from the required disclosures made by issuers in their IPO registration statements; however, suffice to say that these other offering expenses typically range upwards from US\$4 million in the aggregate and are frequently significantly higher. Note that companies typically also incur incremental expenses on an ongoing basis to be a public company, including:

- expanded accounting, investor relations and legal capabilities;
- higher levels of professional fees for auditors;
- outside counsel and other advisers;
- annual stock exchange listing fees;
- director fees; and
- directors' and officers' insurance coverage.

CORPORATE GOVERNANCE

Typical requirements

11 | What corporate governance requirements are typical or required of issuers conducting an IPO and obtaining a stock exchange listing in your jurisdiction?

A US company listed on either the New York Stock Exchange (NYSE) or the Nasdaq is generally required to have a board of directors comprising a majority of independent directors, an audit committee composed of three or more directors, all of whom must be independent, and compensation and corporate governance and nominating committees, both of which must be composed solely of independent directors. In connection with its IPO and listing, a company may employ a phased-in schedule to meet these board and committee independence requirements. At least one director on each of the required committees at the time of listing must be independent, subsequently followed by a majority of independent directors on each requisite committee within 90 days after listing and fully independent committees and a majority of independent members of the board of directors within 12 months after listing.

In addition, there are important exemptions for 'controlled companies' (generally, a company in which more than 50 per cent of the voting power for the election of directors is held by an individual, a group or another company) and foreign private issuers. If an issuer is a controlled company and elects to rely on the applicable exemptions, then it will not be required to have a majority of independent directors on its board of directors, nor will its board be required to have a nominating and corporate governance committee or a compensation committee. The issuer must, however, still comply with the audit committee requirements described above. The issuer must also disclose in the annual proxy statement that it is relying on the controlled-company exemption and explain the basis for its conclusion that the exemption is applicable. Similarly, foreign private issuers are not required to have a majority of independent directors and are generally required to meet only the audit committee requirements noted above. Although not required, implementation of other corporate governance practices such as corporate governance committees and compensation committees are frequently recommended as preferred practices. Any variation by a foreign private issuer, based on home-country practices, from the governance requirements applicable for US companies on the relevant US exchange, must be disclosed each year in a concise summary in its annual report on Form 20-F.

New issuers

12 | Are there special allowances for certain types of new issuers?

The Jumpstart Our Business Startups Act of 2012 (the JOBS Act), as modified in certain respects by the Fixing America's Surface Transportation Act passed in 2015, has enabled certain companies to enjoy the benefits of being an EGC, which is any company with total gross revenues of less than US\$1.07 billion (a figure which is adjusted over time to account for inflation) during its most recently completed fiscal year. An EGC may generally continue holding this status until the earliest to occur of:

- the final day of the fiscal year in which such company had total gross revenues that exceeded US\$1.07 billion;
- the fifth anniversary of such company's IPO;
- the date that such company has issued more than US\$1 billion in non-convertible debt in the three years prior; or
- the date that such company is deemed a 'large accelerated filer' (ie, a seasoned issuer with US\$700 million or more of public float held by non-affiliates).

A number of JOBS Act provisions benefit an EGC pursuing an IPO, including the following:

- An EGC need not present more than two years of audited financial statements (rather than three years) or selected financial data (rather than five years) in the registration statement for its IPO. With respect to executive compensation, among other things, an EGC is generally required to disclose only the compensation of three executive officers (including the principal executive officer) rather than five (including the principal executive and financial officers). Such a company is also not required to present a compensation discussion and analysis.
- Certain audit and accounting rules are relaxed for EGCs. For example, auditors of EGCs are not required to attest to the internal controls under the Sarbanes-Oxley Act of 2002, section 404(b).

Although practice in this area has not changed widely following enactment of the JOBS Act, publication or distribution by a broker or dealer of research reports about an EGC subject to a proposed public offering, whether before or after the registration statement has been filed or become effective, would not constitute an offer for sale even if the broker or dealer is participating or will participate in the offering. Also, rules limiting the ability of a broker or dealer to publish reports about an EGC during the customary lock-up or other post-IPO period are also relaxed.

Certain key benefits initially available only to EGCs, such as the ability to submit the registration statement confidentially in the first instance and the ability to conduct testing-the-waters meetings with investors prior to filing the registration statement, have now been made more broadly available to all IPO issuers.

There are also many benefits, including those that continue following the IPO, available to companies that qualify as 'smaller reporting companies'.

Anti-takeover devices

13 | What types of anti-takeover devices are typically implemented by IPO issuers in your jurisdiction? Are there generally applicable rules relevant to takeovers that are relevant?

Once a company has made a large portion of its stock available to the public through an IPO, the company could be a potential target for a takeover. Accordingly, it is worth considering as part of the lead-up to an IPO whether to implement anti-takeover protections that will impede hostile acquirers who may seek to gain control of the company without negotiating with the company's board. Given that investors may suspect that management is attempting to use such protections to entrench its own position at the expense of shareholders, a company should be thoughtful about its approach to such protections.

A number of devices and protections are available to IPO issuers. The most powerful anti-takeover protection seen with some level of frequency in the US, particularly in the high-technology industry, is a dual-class high vote/low vote structure, which affords the holders of a high vote class of stock (typically selected pre-IPO owners or insiders) with voting power sufficient to control the election of directors even when public investors, who hold a separate low vote class of stock, own a majority of the economic interests in the company. Another such device is a classified board, which is a board of directors divided into multiple classes (almost always three), each of which serves a staggered multi-year term (almost always three years), which prevents a hostile acquirer from replacing more than a specified percentage (almost always one-third) of the directors at any single annual meeting. The prospect of having to conduct successful proxy fights at two successive annual meetings in order to gain control of a company's board can, in and of itself, be a significant deterrent to a hostile bidder. In contrast to the use

of a high vote/low vote structure, which remains less common outside specific industries and can attract investor resistance, the significant majority of IPO issuers have classified boards, although among larger publicly traded companies it has become increasingly rare for this board structure to be retained over the long term.

There is also a welter of additional measures that are nearly universally implemented without significant investor resistance. For example, an IPO issuer's certificate of incorporation typically prohibits stockholder action by written consent, which prevents a majority of the shareholders of the company from taking pre-emptive, unilateral action in lieu of a meeting. The certificate will also typically be drafted to include provisions restricting stockholders' ability to call a special stockholders' meeting, thus further inhibiting their ability to take extraordinary action. A company's by-laws will also require timely advance notice to the company from stockholders before such stockholders may nominate new directors or seek to make corporate changes. A supermajority of shareholders' votes may also be required in order to amend the company's certificate of incorporation or by-laws, although such supermajority voting requirements are becoming somewhat less universal due to the voting recommendations of proxy advisory firms.

It is also almost universal for IPO issuers in the US to authorise in their certificate of incorporation what is referred to as 'blank check' preferred stock, which enables a board to create and issue new series of preferred stock with whatever rights and preferences the board may desire at a given time. The board may use this ability to take certain anti-takeover actions, including the implementation of a stockholder rights plan, or 'poison pill', without further stockholder approval. A poison pill generally allows stockholders to purchase a company's common stock at a highly discounted price, triggered upon the acquisition of a large block of such stock by a third party, the effect of which is to dilute the acquirer's value. In recent years poison pills have become rare in US IPOs because of the negative reaction they tend to engender among investors and the fact that the board may deploy a poison pill later when needed.

In addition, unless an IPO issuer takes affirmative action to opt out, Delaware's anti-takeover statute (section 203 of the Delaware General Corporation Law) will apply to each IPO issuer incorporated in that state (which is the jurisdiction of organisation for most publicly traded US companies). This statute provides that, subject to certain exceptions specified in the law, a publicly held Delaware corporation may not engage in certain 'business combinations' with any 'interested stockholder' for three years after the date of the transaction on which the person became an interested stockholder. In general, a stockholder becomes an 'interested stockholder' on the day it acquires more than 15 per cent of the voting stock of the corporation. These provisions generally prohibit or delay the accomplishment of mergers, assets or stock sales or other takeover or change-in-control attempts that are not approved by a company's board of directors. Other states have adopted similar statutes. Some entities, such as companies controlled by financial sponsors, opt out of these anti-takeover statutes to avoid impeding the sponsors' ability to sell off their stakes following the IPO.

FOREIGN ISSUERS

Special requirements

14 What are the main considerations for foreign issuers looking to list in your jurisdiction? Are there special requirements for foreign issuer IPOs?

Before a foreign private issuer (as defined below) proceeds with an IPO and listing in the US it should consider the costs associated with the preparation of the Securities and Exchange Commission (SEC) registration statement (typically, on the SEC Form F-1), including the expense

associated with the preparation and audit of SEC-compliant financial statements. This registration statement, and the foreign private issuer's required ongoing annual report on Form 20-F, will require extensive disclosure. Generally, these disclosures are consistent with prevailing disclosure requirements for publicly traded companies in other jurisdictions, but are more specific and comprehensive. While compliance costs will decline over time, foreign private issuers should also anticipate ongoing compliance costs as US-listed companies. Although the ongoing compliance burdens on a foreign issuer are lower than those applicable to a US issuer (as described further in the next paragraph), once listed in the US, a foreign private issuer will be required to maintain (and ultimately have its outside auditors opine as to the effectiveness of) internal control over financial reporting and its principal executive and principal financial officers will be required to personally certify as to the foreign private issuer's required annual reports. A foreign private issuer should also understand potential exposure to legal proceedings in the US and that, by becoming an SEC-reporting company, it becomes subject to certain US laws and regulations, including the Foreign Corrupt Practices Act of 1977, which may not otherwise have applied to it.

Foreign private issuers do benefit from a number of dispensations and exemptions from requirements otherwise applicable to US issuers when conducting an IPO and listing in the US. Primarily among these, the foreign private issuer may prepare its financial statements in accordance with US GAAP, international financial reporting standards (IFRS) or its home country GAAP (although, if it uses home country GAAP or IFRS not issued by the International Accounting Standards Board it will be required to include a reconciliation to US GAAP) and these financial statements become stale less quickly. In addition, the disclosure requirements in Form F-1 available to foreign private issuers (versus Form S-1) permit reduced levels of disclosure relating to, among other things, executive compensation. Following the IPO, unlike a US issuer, a foreign private issuer is generally not required to file quarterly reports, including interim financial statements, with the SEC or to file current reports upon the occurrence of specified corporate developments. In addition, certain provisions of the US securities laws and regulations simply will not apply to a foreign private issuer, such as the federal proxy rules and section 16 of the Exchange Act relating to beneficial ownership reporting and short swing trading by directors, officers and 10 per cent owners.

A foreign private issuer is any foreign issuer other than a foreign government except an issuer meeting the following conditions as of the last day of its most recently completed second fiscal quarter:

- more than 50 per cent of the outstanding voting securities of such issuer are directly or indirectly owned of record by US residents; and
- any of the following:
 - the majority of the executive officers or directors are US citizens or residents;
 - more than 50 per cent of the assets of the issuer are located in the US; and
 - the business of the issuer is administered principally in the US.

In the case of a new registrant, the foreign private issuer determination will be made as of a date within 30 days prior to the issuer's filing of an initial registrant statement with the SEC.

In the event that a company fails to qualify as a foreign private issuer as of the last business day of its most recently completed second fiscal quarter, it will no longer be eligible to use the SEC form and rules designated for foreign private issuers beginning on the first day of the next fiscal year.

Selling foreign issues to domestic investors

- 15 | Where a foreign issuer is conducting an IPO outside your jurisdiction but not conducting a public offering within your jurisdiction, are there exemptions available to permit sales to investors within your jurisdiction?

Yes, a foreign issuer that is conducting an IPO and listing in its home country will frequently make offers and sales in the US to qualified institutional buyers (ie, generally an entity that owns and invests, on a discretionary basis, at least US\$100 million in securities) in reliance upon rule 144A of the Securities Act. In addition, a foreign private issuer that maintains a primary listing outside of the US and has not conducted a public offering or listing in the US may be exempt from the ongoing SEC reporting requirements of the Exchange Act under rule 12g3-2(b) even if such issuer has numerous US shareholders.

TAX

Tax issues

- 16 | Are there any unique tax issues that are relevant to IPOs in your jurisdiction?

Generally speaking, the fact that a foreign private issuer conducts an IPO and lists its securities in the US (as opposed to having conducted an IPO and listing outside of the US) does not alter the otherwise-applicable US federal taxation of the company or its stockholders. For a variety of reasons, foreign private issuers would typically not change their places of domicile to the US in order to facilitate an IPO in the US.

INVESTOR CLAIMS

Fora

- 17 | In which fora can IPO investors seek redress? Is non-judicial resolution of complaints a possibility?

A private claim by an investor relating to a US IPO is typically brought in the US courts that have federal jurisdiction over the defendants; however, suits that allege violation of the federal securities laws may also be filed in certain state courts under certain circumstances, as section 22(a) of the Securities Act provides for concurrent state court jurisdiction for civil actions alleging a violation of the Securities Act's liability provisions. Typically, arbitration clauses are not included in documentation relating to US IPOs, so non-judicial resolution of complaints related to IPOs is uncommon. The Securities and Exchange Commission (SEC) also may investigate violations of securities laws and institute court or administrative proceedings. The SEC may also bring actions for causing or aiding and abetting violations – a claim not available to private investors. In federal court proceedings, investors may seek to obtain injunctive relief, financial relief, a prohibition against a certain individual serving as an officer or director of a public company, or other equitable relief. In SEC administrative proceedings, the SEC can issue a cease-and-desist order, impose financial penalties and bar an individual from serving as a director or officer of a public company.

Class actions

- 18 | Are class actions possible in IPO-related claims?

Yes. There are a number of claims that investors could bring against a company (and its directors and officers) that has undertaken an IPO in the US. Such claims are frequently brought by a claimant on behalf of a class pursuant to a class action lawsuit.

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Claims, defendants and remedies

- 19 | What are the causes of action? Whom can investors sue? And what remedies may investors seek?

A company pursuing an IPO in the US may be subject both to civil and to criminal liability. In a civil context, the remedy investors may seek depends on the specific cause of action. For section 11 liability, damages generally are calculated as the loss in the value of the investor's shareholdings; therefore, the maximum amount of section 11 liability in an IPO equals the aggregate sale price of the shares offered in the IPO. The remedy for section 12 violations typically is rescission, which in an IPO means that the defendant (eg, the company going public) must repurchase the shares offered in the IPO at cost plus interest or pay damages directly to the plaintiff if the securities were sold during the interim period. Under rule 10b-5, a plaintiff may be entitled to recover the out-of-pocket loss caused by a material misstatement or omission.

UPDATE AND TRENDS

Key developments

- 20 | Are there any other current developments or emerging trends that should be noted?

The US IPO market had a phenomenal year in 2020 notwithstanding factors such as the global covid-19 pandemic and a US presidential election that could have dampened IPO activity. That momentum continued into 2021. In fact, the first quarter in 2021 was the busiest quarter for US IPOs in over two decades with 100 IPOs raising US\$39.2 billion in aggregate proceeds. And such a notable quarter is before including the special purpose acquisition company (SPAC) IPOs, which in the first quarter of 2021 completed more deals and raised more proceeds than the entire already extraordinary 2020, although the market environment

for SPACs has more recently been challenged. A SPAC IPO is a company with no assets or operations that goes public with the promise to IPO investors that it will merge with an operating company within a specified period of time, typically 18 to 24 months. This provides an alternative to the traditional IPO process as an operating company can go public by merging with a SPAC, which is commonly referred to as a de-SPAC merger. While SPAC IPOs, and the subsequent merger with a real operating company, have been around for decades, they have become more mainstream in recent years. With the rise in popularity of SPAC IPOs, stock exchanges in other countries are exploring ways to accommodate this non-traditional IPO process, which has, to date, largely been a US phenomenon.

Coronavirus

21 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

While the United States is fortunately starting to emerge from pandemic-era lockdowns, the SEC implemented a number of procedural measures designed to facilitate greater use of electronic communications with their staff members that will likely survive. The pandemic also was the catalyst for the widespread adoption of virtual roadshow presentations, another feature that will likely continue to survive the pandemic in conjunction with the return of in-person investor meetings.



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