

PRESENTED AT

29th Annual Technology Law Conference

May 26-27, 2016
Austin, Texas

Guide to the Initial Public Offering

J. Robert Suffoletta



Guide to the Initial Public Offering

Eighth Edition

Prepared by:

Steven E. Bochner, Esq.

Jon C. Avina, Esq.

Calise Y. Cheng, Esq.

W&R Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

 **MERRILL**CORPORATION

About WSGR.

Wilson Sonsini Goodrich & Rosati is the premier provider of legal services to technology, life sciences and growth enterprises worldwide. We represent companies at every stage of development, from entrepreneurial start-ups to multibillion-dollar global corporations, as well as the venture firms, private equity firms and investment banks that finance and advise them. The firm is nationally recognized as a leader in the fields of corporate governance and finance, mergers and acquisitions, private equity, securities litigation, employment law, intellectual property and antitrust, among many other areas of law. For more information, please visit www.wsgr.com.

About Merrill Corporation.

High risk, high reward makes for high anxiety in today's complex work space. What about low risk, high reward? Is it even possible? It is when you partner with us. Merrill's proven team of highly driven professionals can navigate the complexity, freeing you to focus on bigger opportunities. Lean on our deep global expertise to support your company's needs around the world. Leverage our innovative technology and advanced analytics. Create seamless connections across stakeholders. Bank on ironclad security. From secure content sharing and disclosure, to regulated communications and compliance services, to printing and digital communications – we secure the solutions so you can secure the business of moving ahead.

Merrill for financial transactions and reporting.

Time sensitive. Privacy sensitive. Brand sensitive. Sharing confidential financial documents is a complex process. Updating those who need to be informed without risking security is paramount. Merrill is your 24/7/365 partner in ensuring the highest security with speed and accuracy. Leverage our world-class technology to create seamless connections so that transactions progress. Tap into our global network of experts and access deep industry knowledge. Navigate ever-changing regulatory requirements. Manage regulated disclosure with precision and accuracy. Replace deal complexity with progress. Ensure secure content sharing and collaboration with our award-winning Merrill DataSite and Merrill Bridge platforms. Deliver confidently with our superior printing and digital services. From IPOs to mergers to financial disclosure and reporting – we secure the content so you can get back to making business thrive.

GUIDE TO THE INITIAL PUBLIC OFFERING

*Steven E. Bochner, Esq. • Jon C. Avina, Esq. •
Calise Y. Cheng, Esq.*

Eighth Edition

**Published by
MERRILL CORPORATION
St. Paul, Minnesota**

This booklet is not intended to provide legal advice as to any specific situation. This booklet is intended only as a general overview for the non-lawyer and does not address the full range of federal and state securities laws, the rules of the Financial Industry Regulatory Authority and the listing standards and other requirements of the trading markets, or the myriad other laws, rules and practices that are applicable to an initial public offering. These laws and rules are detailed and complex, and securities counsel should therefore be intimately involved throughout the public offering process. The views expressed in this booklet are those of the authors only.

Copyright © 2016 by

Steven E. Bochner, Jon C. Avina and Calise Y. Cheng

ALL RIGHTS RESERVED

No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without the written permission of the authors.

Merrill Corporation
Publications Department
One Merrill Circle
St. Paul, Minnesota 55108
(651) 698-1865

ISBN 978-0-692-62149-3

Merrill Corporation products are designed to provide accurate and current information with regard to the subject matter covered. They are intended to help attorneys and other professionals maintain their professional competence. Products are distributed with the understanding that neither the Corporation, any affiliate company, nor the editors are engaged in rendering legal, accounting, or other professional advice. If legal advice or other expert assistance is required, the personalized service of a competent professional should be sought. Persons using these products when dealing with specific legal matters should also research original sources of authority.

PRINTED IN THE UNITED STATES OF AMERICA

About the Authors

Wilson Sonsini Goodrich & Rosati is the premier provider of legal services to technology, life sciences, and growth enterprises worldwide, and a leading advisor to issuers and underwriters of initial public offerings. For more information about Wilson Sonsini Goodrich & Rosati, visit the firm's Web site at www.wsgr.com.

Steven E. Bochner is a partner in the Palo Alto office of Wilson Sonsini Goodrich & Rosati. In 2005, Steve was appointed to serve on the SEC's Advisory Committee on Smaller Public Companies. He has also served as a lecturer at the University of California, Berkeley School of Law and as Co-Chair of the Nasdaq Listing and Hearing Review Council. As a member of the Council, Steve was extensively engaged in the development of Nasdaq's listing standards, including governance and disclosure reform. Steve also served on the IPO Task Force and was extensively involved in designing the IPO provisions of the JOBS Act of 2012.

Jon C. Avina is a partner in the Palo Alto office of Wilson Sonsini Goodrich & Rosati. He received his B.A. from Harvard University in 1994 and his J.D. from Stanford Law School in 1997.

Calise Y. Cheng is a partner in the Palo Alto office of Wilson Sonsini Goodrich & Rosati. She received her B.A. from the University of California, Berkeley in 2000 and her J.D. from the University of Minnesota Law School in 2006.

The authors also gratefully acknowledge input from current colleagues John E. Aguirre, Steven V. Bernard, Asaf Kharal, Anthony T. Kikuta, Scott T. McCall, Michael S. Russell, Ignacio E. Salceda, and Marianne Stark-Bradley, all of Wilson Sonsini Goodrich & Rosati, as well as former colleagues Eric Finseth, Ralph J. Barry and Roger D. Stern. Responsibility for errors, if any, is solely that of the current authors.

(This page has been left blank intentionally.)

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
CHAPTER ONE: THE INITIAL PUBLIC OFFERING DECISION . . .	3
1.1 Introduction	3
1.2 Prerequisites to an Initial Public Offering	3
1.2.1 Factors to be Considered Before Proceeding with an Initial Public Offering	3
1.2.2 Emerging Growth Companies	4
1.3 Deciding Whether to Undertake an Initial Public Offering . .	5
1.3.1 Benefits of an Offering and Being a Public Company	5
1.3.2 Costs of an Offering and Being a Public Company . .	6
1.3.3 Making the Decision	11
CHAPTER TWO: THE INITIAL PUBLIC OFFERING PROCESS . . .	12
2.1 Overview of the IPO Process	12
2.2 The Players	12
2.2.1 The Company's Board and Management	13
2.2.2 The Managing Underwriters	14
2.2.3 The Company's Counsel	15
2.2.4 The Company's Auditors	16
2.2.5 The Underwriters' Counsel	16
2.2.6 The Financial Printer	16
2.2.7 Other Participants	16
2.3 The Process Through the Filing of the Registration Statement	17
2.3.1 Structuring the Offering	17
2.3.2 Structuring the Company: Governance, Controls and Housekeeping	21
2.3.3 The Organizational Meeting	26
2.3.4 Statutory Restrictions on Publicity	26
2.3.5 "Testing the Waters"	28
2.3.6 Purpose of the Registration Statement	28
2.3.7 Confidential Review of Draft Registration Statements	29

	<u>Page</u>
2.3.8 The Due Diligence Process	30
2.3.9 Contents of the Registration Statement	33
2.3.10 The Drafting Process	39
2.3.11 The Underwriting Agreement	40
2.3.12 Board and Stockholder Approvals	41
2.3.13 State Blue Sky Laws	41
2.3.14 Filing the Registration Statement	41
2.3.15 Submitting the Draft Registration Statement	42
2.3.16 Using the EDGAR System	42
2.3.17 FINRA Review of Underwriting Arrangements	43
2.3.18 Application for Listing on a Trading Market	43
2.4 After Filing but Before Effectiveness	43
2.4.1 The SEC Comment Process	43
2.4.2 Additional Activities After Filing	44
2.4.3 The Marketing Effort	45
2.5 Effectiveness and Post-Effectiveness	49
2.5.1 Mechanics of Going Effective	49
2.5.2 The Final Prospectus	49
2.5.3 Mechanics of Closing	50
2.5.4 Exercise of the Overallotment Option	50
CHAPTER THREE: CERTAIN CONSEQUENCES OF AN INITIAL PUBLIC OFFERING	51
3.1 Liability on the Prospectus	51
3.2 Public Disclosure Obligations	52
3.2.1 Periodic Reporting	52
3.2.2 Current Reporting of Material Events	53
3.2.3 Proxy Rules and the Annual Report to Stockholders	55
3.2.4 Controls and Procedures; CEO/CFO Certifications	56
3.2.5 Regulation G and Item 10(e): Restrictions on Non-GAAP Financial Measures	57
3.2.6 Regulation FD: The Prohibition on Selective Disclosure	59
3.3 Corporate Governance	59
3.3.1 Definitions of “Independent”	60

	<u>Page</u>
3.3.2 Majority Independent Board	61
3.3.3 Audit Committee	62
3.3.4 Nominating Committee	62
3.3.5 Compensation Committee	63
3.3.6 Stockholder Approval of Equity Compensation	63
3.3.7 Code of Ethics	63
3.3.8 Governance Reporting Requirements	63
3.4 Restrictions and Reporting Obligations Applicable to Insiders and Others	64
3.4.1 Insider Trading	64
3.4.2 Section 16	66
3.4.3 Ownership Reporting Requirements (Schedules 13D and 13G)	67
3.5 Liquidity of Stockholders After the Offering	68
3.5.1 “Affiliate” Status	68
3.5.2 Sales by Affiliates	68
3.5.3 Sales by Nonaffiliates	69
3.6 Prohibition on Loans to Directors and Executive Officers . . .	70
3.7 Investment of IPO Proceeds	70
CONCLUSION	71
INDEX	72

(This page has been left blank intentionally.)

INTRODUCTION

We last updated this booklet five years ago when we were beginning to see signs of life in the IPO market after several difficult years that followed the collapse of the financial services industry in the fall of 2008. Since then, we have witnessed a number of high profile technology IPOs from companies such as Facebook, LinkedIn, Twitter, Box and Square. We have also seen the passage of the Jumpstart Our Business Startups Act (“JOBS Act”) in 2012, which has provided “emerging growth companies” with a number of accommodations for structuring and executing a successful IPO. The JOBS Act has also allowed private companies to significantly increase their number of stockholders without having to “go public” in order to comply with certain securities laws. At the same time, we have experienced an active private market for raising capital with a number of crossover and private equity investors in search for yields in an environment of near-zero interest rates making large investments in a broad range of technology companies, such as Uber, Lyft, Dropbox, Pinterest, Airbnb and Zenefits. As a result, many companies that would otherwise be typical IPO candidates have elected to stay private longer as they continue to scale their business model. In fact, the combination of these JOBS Act accommodations and the healthy private market for raising capital contributed to a tepid market for technology IPOs in 2015. However, similar to our views of the market five years ago, we predict a healthy return of the technology IPO market over the next several years as a new stable of disruptive companies begins to access the public markets for the capital and cache that come with being a public company. Just as we are beginning to see valuation retrenchment and more investor-friendly terms in the private market, we are starting to witness a renewed sense of optimism from many of the players in the IPO market, including investment bankers, venture capitalists and emerging growth companies, especially those in the technology and life sciences industries. Given this development, we felt that the time was right to update our Guide to the Initial Public Offering to provide a new set of readers with an overview of the most important aspects of planning, launching and completing a successful IPO.

We have organized this booklet into three major chapters.

In Chapter One, we discuss the period leading up to a decision to proceed with an initial public offering, with a focus on the prerequisites to, as well as the costs and benefits of, proceeding with an initial public offering and becoming a public company.

In Chapter Two, we turn to the period beginning with the decision to proceed with the offering and continuing through the closing of the sale of the shares to the public. We first describe the events and legal restrictions encountered

prior to the submission of the registration statement to the Securities and Exchange Commission (the “SEC”). We include an overview of the process and factors impacting the timing of the offering, the members of the working group and their respective roles during the process, structural and organizational issues affecting the offering, preparation of the registration statement, and the “due diligence” process. This “pre-filing period” is followed by what is often called the “waiting period,” during which time the company responds to comments to the registration statement from the SEC and markets the offering to potential investors in what is referred to as the “road show.” Once the company completes the SEC comment process and marketing, it will ask the SEC to declare the registration statement “effective,” at which time the company can begin selling stock to the public.

In Chapter Three, we conclude with a discussion of certain consequences of becoming a public company, including the company’s disclosure obligations, corporate governance requirements, and the trading restrictions and reporting obligations applicable to the company and its directors, executive officers and other affiliates.

The initial public offering should not be viewed as an end point or ultimate goal; rather, it is one step in the growth and maturation of a business enterprise. This booklet is intended to provide a high-level perspective on this exciting process and the key issues that impact it.

As a final cautionary point, please note that this booklet does not attempt to address all existing laws or regulations applicable to the subjects covered. The booklet summarizes certain of the applicable statutory and regulatory provisions and, in the interest of brevity, is deliberately incomplete. In making legal determinations, you should not rely on this booklet but rather on the advice of experienced corporate and securities counsel.

CHAPTER ONE: THE INITIAL PUBLIC OFFERING DECISION

1.1 Introduction

Many factors affect the success of an initial public offering, both within and outside of a company's control. These factors include:

- the state of the public equity markets generally;
- the perception of the company and its industry segment by the financial community;
- the financial condition and recent operating results of the company; and
- the quality, experience and commitment of the company's management and the board of directors, as well as other members of the working group.

While the benefits of going public, such as the capital raised in the offering, improved future access to the financial markets, and liquidity for investors and employees, are significant, the board of directors and management should fully understand the costs and consequences of becoming a public company before proceeding with an IPO. These consequences include potentially greater exposure to liability, increased emphasis on corporate governance (including composition of the board of directors and its various committees), greater transparency and, as a result, less ability to control the disclosure of sensitive company information, and a marketplace that focuses largely on short-term operating results, as well as a significant increase in management time and administrative costs necessary to support the expanded governance, internal control, SEC reporting and investor relations functions of a public company.

1.2 Prerequisites to an Initial Public Offering

1.2.1 Factors to be Considered Before Proceeding with an Initial Public Offering

A major factor to consider in determining whether to proceed with an IPO is the state of the stock market generally. Market conditions can have a significant impact on the timing of an IPO and the valuation that a company can receive in the transaction. The state of the company's industry can also affect the success of the offering. The valuations of companies that are already public and that the investment community considers to be comparable to the company contemplating an IPO typically have a direct impact on the

company's valuation and market reception. Various industries can fall into favor or disfavor with the investment community. An experienced investment banking firm can assist management in evaluating the condition of the market and its effect on the company's planned offering.

However, the most critical factor is the company itself. With the adoption of the Sarbanes-Oxley Act of 2002 ("SOX") and the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), the bar has been significantly raised with respect to the level of maturity and infrastructure that a company must have in place before it embarks on an IPO. While the adoption of the JOBS Act in 2012 and the Fixing America's Surface Transportation Act ("FAST Act") in 2015 have eased certain requirements for emerging growth companies (as discussed in more detail below), companies preparing for an IPO are still expected to have robust governance and financial infrastructures and experienced management in place to prepare for the increased transparency and reporting obligations required for life as a public company. In determining whether a company is ready for an IPO, the board and management should consider:

- the company's business and financial outlook;
- principal risks of the business;
- the adequacy of internal financial reporting and accounting controls;
- the maturity of the company's governance structures; and
- the company's willingness to accept the need for transparency and disclosure that go hand in hand with being a public company.

These factors must be evaluated in terms of their impact on the feasibility and timing of an offering, their implications for valuation, and their effect on potential liability of officers and directors both during and after the offering.

Finally, the board and management need to take a hard look at themselves. The burdens of running a public company, with the attendant liability risks and reporting obligations under the close watch of the SEC, analysts and the public, require a strong, ethical, experienced and disciplined board and management team.

1.2.2 Emerging Growth Companies

As discussed above, the JOBS Act and the FAST Act have eased certain requirements for emerging growth companies in connection with their IPOs. Under the JOBS Act, an emerging growth company ("EGC") is an issuer that, for its most recently completed fiscal year, had total annual gross revenues of

Also available as part of the eCourse

[Business Transactions for the Tech Company](#)

First appeared as part of the conference materials for the
29th Annual Technology Law Conference session

"Taking a Company Public: Key Legal and Business Considerations"