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## **Guide to the Initial Public Offering**

**J. Robert Suffoletta**



# Guide to the Initial Public Offering

Eighth Edition

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# GUIDE TO THE INITIAL PUBLIC OFFERING

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Calise Y. Cheng, Esq.*

Eighth Edition

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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.

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# 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

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