
Webcast

The JOBS Act: Implications for Pre-IPO Companies

Panelists:

Scott Cutler – NYSE Euronext

Joe Hall – Davis Polk

Mark Heesen – National Venture Capital Association

Martin Wellington – Davis Polk

Moderator:

Frank Currie – Davis Polk

Davis Polk & Wardwell LLP

Davis Polk



Panelists



Frank Currie – Partner, Davis Polk (Moderator)

Frank is a founding member of Davis Polk’s Menlo Park office and has been active in the formation and operation of the firm’s Global Technology Group. He represents technology companies and their investors and advisers in mergers and acquisitions, strategic alliances and capital formation transactions, as well as in matters of corporate governance and securities law compliance.



Scott Cutler – EVP and Head of Global Listings, NYSE Euronext

Scott is responsible for the NYSE listing business globally and manages the Exchange’s relationship with over 2100 companies listed at the NYSE in Canada, Latin America, United States and Asia. He is also responsible for the Exchange’s relationship with the Investment Banking, Private Equity, Venture Capital, and Legal Communities to attract new listings. In addition, Mr. Cutler oversees the Capital Markets business including, Initial Public Offerings for operating companies, Structured Products, Closed-End Funds, and REITs listing on the NYSE or NYSE Amex.

Panelists



Mark Heesen – President, National Venture Capital Association (NVCA)

Mark Heesen has advocated for the venture capital industry, entrepreneurship and innovation for nearly two decades, first as NVCA's head of public policy and, since 1999 as the Association's president. Under Mark's leadership, the NVCA has grown in both scope and scale as it relates to its public policy agenda, research initiatives, and member programs.



Joe Hall – Partner, Davis Polk

Joe's practice includes advising issuers and underwriters on capital markets transactions; advising SEC-regulated entities on regulatory matters; and advising on securities, corporate and governance matters. Joe previously served as Managing Executive for Policy at the U.S. Securities and Exchange Commission under Chairman William H. Donaldson and assisted in directing the Commission's policy-making and enforcement activities. Joe recently represented EPAM Systems on its NYSE IPO



Martin Wellington – Partner, Davis Polk

Martin is a member of Davis Polk's Corporate Department, practicing in the Menlo Park office. He has worked on mergers, acquisitions, public and private securities offerings and other corporate transactions. Martin recently represented Pandora Media and Angie's List in their initial public offerings.

Overview

Regulatory “On Ramp” For IPO Companies

- Facilitating IPOs
- Relaxing Public Reporting Requirements
- Research

General Solicitation and Other Consequences for Private Offerings

Increased Shareholder Numerical Thresholds for Public Company Reporting

Facilitating IPOs: Process

Confidential review

- EGCs are permitted to submit the registration statement for their IPO on a confidential, nonpublic basis for review by the SEC
 - IPOs already on file may switch to confidential track
- Must file publicly 21 days before the road show
 - Public filing must include all previously submitted drafts
 - Staff position regarding public release of correspondence by SEC post-IPO unaffected

Pre-deal marketing

- EGCs are able to hold meetings with institutional accredited investors and qualified institutional buyers to “test the waters”
 - Prior to submission
 - Prior to public filing
 - Prior to road show

Facilitating IPOs: Disclosure

Audited financial statements

- EGCs would need to provide only two (not three, as is the current requirement) years of audited financial statements in their IPO registration statement. In addition, “selected financial data” for prior periods would not be required
 - It is unclear to what extent market practice will migrate to these loosened requirements
 - Consider desire to show historical “ramps” in road show deck
- **Executive Compensation**
 - An EGC can omit “CD&A”, disclose compensation for fewer executives and less detail on compensation
- **Disclosure Regarding EGC status**
 - No rulemaking to date
 - SEC guidance and practice is evolving
 - Prospectus Cover
 - Risk Factors

Relaxing Public Reporting Requirements

Sarbanes-Oxley Section 404(b)

- An EGC is not required to provide an auditor's attestation report on its internal controls.
 - However, management attestation still required

Executive Compensation

- An EGC is not required to hold shareholder advisory votes on executive compensation

New U.S. GAAP Rules

- An EGC may elect not to comply with new GAAP accounting pronouncements applicable to public companies until the pronouncements are also applicable to private companies.

Accounting Firm Rotation

- An EGC will not be required to comply with any future PCAOB rules mandating accounting firm rotation or requiring a supplement to the auditor's report covering additional information about the audit and the financial statements.

General Solicitation and Other Consequences for Private Companies

Prohibition on “general solicitation” removed from 144A and Reg D offerings, so long as all actual purchasers are QIBs or AIs

- Greater flexibility for concurrent public and private offerings and transitioning from public to private and vice versa. Publicity restrictions of integration analysis are no longer relevant.

No requirement to register until either held by 2,000 shareholders or 500 shareholders who are not accredited investors

- Calculation excludes shares issued pursuant to employee compensation plans
- Implications
 - Issuers can stay private for a much longer period of time
 - May result in significant increase in trading on private secondary markets, such as SecondMarket and SharesPost, and lead to further developments in secondary market trading of private companies

Research

Pre-deal research

- Publication of research related to an EGC prior to a proposed IPO by that company is permitted
- Pre-deal research is not subject to 1933 Act liability but would still be subject to 10b-5
 - Liability concerns may limit banks willingness to issue pre-deal research

FINRA required to change its restrictions on research

- Including eliminating restrictions on
 - a research analyst participating in meetings with an EGC alongside investment bankers and
 - publishing or distributing research reports for specified periods of time following an IPO and in connection with the expiration of related lock-up periods
- Other FINRA restrictions are unaffected including Regulation AC, which requires research analysts to certify to the truthfulness of the views they express in their research reports and make disclosures regarding their receipt of compensation
- It is unclear what the ongoing status of the Global Research Settlement will be in light of the JOBS Act's mandated changes to SEC and FINRA research rules.

Appendix: Applicability

Most but not all of the JOBS Act provisions are only applicable to EGCs

Emerging Growth Companies

- IPO companies with annual gross revenues of less than \$1 billion during their most recent fiscal year.
- A company would retain EGC status, and the reduced regulatory and reporting requirements associated with it, until the earliest of:
 - the first fiscal year after its annual revenues exceed \$1 billion;
 - the first fiscal year following the fifth anniversary of its IPO;
 - the date on which the company has, during the previous three-year period, issued more than \$1 billion in non-convertible debt; and
 - the date on which the company achieves “large accelerated filer” status. (Basically, a company with \$700 million of public equity float that has been reporting for at least one year.)
- Estimates that over 90% of IPO companies over the past three years would have qualified as EGCs
- Not available to companies whose first registered sale of equity securities occurred on or before December 8, 2011
- Available to EGCs that are foreign private issuers

Panelist's Contact Information

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