Introduction

The first sale of a company's shares to the public and the listing of those shares on a stock exchange ("IPO") are milestone events for any organization. However, the IPO should be more than a financing event for the company or an exit vehicle for shareholders. If structured and managed properly, it is a process that can transform the management, processes, and culture of an organization. If done badly, it can result in heartache and liability for senior management and controlling shareholders.

Going public is not for every successful company. A founding shareholder or multigenerational family ownership, for example, may not be prepared to surrender operating control, subject itself to public disclosure and scrutiny, surrender perks and financial support, or comply with several new legal and accounting requirements enforced by expensive lawyers and auditors. If the company lists its shares outside of its home jurisdiction, the organization will also have to adjust to an unfamiliar legal system, and foreign customs and practices—some of which may be hostile.

There are several alternatives to going public. These include:

- Refinancing or sales of non-core assets to release cash for growth
- Sale of equity to a private equity firm, possibly as a pre-IPO step
- Joint ventures or strategic alliances with strategic or financial partners
- Sale to a strategic or financial buyer

These alternatives should be considered and explored along with the IPO process, especially if there is a lack of consensus within ownership or management regarding the best course of action.

Even if a company is ready to go public, the market may not be receptive. The windows for IPOs open and close very quickly. Red-hot markets offering lofty P/E multiples can turn ice-cold within months. Therefore, companies anticipating an IPO in their future should prepare to become public companies at least 12-24 months prior to a planned filing. Those growing and well-performing companies that are ready to be public can jump in when a market window opens for IPOs. Those that are not ready may miss the window and the opportunity a successful IPO can offer.

This summary poses some fundamental questions every company considering going public in the United States should ask itself if it believes it is ready to put on the golden straitjacket of laws, rules, customs and practices of the U.S. capital markets. While it is written from the perspective of a non-U.S. company offering shares directly or indirectly by means of a sponsored ADR program, many of the questions are applicable to U.S. companies contemplating an IPO.

A Note on American Depositary Receipts

Shares of foreign corporations may be issued and traded in the U.S. in three different forms: (i) a direct sale and listing of shares; (ii) as shares issued by the non-U.S. corporation specifically for the U.S. market (e.g. "Shares of New York Registry" issued by ArcelorMittal); or (iii) through American Depository Shares ("ADSs"). ADSs are by far the most common form of equity securities offered by non-U.S. companies in the U.S.

ADSs are represented by American Depositary Receipts ("ADRs"), which are negotiable receipts issued in registered form by a U.S. bank or trust company as depositary ("Depositary"). Each ADS represents a specified number or fraction of a company's equity securities deposited with a custodian in the company's home country. The number is determined by the company with a view toward setting an appropriate trading price per ADS. Each ADR represents one or more ADSs.

The ADR structure was developed to overcome certain practical problems facing U.S. investors, such as cumbersome mechanics of transfer and shares issued only in bearer rather than registered form. The ADR structure also facilitates distribution of dividends, payment of local withholding taxes, and currency conversion, all of which are implemented on behalf of the ADR holders by the Depositary.

The issuance of ADRs may be either "sponsored" or "unsponsored" by the company. "Unsponsored" ADRs are issued by a Depositary for already outstanding foreign shares without an agreement with the issuer of the shares to support the program. Unsponsored programs cannot be established by a Depositary unless the company either is subject to the periodic reporting requirements under the Securities Exchange Act of 1934 ("1934 Act") or is exempt from these requirements.[1] "Sponsored" ADRs are issued by a Depositary pursuant to an agreement with the company and with its cooperation for shares that are already outstanding or for newly issued shares specifically for an offering of ADRs in the United States. An IPO in the United States using ADRs will require a "sponsored" program with the full cooperation of the issuing company.

An IPO to raise capital by a non-U.S. company utilizing a sponsored ADR program would require filing a registration statement covering the company's underlying shares, the ADSs and the ADRs on SEC Form F-1, which requires substantially the same issuer information as SEC Form 20-F. An additional simplified registration statement dealing primarily with the depositary agreement must also be filed on SEC Form F-6. This would also require the company to file periodic reports with the SEC under the 1934 Act until it deregisters under the 1934 Act.

[1] A foreign private issuer (*see* discussion at fn. 6) is automatically exempt from the registration and periodic reporting requirements of the 1934 Act if it: (i) is not currently required to file or furnish reports under the 1934 Act (i.e., it has not offered or listed securities in the United States); (ii) has a class of securities listed on one or more exchanges in its primary trading market that constitutes at least 55% of its worldwide trading volume; and (iii) has published on a website or other electronic information delivery system English translations of the material information it has (a) made public pursuant to the law of its home country, (b) filed with a securities exchange, or (c) distributed to its security holders, including, at a minimum, English translations of its annual report (including financial statements), interim reports that contain financial statements, press releases and all other communications and documents distributed directly to holders of each class of securities to which the exemption relates. *See* SEC Rule 12g3-2(b).

1. Does the Company have compelling financial metrics to attract investors and to list on the chosen securities exchange?

IPO candidates must have a compelling story to attract investor interest. Investors will assess whether a company has a solid track record, a plan for continued growth, and a business model that is sustainable and scalable.

How does the Company compare to its peers?

The most successful IPOs involve companies that outperform their competitors. To present a compelling equity story, a company should benchmark its performance to demonstrate superior performance compared to its industry peers. In particular, a company should demonstrate superior performance in:

- Sales growth
- Profitability growth
- EBITDA growth
- Gross margins
- Lower debt-to-equity ratio
- Cash and investments on hand

Solid and improving financial performance with sales and EBITDA growth, organic or by acquisition, indicates the potential for future growth and positive stock performance. Sensitivity to high debt-to-equity ratios will often fluctuate with macroeconomic conditions and industry prospects.

Does the Company have a sustainable, predictable business model?

In addition to basic financial performance, a business model that delivers stable, growing sales, EBITDA and profits in good economic times and bad can be important in attracting institutional interest in an offering. Some companies have never recovered from unexpected bad results following an IPO.[2] Since most public companies compete for analysts' and investors' attention, companies have to appreciate that volatile and unpredictable performance makes following a company a risky proposition for analysts and institutional investors who must answer to their own constituencies.

Do macroeconomic factors support reasonable and sustainable growth post-IPO?

Companies do not operate in a vacuum. As good as a company's management and business model may be, if the macroeconomic factors of the economy or industry sector in which the company operates are negative, the odds are that the market will discount the future prospects of the company. Prices of Chinese and Brazilian public companies were red hot when the Chinese and Brazilian economies were growing at significant rates. When economic growth slowed in these economies, however, this slowdown correlated with a reduction in the trading multiples of Chinese and Brazilian public companies. Recently, stock prices in Japan have soared as a result of stimulative economic policies introduced by a new government.

In the final analysis, from a financial perspective, a company contemplating an IPO should have excellent company financial metrics, a sustainable and scalable business model, and operate within an economy

[2] *See*, for example, the history of Groupon, Inc., which lost 72 percent of its market value as the market perceived a deterioration in its core business.

and industry sector that support growth in the company's core business lines for the foreseeable future. If not, while not impossible, a successful IPO may be challenging.

2. Is the Company's culture compatible with a public company?

There are thousands of successful companies throughout the world that operate in strong economies and industry sectors that could be eligible for successful IPOs. Many of these companies, however, are ill-suited culturally for the public scrutiny, disclosure, surrender of control to independent directors, and enhanced business and financial processes and infrastructure implemented by professional managers and verified by independent auditors that follow an IPO. There are several questions that can be asked to assess whether a company's culture is truly compatible with the obligations of a public company. For a family-controlled company,[3] the following questions may be relevant:

Are family members willing to surrender absolute board control by the addition of independent directors?

Can controlling family members maintain their lifestyle, financially and socially, without reliance on the company?

Are family members prepared to repay loans from the company prior to the IPO?

Are family executives prepared to surrender their positions to professional managers?

Are family members willing to eliminate company expense accounts and services (e.g., homes, planes, cars)?

Can insider transactions and relationships (leases of offices, plants, equipment; supply or other vendor contracts) pass independent, third-party scrutiny or be modified to being no less favorable to the company than what would be the terms offered by an independent third party?

Will the company's prospects suffer if it changes its relationships with suppliers, customers and government officials to comply with applicable antibribery laws (e.g., Foreign Corrupt Practices Act)?

Is company ownership prepared to provide detailed disclosure of its business and operations and subject itself to the scrutiny expected of a public company?

Prior to starting the IPO process, ownership and management should undertake a very honest assessment of the cultural adjustments that would need to be made in order to operate as a public company. If the changes are practically impossible or too painful to endure, then alternative transactions should be considered for raising capital or selling.

3. Is the Company's corporate structure suitable for a public company?

The entity into which investors will be investing should be easy to describe and easily understood by investors. Unless there is a compelling strategic reason, complicated ownership structures, such as brother/sister corporations, partnerships and complicated cross-ownership structures, should be avoided. The most common and preferred structure for an IPO is a single operating company or a holding company with wholly owned operating subsidiaries.

To achieve the desired structure, it may be necessary to merge various companies into a single structure, spin off or sell certain operations, implement exchange offerings or carve out the assets and business

[3] Many of these same questions can be asked of a founder-entrepreneur who maintains a dominant management and ownership position in the company.

operations of the company to be taken public. This process should occur as a companion to simplifying the capital structure of the company being taken public.[4] Audited financial statements for the reorganized company covering the required time periods will also have to be prepared, which could take several months to complete.[5]

Shareholder arrangements deviating significantly from one vote per share for all shareholders and equal treatment on sales proceeds and distributions are frequently discouraged, although in certain situations maintenance of operating control where the success of a company is closely aligned with an individual or a family may be desirable.

For companies organized in jurisdictions with unknown corporate laws or court systems, investment bankers may advise and investors may require that a holding company be organized as the public company in a different jurisdiction to ensure a legal governance structure with known duties and remedies and more impartial courts to resolve disputes.

4. Is the Company's capital structure suitable for a public company?

Just as investors desire an easily understood corporate and ownership structure, they also desire a simple capital structure.

Does the Company have several series of convertible preferred stock, convertible debt securities or multiple classes of common stock with different voting or economic rights?

If present, and considered to be unacceptable to new investors, exchange offers of new securities, often of the same class to be sold to the public for the preferred stock, debt securities or alternate class of common stock, should be negotiated, documented and implemented prior to filing the IPO. Unless maintenance of voting control in the controlling shareholder(s) is desirable from the investor's point of view, super-voting shares may have to be exchanged for one vote per share or preferred shares with more limited approval rights.

Do convertible preferred shares and convertible debt securities automatically convert upon an underwritten public offering of the size and the share price contemplated?

If not, the offering may be reduced to a level below the threshold required for conversion, the Company may seek to implement amendments in the rights, preferences and privileges of the securities and to implement an exchange offer sooner rather than later.

Must the Company shares be split either forward or reverse to get an expected trading price into a typical range ($10-$20 per share) based on the estimated value of the Company and the number of outstanding shares?

Smaller per share trading prices (e.g., $5.00 or less) would result in the stock being characterized as a "penny stock", which will dissuade certain investors and result in certain additional requirements on broker-dealers under SEC rules. In addition, listing standards of stock exchanges require minimum trading prices as a condition for continued listing.

If the offering is to be made by means of a sponsored ADR program, the target per share price can be achieved without a stock split by setting the exchange ratio of the ADR to the underlying company shares at the desired level.

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[4] *See* discussion under Question 4.
[5] *See* discussion under Question 7.

Do certain large shareholders have the right to include their shares in the IPO pursuant to registration rights?

If yes, early discussions with underwriters must be held in order to reconcile the allocation of the IPO between primary shares issued by the company and secondary shares being sold by existing shareholders. Existing shareholders likely will be required to agree to refrain from exercising registration rights in excess of a certain amount of the offering and from selling shares in the public market ("lockup") after the IPO for several months (e.g., six months). The company may also have to negotiate the termination of registration rights, rights of first refusal, drag-along and tag-along rights if they do not automatically terminate upon the IPO to eliminate conflicting shareholder rights post-IPO.

Do shareholders have preemptive rights?

It is not uncommon for privately held companies to provide shareholders with preemptive rights in their charter documents. Some jurisdictions require preemptive rights by statute. Preemptive rights can be viewed positively in an IPO as a sign of confidence in the company's prospects; however, once the company is public, preemptive rights can prove cumbersome if a necessary capital infusion is required quickly. If legally permitted, preemptive rights should be eliminated once the company becomes public.

5. Are the Company's charter documents appropriate for a public company listed in the target jurisdiction?

A company's charter documents (e.g., articles and bylaws) should be suitable for a public company in the jurisdiction in which the company is organized or its shares are traded.

Do the company's charter documents provide for any of the following:

- preemptive rights
- restrictions on share transfers (e.g., consent or rights of first refusal)
- cumulative voting
- special voting requirements (e.g., supermajority requirements)
- special information rights
- rights to board seats
- corporate approval rights by class of security, or
- co-sale rights

If any provisions of this nature are present and do not automatically terminate upon the planned IPO, negotiations may have to be held with the affected shareholders with the aim of eliminating them upon the IPO.

6. Does the Company have a corporate governance structure expected of a public company in international capital markets?

Many companies view the corporate governance requirements for publicly listed companies, including independent board members, as a necessary evil in the IPO process. While there is no consensus that good corporate governance practices lead to good stock market performance, it is hard to disagree with the proposition that bad corporate governance practices should be avoided.

Many governance requirements found in the law and stock exchange listing requirements have been adopted to avoid abusive practices. For example, many of the requirements found in the restrictive Sarbanes-Oxley Act can be traced to major corporate frauds and failures in the United States that occurred in the 1990s. The numerous trading suspensions and enforcement actions taken recently against foreign private issuers who went public in the United States by means of reverse mergers into public shells led to additional restrictions and heightened disclosures for these types of transactions.

The SEC has adopted specific rules applicable to foreign private issuers that are designed to recognize international and home jurisdiction standards. In general, and subject to certain conditions, the rules provide that:

- Foreign private issuers may present financial statements pursuant to U.S. GAAP, International Financial Reporting Standards ("IFRS"), or home country accounting standards with a reconciliation to U.S. GAAP;
- Foreign private issuers are exempt from the proxy rules under the 1934 Act;
- Insiders of foreign private issuers are exempt from filing beneficial ownership reports required by Section 16(a) of the 1934 Act and are not subject to the short-swing trading rules under Section 16(b) of the 1934 Act;
- Foreign private issuers are exempt from the disclosure requirements of Regulation FD;
- Foreign private issuers may use particular registration and reporting forms designed specifically for them;
- Foreign private issuers may have their shares or ADRs trade on the OTCQX without having to comply with the 1934 Act reporting requirements, subject to certain conditions; and
- Foreign private issuers may avail themselves of the benefits offered by the Jumpstart Our Business Startups Act ("JOBS Act"), including confidential filing of registration statements, market testing in advance of filing, more limited financial disclosure, and exemption from the attestation requirements.

U.S. law and NYSE and NASDAQ rules each have corporate governance standards that cover board and committee independence, duties and responsibilities of board committees, codes of conduct and related party transactions. While domestic U.S. issuers must comply with all of these standards, foreign private issuers[6] are permitted to comply instead with home country governance practices.

SEC, NYSE and NASDAQ permit foreign private issuers to follow the governance requirements of their home countries in lieu of the U.S. rules for such matters as independence of directors, compensation and

[6] A corporation incorporated or organized under the laws of a non-U.S. country is a "foreign private issuer under SEC Rule 405 under the Securities Act of 1933 and SEC Rule 3b-4 under the Securities Exchange Act of 1934, unless (A) more than 50% of the corporation's outstanding voting securities are directly or indirectly held of record by residents of the United States, and (B)(i) the majority of its executive officers or directors are U.S. citizens or residents, (ii) more than 50% of its assets are located in the United States or (iii) its business is administered principally in the United States. If a non-U.S. corporation ceases to qualify as a "foreign private issuer," it will become subject to the provisions of the U.S. securities laws and U.S. stock exchanges applicable to a domestic (U.S.) corporation.

For purposes of this definition, a foreign private issuer should calculate its U.S. ownership by taking account of beneficial ownership reports provided to it or publicly filed (in the United States. or other jurisdictions) and by looking through the record ownership of "street name shares" (shares owned of record by brokers, dealers, banks and nominees located in the United States or other jurisdictions). The calculation of U.S. ownership is made annually as of the last business day of its second fiscal quarter and need not worry about increases in such ownership until the next annual test.

nominating committees, and the composition of audit committees. The U.S. exchanges require, however, a foreign private issuer to disclose in its annual report on Form 20-F or Form 40-F each NYSE or NASDAQ corporate governance requirement that it does not follow and the alternative that it does utilize. In addition, both the NYSE and NASDAQ require written notification of any noncompliance with the applicable U.S. corporate governance rules.

Does the Company have an audit committee of at least three independent board members?

All U.S. companies that list on a U.S. national exchange eventually must have a fully independent audit committee of at least three independent board members,[7] one of which should be a "financial expert."[8] Foreign private issuers, however, are granted exemptions[9] from the SEC independence requirements for Audit Committees for the following practices:

- *Employee representation*: If a nonmanagement employee is elected or named to the board of directors or audit committee of a foreign private issuer pursuant to the governing law or documents of that company, an employee collective bargaining or similar agreement, or other home country legal or listing requirement, that employee may serve as a committee member.

- *Two-tiered board systems*: Many non-U.S. companies have a management board and a supervisory/nonmanagement board. The SEC treats the supervisory board as a "board of directors" for purposes of the 1934 Act. As such, the supervisory board itself can act as the audit committee for purposes of the 1934 Act or it can select a separate audit committee.

- *Controlling shareholder representation*: The SEC permits one member of a foreign private issuer's audit committee to be a shareholder, or representative of a shareholder or shareholder group, owning more than 50% of the foreign private issuer's voting securities, subject to certain conditions.

- *Foreign government representation*: In some instances, a foreign government may be a significant securityholder or own special shares that entitle the government to exercise certain rights related to the company. The SEC permits a representative of a foreign government to be an audit committee member, subject to certain conditions.

- *Listed issuers that are foreign governments*: Listed issuers that are also foreign governments are exempt from the SEC independence requirements.

- *Board of Auditors*: The SEC permits auditor oversight through a board of auditors, subject to certain conditions.

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[7] Under SEC Rule 10A-3, an issuer need only have one fully independent member at the time of its initial listing in the United States, a majority of independent members within 90 days of listing, and a fully independent audit committee within one year of listing. Under Rule 10A-3, "independent" means that no member of the audit committee may be an "affiliated person" of the issuer of any subsidiary of the issuer and may not accept any consulting, advisory or other "compensatory fee" from the issuer of any of its subsidiaries, other than compensation paid to a director for service on the board of directors.

[8] A person who has <u>all</u> of the following attributes: (i) an understanding of generally accepted accounting principles and financial statements; (ii) the ability to assess the general application of those principles in connection with the accounting for estimates, accruals and reserves; (iii) experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to those than can reasonably be expected to be raised by the issuer's financial statements or experience actively supervising persons engaged in such activities; (iv) an understanding of internal controls and procedures for financial reporting; and (v) an understanding of audit committee functions. *See* SEC Release Nos. 33-8177 and 34-47235 (Jan. 23, 2003).

[9] *See* SEC Rule 10A-3(b)(iv).

If there is no financial expert on the audit committee, the foreign private issuer must explain why in its annual report on Form 20-F.

Does the Company have governance policies and procedures in place?

In addition to qualified, independent board members, a domestic public company is expected to have governance principles and reporting policies. Among those expected of U.S. public companies are:

- Code of Conduct and Ethics
- Insider trading policy
- Whistleblower policy

In addition, most public companies in the United States. also have the following:

- Communications policy to avoid violating SEC Reg. FD
- Compliance and ethics programs
- Corporate governance principles

The SEC and U.S. stock exchanges permit non-U.S. companies to comply with governance requirements of their home countries, instead of those required of U.S. companies. Even if not required, however, adherence to those rules could be viewed favorably by U.S. and home country investors.

7. Is the Company's board of directors and senior management team qualified by background and experience for a public company?

The ideal IPO executive team will have a successful track record running companies in the industry sector and have at least one successful IPO in their experience. The two most important positions are a CEO, or COO if the CEO position is filled with an active founder, and CFO. This is important both from the standpoint of an IPO as an event, but more importantly as being engaged in the process of transforming a private company and operating it successfully as a public entity.

For the CEO/COO, this experience will indicate a knowledge of legal and market obligations, public company etiquette, experience with public scrutiny, including answering questions from the press and analysts, and how to deal with crises as a public company. One of the good decisions made by Facebook prior to its IPO was to bring on board Sheryl Sandberg as its Chief Operating Officer. Her skills were viewed as crucial in complementing the strengths and weaknesses of founder Mark Zuckerberg. For the CFO, this experience is crucial as a detailed knowledge of and familiarity with accounting and auditing principles applicable to public companies, managing the periodic reporting and disclosure process, and the ability to inspire credibility with the investment community are critically important attributes. The ability to speak English well, especially for companies going public in English-speaking jurisdictions, is critical.

Incentives of a type and amount unprecedented for the private company may be required to recruit the best senior management team. These include performance-based compensation structures, share options, greater transparency and employee involvement.

The recruitment and retention of a qualified board, including independent directors, are crucial to a successful transformation process. The ideal board should represent a mix of skills, including industry expertise, technical knowledge, business development, marketing, strategic planning, financial expertise, government relations, and acquisition integration. Public company experience is critical for at least a

majority of the independent board members. Collectively, the board should have the stature and credibility within the investment community that inspires confidence that shareholder interests will be protected and management will be held accountable for future performance.

It is highly unlikely that a private company will have many, if any, independent directors (as that term is defined in various stock exchanges and jurisdictions) prior to starting the IPO process. Therefore, substantial time and effort, as well as compensation, are required to identify, appoint and nurture a qualified board of independent directors. Even if not required, a majority of independent directors is considered ideal from a public shareholder and best corporate practice perspective.

8. Does the Company have in place the financial and reporting infrastructure and systems of a public company?

The financial infrastructure and system of a public company are very different from those of a typical private company. Much of the discussion regarding an IPO focuses on the time period for which audited financial statements are required and what effort it will take to complete those financials. The more challenging task, however, is to install well in advance of the IPO the infrastructure of qualified people, systems, policies, internal controls and procedures that will enable the production of reliable and consistent periodic reports in compliance with applicable legal and stock exchange regulations and provide a basis for accurate explanations of the company's financial results and condition to shareholders and the investment community.

Does the Company prepare its financial statements in accordance with U.S. GAAP or IFRS?

Many private companies do not have their financial statements audited. If they do, often they are prepared in accordance with local accounting standards that are audited by local auditing firms. In order to access the U.S. and other major capital markets, a company must present financial statements for minimum time periods (2-3 years), unaudited statements between the date of the last audit and end of the last quarter, and selected data for specified historical periods that have been prepared in accordance with generally accepted accounting principles of the United States or with IFRS.[10]

Financial statements for all foreign private issuers, other than those that qualify and elect to be treated as Emerging Growth Companies ("EGCs")[11] under the JOBS Act enacted on April 5, 2012, must include audited balance sheets as of the end of each of the three[12] most recent fiscal years and audited statements of income and cash flow for each of the three most recent fiscal years, the last one of which cannot be older than 12 months.

An EGC that is conducting an IPO need only provide audited financial statements for the two most recently completed fiscal years, together with two years of selected financial data and management's discussion and analysis. A foreign private issuer EGC that is dual-listing its securities in the United States. and another jurisdiction may be required to provide additional years if so required by the other jurisdiction.

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[10] The U.S. Securities and Exchange Commission accepts financial statements prepared in accordance with IFRS without the need to reconcile them to U.S. GAAP. If the company must prepare financials in accordance with local GAAP, those statements must be reconciled with U.S. GAAP in the registration statement.

[11] (i) annual gross revenues of less than $1 billion during its most recent fiscal year; (ii) issuance of no more than $1 billion in nonconvertible debt during the previous three-year period; and (iii) the initial registered public offering of stock occurred on or after December 9, 2011. Once qualified, an issuer will remain an EGC until the earliest of (i) the last day of the fiscal year five years after its IPO; (ii) the last day of the fiscal year in which annual gross revenues exceed $1 billion; (iii) the date on which it has issued more than $1 billion in nonconvertible debt during the previous three-year period; or (iv) the date on which it is determined to be a "large accelerated filer," defined as having a public float of at least $700 million and having been a 1934 Act reporting company for at least 12 months. Foreign private issuers may elect to be treated as EGCs and *must* elect EGC treatment if they wish to take advantage of the benefits offered to EGCs.

[12] If the company's home jurisdiction requires only two years, then two years of balance sheets should be acceptable.

Are the Company's financial statements certified by independent auditors of international standing?

The financial statements required to be included in the registration statements filed in connection with the IPO and annual reports with the SEC must be certified by a firm of independent[13] auditors following an examination in accordance with auditing standards and practices generally accepted in the United States and registered with the Public Company Accounting Oversight Board ("PCAOB"). While there is no requirement that the auditing firm be one of the Big 4, as a practical matter investment bankers and investors may require an audit by one of these firms.

Is the Company prepared to implement and maintain internal control over financial reporting to provide reasonable assurance regarding the reliability of financial reporting and the preparation of the Company's financial statements in accordance with IFRS or U.S. GAAP?

- Once a company has filed its initial registration statement and listing application, its financial systems, processes and controls must be able to support the timely filing of periodic reports expected of a public company by securities regulators, stock exchanges and the capital markets. An initial set of questions that a company should ask regarding its financial controls may include the following:
    - Does the Company maintain records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the Company and its subsidiaries?
    - Can the Company provide reasonable assurance that transactions are recorded as necessary to permit preparation of the Company's financial statements in accordance with IFRS or U.S. GAAP, and that receipts and expenditures of the Company are being made only in accordance with authorizations of the Company's management and directors?
    - Do the Company's procedures provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the Company's assets that could have a material effect on the Company's financial statements?

Is the Company prepared to implement and maintain disclosure controls and procedures to ensure that material information required to be disclosed by the Company in its periodic reports is recorded, processed, summarized and reported within the time periods specified in the applicable rules and forms and is accumulated and communicated to the Company's management as appropriate to allow timely decisions regarding required disclosure?

Once a registration statement for an IPO becomes effective, the issuing company must comply with the periodic reporting requirements of the 1934 Act until it deregisters under the 1934 Act. ADR holders are considered to hold the shares underlying the ADRs, and the relevant class of securities is the class of the underlying shares.

For companies that are subject to the 1934 Act reporting requirements, within four months after the close of each fiscal year, annual reports on Form 20-F must be filed with the SEC. This means that a Company that has gone public in the United States. or listed its shares on a U.S. national market must finalize its financial statements, have those statements examined by the outside auditors, prepare the information required for the Form 20-F, and present that information to the Company's Audit Committee in sufficient time to review the material, ask questions, and approve the filing of the annual report with the SEC and U.S. stock exchanges within 120 days after the end of each fiscal year.

[13] Independence standards are contained in SEC Rule 2-01 of the Regulation S-X under the 1934 Act. In addition, the PCAOB has ethics rules on auditor independence.

In addition to filing annual reports on Form 20-F, foreign private issuers are required from time to time to file a current report on Form 6-K, which requires that the issuer promptly provide to the SEC and to each U.S. stock exchange on which its securities are listed significant information that (i) must be made public in its country of domicile or incorporation pursuant to the law of that country, (ii) is filed with any foreign stock exchange on which its securities are listed and made public by such exchange, or (iii) is distributed to its security holders. Unless a non-U.S. company is required to file quarterly financial reports in its home country or with a non-U.S. exchange, a non-U.S. company subject to the 1934 Act is exempt from the requirement to file quarterly reports with financial statements with the SEC.

Does the Company have an IT system that is adequate for the financial and disclosure obligations of a public company?

Information technology is critical in helping a public company capture, organize and evaluate relevant business information quickly and easily to permit swift financial analysis and reporting. An assessment should be made of the current IT infrastructure and personnel. An upgrade to a company's IT system may be necessary in order to provide the infrastructure for the financial and disclosure controls that must be implemented to meet the Company's new obligations as a public company.

Does the Company have any significant accounting or financial reporting issues?

Prior to an IPO all significant accounting and financial reporting issues should be identified and resolved. Among these are the following:

- Adjusting historical financial statements to IFRS or U.S. GAAP
- Asset valuation impairment issues
- Revenue recognition issues
- Consolidated subsidiary financial statement issues
- Tax accounting and reporting issues
- Related-party transaction issues
- Going concern issues

It may take some time to identify and resolve issues of this type, including restating earlier financial statements. Ideally, the time to identify and resolve problems is well before the first organizational meeting for an IPO.

Does the Company have an effective tax infrastructure?

With the increasing demand worldwide for tax transparency and tax revenues, it is crucial that a company engaged in multinational operations have a tax infrastructure that is appropriate for its operations and public company status. This infrastructure should include:

- A corporate structure that lowers the effective tax rate on a consolidated basis
- A capability to develop and improve procedures to review tax issues
- An ability to manage tax risk and controversies

Successful IPO companies test their newly enhanced financial and disclosure infrastructure and personnel by acting like a public company for 2 or 3 quarters including one annual report cycle by preparing the necessary reports and backup documentation, and having those reviewed by outside auditors and presented to the audit committee within the time frames required for public companies. These dress rehearsals can spot weaknesses, and develop the confidence the entire team requires of a successful public company.

9. Does the Company face major threats that should be resolved prior to IPO?

Larger public companies are looking beyond internal financial and disclosure controls to manage the entire enterprise's risk. It is one thing to identify and disclose risks facing a company, as is required in Form 20-Fs and registration statements, it is another to manage or reduce those risks. The best managed public companies develop a comprehensive process and structure to identify and manage risks throughout the enterprise.

As part of the IPO diligence process, material litigation or similar proceedings will be identified. If at all possible, these proceedings should be resolved prior to filing the IPO. As part of a comprehensive risk management process, changes to policy or procedures should be implemented to avoid similar problems in the future.

In preparation for the IPO and to ensure future stability, material contracts should be renewed or extended or renegotiated to ensure continuity post-IPO and beyond.

10. Has the Company selected the right stock exchange and listing option?

Once a company decides that it is ready to go public, an important related question is on what stock or stock exchanges should it list. An obvious choice is to list on its domestic stock exchange; however, the company may not meet listing requirements (e.g., history of net income over a certain threshold), or the local exchange may not provide the liquidity, institutional shareholder base, or valuation that foreign stock exchanges may offer. For example, while several large established Brazilian companies have raised billions of dollars on BM&FBOVESPA over the last several years, fewer smaller growth companies were able to access capital on this exchange even after the creation of a special market for such companies.

With the globalization of capital markets and consolidation in the stock exchange sector, competitive options are available to quality companies seeking to raise capital. NASDAQ competes with the London Stock Exchange, and the Hong Kong Stock Exchange competes with NYSE Euronext, while the Singapore Stock Exchange is emerging as an attractive market for Asian (ex-Japan, Korea and China) companies. In the final analysis, the selection of an exchange is a strategic decision that should be determined after consideration of the fundamental nature of the company's business. Among the factors to consider are the following:

- Focus (industry, geography) of the exchange
- Profile of the companies that have listed recently
- IPO activity
- Listing standards and fees
- Valuation
- Depth and quality of the exchanges' institutional investors and their understanding of a company's business

- Likelihood of attracting analyst coverage
- Visibility to customers and suppliers
- Comparable companies trading on the market

It is important to understand that even if a quality company cannot list on its domestic stock exchange or that exchange is inhospitable to smaller, rapidly growing companies, there are alternatives available.

Does it make sense to list on more than one market?

Over time, listing on more than one stock exchange could be a viable option. It is not unusual for a dual listing to occur in a company's domestic market and on one foreign exchange. See, for example, the proposed IPOs of Azul SA, a Brazilian company going public and listing on both the NYSE and the BM&FBOVESPA, Form F-1/A filed May 24, 2013, and Votorantin Cimentos, a Brazilian company going public and listing on both the NYSE and the BM&FBOVESPA, Form F-1/A filed on May 29, 2013.

The advantages of this approach are to gain access to large pools of capital abroad; allow exposure to a new group of investors who might be eager to purchase shares in the open market; increase the company's visibility by additional analyst and press coverage; and open future financing options that the domestic market may not offer. The disadvantages of a dual listing include: higher cost and complexity of preparing an IPO for multiple markets; possibly more stringent listing, disclosure and governance requirements; adverse stock price movements in one market adversely affecting trading price in other markets; and return of foreign-held shares to the domestic market.

Historically, dual listings have been conducted by large companies with significant international operations and experience in dealing with multiple jurisdictions and constituencies. The magnitude and difficulty of transforming a privately held company to a public entity argue for focusing on one stock exchange for the IPO with listings on other markets, foreign or domestic, reserved for the future. With the global consolidation of stock markets, it may be more feasible to list on more than one exchange in connection with an IPO.

Another alternative that non-U.S. companies may consider is to list shares in the domestic market and conduct a concurrent private placement to qualified institutional buyers ("QIBs") in the United States under a combined SEC Rule 144A/Regulation S offering. The private placement can involve the direct offering of shares or ADRs. Under this approach the non-U.S. issuer would not be required to file a registration statement with the SEC on Form F-1 and should be exempt from the obligation to file periodic reports under the 1934 Act.[14]

[14] The QIBs can resell and trade these securities immediately, but only to other QIBs. After the passage of 12 months from this offering, the company could list the shares sold in the U.S. private placement on a U.S. exchange with the filing of a Form 20-F with the SEC, after which time the company would have to comply with the periodic reporting requirements under the 1934 Act. The QIBs may require registration rights requiring the issuing company to register the shares prior to 12 months, which would necessitate the filing of a registration statement on Form F-1 and subsequently compliance with the 1934 Act.

Conclusion

An IPO is more than a financing event or a goal in and of itself. It is a process of change in the fundamental nature of a private company to a public company with all that this entails. Experienced investment bankers, accountants and lawyers can help a company with this process, but ultimately it requires the commitment, perseverance, and vision of the current owners and senior management—some or many of whom may be displaced before the process is completed.

Companies with successful IPOs:

Evaluate alternatives before locking into the IPO track

- They consider a number of alternatives, including recapitalization and sale of non-core assets, a capital raise to a private equity fund, joint ventures and partnerships and an outright sale to a strategic or financial buyer.

Plan and prepare early

- The IPO process should start far enough in advance so that the pre-listed company can operate like a public company at least 12 months prior to the planned filing and listing.

- For planning purposes, allow the Company more time to transform itself to a public company. Delays in reaching consensus with key owners, recruiting the right people to management positions and the board of directors, installing the required financial and disclosure reporting infrastructure, and testing the efficacy of systems and procedures will take longer than anticipated. Unforeseen delays always occur and the press of normal business will compete for time. Allow enough time to generate periodic financial reports for at least 3 quarters and one annual report prior to filing.

- Consideration should be given to retain a consultant or advisor responsible for keeping the pre filing IPO process on track and preserve senior management time.

- Focus on recruiting a qualified board of directors with IPO or public company experience who should be helpful advisors and consultants in the preparatory process, including in the recruitment of qualified management personnel.

Outperform competitors on key metrics

- In order to stand out from the crowd, the successful IPO candidate outperforms the competition financially. The standard metrics by which IPO candidates are judged include sales growth, profitability, EBITDA growth, and debt-to-equity ratios. The metrics are evaluated as appropriate for the stage of development of the company. A young technology or social media company with rapid growth will be evaluated differently than an established mining or manufacturing company.

- Develop a compelling investment story backed up by a simple and effective strategy, superior performance, quality management and board of directors within positive industry and macroeconomic factors.

Treat investors as your partners

- Treat investors with the respect that they deserve as suppliers of the capital needed to succeed. Communicate with them often, listen to their concerns, and share your plans for the company. Above all, implement your plan and deliver on your forecasts.

- Deal quickly with accounting and disclosure challenges and avoid patches instead of fundamental solutions.

Focus on being a public company, not just going public

- Most entrepreneurs, and their transaction-focused advisors, focus on “going public” as an end in itself instead of becoming a public company. Many view the enhanced policies, procedures, systems, legal obligations, and added compliance and personnel expense, especially accounting and legal, as a necessary evil. This mind-set should be avoided, but if it cannot be avoided then an alternative to an IPO should be chosen.

- If executed well with proper planning and pre-IPO changes excellent, private companies can become successful public companies for all of their stakeholders.

For additional information concerning going public in the United States or any other matter relating to U.S. corporate or securities law, contact:

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