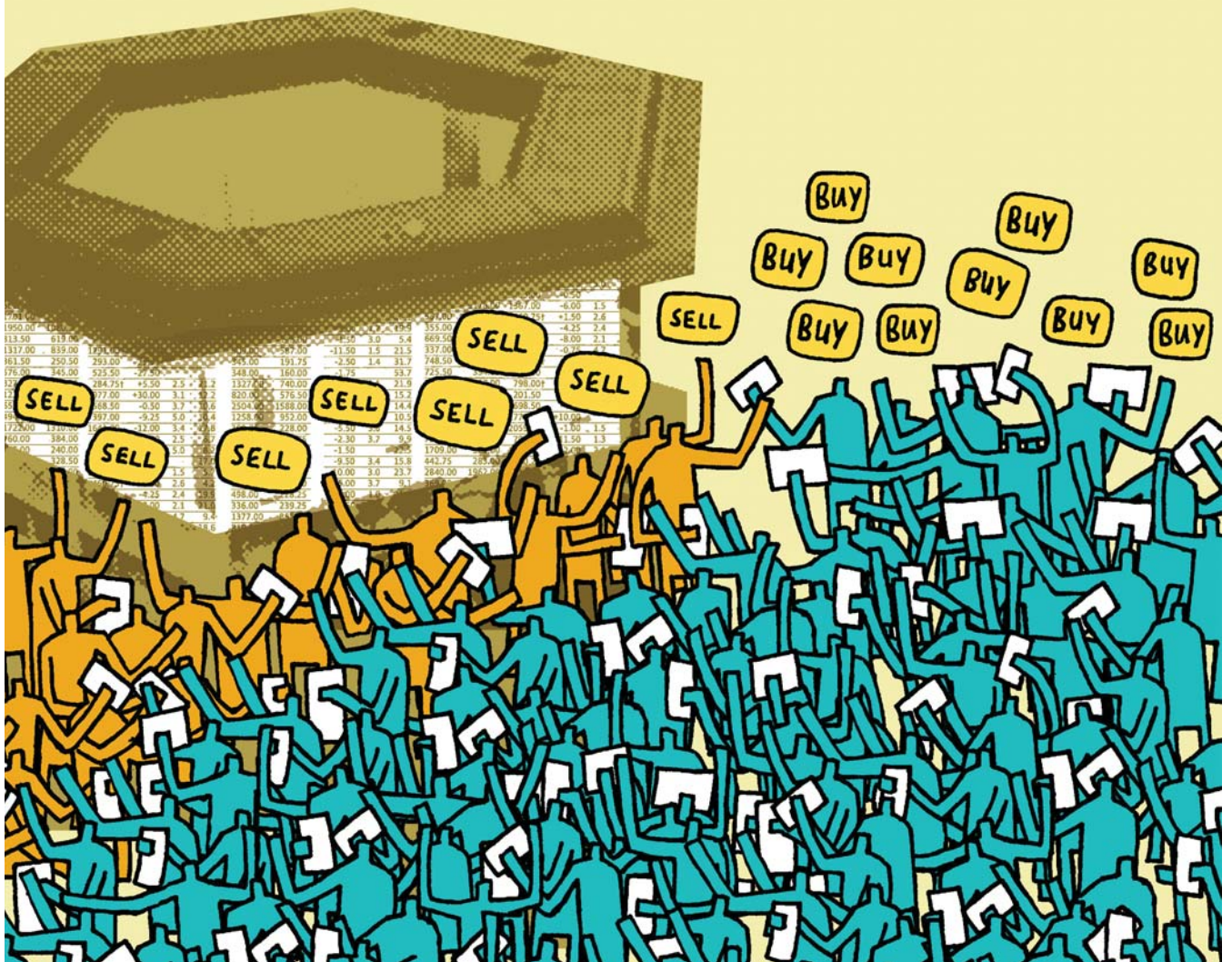


Preparing a company for an IPO

Taking a company public is a challenging process requiring careful preparation and planning. In this feature, Jim Wickenden, Adam Wells and Ben Novick highlight the main issues a company should consider when contemplating an initial public offering.



Going public is a major step in any company's life and is a challenging and dynamic process. The keys to maximising the value of a company and achieving a successful initial public offering (IPO) are careful preparation and planning and the appointment of experienced advisers. In addition, a company should have a clear understanding of the requirements of the capital markets and regulatory environments in which it operates.

This article highlights the following main issues a company should consider when contemplating an IPO:

- Whether it is ready to go public.
- The team that needs to be in place to prepare a company for the IPO.

Illustration: Tim Ellis

Going public: advantages and disadvantages

Going public offers a number of potential advantages, including:

- Ability to raise funds in the IPO to further the company's business plan.
- Having publicly-traded securities that the company can use as acquisition currency in the future.
- Ability to attract and retain personnel through employee share or option schemes in relation to publicly-traded shares.
- Liquidity for owners of the company, including any venture capital or other professional investors.
- Increased access to future capital.
- Increased market profile and stature for the company.

Going public also has a number of potential disadvantages, including:

- Detailed disclosure about the company will be made public that it may be reluctant to publish, such as information about salaries or transactions with management.
- Significant demands on senior management time during the IPO process.
- Numerous ongoing compliance obligations.
- Increased liability exposure for the board of directors and the company.
- Less flexibility and control in managing the business (for example, in a private company, corporate governance matters may be conducted more informally, and management need not be concerned with how their decisions will affect short term share price).
- Increased ongoing expenses, including professional fees.

- Where to list a company.

■ Other key issues that need to be addressed to prepare a company for the IPO, such as the preparation of financial statements and corporate governance matters.

Whether the company is ready

An IPO is the first sale of a company's securities to investors on a public stock exchange. As a preliminary matter, a company considering an IPO should ask itself whether it is ready to go public given its current stage of development and in light of its prospects. More specifically, the company should consider whether it has:

- A strong senior management team in place with sufficient public company experience to manage its life in the public spotlight.

■ A history of revenue growth and profitability with strong financial reporting controls and procedures.

- A clear strategy to achieve its objectives.

Increasingly, investors have shown little patience for public companies that cannot "hit their numbers" and deliver on their strategies. As a result, it is important that a company considering going public can answer the above questions affirmatively and with confidence.

Companies usually try to time IPOs during bull markets that are accompanied by strong investor demand. A company should carefully consider the potential advantages and disadvantages of going public before it makes its decision (*see box, Going public: advantages and disadvantages*).

The IPO team

Once a company decides to go public, one of the first steps is to assemble an experienced and trusted IPO team to guide the company through the process. This team includes:

- Internal members, such as the company's senior management.
- External members, such as the underwriters, legal counsel (for both the company and the underwriters), company accountants and others.

Each of these team members has an important role in the IPO process.

Senior management

A company's senior management team is the most important participant in the IPO process. An IPO will require a significant amount of senior management's time and energy, which should not be underestimated (*see box, Managing an IPO*). If the transaction involves an exit by a private equity firm, it is increasingly common to coordinate the IPO track in parallel with a sale track to create competitive price tension and maximise value (referred to as dual-track transactions). In these circumstances, the balancing act between the demands of the dual-track process and the demands of running a company's business is even more challenging for senior management.

Board of directors

The company's board of directors must be kept informed during the process and, as a result, the IPO timetable should reflect board meetings for the main steps in the IPO process. To satisfy corporate governance requirements, it is typically necessary to appoint at least one or two new members to the board of directors who are considered "independent" and to form new board committees (for example, audit, remuneration and nomination committees) (*see below, Key issues to address: Corporate governance*). Identifying suitable candidates for appointment to the board can take a significant amount of time and effort. Due to concerns over personal liability relating to the IPO, potential directors often insist that they be involved in the IPO process at an early stage, and will usually want to review a company's indemnification and insurance arrangements.

Underwriters

The selection of underwriters is an important step in assembling a company's

external IPO team. Many large IPOs involve two or three investment banks that act as the managing underwriters. Where multiple banks are involved, a single bank (or, possibly, two or three banks) may be chosen as the lead manager or managers (also referred to as the global co-ordinator or co-ordinators). The other managing underwriters are typically referred to as the co-managers. The lead manager is usually responsible for structuring the offering, co-ordinating the timetable, allocating responsibilities, preparing the analyst presentation, participating in the drafting of the offering document, organising the IPO “road-show” and advising on the pricing of the offering (*see box, Managing an IPO*).

On larger IPOs, the lead manager typically recommends an additional group of investment banks to help distribute the stock, which is referred to as the “underwriting syndicate.” In certain jurisdictions such as the UK, a bank also performs the regulatory role of “sponsor”. The sponsor, among other things, assesses the suitability of the company for listing and typically makes certain declarations to the securities regulator. The role each bank receives affects its allocation of the underwriting fees, which vary depending on a number of factors, including the size of the IPO and where a company is being listed. According to a study by the London Stock Exchange, the average gross commission in the US is about 5.6%, while outside the US it is about 3.5% (*Interim Report of The Committee on Capital Markets Regulation, see below, US regulatory and litigation environment*).

A recent development in Europe is the competitive IPO process. The main difference between a conventional IPO and a competitive IPO is the timing of the appointment of the underwriters. While in a conventional IPO the lead underwriters are chosen at the outset of the process, in a competitive IPO the underwriters and their respective roles are determined much later on. The perceived advantages of this structure are to give a company greater control of the IPO process, and to provide access to more information from a greater number of investment banks and potentially more favourable underwriting terms. However, competitive IPOs are relatively rare and present a number of challenges, and therefore are only likely to be attractive to a company under specific circumstances.

The selection of a particular investment bank depends on a number of factors, such as:

- **Expertise.** Some banks have expertise in specific industries, or have good relationships with institutional or retail investors in a particular geographic region. Accordingly, the merits of each bank should be considered in light of the particular circumstances of the offering and their relative strengths.

- **Initial valuation estimates.** A company’s choice of underwriter may be influenced by the banks’ initial valuation estimates of the company during the pitch process. While these estimates may be useful in assessing the prospective underwriter’s knowledge and understanding of the industry and the company, they are typically made when the IPO is still many months away and when the underwriter has not yet been appointed or conducted the due diligence necessary to create its financial models. A company’s actual valuation is ultimately driven by the market’s assessment on the date of the IPO.

- **Quality of research analysts.** Companies are also typically interested in the reputation and strength of the prospective banks’ research analysts (*see box, Managing an IPO*). In a series of settlements between the US Securities and Exchange Commission (SEC), the US Department of Justice, the New York State Attorney General’s Office and many of the major investment banks in 2003, information barriers were erected between the investment banking and research divisions of investment banks to address perceived abuses that occurred during the 1980s and 1990s. As a result of this settlement and other rules and regulations adopted in various jurisdictions, research analysts cannot participate in pitches and other communications for the purpose of soliciting investment banking business. A company should therefore consult with its lawyers to determine under what circumstances it can communicate with a research analyst before selecting an underwriter.

Issuer’s legal counsel

Selecting issuer’s legal counsel is another significant decision in assembling the external IPO team. As with the underwriters, the choice of legal counsel is an individual one. However, there are some important factors to keep in mind:

- **IPO experience.** While a company may have an existing relationship with one or more law firms, it should choose a firm to advise it that has significant IPO experience, as well as expertise in acting for listed companies post-IPO.

- **Industry experience.** As issuer’s counsel have initial responsibility for drafting the offering document, it is important that they understand the industry and can grasp the issues relevant to the company’s business.

- **Multi-jurisdictional capability.** Many large firms have lawyers who are qualified in numerous foreign jurisdictions (for example, US-qualified lawyers working in London or Hong Kong). While it is not necessary to choose a firm that can offer all of these services, it is worth keeping in mind that a company may require legal advice in multiple jurisdictions depending on the nature of the company’s business and where the company is expected to be listed and the IPO marketed.

- **Chemistry.** As with all external advisers, a company should be comfortable with the individuals it will be working with during the IPO process. A company should also consider whether it will work with these same individuals post-IPO.

The role of issuer’s legal counsel involves:

- Taking the lead in drafting the offering document and revising it throughout the stages of comments from the IPO team and the relevant government regulator reviewing it.

- Conducting due diligence on a company to gather information to draft the offering document and to help minimise potential liability for the company and its board of directors (*see box, Managing an IPO*). The due diligence process also identifies what third-party consents are required for the IPO.

- Assisting in pre-IPO corporate house-keeping matters and preparations, including any corporate reorganisations, corporate governance matters, employee incentive schemes and publicity restrictions (*see below, Key issues to address*).

- Delivering certain legal opinions to the underwriters to provide comfort that the IPO process was properly conducted.

Managing an IPO

Senior management should expect that the IPO will take significant time and effort. Some of the main areas of senior management involvement are:

- **Establishing the IPO team** (*see main text*).
- **Kick off meeting.** A meeting between senior management and external advisers should occur at a preliminary stage to discuss exactly what is expected and what the key milestones are for the IPO, the detailed timetable, what meetings senior management should attend and what information is needed from each of them during the process.
- **Due diligence.** As part of the legal due diligence exercise and to assist in preparing the offering document, a company needs to assemble a data room where its material documents are placed for review by legal counsel. It is important for the advisers to start their diligence early to allow sufficient time to address any issues that arise. The company's external advisers also typically meet with senior management to conduct business and financial due diligence.
- **Drafting the offering document.** The company's legal counsel usually has primary responsibility for the drafting of the offering document. The offering document is not only a marketing document but also a protection document. From a marketing perspective, the offering document explains the company's competitive strengths, strategy and market opportunity (often referred to as the "equity story").

Of equal importance, the offering document must inform investors of the risks relating to the company to protect the company and its officers and directors from potential liability for material misstatements or omissions. The specific content requirements of the offering document vary depending on where a company lists, where the shares are sold and the nature of its business.

The offering document typically needs to be submitted to the relevant regulator for review and comment. Depending on where the company intends to list, it generally takes six to eight weeks (or longer) and three to four submissions before the company receives final approval from the regulator.

- **The analyst presentation.** In Europe and other jurisdictions outside the US, it is common practice for senior management to meet with analysts employed by the underwriting banks before the IPO and for such analysts to publish pre-deal research on the company before the start of the roadshow (*see below*). The underwriters take the lead in preparing a presentation to these research analysts, which usually requires at least several meetings and rehearsals with senior management to prepare fully.

Senior management's presentation to the analysts is not only an important event in the IPO process but also sets the tone for the relationship the company will have with the investor community after the IPO. Analysts should come away from this meeting with a clear understanding of, and enthusiasm for, the company's business and prospects.

- **The roadshow.** This is the pivotal stage of the selling effort, and occurs after the offering document is printed. The roadshow is the opportunity for senior management to meet with investors and tell the company's equity story. It typically involves a number of presentations in various cities over several weeks, as well as one-on-one meetings with key potential investors. During the roadshow, the lead underwriter "builds a book" of investor interest in the shares to be offered, noting how many shares investors would be prepared to acquire and at what price.

- **The pricing meeting.** The pricing meeting occurs immediately after the roadshow. The underwriting banks and the company meet and review the order book, set the final price for the securities and determine allocations.

- Preparing a company for the legal environment it will operate in once it becomes a public company.

Underwriters' legal counsel

The primary function of underwriters' legal counsel is to oversee the work by issuer's counsel and advise the investment banks on their underwriting role or on any other roles they may have in certain jurisdictions (for example, as sponsor). Throughout the process, underwriters' counsel is focused on protecting the reputation of their investment banking clients by identifying and mitigating risk. Specifically, underwriters' counsel:

- Conduct due diligence on the company to assist the underwriters in satisfying their due diligence obligations.
- Prepare research guidelines.

- Review and comment on the offering document.

- Draft the underwriting agreement and related documentation.

- Co-ordinate the closing documentation for the IPO.

Accountants

A company usually engages one of the large international accountancy firms as its accountants. The terms of their engagement and the scope and purpose of their work are typically set out in a detailed engagement letter.

While the exact scope of the accountants' work depends on the operating history of the company, market practice and applicable rules in each jurisdiction, their duties usually involve delivering:

- A report on financial statements included in the offering document.

- Comfort letters to the underwriters and the company's board of directors to the effect that:

- the financial statements included in the offering document comply with applicable accounting standards; and

- other financial information included in the offering document has been properly extracted from the accounting records of the company.

The preparation of the financial statements to be included in the offering document is usually an important factor in determining the IPO timetable (*see below, Key issues to address: Preparation of financial statements*).

Other members of the external team

For a large IPO, a company usually retains an external public relations (PR) firm to help it proactively manage publicity. The PR firm monitors commentary in the market about the company, and typically has good relationships with editors of the major newspapers. In addition, a PR firm can help the company's post-IPO interaction with the market and analysts.

A company also needs to retain a financial printer responsible for printing copies of the offering document to be sent to potential investors. Printing costs can vary widely and may be significant. The underwriters and their lawyers can recommend firms to the company and solicit quotes on its behalf. These quotes should be compared carefully as different assumptions can result in significant variations in final printing costs. Once a printer is selected, the external advisers co-ordinate the printing process for the company and can help to reduce printing costs by managing the process efficiently.

Where to list

Choosing where to list a company's securities is an important decision, as it affects not only the IPO but also the regulatory environment the company will operate in after the IPO. The listing decision usually takes into account both commercial and legal factors. From a commercial perspective, a company should seek advice from prospective underwriters; they typically consider factors such as the company's funding and liquidity requirements, potential relative valuations and the strength of analyst coverage.

A company should also balance the commercial benefits of listing in a particular location against the cost and burden of regulatory compliance. For example, a company may consider pursuing a US listing because it may provide a valuation premium compared to a European listing. However, a company should weigh the potential benefits against the cost of complying with US regulation, including the US Sarbanes-Oxley Act of 2002 (SOX), and US litigation risk.

The American capital markets historically have been the largest and among the most active in the world. In 2006, global IPO volume increased from US\$167 billion (about EUR124.3 billion) in 2005 to US\$257 billion (about EUR191.2 bil-

lion). However, the continuing trend towards globalisation of the capital markets was reflected in the fact that for the first time, China had the highest dollar value of IPOs, with 155 transactions worth US\$53.5 billion (about EUR39.8 billion), compared to 235 US-listed transactions worth US\$48 billion (about EUR35.7 billion). Overall, the US market share of IPOs has declined from 57% in 2001 to 16% in 2006 (see *US Chamber of Commerce, Commission on the Regulation of US Capital Markets in the 21st Century, Report and Recommendations, March 2007*, at <http://www.capitalmarketscommission.com/portal/capmarkets/default>).

In addition, 24 of the 25 largest IPOs in 2005 and nine out of the ten largest IPOs in 2006, including the world-record US\$21.9 billion (about EUR16.3 billion) IPO of the Chinese bank ICBC, were listed outside the US (see *Ernst & Young, Accelerating Growth: Global IPO Trends, 2006* at [http://www.ey.com/global/download.nsf/International/IPO_-_Global_IPO_Survey_2006/\\$file/E&Y-SGM-GlobalIPO-Survey2006.pdf](http://www.ey.com/global/download.nsf/International/IPO_-_Global_IPO_Survey_2006/$file/E&Y-SGM-GlobalIPO-Survey2006.pdf)). According to testimony to the US House of Representatives by Marshall Carter, the Chairman of the New York Stock Exchange, "[i]n 2000, nearly half, 46.8% of the global IPO equity was raised on US exchanges. However, in 2005 only 5.7% of the dollars raised by non-US companies was raised through shares listed on US stock markets subject to US regulatory rules and oversight."

This and other similar evidence raises the question of why the US public equity markets are seemingly losing their competitiveness. There are two possible explanations for this:

- The increasing attractiveness of markets outside the US.
- The US regulatory and litigation environment.

Markets outside the US

Non-US issuers are increasingly turning to the European and Asian capital markets. This reflects in part the relative increase in liquidity of the non-US markets and the increased confidence that investors and companies have in the non-US markets as a result of more transparency and better disclosure. For example, within the EU, recent legislation, such as the EU Prospectus Directive (2003/71/EC), has created a more

consistent set of regulations for offering document disclosure, and crafted principles of harmonisation that promote the passporting of securities offerings across the EU.

From 2003 to 2005, as the European and Asian capital markets have continued to mature, the average valuation premium for non-US companies listed in the US dropped by 19% (and dropped even more for non-US companies listed in more developed markets) (see *Interim Report of The Committee on Capital Markets Regulation*).

The shift in market dynamics is also due to macroeconomic factors and more companies coming to market from the Middle East, Russia, Eastern Europe and other regions that are geographically closer to London and tend to perceive the UK or Asian markets as more welcoming. Companies also have more listing options due to the increasing global reach of institutional investors. Given that there are viable listing alternatives outside the US, many non-US companies no longer see a compelling reason to list in the US.

Since 2003, London has increased its share of the global IPO market from 5% to almost 18% (see *Joanna Chung, "Floating along in a sea of global liquidity", Financial Times, 30 May 2007*). London's junior market, the Alternative Investment Market (AIM), has increasingly become popular due to its lighter regulatory touch. Currently, about 70 US companies are listed exclusively on AIM (see *Tom Bawden, "Wall Street moves on red tape as IPO exodus continues", The Times, 30 May 2007*). Both London, with an IPO dollar value of US\$37.3 billion (about EUR27.8 billion) in 2006, and the Hong Kong stock exchange, with an IPO dollar value of US\$41.2 billion (about EUR30.6 billion), surpassed the New York Stock Exchange's US\$29.3 billion (about EUR21.8 billion) IPO value last year (see *Chung, 30 May 2007*).

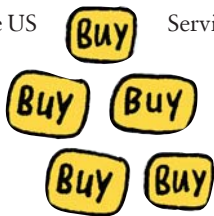
US regulatory and litigation environment

SOX, which was enacted in the wake of a number of high profile US corporate meltdowns such as Enron and Worldcom, has resulted in many non-US companies choosing to list outside the US. Section 404 of SOX has been the source of most complaints, requiring management to assess and report on the effec-

tiveness of internal controls over financial reporting and the auditor to attest and report on management's assessment of the effectiveness of internal controls over financial reporting. Many business leaders have criticised section 404 as requiring cumbersome internal and external procedures, with the costs far outweighing the benefits. The cost of complying with section 404 has been estimated by business consultants CRA International to range from US\$1.2 million (about EUR920,000) in the first year of compliance for smaller companies to US\$8.5 million (about EUR6.5 million) in the first year for larger companies.

SOX is only one of the perceived problems. The US Patriot Act and more stringent immigration regulations have sparked debate and concern in the US that international talent is increasingly choosing to work in London and other international financial centres.

When asked by Oxera Consulting in 2005 to compare the business climate in the UK to the US, business leaders preferred the UK's single, principles-based regulator, the Financial Services Authority (FSA), to the multitude of US regulators and their more prescriptive, rules-based approach. In addition, the US enforcement environment is generally more active and often perceived as more punitive than the FSA's enforcement style.



Political, business and academic leaders in the US are aware that the US public equity markets are losing competitiveness and have begun addressing the issue. For example:

- The SEC has recently amended rules that provide guidance in a number of areas cited as concerns by management in completing their evaluation of internal controls over financial reporting under section 404.
- The Public Company Accounting Oversight Board has recently adopted rules to revise the auditing standards on internal controls over financial reporting.
- The SEC has also recently adopted rules that make it easier for non-US companies to deregister from the US Securities Exchange Act of 1934, as amended (the Exchange Act).

■ The Committee on Capital Markets Regulation (the Committee), comprised of academic and business leaders in the US, was recently formed to assess why the US public markets are losing ground to foreign and private markets. The Committee, which has received support from US Treasury Secretary Hank Paulson, issued its interim report in November 2006 (see www.capmktreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf).

The report contains 32 specific recommendations, including:

- reducing the costs of complying with section 404 by clarifying its implementation;
- exempting non-US companies from section 404 if they are subject to equivalent home country requirements; and
- recommending reforms to the public and private US enforcement system, such as clarifying US liability standards and reserving criminal prosecution for exceptional circumstances.

New York Governor Eliot Spitzer recently created the New York State Commission to Modernize the Regulation of Financial Services, a panel tasked with retooling state regulations to keep New York City a competitive global financial centre. The creation of the panel follows studies commissioned by New York Senator Charles Schumer and New York City Mayor Michael Bloomberg that suggest New York City is losing ground to London and other financial hubs. Also in May, Treasury Secretary Paulson announced the creation of an advisory committee to recommend adjustments to the US accounting industry designed to increase the competitiveness of US capital markets.

The American reputation for litigation, driven by favourable US laws for plaintiff class-action suits and stringent investor protections from the SEC, has also given many non-US companies reason to pause before pursuing a US listing. Settlement of securities-related class action lawsuits in absolute terms increased from US\$150 million (about EUR115.5 million) in 2004 to US\$3.5 billion (about EUR2.7 billion) in 2005 and directors' and officers' liability insurance (D&O insurance) is about six times more expensive in the US than in Europe. According to

PricewaterhouseCoopers, even when the Enron and WorldCom settlements are excluded, the average cost of a private securities litigation settlement soared from US\$27.8 million (about EUR21.4 million) in 2004 to US\$71.1 million (about EUR54.7 million) in 2005, an increase of 156%.

Although a number of non-US companies are choosing to list on an exchange outside the US, most large IPOs by non-US companies are structured to access US institutional demand through an unregistered offering in the US pursuant to Rule 144A of the US Securities Act of 1933, as amended (see box, *Rule 144A offering*).

Key issues to address

Once the decision of where to list the company has been made, there are a number of other matters that should be considered, including:

- The preparation of financial statements.
- Corporate governance issues.
- Other corporate issues; for example, incentive schemes and employment and severance agreements.

Preparation of financial statements

The preparation of the financial statements is typically an important factor in determining the IPO timetable. At the outset, a company should agree with its advisers on the financial information that needs to be included in the offering document. If a company has a complex financial history (for example, because it has recently been spun off from a larger group or made significant acquisitions), it may be advisable to discuss at an early stage with the listing authority what financial information will be presented in the offering document. The IPO should generally be launched on the back of a company's year-end or interim financial statements.

Where a company lists and where it is incorporated affects how the company's financial statements must be prepared and what information needs to be disclosed. For example, a non-US company contemplating an SEC-registered offering in the US would be required to prepare its financial statements in accordance with US generally accepted accounting principles (US

GAAP) or provide a reconciliation to US GAAP (see above, *Where to list: US regulatory and litigation environment*).

Companies that list on a regulated market within the European Economic Area are also required to comply with specific regulatory requirements. EU issuers must present their financial information in accordance with International Financial Reporting Standards (IFRS), issued by the International Accounting Standards Board (IASB). Non-EU issuers can, until 1 January 2009, report under their home GAAP if that home-country GAAP is considered to be "equivalent" to IFRS. Although US, Canadian and Japanese GAAPs are considered "equivalent", the equivalency of GAAPs for other countries is still under consideration by the Committee of European Securities Regulators.

Corporate governance

Early on in the IPO process, a company should consider what changes need to be made to its corporate governance structure to ready itself for public life. The minimum legal requirements for corporate governance are determined by the company's choice of listing location and country of incorporation, as well as "best practices" that should be complied with, if possible. Some of the main areas that typically require consideration are:

- **The appointment of independent board members.** A private company rarely has a sufficient number of "independent" directors. It will therefore probably need to find suitable additions to its board.

- **The creation of new board committees.** Public companies typically have a number of board committees, such as:

- an audit committee to oversee compliance with internal corporate codes and external regulations and laws in relation to financial matters;

- a nomination committee, charged with creating a system for nominating directors and managing board members, as well as ensuring that the process is open to scrutiny; and

- a remuneration committee, which addresses the salaries and benefits of top executives.

- **D&O insurance.** When a company goes public, the chances of its directors

Rule 144A offering

Rule 144A is a popular method for non-US companies to access US institutional demand through an unregistered offering of their shares in the US. In 2005, non-US companies raised around US\$83 billion (about EUR63.9 billion) in equity issues in the US institutional market pursuant to Rule 144A, as compared to only US\$5 billion (about EUR3.9 billion) in the US public equity market.

Specifically, Rule 144A creates an exemption from registration under the Securities Act of 1933, as amended for re-sales of securities to qualified institutional buyers (QIBs) in the US. QIBs are generally the largest mutual funds, pension funds, insurance companies and other professional asset manager entities that in the aggregate own and invest on a discretionary basis at least US\$100 million (about EUR77 million) in securities of non-affiliated issuers. Rule 144A offerings can be conducted side-by-side with a listing and offering outside the US and therefore provide an opportunity to gain additional demand from major US institutions and to create additional price support for the IPO.

From a legal perspective, Rule 144A offers a number of advantages over an offering registered with the US Securities and Exchange Commission (SEC), including:

- Access to the US institutional market without becoming subject to the US Sarbanes-Oxley Act of 2002 (including section 404) or any significant ongoing US disclosure obligations.
- Access to the US institutional market without going through the SEC registration process (allowing greater control over the IPO timetable).
- No requirement to produce financial statements in accordance with US generally accepted accounting principles (US GAAP) or to provide a reconciliation to US GAAP, which often require significant time and expense to produce.

In addition, US liability for a Rule 144A offering is generally based on section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, as amended. A plaintiff in a Rule 10b-5 action has to show that the defendant intentionally or recklessly made an untrue material statement, or omitted a material fact. In contrast, an SEC-registered offering creates strict liability for a company.

being sued increases significantly in certain jurisdictions. For this reason, the directors generally require that the company has adequate D&O insurance. A company should discuss with its advisers what the appropriate level of coverage is based on where it lists, the type of offering and the risk profile of the company.

Other issues

Beyond corporate governance, there are a number of other issues that the senior management team (with advice from the external advisers) need to consider in preparing for an IPO. Some of the more important considerations for the team are:

- **Incentive schemes.** Consider what existing share and option schemes the company has for its employees and management, and whether new schemes will be created as part of the IPO. Analysis of

this issue usually requires the advice of specialist counsel in the fields of employment law and tax law.

- **Employment and severance agreements.** These should be reviewed for legality, and for whether or not they provide the proper amount of protection to investors in the company. The company should ensure that, as far as possible, the management team will continue to take the company forward.

- **Amending shareholder agreements.** Assess what will happen with the company's largest shareholders after the IPO. Consider, for instance, whether they will sell down their holdings, continue to have board representation or maintain any veto rights on certain company decisions. In most instances, any special rights of the major shareholder will be unwound. Legal counsel should review any written

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agreement (or oral undertaking) with the shareholders.

■ **Credit facility.** Determine whether the company's credit arrangements are adequate and whether the company has an existing credit facility in place or if it should refinance that facility in connection with the IPO. If the company is entering into a new credit facility simultaneous with the IPO, this needs to be considered in the context of the overall timetable to ensure it is completed on time.

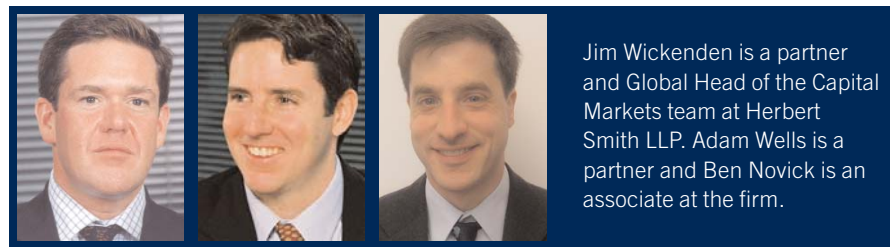
Timetable

While timing varies based on the circumstances, the IPO process generally takes from three to six months to complete once the company appoints external ad-

visers. Market conditions must also be considered when planning the IPO timetable, and this or other factors can significantly extend the timetable. However, there are a number of issues that a company can begin working on at an early stage (*see above*) to shorten the IPO process and to allow it to react more rapidly to favourable market conditions.

Expenses

Underwriter commissions vary depending on where a company decides to list and other factors (*see above, The IPO team: Underwriters*). In 2006, the average cost to complete an SEC registered IPO in the US was reportedly US\$2.58 million (about EUR2 million) (excluding underwriter commissions) (*see www.ipovital-signs.com*). Although a company's circumstances and the size of the offering may result in costs differing substantially, a company planning an IPO in Europe would likely incur similar costs in pounds sterling or euros (excluding underwriter commissions). The main non-underwriting expenses are professional fees (accounting, legal and public relations), printing and marketing costs. On top of these tangible costs are the intangible costs of the time that senior management must dedicate to the IPO process.



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