

Going Public? It pays to plan wisely

By Stuart M. Sieger

A public offering moves your company from the normal conduct of a profitable and growing business into new and unknown realms. At times a public offering will overshadow your business by diverting management resources and focusing on potential liabilities the business had never before incurred or considered. At the same time, a public offering can be a source of substantial capital with apparently little or no strings attached, and can give you currency of your own (your stock) that you can print and spend.

Most business managers and owners have some idea of the public offering process, but are not expert in how to go public. The principal source of assistance for management will come from expert Securities and Exchange Commission (SEC) counsel.

In the public offering process, one of the first steps is to structure the letter of intent with your underwriter. While this will ultimately result in an underwriting agreement that is signed just before the offering or sale, the letter of intent is the business roadmap of the process and embodies your business deal. The letter of intent deals mainly with two critical matters: how much you are raising and for what part of the company, and what the underwriter will be paid. Be prepared for these critical discussions with your underwriter, indicating key points about your historical results and most importantly, the business strategies you are developing, and be ready to deliver the most compelling presentation.

Once the letter of intent is completed, the focus shifts to two interrelated processes -- corporate "housekeeping" and the preparation of your registration statement. Most companies have been so busy building their businesses that they have paid little attention to critical due diligence items, such as documenting their intellectual property, structuring agreements with key employees, looking at stock option plans, documenting business alliances and turning them into long term agreements, making sure that licenses are in place for rights being used informally, and formulating a capital structure that appropriately rewards the people who helped you get to the public offering. These omissions are common in today's severely shortened business development cycle. Indeed, some or all of these items are on the underwriter's hit list in the letter of intent and will have been negotiated.

At the same time, your management should prepare the registration statement. Drafting is carried out by your SEC counsel with substantial input from, and review by, your management. This is the central task of the public offering. Your company and your controlling stockholders, who will often also be your management, will be liable for an inaccurate or misleading registration statement (which can be viewed as the investors' "insurance policy"). This liability is asserted when, despite the financing, your business does not prove to be as successful as expected, or indeed fails. In either case, the assertion by purchasers of a demand for return of their money can be the final blow to a weakened business model. In the case of a failed business, the liability can be transferred to the founders and controlling stockholders. The underwriters are also liable for an inaccurate or misleading registration statement. Your registration statement should make full disclosure of all material risks while presenting a portrait of your business to encourage investment.

You must thoroughly understand your business, its potential as well as its risks. Your executives want the deal to go through and not to dwell on negatives. The best guarantee that the job will be done fully and carefully is to use attorneys who have done it before. SEC counsel must have an intelligent and informed grasp of business and accounting principles in general, and a clear understanding of the dynamics of the industry in which you operate. SEC counsel must also have the courage and tenacity to get to the heart of matters, including negatives, when your executives are inclined to cast a rosy

glow. Good SEC counsel is, at times during the process, adversarial to his or her own client, albeit for good reason.

The language of the registration statement is important, especially with the SEC's plain English requirement. The registration statement can accomplish its dual purpose of protecting management and portraying the positives of your business only if it is exceedingly well written and is a highly effective communication to non-lawyers in which there is no room for "legalese." Certain language should be used that will protect both your management and the underwriter.

The SEC comments on the registration statement, and the National Association of Securities Dealers (NASD) comments on the underwriter's compensation. Before going "effective," you have to effectively deal with Securities Exchange or NASDAQ listings and other technical matters, negotiate the underwriting agreement (which may vary materially from the letter of intent), and help get the deal closed and the money in the bank. The principal point of contact between your company and these agencies is your SEC counsel, and the process often requires a substantial amount of negotiation.

If all this sounds highly skilled and demanding, requiring legal expertise, business sense, the ability to manage relationships and the strength to "do the right thing," it does! Your SEC counsel is a key player in your business and works to keep your company and management out of harm's way. You will literally live together during the public offering process and will develop a strong bond of trust. Therefore, as with all things in business and elsewhere, it pays to choose your SEC counsel wisely.

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