

Morgan Lewis



Emerging Life Sciences Companies

second edition

Chapter 28

Outline of Issues for a Biotech Company
to Consider In Preparing for an IPO

Chapter 28

OUTLINE OF ISSUES FOR A BIOTECH COMPANY TO CONSIDER IN PREPARING FOR AN IPO

Advanced planning is critical for a life sciences company contemplating an initial public offering (IPO). With market forces narrowing available “windows” to go public, an issuer that is well-prepared shall be able to consummate an offering when the timing is right. The outline below provides an overview of many of the issues that will need to be addressed by a company considering an IPO.

Issues to Consider in the Year in Advance of IPO Kick-Off Meeting

- A. Estate planning for executives
- B. Hire experienced IPO counsel
- C. Choose accounting firm and confirm accounting firm partner has IPO experience
- D. Ensure availability of audited financial statements for requisite periods
- E. Establish website and public communications policy
 - 1. Update website sufficiently in advance of IPO to establish a history of ordinary course business and financial communications
 - 2. Limit website and other public communications to ordinary course business and financial matters
- F. Establish rational fair market value exercise price for option grants to avoid 409A and 123R issues
- G. Consider accelerating vesting for, or canceling, out-of-the-money options
- H. Repay officer and/or director loans
- I. Assess sufficiency of minute books and other corporate records
- J. Obtain directors’ and officers’ (D&O) insurance and understand required IPO upgrades
- K. Consider impact of product development and launch schedules on IPO timing to avoid negative surprises
- L. Add independent directors to board of directors

- M. Consider any required upgrades to management team
- N. Upgrade internal controls, including Sarbanes-Oxley compliance, to ensure integrity of financial statements and sound corporate governance
- O. Prepare due-diligence materials, including all FDA and intellectual property (IP) support
- P. Prepare fact book to support market data

Formation of Working Group

- A. Management
- B. Company counsel (including regulatory and IP counsel for IPO transaction)
- C. Managing underwriters
- D. Underwriters' counsel
- E. Auditors
- F. Transfer agent
- G. Financial printer

Issues to Consider in Choosing Managing Underwriters

- A. Firm's expertise in life sciences industry
 - 1. Recent transactions
 - 2. After-market performance
- B. Resource commitment (during and after the transaction)
 - 1. Investment banking team
 - 2. Research analyst (note independence requirements)
 - 3. Market-making activities
- C. Research positioning in life sciences industry
 - 1. Current coverage universe
 - 2. Firm's ability to articulate the Company's opportunity
- D. Valuation, structure, and timing
 - 1. Approach to valuation
 - 2. Transaction terms (see "Structure of Offering" section later in this outline)
 - 3. Filing strategy/pricing strategy

4. Recommendation on timing
- E. Proposed spread and other underwriters' compensation matters
- F. Recommended selling strategy
 1. Institutional vs. retail
 2. Domestic vs. international
 3. Road show recommendations
- G. Specific qualifications as a manager
 1. Differentiation from other investment banking firms
 2. Value-added capabilities
- H. Lead managers
 1. Number of lead managers
 2. Fee split arrangement
- I. Any recommended changes in Company's management team or corporate strategy?
- J. Ask to speak with CEOs of other clients
- K. Underwriter's compensation issue if affiliate of underwriter is an investor

Timing of and Responsibilities for Offering

- A. Begin to prepare S-1 prior to kick-off meeting
- B. Internal preparation meetings before kick-off meeting
- C. Kick-off meeting—Week 1
- D. Drafting meetings—Weeks 1–4
- E. Due diligence—Weeks 1–4
- F. Filing target date—End of Week 4
- G. SEC review period
 1. Thirty to thirty-five days to first comments—End of Week 9
 2. Fifteen days to complete response—End of Week 11
- H. Road show schedule/presentation—Weeks 12–15
- I. Possible shareholders' meeting (see "Corporate Structure Issues" section later in this outline)
- J. Other lead-time issues (e.g., artwork for prospectus, requests for confidential treatment)

Structure of Offering

- A. Offering entity
- B. Offering size
 - 1. Primary
 - 2. Selling shareholders, if any
 - 3. Overallotment option (size and split between company and any selling shareholders)
- C. Use of proceeds
- D. Syndicate strategy
- E. Shares to be reserved for specific investors or syndicate members
- F. Underwriter compensation—anticipated discount from price to public
- G. Road show
- H. NASDAQ National Market/New York Stock Exchange listing
- I. Ticker symbol preference (reserve in advance)
- J. Directed share program

Corporate Structure Issues

- A. Board of directors; management; employees
 - 1. Directors
 - a. Composition of board after offering—a majority of independent directors
 - b. Committees, including audit and compensation committees with at least three independent directors
 - c. Director compensation arrangements
 - (i) Cash compensation
 - (ii) Stock option compensation
 - (iii) Committee compensation
 - d. Audit Committee “financial expert” and other financially sophisticated matters
 - 2. Officers
 - a. Titles
 - b. “Executive” officers vs. “senior” officers

- c. Section 16 insiders—reporting and compliance issues
 - d. Employment arrangements
 - e. Incentive arrangements
3. Employees
 - a. Noncompete, nonsolicitation, and confidentiality arrangements
 - b. Incentive arrangements and plans
 4. Option and benefit plans
 - a. Compliance with ERISA, tax, and securities laws—Rule 701
 - b. Consider plans or plan amendments
 - (i) New equity compensation/stock option plans
 - (ii) 401(k) plan (match feature with or without company stock feature)
 - (iii) Employee stock purchase plan
 - c. SEC registration of shares issuable upon exercise of options (Form S-8)
 5. D&O liability insurance
 - a. Coverage amount
 - b. Cost
 - c. Breadth of coverage
 - d. Deductibles
- B. Corporate structure
1. Charter and bylaws—review and make any necessary changes
 - a. Review capital structure (make sure that there will be sufficient common stock and blank check preferred)
 - b. Antitakeover provisions, including consideration of a classified board
 - c. Remove any unnecessary provisions
 - d. Review indemnification provisions
 2. Review corporate structure
 - a. Consider merging subsidiaries into parent prior to offering
 - b. Tax issues, including the use of a Delaware or foreign “technology” subsidiary for state tax planning

3. Corporate records
 - a. Review minute books for completeness and accuracy
- C. Share capital
 1. Review existing shareholder list
 - a. Registration rights/waivers
 - b. Lock-ups
 - (i) Existing lock-ups required by financing agreements
 - (ii) Requests for new lock-ups
 - (iii) Lock-ups in option agreements
 - c. Preemptive rights; antidilution provisions
 - d. Accuracy and completeness of stock book
 2. Identify all issuances of shares since formation
 - a. Shares authorized and outstanding—amend charter as necessary
 - b. Transition stock recordkeeping to transfer agent
 - c. Stock options outstanding and to be granted
- D. Corporate governance
 1. Prepare new board committee charters
 2. Prepare code of conduct that includes code of ethics (note specific issues for biotech companies)
 3. Prepare insider trading policy
 4. Prepare disclosure controls and procedures

Review Legal Issues

- A. Outstanding claims—resolve if practical to do so
- B. Third-party consents
- C. Disclosure issues
 1. Confidentiality agreement restrictions
 2. Material contracts
 - a. Identify
 - b. Disclosure issues

- c. Exhibits to registration statement
- d. Confidential treatment
- 3. Related-party transactions
 - a. Identify
 - b. Consider if advantageous to continue
 - c. Review documentation
 - d. Ratification by independent directors
- 4. Regulatory progress and issues
- 5. Status of IP and any infringement issues
- 6. Employment agreements
- 7. Management compensation
- 8. Option grants to executive officers
- 9. Pending acquisitions or other material transactions
- 10. Restrictions on future activity contained in development, co-promotion, and other business agreements
- 11. Antitakeover provisions
- 12. D&O questionnaires—identify any issues raised by responses
- D. Make sure that there is appropriate trademark protection for the Company’s name and that there are no other IP conflicts
- E. Review web page for “gun jumping” and substantive issues
- F. Blue-sky matters—most likely not an issue as a result of NSMIA
- G. Review NASD affiliations, if any
- H. Consider safe harbors and implications of 2005 securities offering reforms

Accounting and Financial Issues

- A. Preparation and audit of financial statements—three years or from inception
- B. Need for unaudited interim financial statements—SAS 71 review
- C. Historical option pricing or other cheap stock issues
- D. Historical review recognition policy
- E. Management’s discussion and analysis of financial condition and results of operation

- F. Comfort letter from auditors to underwriters (note: underwriters may request comfort on all five years included in selected financials)
- G. Management letters
- H. Availability and discussion of forecast information
- I. Tax issues—NOLs (Section 382 analysis); 409A-related matters
- J. Goodwill/intangibles
- K. SEC requirements for separate financials in connection with acquisitions
- L. Pro forma presentations

Interaction with Public During Offering Process; Publicity

- A. Prior to filing
- B. Registration period
- C. Posteffectiveness
- D. Filing press release—Rules 135, 134
- E. Employee communications
- F. Website communications
- G. Analyst and investor meetings
- H. Public relations firm
- I. Communications with existing investors

Postoffering Issues for Underwriters

- A. Continuing market making
- B. Provision of research reports
- C. Follow-on offering
- D. M&A services