An Expert's View

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Will serves as co-head of the firm's Corporate Department. His practice focuses on representing issuers and investment banking firms in connection with a wide variety of public and private securities offerings, including high-yield and investment grade debt offerings, IPOs and other equity and equity-linked offerings.

Will examines recent developments in IPOs:

EGCs are clearly taking advantage of the confidential submission process, with more than 90% of issuers that are EGCs filing confidentially in the first half of 2014. Are EGCs taking advantage of any other accommodations available to them under the JOBS Act?

Our experience has been that EGCs are taking advantage of several other accommodations available to them under the JOBS Act. In particular, most EGCs have provided reduced executive compensation disclosures, including no CD&A (Compensation Discussion and Analysis) and disclosure regarding fewer officers. In addition, many EGCs have chosen to present a reduced number of years of financial statements and selected financial data. The reduced financial disclosure is particularly popular among smaller EGCs, as well as EGCs whose older financial information may not be as relevant to investors in evaluating its current or future performance, such as start-ups and companies in high-growth industries.

EGCs are also utilizing the testing the waters option. Testing the waters allows EGCs to communicate with qualified institutional buyers and other institutional accredited investors before or after the initial filing of a registration statement in order to measure potential investor interest in the IPO. This is at least contemplated in almost every deal. Testing the waters can provide helpful information regarding the potential size and timing of an IPO. Finally, EGCs have been choosing to defer compliance with Section 404(b) of the Sarbanes-Oxley Act, which requires an independent auditor's assessment of the company's internal control over financial reporting.

The extent to which EGCs are not taking advantage of accommodations afforded them is usually driven by marketing considerations and determinations on what the market is willing to accept. It is a deal-by-deal analysis, which depends on the particulars of the deal (for example, the industry) and how hot the market is.

Are you seeing any changes in terms of the lock-up agreements for the company or its officers and directors?

Generally, no. While the terms of the lock-up agreements vary from deal to deal, there have not been any discernible trends. In a few deals, however, we have received requests for lock-up waivers to be able to be given by less than all the lead bookrunners.

In a typical transaction, the lead bookrunners act as representatives of all the underwriters and take primary responsibility in negotiating the terms of the lock-up agreement on the underwriters' behalf. Normally, the prior written consent of all the representatives would be necessary for a lock-up waiver to be given to the company or its officers and directors. However, we have been seeing instances where the representatives have agreed to lock-up waiver provisions that require the consent of only a majority, rather than all, of the representatives.

Have you seen any identifiable trends relating to changes in prospectus disclosure? Have the SEC comment letters focused on any particular disclosure requirement?

One trend relating to prospectus disclosure we have noticed is the foreshadowing of future impairments of goodwill and other long-lived assets. The SEC has been focusing on disclosures around goodwill and other long-lived assets that may potentially be at risk for a material impairment charge. This is consistent with the SEC's recent focus on "fundamentals" and financial reporting from an enforcement perspective. The general idea of foreshadowing impairments receives significant attention in the SEC's Financial Reporting Manual, in which you can find a helpful discussion in Section 9510.

In terms of comment letters, in circumstances where the fair value is not substantially in excess of its carrying value, the SEC has asked for more detailed disclosures in the MD&A, including:

- The percentage by which the fair value exceeds the carrying value.
- A description of the material assumptions that drive estimated fair value.
- A discussion of uncertainties associated with each key assumption.
- A discussion of the potential events, trends and/or circumstances that could have a negative effect on estimated fair value.

These disclosures are intended to assist a potential investor in assessing the likelihood of a future material impairment and in better evaluating the financial condition of the issuer.