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This book brings together in one place the information that companies and their advisors need to know as they prepare for an initial public offering and the beginning of life as a public company. From David’s many years in the IPO trenches, he has heard all the questions that come up in the IPO process. These range from nuts-and-bolts “how to” questions, like what happens at the printer, to much more esoteric ones, like how does bookbuilding work—and everything in between. In this book, he shares his tremendous knowledge and that of many others who contributed to this enormous effort in a presentation that should help anyone in the IPO world perform better. In today’s tumultuous securities markets, it is more important than ever to be well prepared in order to increase the chances of successful IPO execution.

As a former SEC staff member, I believe that the insights contained in this book—including what the staff looks for in a registration statement, what to expect in the SEC comment process, what the staff’s role is (and is not), and how to interact with the staff—should significantly improve the experience for all involved. With a greater understanding of the process of going public and of working with the staff, companies will be better equipped to avoid the common pitfalls that slow down the review process and frustrate everyone.

As a private practitioner, I know that this book will be an invaluable resource for IPO companies and their advisors. Many of the problems we wrestle with in getting a company ready to go public can be avoided by just being sensitive to the issues from the very first days of the company’s life. Although skilled lawyers can fix most things if a company gets off on the wrong foot, the IPO process will be a lot smoother and more efficient if the company starts in the right direction. This book walks companies and their advisors through the essential steps of IPO preparation, from incorporation through the organizational meeting and beyond.

Above all else, this book should help to level the playing field in terms of IPO information. Each company has only one IPO. While some companies bring an IPO veteran or two into management to help with the process, that often is not the case. Just the jargon of going public—confidential submissions, nonpublic review, test-the-waters, XBRL, green shoes, red herrings, FWPs, blood letters, bedbug
letters, institutional pots, FinCEN certifications, the global settlement—can overwhelm even the most capable and confident team. And other topics a private company may think it knows well—such as GAAP accounting—turn out to have some twists in the public company context. Now companies going through the IPO process will have a valuable resource to help them frame smart questions and make better decisions.

Successfully completing an IPO can be a career high point for everyone involved. With the information that David so generously shares in this book, we all should have a better chance of having that experience.

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October 2018

Ms. Cross served as Director of the SEC’s Division of Corporation Finance from June 2009 through the end of 2012. During her tenure, Ms. Cross led the Division’s efforts to implement both the Dodd-Frank Act and the JOBS Act, including the Division’s pragmatic response to numerous issues arising from the “IPO on-ramp” provisions of the JOBS Act. Under her leadership, the Division recommended rulemaking releases to the Commission relating to say-on-pay, conflict minerals, proxy access, compensation committees and compensation advisers, asset-backed securities, the new regulatory regime for derivatives, and other topics. Between 1990 and 1998, Ms. Cross served the Division in a variety of capacities, including as Chief Counsel and Deputy Director. From 1998 to 2009, Ms. Cross was a partner at WilmerHale, advising clients on corporate and securities matters. She rejoined WilmerHale as a partner in April 2013.
Preface

Initial public offerings have a special allure in both the business world and popular culture. Many entrepreneurs—and the investors in their companies—aspire to an IPO, and the term “going public” conjures up images of wealth, success, and excitement. Rock-star IPOs by companies such as Alibaba, Facebook, Google, and Twitter add to the buzz. Yet, despite widespread interest in IPOs, the actual process of planning for and completing a successful IPO is not well understood by those who have not been through it—and even seasoned IPO veterans will find that the process continuously changes.

This book is designed to meet the market need for a straightforward and practical guide to, and explanation of, the IPO process. A handful of IPO-related guidebooks are available, and several securities law treatises of prodigious length and complexity exist; but this book has a different purpose and approach:

• By focusing only on IPOs, this book is of manageable scope and complexity.

• This book is intended for C-level officers (chief executive officers, chief financial officers, chief accounting officers, and chief legal officers) and board members of companies contemplating an IPO—and counsel to these companies. It should also be helpful to professionals in related fields, such as venture capital, private equity, accounting, investment banking, and investor relations. Although the subject matter involves legal matters, this book is not legalistic. IPOs are grounded in the securities laws, but readers need not be securities lawyers. This book is more a conversation about the essential elements of the IPO process than a treatise packed with technical securities law esoterica.

• Important subjects that other IPO guides only touch on—or omit altogether—are covered in this book, including the key attributes of successful IPO candidates; accounting preparation; pre-IPO financial planning for executives; the sources and nature of corporate governance requirements; how to navigate through SEC review; and the actual workings of the underwriting process. This book reviews the considerations applicable
to IPOs by “emerging growth companies” under the JOBS Act; explains the SEC staff’s new nonpublic review process; and discusses special types of IPOs, such as dual tracks, SPAC IPOs, Regulation A IPOs, spin-off IPOs, Form 10 IPOs, Rule 144A IPOs, direct listings, reverse-merger IPOs, tracking stock IPOs, post-bankruptcy IPOs, cross-border IPOs, and IPOs by venture capital–backed, private equity–backed, life sciences, and smaller reporting companies.

- The text of this book is interspersed with selected empirical data to address common questions—for example, the duration of the IPO process from initial filing or submission of an IPO registration statement to closing; turn-around time for SEC review of the initial filing or submission of the registration statement and each amendment; the prospectus sections that draw the most SEC comments; the extent to which emerging growth companies are taking advantage of the relief available to them; variability in underwriting discounts for IPOs; the prevalence of selling stockholders in IPOs; the use of takeover defenses by IPO companies; the frequency of directed share programs; the typical number of directors and executive officers in companies going public; and the percentage of IPO companies that engage “Big 4” accounting firms.

- Many chapters include IPO planning tips to help companies anticipate and address topics that otherwise might create problems or disrupt the IPO process. This book also includes sample checklists, questionnaires, and governance materials for use by IPO companies. No legal form is truly turnkey, but these samples have been battle-tested in dozens of IPOs and should provide a solid starting point for companies and their lawyers.

This book omits reproductions of the voluminous statutes, SEC rules, and other public-domain source materials that govern or affect IPOs. Legal matters are discussed to the extent appropriate for the book’s mission, but the Internet is a vastly more efficient, current, and eco-friendly way for interested readers to access these materials.

IPOs have weathered cyclical, economic uncertainty, market upheavals, regulatory reforms, and occasional scandals to remain a fixture in the financing landscape. The Securities Act of 1933, the Securities Exchange Act of 1934, and the SEC are all more than seventy-five years old. Change is constant in securities regulation, however, and the past fifteen years or so has been a period of unprecedented change. The Sarbanes-Oxley Act of 2002 has had significant consequences
for IPO preparation and public company life; the “global settlement” in 2003 separated the roles of investment bankers and securities analysts in the offering process; the SEC’s “securities offering reform” of 2005 modified fundamental aspects of the IPO process; the Dodd-Frank Act of 2010 imposed significant corporate governance, executive compensation, and disclosure requirements on public companies; and the JOBS Act, enacted in April 2012 (and amended by the FAST Act in December 2015), effected profound changes to the securities laws with broad implications for pre-IPO companies and the conduct of IPOs. New and expanded disclosure requirements—particularly in the areas of executive compensation and corporate governance—combined with a seemingly inexorable expansion in accounting requirements have lengthened the period of time typically required to prepare an IPO registration statement and complete SEC review.

With Congress continuing to play a major role in securities regulation and disclosure matters, SEC rulemaking required by the Dodd-Frank Act and FAST Act not yet finalized (although mandatory JOBS Act rulemaking was completed in 2016), and the Trump administration’s deregulatory focus, more changes affecting the IPO market are on the way. For example, the SEC staff has been taking steps—in some cases through changes in staff policies and practices rather than formal rules—to encourage IPOs and follow-on offerings. Moreover, market practices continue to evolve in response to regulatory changes and other factors, such as the increasing globalization of the capital markets, the proliferation of social media, and the ability of “unicorns” to raise vast sums of money privately. These topics will no doubt provide much fodder for future supplements to this book.

Organization of This Book

This book is organized into four parts:

- Part I begins with an introduction to the IPO market and then discusses IPO preparation prior to the formal commencement of the process.
- Part II focuses on the IPO process itself.
- Part III addresses selected post-IPO topics, including public company obligations, investor relations, and future liquidity and fundraising.
- Part IV provides a glossary of IPO terms and sample IPO materials.

IPO jargon is used sparingly in this book, but some terms are an inherent part of the IPO vernacular. Readers may find it helpful to refer to the glossary if unfamiliar words or phrases are encountered.
Scope and Terminology

This book focuses on the traditional, firm-commitment underwritten IPOs of common stock that dominate the market in the United States. Other types of IPOs exist, however, including “Dutch auctions,” in which the underwriters solicit bids from potential purchasers and the offering price is set at the highest clearing price; “best-efforts IPOs,” in which the underwriters agree to use their best efforts, without a firm legal commitment, to purchase and resell the offered shares; and “direct IPOs,” in which the company offers shares to the public directly (often online) without the assistance of underwriters.

For convenience, this book uses the word “company” to refer to the issuer and the phrase “common stock” to refer to the securities issued. The IPO issuer is usually a corporation and usually issues common stock, but the issuer can be another type of entity and can issue other types of securities.

Except as specifically noted, this book does not discuss smaller reporting companies, foreign private issuers, asset-backed issuers, registered investment companies, business development companies, or blank check companies.

Many of the statements contained in this book are based as much on practice and custom as on black-letter laws and regulations. Most of these statements could be qualified with words like “generally” and “usually.” Even when such qualifiers are not used, readers should understand that nearly everything about an IPO depends on the particular facts and circumstances and that there are exceptions to most statements.

Data Sources

Unless otherwise noted, all IPO data in this book from 1996 (the year that electronic filing on the SEC’s EDGAR system became mandatory) to the present was compiled by WilmerHale from SEC filings and excludes IPOs by SPACs, REITs, bank conversions, closed-end investment trusts, and oil and gas trusts and partnerships, as well as proceeds from exercises of underwriters’ over-allotment options. All references to “U.S. IPO” data mean data for IPOs by U.S. issuers in the United States. In addition:

- Thomson Reuters provided the IPO volume data for 1970 to 1995 and the offshore IPO data in chapter 1; the data for private equity–backed M&A transactions, Rule 144A IPOs, tracking stock IPOs, and cross-border IPOs in chapter 21; and the data for follow-on public offerings and Rule 144A placements in chapter 24.
Preface

- Prof. Jay R. Ritter of the University of Florida provided the IPO volume data for 1960 to 1969 and the median IPO company age data in chapter 1.

- The venture capital financing statistics in chapter 2 and the venture capital–backed M&A and IPO statistics in chapter 21 are based on WilmerHale’s analysis of data from Dow Jones VentureOne.

- Institutional Shareholder Services and SharkRepellent.net provided governance data as noted in chapter 5. The other governance data in chapter 5 is based on WilmerHale’s analysis of SEC filings.

- The SPAC volume data for the period 2007–2009 contained in chapter 21 was provided by SPAC Analytics. All other SPAC data in chapter 21 is based on WilmerHale’s analysis of SEC filings.

- The statistics on Rule 144A equity placements and PIPE financing transactions in chapter 24 are based on WilmerHale’s analysis of data from PrivateRaise.

- Other sources of data and statistics are as noted in the book.

- All other data and statistics in the book are based on WilmerHale’s review and analysis of SEC filings and information from other sources considered reliable.

Important Limitations

This book is intended to provide general information only. The statements in this book do not constitute legal advice as to any particular matter or situation, nor do they represent advice concerning tax, estate planning, accounting, investment banking, or other matters.

In general, information in this book is intended to be current as of October 1, 2018, but the applicable laws, rules, and regulations are extensive, complex, and subject to frequent change. Any company contemplating an IPO should engage experienced securities counsel and other professional advisors. The sample IPO forms included with this book are for illustrative purposes only and should be used only with the assistance of qualified counsel. All references to tax or estate planning matters are based solely on U.S. federal law; state and local law considerations may vary; and readers should consult their own advisors for guidance.

The views expressed in this book are those of the author and do not necessarily represent the views of Wilmer Cutler Pickering Hale and
Dorr LLP, the Securities and Exchange Commission, the SEC commissioners, the SEC staff, or any other person or entity. Any errors or omissions are attributable solely to the author. Comments may be sent to the author at david.westenberg@wilmerhale.com.

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October 2018
The author gratefully acknowledges many current and former WilmerHale colleagues who contributed to this book.

Jonathan Wolfman has provided invaluable assistance in the initial preparation and ongoing updates of this book. Mr. Wolfman regularly advises public companies on a wide range of securities law matters. A noted authority and frequent speaker and commentator on disclosure and corporate governance topics, he co-chairs WilmerHale’s Corporate Governance and Disclosure Group, is named among The Best Lawyers in America in the area of corporate governance, is recognized as a leader in the corporate/M&A field in Chambers USA: America’s Leading Lawyers for Business, is recommended in The Legal 500 United States for corporate governance work, and is included in the BTI Client Service All-Stars report for combining “exceptional legal expertise with practical advice, business savvy and innovative, effective solutions.” Best Lawyers named Mr. Wolfman as Boston’s “Corporate Governance Law Lawyer of the Year” for 2018. He is also a former co-chair of the Subcommittee on Disclosure and Continuous Reporting of the American Bar Association’s Committee on Federal Regulation of Securities and co-editor of The Practitioner’s Guide to the Sarbanes-Oxley Act, published by the American Bar Association. In addition to being the principal author of chapter 5, Mr. Wolfman reviewed and commented on the book in its entirety, improving it considerably with deft changes and insightful suggestions and saving the author from countless errors of omission and commission. His contributions have made this book immeasurably better.

This book has benefited greatly from the insights and suggestions of current and former WilmerHale partners Lillian Brown, James R. Burke, Meredith B. Cross, Mark L. Johnson, Jason L. Kropp, Erika L. Robinson, Patrick J. Rondeau, Knute J. Salhus, Edward Young, and Jennifer A. Zepralka. These practitioners collectively have more than 200 years of capital markets and securities experience, including more than a quarter century with the SEC’s Division of Corporation Finance.

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And of course we thank our clients—past, present, and future—without whom WilmerHale would have no IPO practice.

• • •

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About the Author

DAVID A. WESTENBERG has guided numerous clients from formation through venture financing and on to successful IPOs or acquisitions. He has led more than fifty IPOs and other capital markets transactions and advised dozens of public companies on corporate and securities law matters. His recent public offering experience includes the IPOs of Acacia Communications, Accretive Health, Blue Apron, Casa Systems, EverQuote, Endurance International, and Tango as issuer counsel; the IPOs of Brightcove, HubSpot, and Imprivata as underwriters’ counsel; and follow-on offerings for Acacia Communications, Bottomline Technologies, Endurance International, SS&C Technologies, Tango, and other companies as issuer counsel. He also has handled a variety of M&A transactions, including the sale of Gilt Groupe for $250 million to Hudson’s Bay Company, the sale of Kiva Systems for $775 million to Amazon.com, and the dual track IPO/sale process for EqualLogic, resulting in its $1.4 billion acquisition by Dell—the largest all-cash purchase price in history for a private VC-backed company at the time the acquisition agreement was signed. In addition, he has advised various clients on late-stage and crossover financings.

Mr. Westenberg is the editor and principal author of WilmerHale’s annual IPO Report, Venture Capital Report, and M&A Report. He is recognized as a leader in the capital markets field in Chambers USA: America’s Leading Lawyers for Business, is recommended in The Legal 500 United States for equity capital markets work, and is listed in The Best Lawyers in America in the areas of corporate, venture capital, mergers and acquisitions, technology law, and information technology law. Best Lawyers named Mr. Westenberg as Boston’s “Technology Law Lawyer of the Year” for 2012 and for 2018, and as Boston’s “Information Technology Law Lawyer of the Year” for 2015 and for 2019. Previously, he was selected by American Lawyer magazine as “Dealmaker of the Year” for equities and was named an “All Star for Law & Technology” by Mass High Tech for fostering the development of New England technology companies. A graduate of MIT and Harvard Law School, Mr. Westenberg joined the firm in 1983 and became a partner in 1992.

Mr. Westenberg blogs on IPOs at wilmerhale.com/blog/IPO and can be followed on Twitter at @DWestenbergIPO.
In 2013, Initial Public Offerings: A Practical Guide to Going Public was selected by the Burton Foundation, in conjunction with the Association of Legal Administrators, as the “Outstanding Authoritative Book by a Partner in a Law Firm.” This award is given annually to one book that represents “an important contribution to the legal profession” and “is comprehensive in scope, informative, incisive, and is an important reference and informational tool.”

About WilmerHale

WilmerHale, formed in 2004 through the merger of Hale and Dorr and Wilmer Cutler Pickering, has one of the nation’s leading IPO and securities practices. The firm has served as company counsel or underwriters’ counsel in hundreds of IPOs in the software, biopharmaceuticals, Internet, financial services, communications, retail, semiconductor, energy, medical devices, manufacturing, consulting services, professional sports, and other industries. WilmerHale’s corporate lawyers are also well known for their work in venture capital, mergers and acquisitions, strategic alliances, corporate governance, and the representation of startup companies.

WilmerHale has more than 1,000 lawyers, with offices in the United States, Europe, and Asia. In addition to more than 250 corporate and transactional lawyers, the firm includes a preeminent securities defense and enforcement practice of more than 200 lawyers; over 500 litigators with unmatched trial, appellate, and Supreme Court experience; a regulatory practice that includes more than 100 lawyers who have held high-level government positions; an intellectual property practice with more than 120 attorneys and technology specialists who hold scientific or technical degrees; and other lawyers who focus on international, tax, bankruptcy, labor and employment, environmental, and real estate matters. WilmerHale has consistently distinguished itself as a leader in pro bono representation, and many of the firm's lawyers have played, and continue to play, prominent roles in public service activities of national and international importance.
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GOING PUBLIC

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