

**“Capital Markets: The Latest Developments”**

**Thursday, December 12, 2024**

**Course Materials**

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2 to 3 p.m. Eastern [archive and transcript to follow]

Macroeconomic volatility has made for bumpy capital markets in recent years, but some companies are forced to grapple with the uncertainty to raise capital. This webcast will review the current state of the capital markets, explore financing alternatives and discuss IPO readiness and recent developments impacting public offerings.

Join our panelists:

- **Maia Gez**, Partner, White & Case
- **Anna Pinedo**, Partner, Mayer Brown
- **Richard Segal**, Partner, Cooley
- **Andrew Thorpe**, Partner, Gunderson Dettmer

Topics:

1. Current State of the Capital Markets
2. IPO Readiness
3. SEC Comment Trends and Review Time
4. Transition to T+1 Settlement
5. Recurrent Issues in Initial or Follow-on Public Offerings
  - Comfort letters
  - Flash numbers
  - Cheap stock
  - Lockups
6. Considerations for and Trends in Various Hybrid/Follow-on Offering Alternatives
  - PIPEs
  - RDOs
  - ATMs (including with forwards)
  - CMPOs

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# “Capital Markets: The Latest Developments”

## Course Outline

### 1. Current State of the Capital Markets

- From the Mayer Brown [Free Writings + Perspectives Blog](#):
  - The outlook for IPOs in 2025 appears generally positive, with several key indicators suggesting a robust environment for equity issuance.
  - IPO volumes have surged to nearly \$30 billion this year to date, a significant increase from \$18 billion last year, with 60 IPOs priced year to date, marking a 130% increase. Broader market indices are up around 25%, indicating a healthier market overall.
  - Notably, the focus has shifted from the MAG-7 stocks to a broader cohort of companies benefiting from the market uptick. As companies prepare for their public debut, there is an expectation that they will do so when they are more scaled, leading to larger IPO sizes in terms of dollars raised. Looking ahead, the panel anticipates that IPO volumes could grow to \$40 billion in 2025, with 80-85 new listings expected, driven by a more favorable macroeconomic backdrop and potential interest rate cuts. While these improvements are promising, we have not returned to the average IPO levels of the past 15 years.
  - Many companies are optimizing operations in private markets, leading to increased private capital activity. This trend allows firms to stay private longer, which could impact the number of IPOs in 2025.

## 2. IPO Readiness

- Stock exchange updates
  - NYSE’s updated rules regarding “Active Related Parties” — Sections 312.03(b) and 312.04 of the NYSE Listed Company Manual
  - In September 2024, the SEC approved amendments to the rules governing how exchanges quote individual stock prices (including Rule 612 of Regulation NMS), including to reduce the minimum pricing increment for “tick-constrained stocks” (those with narrow bid-ask spreads) to half a penny
- Renewed focus on director independence and D&O questionnaires
- For those looking to capitalize on an open IPO window, this [Cooley blog](#) walks through how to prepare (while acknowledging that this is not comprehensive):

### **Financial reporting and internal controls readiness**

- Identify personnel needs.
- Assess Sarbanes-Oxley Act of 2002 (SOX) compliance readiness.
- Assess annual and quarterly financial statement closing timeline readiness.
- Review IT and cybersecurity readiness.

### **Audit and tax readiness**

- Identify key accounting and tax issues.
- Flag “cheap stock” exposure and/or remediation measures required.
- Review past or planned significant acquisitions to determine financial statements required.

- Map Public Company Accounting Oversight Board (PCAOB) audit timelines.

### **Legal readiness**

- Identify and analyze legal risks, such as:
  - Data privacy risks, including regulatory compliance (General Data Protection Regulation, California Consumer Privacy Act, and others)
  - Other regulatory risks
  - Intellectual property risks, including related to disputes, patent coverage, Proprietary Information and Inventions Assignment Agreements, and contractor agreements
  - Pending or threatened litigation exposure
- Audit the company's capitalization table to identify what actions may be required to ensure all company equity is properly authorized and issued.

### **Governance readiness**

- Determine what changes to the executive team may be necessary or desirable.
- Review board composition and identify changes needed to:
  - Meet stock exchange independence requirements
  - Meet applicable diversity requirements or desired standards
  - Enhance the collective expertise of the board to improve performance, anticipate investor demand or meet stock exchange requirements

- Establish stock exchange-compliant committees
- Audit existing governance policies to identify gaps.

#### **Human resources readiness**

- Review compensation practices to see if they are competitive, appropriate, and ready to withstand public scrutiny.

### **3. SEC Comment Trends and Review Time**

- Corp Fin may review a company's registration statement to ensure compliance with SEC disclosure rules and federal securities laws, and to ensure the disclosure provided to investors is clear, balanced and not misleading
- Typically, the time frame for SEC review is between 90 to 150 days for a full review
  - Initial filing:
    - You hear about whether the Staff will review your filing within a matter of days
    - In the case of a full review, you can anticipate comments around 30 days after the initial filing
    - If it has been 10 days and you have not heard from the Staff, you should give the appropriate Corp Fin office a call to find out the status of the filing
  - First amendment:
    - After you amend in response to initial comments, the Staff generally takes about 10 business days to get back to you on amendments, although that can vary depending on the nature, content and number of the comments, as well as the Staff's workload

- IPOs get fully reviewed
  - Legal and accounting teams (who are primarily responsible for the review) are assigned to the offering. The four team members are as follows (although they may consult others):
    - Legal examiner (junior attorney)
    - Legal reviewer (senior attorney)
    - Accounting examiner (junior accountant)
    - Accounting reviewer (senior accountant)
  - It may be worth contacting the Staff on a pre-filing basis to discuss certain limited issues

#### 4. Transition to T+1 Settlement

- In February 2023, the SEC adopted rules shortening the standard settlement cycle for most securities transactions from two business days after the trade date (T+2) to one (T+1) (Rule 15c6-1(a))
- The rules also shortened the standard settlement cycle for firm commitment offerings priced after 4:30 p.m. from four business days after the trade date (T+4) to two (T+2) (Rule 15c6-1(c))
- The rules were effective in late May 2024
- Rule 15c6-1(d) continues to permit issuers and underwriters to agree to alternative settlement dates
  - In that case, language similar to the following is included in the prospectus, FWP/pricing term sheet, offering memorandum or other offering document to alert investors of the longer settlement cycle:

Delivery is expected to be made against payment for the [\_\_\_\_\_] on [\_\_\_\_\_], 20[\_\_\_], which will be the [\_\_\_\_\_] business day following the date hereof (this settlement cycle being referred to as



“T+[\_]”). Under Rule 15c6-1 of the Securities Exchange Act of 1934, as amended, trades in the secondary market generally are required to settle in one business day, unless the parties to that trade expressly agree otherwise. Accordingly, purchasers who wish to trade the [\_\_\_\_\_] prior to the date that is one business day before the delivery of the [\_\_\_\_\_] will be required, by virtue of the fact that the [\_\_\_\_\_] initially will settle in T+[\_], to specify an alternate settlement cycle at the time of any such trade to prevent a failed settlement and should consult their own advisors.

## 5. Recurrent Issues in Initial or Follow-on Public Offerings

- Comfort Letters
  - As a condition to closing the securities offering, underwriting agreements usually require the delivery of a comfort letter to the underwriters
  - Comfort letters assist underwriters in establishing their statutory due diligence defense under Section 11 of the Securities Act and creating a record of their reasonable investigation of the issuer and its financial condition
  - Timing of financial statement staleness (Rule 3-12 of Regulation S-X or Rule 8-08 of Regulation S-X for Smaller Reporting Companies) vis-à-vis the 135-day rule (PCAOB AS 6101 (paragraph 47), which permits accountants to give traditional negative assurance only up to 134 days after the end of the most recent period for which the accountant has performed an audit or review)
- Flash Numbers
  - A snapshot of financial results provided in an offering document (prospectus, a prospectus supplement or an offering memorandum)

- Usually a consideration when there has been a significant passage of time since the last earnings announcement but existing financials are not yet stale
- Meant to address the potential concern that proceeding with a securities offering without disclosing some additional financial results could be construed as a material omission and subject offering participants to Section 11 liability
- When flash numbers may be presented, there are a number of considerations:
  - What numbers to include
  - What numbers are available when
  - Whether to disclose ranges
  - How to diligence the numbers
  - Non-GAAP considerations
  - Whether to update your '34 Act file
- Cheap Stock
  - When a company makes pre-IPO equity awards at valuations substantially lower than the IPO price, questions arise under accounting and tax rules
    - Accounting Rules — AS 718 applies to stock-based compensation at both public and private companies
      - Many private companies will try to grant compensatory equity awards only on predetermined dates and obtain an independent valuation on those grant dates to support the determination of grant date fair value

- When equity awards are made on dates on which no valuation was obtained, management must determine a grant-date fair value using reasonable assumptions and methodologies, which is likely to generate comments by SEC Staff reviewing the IPO registration statement
- Lockups
  - Trading plans intended to satisfy the affirmative defense conditions of Rule 10b5-1 are now required to be disclosed in the issuer's SEC filings under Item 408 of Regulation S-K
  - Prior to the new disclosure requirement, lock-up agreements would typically provide an exception for the entry into a 10b5-1 plan only if the entry into such 10b5-1 plan would not be publicly disclosed during the lock-up period

## **6. Considerations for and Trends in Various Hybrid/Follow-on Offering Alternatives**

- PIPE Transactions — Private Investments in Public Equity
  - Private placement of securities of an already-public company
  - Made to selected accredited investors (usually to selected institutional accredited investors)
  - Investors enter into a purchase agreement committing them to purchase securities
  - Usually require the issuer to file a resale registration statement
- RDOs — Registered Direct Offerings
  - A shelf takedown where securities are sold on a best efforts basis by a placement agent that is engaged by an issuer to introduce the issuer to potential investors

- Purchasers buy the securities directly from the issuer
- Generally marketed on a wall-crossed or confidential basis, usually to a select number of accredited and institutional investors
- ATMs — At-the-Market Offerings
  - Continuous offerings of securities into an existing trading market for the securities at a price related to the then-market price of the securities
  - Flexible way to raise modest amounts of capital with minimal market impact, at a low cost and with limited management involvement
  - Baby shelf limitation for ATM programs
    - We have recently learned of an informal Corp Fin Staff position that, for purposes of an ATM program, the takedown off the shelf is deemed to occur when the ATM prospectus supplement is filed, and that the one-third limitation is not remeasured at the time of each sale of securities in the program. In other words, the amount available under the ATM program is locked in when the prospectus supplement is filed, and will not be updated until the company amends its Form S-3 registration statement or files a new prospectus supplement for the ATM
  - Forward Deals
    - Allows an issuer to sell its securities at the current trading price without actually issuing any securities to satisfy the forward commitment until a future settlement date

- CMPOs — Confidentially Marketed Public Offerings
  - A shelf takedown confidentially discussed with a select group of institutional investors after they are wall-crossed
  - Quickly “flipped” to retail investors and other institutions after public announcement, usually overnight