

## Preparing For Your First 10-K

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Just when you thought it was safe to go back to managing your company after your initial public offering (IPO) you realize it is time to file your first Form 10-K. This task need not be as daunting as preparing your S-1 Registration Statement, but equal care and effort must be expended on your Form 10-K as was expended in preparing on your IPO S-1 Registration Statement. This article covers some of the basics.

First of all, what is a Form 10-K? When you filed your Registration Statement on Form S-1 in connection with your IPO you were registering the offer and sale of securities of your company to the public. This process is governed by the Securities Act of 1933, as amended (the "33 Act"). Once you have completed your IPO, in a sense you graduated to regulation under the Securities Exchange Act of 1934, as amended (the "34 Act"). It is the 34 Act which regulates the after market for your securities. The theory of both the 33 Act and the 34 Act in one sense is the same, namely that investors are entitled to disclosure about the affairs of your company. Just as the initial purchasers of your securities were entitled to disclosure about your company when you went public, so too are the purchasers of your securities in after market trading entitled to continuing updated information about your company. In the first instance the initial investors received that information in the Registration Statement on Form S-1. In the second instance, the after market investors received updated information about your company from a number of sources, but a primary one is the Form 10-K.

Unlike the Registration Statement on Form S-1 however, it is not strictly necessary to send a Form 10-K to each security holder of the company. The company merely files the Form 10-K with the Securities and Exchange Commission electronically. The Form 10-K is then posted on the SEC website (and others as well) and in that sense is made available to anyone who cares to download the information.

How often do I have to file a Form 10-K? The Form 10-K is an annual form and must be provided to the SEC no later than 90 days after the end of your fiscal year for most companies. Unlike an IRS form, for example, the Form 10-K is not a fill in the blank kind of form. Rather, it is like your Registration Statement on Form S-1, in that it requires both narrative disclosure about your company as well as financial information, most notably, the year end audited financial statements of the company.

A good place to start the preparation of your first Form 10-K is your Registration Statement on Form S-1. Much of the required disclosure is the same and one way to look at the Form 10-K is as an updated ongoing Form S-1. It is equally important to be as careful and accurate in your Form 10-K as it was in your Registration Statement on Form S-1.

Often we counsel our clients to assign a senior manager for each required item that must be covered in both the Registration Statement, and then of course the Form 10-K. That way there is both consistency and accountability. Each item that is to be answered in the Form 10-K should have a back-up file maintained at the company with all the information and justification for the disclosure made in response to each item answered, along with a memorandum signed by the

manager responsible, attesting to the correctness of the information. The back-up file system is helpful not only in later justifying a given disclosure, but also ensures accountability. Too often the adage that success has many fathers but failure is an orphan is often applicable when disclosure is subsequently found to be faulty or inadequate. The back up system also creates a permanent working file that may be passed to from one manager to another as responsibility fields change.

Preparation of the Form 10-K should not be viewed as a once a year tedium, but rather an ongoing process. By that is meant that the responsible manager should keep his or her back-up file current during the year, so when it comes time to compile all the information, the Form 10-K in effect writes itself. All the required information has been collected, organized and updated during the year and all that is then required is merely a transposing of the information into the draft Form 10-K.

As stated above, the starting point for the first Form 10-K is the Registration Statement on Form S-1. If proper files and back-up material had been assembled and maintained for the Registration Statement, then it ought not be a daunting task to reconfigure the back-up files to suit the Form 10-K. If these back-up files are not in useful condition for the first Form 10-K then it would be a good idea to begin the back-up file system with the preparation of the first Form 10-K. It is amazing how much time and effort can be saved each year in preparing the Form 10-K if just a little effort is expended during the year in updating and maintaining the working files. Further, should a manager leave, the information remains readily available for his or her replacement to understand not only why the disclosures are what they are, but also the raw information which forms the basis of that information. If managers are diligent in maintaining those working files, not only will the first Form 10-K be far less stressful than otherwise, but each succeeding Form 10-K will likewise be far less disruptive and time consuming than it has to be.

Finally your outside professionals, the accountants and lawyers should review the Form 10-K prior to filing, so remember to leave enough time so they may do a thorough job. Some companies seem to feel that since the Form 10-K is a legal requirement for a public company it is something that should be drafted by the lawyers. While legal review, counsel and input is critical, the ultimate responsibility for the accuracy and completeness of the Form 10-K rests squarely with the company. That responsibility should be taken seriously but the effort in complying, if properly managed, should not be burdensome.

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