



## Investors 'Like' Facebook, But They'll Still Sue

By Ian Thoms

Law360, New York (May 18, 2012, 6:46 PM ET) -- In going public Friday, [Facebook Inc.](#) earned a staggering \$104 billion valuation and made its founder, Mark Zuckerberg, an even richer man, but the social network also opened itself to significant shareholder scrutiny and potential lawsuits tied to its initial disclosures and controversial privacy policy, experts say.

Facebook's public debut got off to a somewhat rocky start Friday, with [Nasdaq](#) delaying its anxiously awaited initial offering due to a technical snafu. When shares finally began moving, they sold for more than \$40 apiece for a time, but by the end of the day, they had fallen to \$38.23, just north of their pre-trading target of \$38.

That could be just the beginning of the problems for Zuckerberg, who has retained majority control over the company he started in a Harvard dorm room eight years ago, but now has a slew of people to answer to regularly, attorneys say.

"They've gone from this privately held company with a ton of mystique to suddenly having the whole world looking at them and studying them," said Vincent P. Schmeltz of [Barnes & Thornburg LLP](#). "It's the difference between casually dating someone to living with them. Sometimes the romance wears off."

Friday's unexpectedly subdued market performance left some already questioning whether Facebook would prove to be the money maker its valuation suggests. In terms of market capitalization, the social networking site has found itself in elite company alongside long-established businesses like [JPMorgan Chase & Co.](#) and PepsiCo, despite having far lower revenues.

"For Facebook to grow into its valuation, it would require firing on all cylinders plus. People are comparing this to [Google](#) or [Apple](#), but it's not Google or Apple. This is a company that hasn't yet figured out how to best monetize its assets," said Robert M. Steinberg of [Jeffer Mangels Butler & Mitchell LLP](#). "And if its stock drops precipitously, that's where the risk of suits comes in."

While the company already has some shareholders, they are primarily Facebook employees, so as the number of stakeholders in the company grows, so too does the potential for allegations of fraud and shareholder derivative claims, attorneys said.

The design of securities laws could also render Zuckerberg vulnerable to litigation as a result of the company's public status, since he would be the one signing off on the company's disclosures, attorneys said.

Some stock analysts have already gone so far as to comment on Zuckerberg's choice of a sweatshirt for meetings with would-be investors, worried that he doesn't take the business side of things as seriously as he should.

"How many people are going to go on their road show and have somebody going to comment on what they're wearing?" said Jeremy Garvey of [Buchanan Ingersoll & Rooney PC](#). "Who's ever cared what a CEO wore? But that's news when Mark Zuckerberg wore a hoodie, a sweatshirt to Wall Street."

Facebook is well aware of the increased attention and potential for securities litigation, indicating as much in its initial registration statement with the U.S. [Securities and Exchange Commission](#). The company also noted that it was already the subject of numerous patent suits and complaints related to user data.

Just Thursday, Facebook was hit with a \$15 million amended complaint in a multidistrict litigation accusing the company of improperly tracking users' Internet habits even after they logged out of their accounts.

"Because we have hundreds of millions of users, the plaintiffs in class action cases filed against us typically claim enormous monetary damages even if the alleged per-user harm is small or nonexistent," Facebook said in its SEC filing.

Facebook listed a host of other potential risks in its IPO paperwork — disclosures investors and plaintiffs attorneys will examine for misstatements or omissions should the company's stock drop and they entertain filing suit, experts said.

Among the risks disclosed was the company's struggles so far to monetize the use of Facebook through mobile products. And even if the company develops a solid plan for making money from its mobile offerings, it will remain dependent on hardware — cellphones, tablets, etc. — sold and controlled by other companies, Facebook said.

"Investors aren't known for their patience, and so Facebook will need to get its mobile act together sooner rather than later," said Jonathan Rick, a director with Levick Strategic Communications LLC.

But chief among Facebook's concerns is its delicate balance between user privacy and advertising. The company depends almost entirely on advertising revenue and its edge in attracting that revenue is the treasure-trove of personal information it has collected from its 900 million users, attorneys said.

Facebook's non-negotiable terms of membership provide that its users consent to the use of their names and likenesses in advertising.

"Facebook needs to use information provided by users to attract advertising dollars, but it's already faced with a spate of privacy lawsuits. It's a bit of a Catch-22," said Robert J. deBrauwere, co-chair of [Pryor Cashman LLP's](#) digital media group.

Facebook lost a major advertiser this week when [General Motors Co.](#) reportedly pulled its \$10 million commitment. The automaker said it would maintain Facebook pages, which do not cost anything, but it would no longer pay for ads.

Facebook's privacy issues have not only raised the ire of its users; they have also caught the attention of government agencies.

In November, Facebook settled the [Federal Trade Commission's](#) claims that it lied to its users about the security and privacy of their personal information.

The Irish Office of the Data Protection Commissioner called for Facebook to allow users to request more information about their stored data in December, as part of an audit of the company. The agency launched

the audit in September after receiving 22 complaints about alleged privacy violations on the part of Facebook from Austrian students who later formed the consumer group Europe v. Facebook.

Facebook disclosed the Irish and FTC probes in its IPO paperwork, but that doesn't mean plaintiffs attorneys won't find those disclosures lacking, according to attorneys. That's the difficulty of preparing a company to go public — there's a world of risks, events and details about the business that must be shared with investors, attorneys said.

"You have groups of lawyers in conference rooms spitballing what else could go wrong with this business and debating whether that's something they need to disclose," he said. "That certainly makes it difficult to raise capital. You have to have a crystal ball."

--Additional reporting by Abigail Rubenstein and Karlee Weinmann. Editing by Sarah Golin.

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