2010 IPO Report

WilmerHale®

WILMER CUTLER PICKERING HALE AND DORR LLP ®

Table of Contents

Market Review

The year 2009 began on the heels of the worst IPO market in decades. Facing the combined burden of an economic recession and plunging capital markets, the IPO market produced only 31 IPOs in 2008—the lowest annual total since 1975—and only one IPO in the entire fourth quarter. Every segment of the IPO market suffered in 2008.

The first quarter of 2009 was much the same. The major stock indices fell to multi-year lows by March, and there were only two IPOs in the first quarter—the spinoff IPO of Mead Johnson Nutrition, and a tiny Chinese offering. Then the market recovery began:

- In the second quarter of 2009, there were ten IPOs, nine of which priced within or above the range.
- The third quarter produced another twelve IPOs—ten of these priced within or above the range.
- Volume spiked in the fourth quarter, with 30 IPOs, although pricing softened as more than 40% of these deals priced below the range.

For the full year 2009, the market generated 54 IPOs, with gross proceeds of $19.2 billion. This total trailed the gross proceeds of $24.1 billion produced in 2008, but nearly three-quarters of the 2008 total came from a single offering. Although the number pales next to the annual average of 500-plus IPOs of a decade ago, as well as the annual run rate of about 200 IPOs that prevailed from 2004 to 2007, the total of 54 IPOs in 2009 gives reason for hope of continued IPO market recovery.

Individual components of the IPO market fared as follows in 2009:

- With eight offerings, venture capital–backed IPOs accounted for 15% of the 2009 market. Most of these companies were in technology or life sciences.
- Private equity–backed IPOs grabbed 41% of the market in 2009, with 22 offerings. Financial sponsors, with their ability to pursue new deals stymied by tight credit throughout 2009, were anxious to take their portfolio companies public. PE-backed companies tend to be large and mature and to produce very large IPOs, such as those of Dollar General and Hyatt Hotels in 2009.
- The tech sector rebounded as technology-related companies produced 56% of the year's IPOs.
- Foreign issuers accounted for 28% of the market in 2009. China continued to be the predominant source of foreign-issuer IPOs in the United States, producing 80% of the total—although the year's largest IPO came out of Brazil.
- SPACs (special purpose acquisition companies)—the darlings of 2005–2007—all but disappeared from the market, with just a solitary IPO in 2009.

The largest IPO of 2009 was the $4.0 billion offering by Brazilian bank Banco Santander, followed by Verisk Analytics' $1.9 billion IPO and the $1.0 billion IPO of Shanda Games.

Aftermarket performance improved in 2009 compared to 2008. The average 2009 IPO appreciated 18% by the end of the year, and 65% of the year's IPOs were trading at or above their offering price at year-end. In contrast, the average 2008 IPO was 36% below its offering price at the end of 2008, and only 16% of that year's IPOs were trading at or above their offering price at year-end 2008.

Although 2009 had no "moonshots" (an IPO that doubles in price on its opening day), both A123 Systems and OpenTable jumped by more than 50% in first-day trading.

The percentage of profitable companies going public increased from 71% in 2008 to a record 82% in 2009, while the median annual revenue of IPO companies soared from $113.5 million to $229.0 million. Both metrics reflect a long-term trend toward larger and more seasoned IPO companies, as well as the prevalence of private equity–backed IPOs in 2009. Smaller companies should not, however, despair: 26% of 2009's IPO companies had less than $100 million in annual revenue and 11% had less than $50 million.

In 2009, 26 IPOs were completed by companies based in the eastern United States (east of the Mississippi River), western US–based issuers accounted for 13 IPOs, and foreign issuers accounted for the remaining 15 IPOs.

Market momentum has continued into 2010, despite continued turbulence in capital markets. Through the first three quarters of 2010, more than 90 IPOs have been completed—more than in all of 2008 and 2009 combined—including 33 by venture capital–backed companies.

Outlook

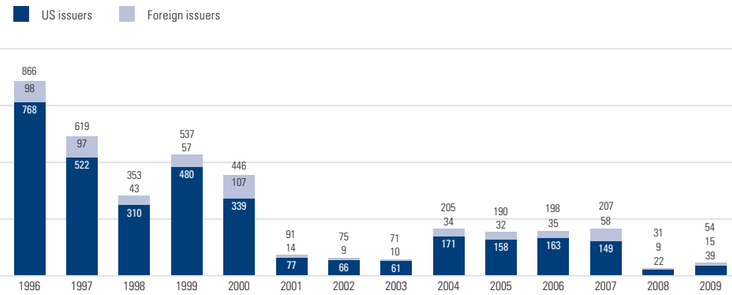
In broad terms, the US IPO market has gone through six phases over the past two decades or so:

- 1991 to 1998—Reasonably stable market, producing an average of 565 IPOs per year
- 1999 and 2000—Go-go market characterized by marginally qualified IPO companies and rampant price euphoria (although annual deal volume was 13% lower than in the preceding eight years)
- 2001 to mid-2003—Very selective market, in which deal volumes fell substantially and IPO candidates were held to much higher standards
- Mid-2003 through 2007—Solid market recovery, although not approaching the deal volumes that prevailed for most of the 1990s
- 2008—Market bottoms out
- 2009 and 2010—Market rebounds from historic lows, but not yet to the deal levels of 2004 to 2007

We remain fundamentally optimistic about the long-term prospects for the IPO market. The pace and extent of the market recovery that began in the second quarter of 2009 will depend on a number of factors. The major factors are neither mysterious, nor easy to predict:

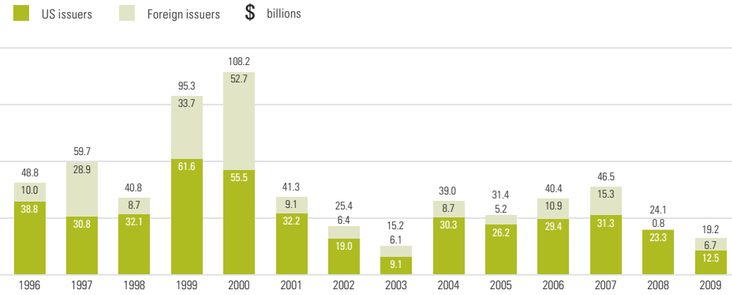
- *Economic Conditions:* Economic growth is a key determinant of strength in the capital markets. By late 2007, five years of economic expansion—largely driven by strong consumer spending, boosted by low interest rates, tax cuts and increased borrowing against home equity as housing values soared—had sputtered to an end. The following recession was longer and more severe than almost anyone anticipated. Although it had begun to recover by mid-2009, the economy has continued to send mixed signals and the timing and extent of economic growth is uncertain.

US IPOs – 1996 to 2009



Source: SEC filings

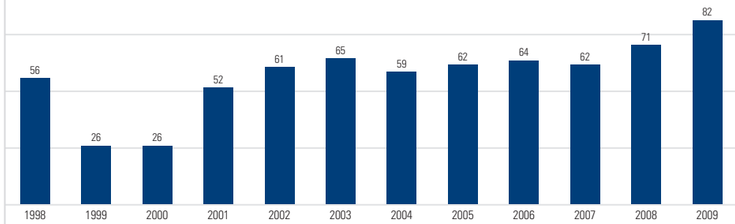
US IPO Dollar Volume – 1996 to 2009



Source: SEC filings

Percentage of Profitable IPO Companies – 1998 to 2009

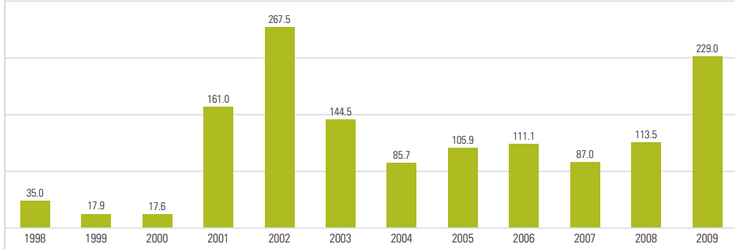
%



Source: IPO Vital Signs

Median Annual Revenue of IPO Companies – 1998 to 2009

$ millions

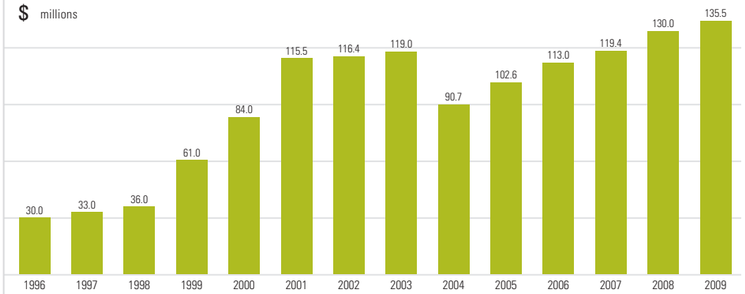


Source: IPO Vital Signs

- *Capital Market Conditions:* Stable and robust capital markets are a leading indicator of IPO activity. After sharply declining in 2008, the Nasdaq stabilized in the first quarter of 2009 and then surged to post a full-year gain of 44% by year-end. Similarly, the Dow recovered from its March low point and increased 19% for all of 2009. Both indices remain below their levels of 2007, however, and have sputtered throughout 2010.
- *Institutional Appetite:* IPOs are relatively risky investments, so the appetite of institutional investors for risk capital affects the IPO market. When other parts of a portfolio feel risky, the investor may stay away. There is a school of thought that the weak IPO pricing at the end of 2009 reflected, in part, some major institutional buyers sitting on the sidelines. These players are critical to the health of the IPO market.
- *Impact of Regulatory Environment:* The corporate governance reforms that began with the adoption of the Sarbanes-Oxley Act in 2002 have created new responsibilities for public companies and their directors and officers. These changes have helped improve accountability to stockholders, board oversight of management, board member qualifications and investor confidence—but have also increased the cost of being public, both in terms of potential liability and the expense of compliance. More recently, the Dodd-Frank Act has created additional responsibilities.

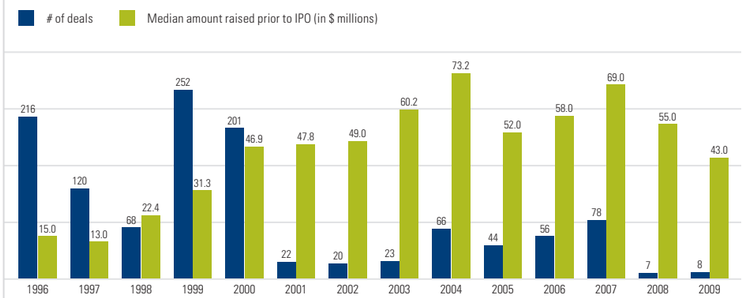
The more rigorous corporate governance environment may deter some IPO candidates, steer them to liquidity through acquisitions, incent them to pursue IPOs in markets outside of the United States, or cause them to pursue more unusual capital-raising transactions. There is some evidence to support each of these suppositions. For most companies, however, the new and enhanced governance requirements can be assimilated into IPO planning and should not pose a major impediment to going public. Moreover, many of the consequences of these requirements—such as a robust finance and accounting organization—are needed in a growing enterprise whether or not it ever pursues an IPO.

Median IPO Offering Size – 1996 to 2009



Source: SEC filings

Venture Capital–Backed IPOs – 1996 to 2009



Source: Dow Jones VentureOne

- *Venture Capital Pipeline:* Venture capitalists depend on IPOs—along with company sales—to provide liquidity to their investors. With the uptick in IPOs by venture capital–backed companies, the number of VC-backed companies entering IPO registration, or resuscitating dormant filings, has been increasing. Longer term, the pool of IPO candidates will be affected by current trends in venture capital investing, including the timeline from initial funding to IPO. According to Dow Jones VentureOne, the median time from initial equity financing to IPO was 7.9 years in 2009—as recently as 2004 and 2005, this figure hovered around 5.5 years.
- *Private Equity Impact:* Private equity investors also seek to divest portfolio companies or achieve liquidity through IPOs. PE-backed companies are usually larger and more seasoned than VC-backed companies or other start-ups pursuing IPOs, and thus can be strong candidates in a demanding IPO market. Private equity–backed IPOs flourished in 2009 and can be expected to continue to enter the IPO market as conditions permit. ■

Profile of Successful IPO Candidates

What does it really take to go public? There is no single profile of a successful IPO company, but in general the most attractive candidates have the following attributes:

- *Outstanding Management:* An investment truism is that investors invest in people, and this is even more true for companies going public. Every company going public needs experienced and talented management with high integrity, a vision for the future, lots of energy to withstand the rigors of the IPO process, and a proven ability to execute.
- *Market Differentiation:* IPO candidates need a superior technology, product or service in a large and growing market. Ideally, they are viewed as market leaders. Appropriate intellectual property protection is expected of technology companies, and in some sectors patents are *de rigueur.*
- *Substantial Revenues:* With some exceptions, substantial revenues are expected—at least $50 million to $75 million annually—in order to provide a platform for attractive levels of profitability and market capitalization.
- *Revenue Growth:* Consistent and strong revenue growth—25% or more annually—is usually needed, unless the company has other compelling features. The company should be able to anticipate continued and predictable expansion to avoid the market punishment that accompanies revenue and earnings surprises.
- *Profitability:* Strong IPO candidates often have track records of earnings and a demonstrated ability to enhance margins over time.
- *Market Capitalization:* The company's potential market capitalization should be at least $200 million to $250 million, in order to facilitate development of a liquid trading market. If a large portion of the company will be owned by insiders following the IPO, a larger market cap may be needed to provide ample float.

All IPO companies need top executive talent, a strong competitive position, adequate market capitalization and deal-savvy advisors, but other factors can vary based on a company's industry and size. For example, many biotech companies will have much smaller revenues and not be profitable. More mature companies are likely to have greater revenues and market caps, but slower growth rates. High-growth companies are likely to be smaller, and usually have a shorter history of profitability.

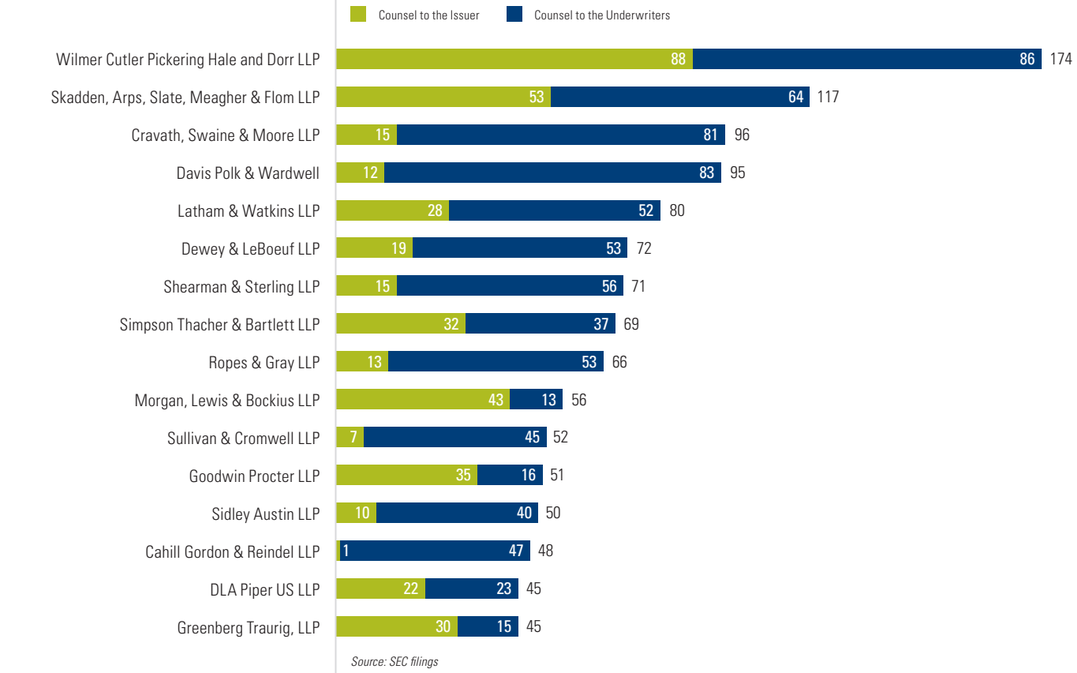
Beyond these objective measures, IPO candidates need to be ready for public ownership in a range of other areas, including employee recruitment and retention; accounting preparation; corporate governance; financial and disclosure controls and procedures; external communications; and a variety of corporate housekeeping tasks. ■

How Do You Compare? Some Facts About the IPO Market

Set forth below are selected metrics about the IPO market, based on combined data for all US IPOs from 2007 through 2009.

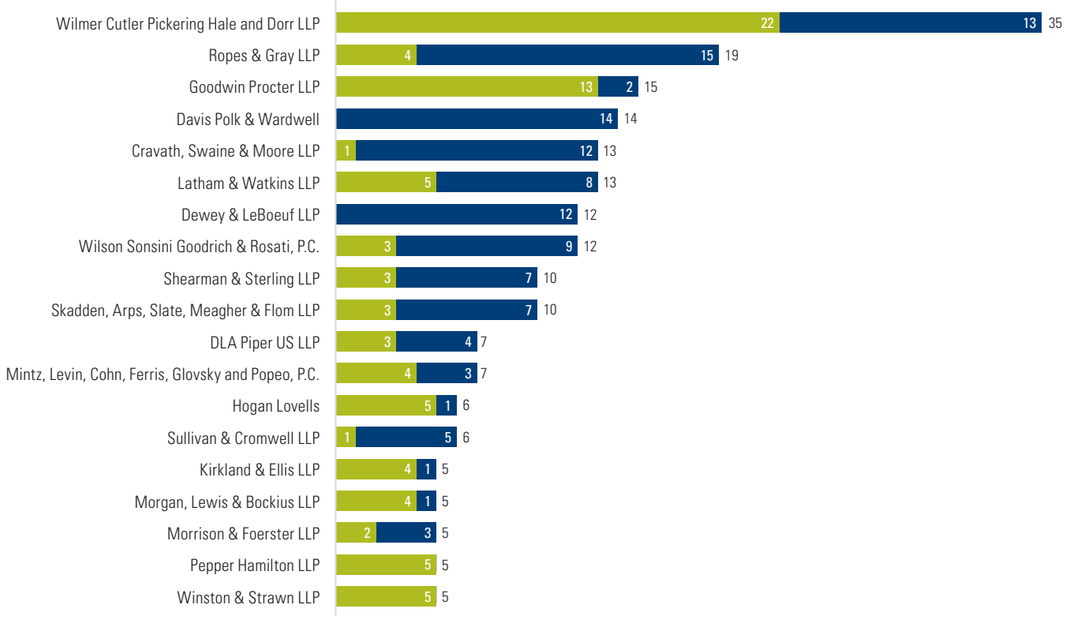
Median offering size	$123.1 million (12% below $50 million and 10% above $500 million)
Median annual revenue of IPO companies	$94.5 million (31% below $50 million and 16% above $500 million)
Percentage of IPO companies that are profitable	66%
Aftermarket performance by year-end	18% average increase from IPO price (2009) 36% average decrease from IPO price (2008) 15% average increase from IPO price (2007)
State of incorporation of IPO companies	Delaware—92% No other state over 1%
Percentage of IPOs including selling stockholders, and median percentage of offering represented by those shares	Percentage of IPOs—54% Median percentage of offering—32%
Percentage of IPOs including directed share programs, and median percentage of offering represented by those shares	Percentage of IPOs—45% Median percentage of offering—5%
Percentage of IPO companies disclosing adoption of ESPP	27%
Percentage of IPO companies using a "Big 4" accounting firm	79%
Form of outside director compensation paid by IPO companies	Cash only—12% Equity only—3% Cash and equity—85%
Stock exchange on which the company's common stock was listed	Nasdaq—62% NYSE—35% Amex—3%
Median number of Form S-1 amendments (excluding exhibits-only amendments) filed before effectiveness	Five
Median IPO expenses	Legal—$1,200,000 Accounting—$825,000 Total—$3,000,000
Median underwriting discount	7%
Time elapsed from initial filing to effectiveness of the Form S-1	Median—112 calendar days 25th percentile—89 calendar days 75th percentile—181 calendar days

Eastern US IPOs – 1996 to 2009



Source: SEC filings

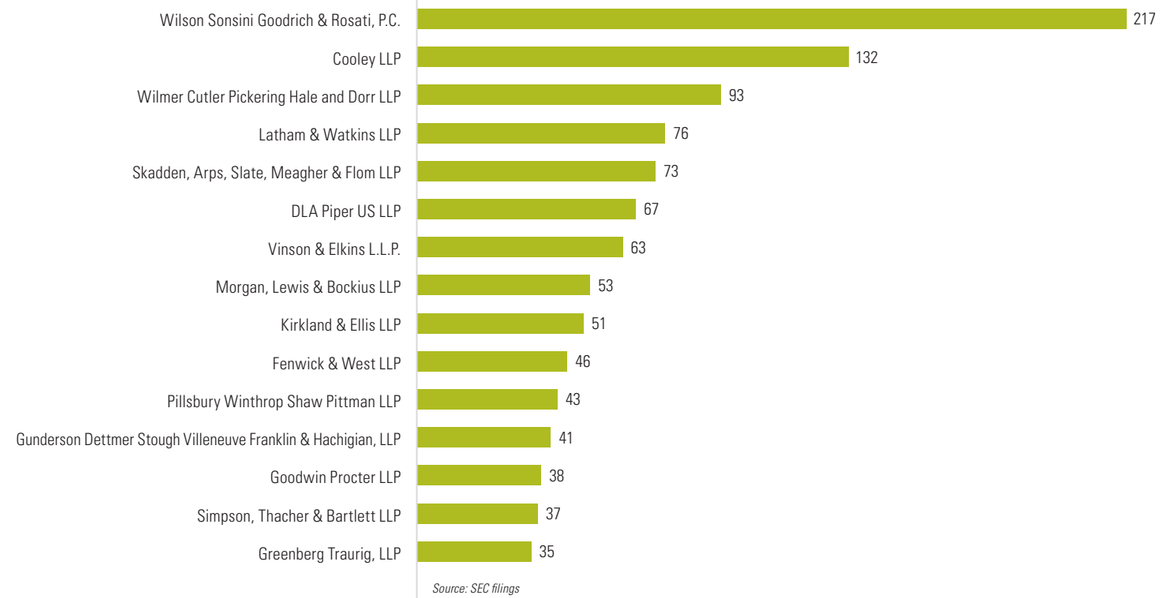
Eastern US Technology Company IPOs – 2004 to 2009



Source: SEC filings

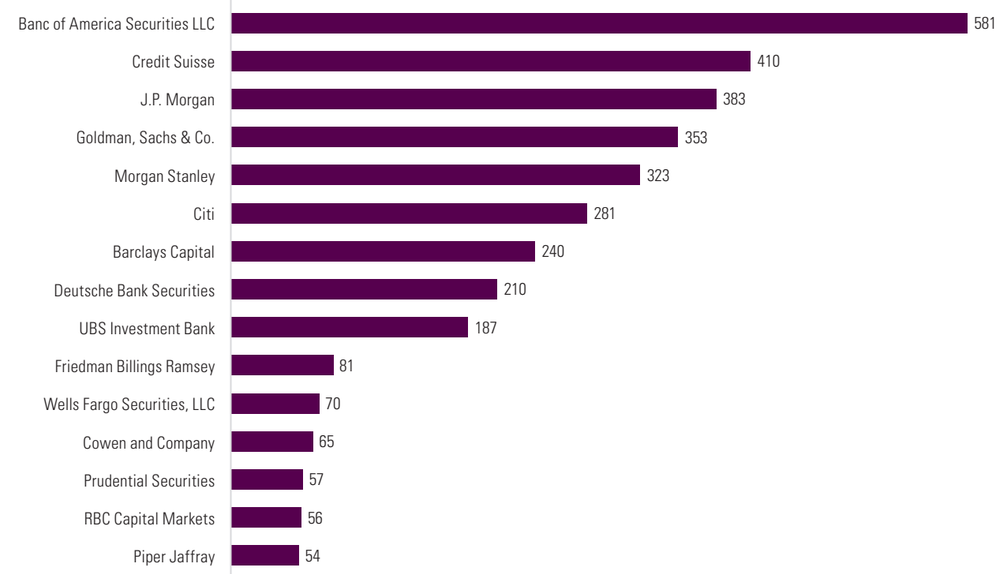
The above charts are based on companies located east of the Mississippi River.

Issuer Counsel in US IPOs – 1996 to 2009



Source: SEC filings

Bookrunner in US IPOs – 1996 to 2009



Source: Thomson Reuters

Counsel of Choice for Public Offerings

SERVING INDUSTRY LEADERS IN TECHNOLOGY, LIFE SCIENCES, CLEANTECH, FINANCIAL SERVICES, COMMUNICATIONS AND BEYOND

SS&C	STATE STREET	LogMeIn	STAPLES	ANALOG DEVICES	Sensata Technologies	American Superconductor	ACCRETIVE HEALTH
Initial Public Offering of Common Stock	*Public Offerings of Senior Notes*	*Initial Public Offering of Common Stock*	*Public Offerings of Senior Notes*	*Public Offering of 5.00% Notes Due July 1, 2014*	*Initial Public Offering of Ordinary Shares*	*Public Offering of Common Stock*	*Initial Public Offering of Common Stock*
$185,006,000	**$4,450,000,000**	**$122,667,000**	**$2,000,000,000**	**$375,000,000**	**$654,120,000**	**$163,300,000**	**$138,000,000**
Counsel to Issuer	Counsel to Issuer	Counsel to Issuer	Counsel to Issuer	Counsel to Issuer	Counsel to Underwriters	Counsel to Issuer	Counsel to Issuer
April 2010	**March and May 2009**	**July 2009**	**January and March 2009**	**June 2009**	**March 2010**	**November 2010**	**May 2010**

NuPathe	BioCryst Pharmaceuticals, Inc.	Infineon technologies	LTXcredence	FSP Franklin Street Properties	Savient Pharmaceuticals, Inc.	AVEO Pharmaceuticals, Inc.
Initial Public Offering of Common Stock	*Public Offering of Common Stock*	*Rights Offering of ADRs Representing Ordinary Shares*	*Public Offering of Common Stock*	*Public Offering of Common Stock*	*Public Offerings of Common Stock*	*Initial Public Offering of Common Stock*
$50,000,000	**$48,750,000**	**$1,037,000,000**	**$50,801,000**	**$119,600,000**	**$96,719,000**	**$89,717,000**
Counsel to Underwriters	Counsel to Underwriters	US Counsel to Issuer	Counsel to Issuer	Counsel to Issuer	Counsel to Issuer	Counsel to Issuer
August 2010	**November 2009**	**August 2009**	**March 2010**	**September 2009**	**April and October 2009**	**March 2010**

Dean Foods	Aegerion Pharmaceuticals	TERADYNE	CAF Corporación Andina de Fomento	Stream Global Services	Labopharm	Evercore Partners	MOMENTA
Public Offering of Common Stock	*Initial Public Offering of Common Stock*	*Public Offering of 4.50% Convertible Senior Notes due 2014*	*Public Offering of 8.125% Notes Due 2019*	*Rule 144A Placement of 11.25% Senior Secured Notes due 2014*	*Public Offering of Common Stock and Warrants*	*Public Offering of Common Stock*	*Public Offering of Common Stock*
$463,641,000	**$54,625,000**	**$190,000,000**	**$1,000,000,000**	**$200,000,000**	**$23,000,000**	**$83,524,000**	**$49,450,000**
Counsel to Issuer	Counsel to Underwriters	Counsel to Issuer	Counsel to Underwriters	Counsel to Issuer	US Counsel to Underwriters	Counsel to Underwriters	Counsel to Issuer
May 2009	**October 2010**	**April 2009**	**June 2009**	**October 2009**	**February 2010**	**September 2010**	**September 2009**

Bottomline Technologies	PHARMASSET	ThermoFisher SCIENTIFIC	TARGACEPT	casella waste systems, inc.	Discovery COMMUNICATIONS	GENPACT	A123 SYSTEMS	AMERESCO
Public Offering of Common Stock	*Public Offering of Common Stock*	*Public Offering of 3.200% Senior Notes due 2015 and 4.700% Senior Notes due 2020*	*Public Offering of Common Stock*	*Rule 144A Placement of 11% Senior Secured Second Lien Notes due 2014*	*Public Offering of 5.625% Senior Notes due 2019*	*Public Offering of Common Stock*	*Initial Public Offering of Common Stock*	*Initial Public Offering of Common Stock*
$66,033,000	**$106,720,000**	**$750,000,000**	**$44,550,000**	**$180,000,000**	**$500,000,000**	**$579,600,000**	**$437,502,000**	**$90,397,000**
Counsel to Issuer	Counsel to Underwriters	Counsel to Issuer	Counsel to Underwriters	Counsel to Issuer	Counsel to Issuer	Counsel to Issuer	Counsel to Issuer	Counsel to Issuer
June 2010	**May 2010**	**April 2010**	**October 2009**	**July 2009**	**August 2009**	**March 2010**	**September 2009**	**July 2010**

WilmerHale®

California

The number of California IPOs dipped from five in 2008 to four in 2009, while gross proceeds plummeted from $18.21 billion (skewed by Visa's record-sized $17.9 billion IPO) to $0.80 billion. These results reflect the lowest level of IPO activity in California in decades.

California's IPOs of 2009 were by Bridgepoint Education ($141.8 million), Dole Food ($446.4 million), Fortinet ($156.3 million) and OpenTable ($60.0 million).

The average California IPO in 2009 ended the year 27% above its offering price—boosted by the strong aftermarket performance of three of the region's four IPOs—compared to the 18% average increase enjoyed by all IPOs nationwide. OpenTable popped 59% on its opening day and ended the year 27% above its offering price.

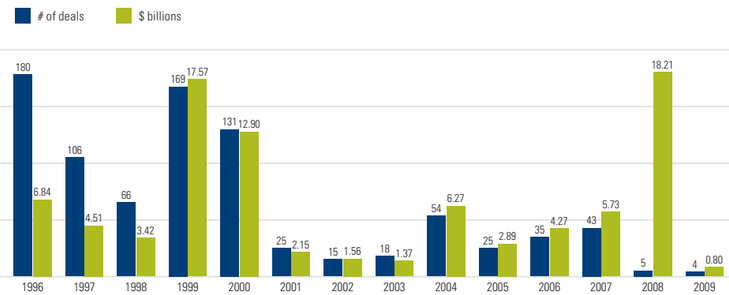
The California IPO market historically has been dominated by technology-related companies, with tech IPOs routinely accounting for 80% to 90% of the total number of the state's offerings. This trend is likely to resume as IPO activity returns to more normal levels.

With capital market and economic conditions improving, California IPO activity should follow suit. In June 2010, electric car maker Tesla Motors became the first American automaker to go public in more than half a century. Other emerging companies that demonstrate strong growth in revenue and profitability can be expected to come to market in the coming months.

Mid-Atlantic

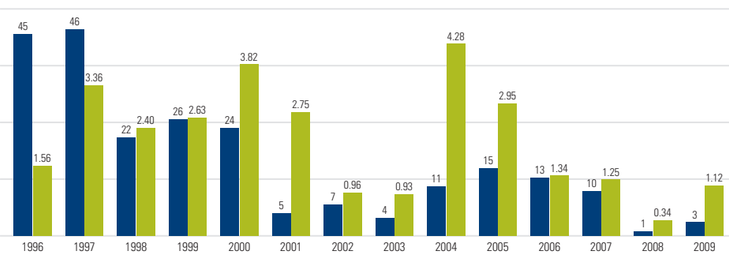
The mid-Atlantic region of Virginia, Maryland, North Carolina, Delaware and the District of Columbia produced three IPOs in 2009, compared to only one in 2008. Gross proceeds soared from $0.34 billion to $1.12 billion, primarily due to one very large IPO.

California IPOs – 1996 to 2009



Source: SEC filings

Mid-Atlantic IPOs – 1996 to 2009



Source: SEC filings

The region's IPOs of 2009 were by Global Defense Technology & Systems ($59.8 million), Rosetta Stone ($112.5 million) and Talecris Biotherapeutics ($950.0 million). Talecris's IPO was one of the largest biotech IPOs in years and bodes well for the health of the region's life sciences sector.

With two IPOs in 2009, Virginia continued as the leading source of IPOs from the mid-Atlantic region. North Carolina contributed the region's other IPO of 2009.

Rosetta Stone jumped 40% on its first trading day before settling back to its offering price at year-end. Global Defense Technology & Systems and Talecris Biotherapeutics appreciated 27% and 17%, respectively, by the end of 2009.

Technology- and defense-related companies historically have contributed a significant portion of the mid-Atlantic region's IPO deal flow. We expect this pattern to continue with improvements in the IPO market.

New England

New England generated three IPOs in 2009, compared to just one in 2008. Proceeds edged up to $0.61 billion in 2009 from $0.5 billion in the prior year.

In 2009, the region's IPOs were by A123 Systems ($380.4 million) and LogMeIn ($106.7 million), both from Massachusetts, and by Connecticut-based STR Holdings ($123.0 million). Each performed well in the aftermarket—the average New England IPO in 2009 ended the year 49% above its offering price.

Momentum has continued into 2010, with New England companies Ameresco, AVEO Pharmaceuticals, Ironwood Pharmaceuticals, Sensata Technologies and SS&C Technologies all completing IPOs to date. Consistent with the region's traditional strengths, two of these offerings were by VC-backed companies (AVEO Pharmaceuticals and Ironwood Pharmaceuticals) and all were technology-related.

We expect that other companies based in New England—primarily drawn from the technology sectors that have been the region's areas of strength for decades—will come to market in the coming months.

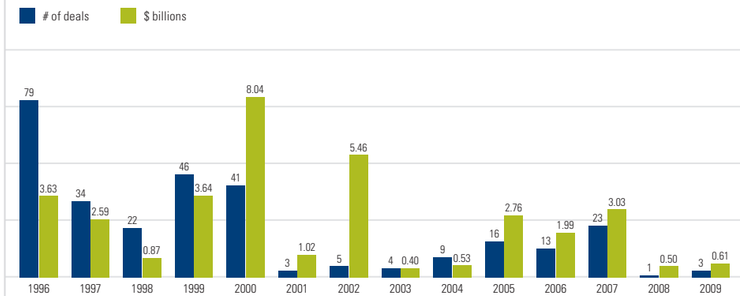
Longer term, we expect that strong levels of venture capital investment in New England, along with the region's world-renowned universities and research institutions, will continue to provide a fertile environment for new companies. Although New England is unlikely to return to the giddy days of 1996 through 2000, when it produced an annual average of 44 IPOs, the region is a natural wellspring of IPO candidates.

Tri-State

The number of IPOs in the tri-state region of New York, New Jersey and Pennsylvania tripled from three in 2008 to nine in 2009. Gross proceeds jumped from $1.68 billion to $3.76 billion.

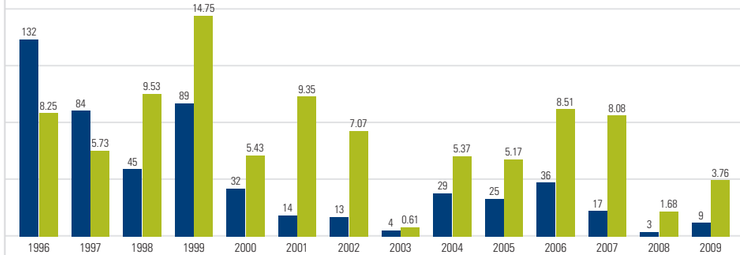
New Jersey and Pennsylvania, which generally trail New York as a source of IPOs, each matched New York's output in 2009.

New England IPOs – 1996 to 2009



Source: SEC filings

Tri-State IPOs – 1996 to 2009



Source: SEC filings

The region's IPOs in 2009 were by Artio Global Investors ($650.0 million), Education Management ($360.0 million), Globe Specialty Metals ($98.0 million), Medidata Solutions ($88.2 million), Mistras Group ($108.8 million), rue21 ($128.5 million), Select Medical Holdings ($300.0 million), Verisk Analytics ($1.9 billion) and Vitamin Shoppe ($154.6 million).

IPOs by tri-state companies in 2009 were strong performers in the aftermarket. All but one of the region's IPOs (Artio Global Investors) were trading above their offering price at year-end 2009, and the average IPO from the region appreciated 23% by the end of the year.

Venture capital activity in the tri-state region now trails only that of California and New England. We expect that VC-backed companies—including those from the technology and life sciences sectors—as well as spinoffs from the region's established companies, will be IPO candidates as the IPO market continues to improve. ■

In recent years, either in response to pressure from stockholders or on their own initiative, the boards of many established public companies have dismantled a number of the anti-takeover provisions that previously were considered standard.

IPO companies, however, continue to implement anti-takeover provisions despite their declining popularity among established public companies, primarily because:

- the need for takeover defenses may be greater given the IPO company's state of development, growth prospects and market capitalization;
- the existence of strong takeover defenses has not historically had an adverse effect on the marketing of IPOs; and
- unless provisions required to be implemented in the corporate charter are put in place prior to the IPO, it will be virtually impossible to adopt them after the company is public.

The following is a summary of the most common anti-takeover provisions adopted by public companies, and some of the questions to be considered by an IPO company's board in evaluating them:

Classified Boards

Should the entire board stand for re-election at each annual meeting, or should directors serve staggered three-year terms, with only one-third of the board standing for re-election each year?

Opponents of classified boards believe that annual elections increase director accountability, which in turn improves director performance, and that classified boards entrench directors and foster insularity. Supporters, however, believe that classified boards enhance the knowledge, experience and expertise of boards by helping ensure that, at any given time, a majority of the directors will have experience and familiarity with the company's business. Supporters also believe classified boards promote continuity and stability, which in turn allow companies to focus on long-term strategic planning, ultimately leading to a better competitive position and maximizing stockholder value.

Limitation of Stockholders' Right to Remove Directors

Should stockholders be able to remove directors from office without cause?

One consequence of a classified board in a Delaware corporation, unless the company's corporate charter provides otherwise, is that directors can only be removed by the stockholders for cause. When a classified board is eliminated, the directors can be removed with or without cause. Sometimes, the right to remove directors is further limited by requiring a supermajority vote. Institutional investors react particularly negatively to provisions that require a supermajority vote to remove a director for cause.

Limitation of Stockholders' Right to Increase Board Size or Fill Vacancies

Should stockholders have the right to increase the size of the board and the right to fill vacancies, or should those rights be reserved for the board?

Many investors believe that stockholders, as the ultimate owners of the company, should have a relatively unfettered ability to change the composition of the board and install directors they believe will be more responsive to stockholder wishes. Supporters of limitations on these rights believe that long-term value creation requires stability and continuity in the board, and that investors are appropriately protected against entrenchment by the directors' state law fiduciary duties, director independence requirements, and the stockholders' ultimate ability to elect replacement directors.

Supermajority Voting Requirements

What stockholder vote should be required to make changes to governance provisions or approve mergers: a simple majority or a "supermajority"?

Opponents of supermajority vote requirements believe that simple-majority provisions make the company more accountable to stockholders, leading to better performance. In addition, opponents believe that supermajority requirements can be almost impossible to satisfy because of abstentions, broker non-votes and voter apathy (especially among retail holders), thereby frustrating the will of the stockholders. Opponents also view supermajority requirements as entrenchment provisions used to block initiatives that are supported by holders of a majority of the company's stock but opposed by management and the board. Supporters, however, claim that supermajority vote provisions help preserve and maximize the value of the company for all stockholders by ensuring that important protective provisions are eliminated only when it is the clear will of the stockholders. When companies have supermajority provisions, the required vote generally ranges between 60% and 80%.

Prohibition of Stockholders' Right to Act by Written Consent

Should stockholders have the right to act by written consent without holding a stockholders' meeting?

Almost all private companies make use of written consents as an efficient way to obtain required stockholder approvals without the need for convening a formal meeting. In contrast, most public companies do not allow stockholders to act by written consent. They instead require that all stockholder action be taken at a duly called stockholders meeting, for which stockholders have been provided detailed information about the matters to be voted on, and at which there is an opportunity to ask questions about proposed business.

Limitation of Stockholders' Right to Call Special Meetings

Should stockholders have the right to call special meetings, or should they be required to wait until the next annual meeting to present matters for action?

Many public companies provide that only the board or specified officers or directors are authorized to call special meetings of stockholders. This could have the effect of delaying until the next annual meeting actions that are favored by holders of a majority of the company's stock. Other companies allow stockholders holding more than a specified threshold of the outstanding shares—commonly 10% to 40%—to call special meetings. Companies that allow stockholders to call special meetings, however, often authorize the board to set the precise location and date of such meetings and sometimes preclude stockholders from calling for a special meeting close in time to an annual meeting.

Advance Notice Requirements

Should stockholders be required to notify the company in advance of director nominations or other matters that the stockholders would like to act upon at a stockholders' meeting?

Advance notice requirements provide that stockholders at a meeting may only consider and act upon director nominations or other proposals that have been properly brought before the meeting. In order to be properly brought, a nomination or proposal must be specified in the notice of meeting and must be brought before the meeting by or at the direction of the board, or by a stockholder who has delivered timely written notice to the company. These provisions could have the effect of delaying until the next stockholder meeting actions that are favored by the holders of a majority of the company's stock. Investors generally do not object to advance notice requirements, so long as the advance notice period is not unduly long. Advance notice periods of 90 to 120 days prior to the anniversary of the prior year's annual meeting date are common.

State Anti-Takeover Laws

Should the company opt out of any state anti-takeover laws to which it is subject, such as Section 203 of the Delaware corporation statute?

Section 203 prevents a publicly held Delaware corporation from engaging in a "business combination" with any "interested stockholder" for three years following the time that the person became an interested stockholder, unless, among other exceptions, the interested stockholder attained such status with the approval of the board. A business combination includes a merger or consolidation involving the interested stockholder and the sale of more than 10% of the company's assets.

The following table sets forth the percentages of all IPO companies in 2007 through 2009 that adopted specified types of takeover defenses prior to or in conjunction with going public:

Takeover Defense	Percentage of IPO Companies
Classified board	59%
Supermajority voting requirements to approve mergers or change corporate charter and bylaws	52%
Prohibition of stockholders' right to act by written consent	69%
Limitation of stockholders' right to call special meetings	77%
Advance notice provisions	83%
Section 203 of the Delaware corporation statute (chose not to opt out)	83%
Blank check preferred stock	81%
Stockholder rights plan ("poison pill")	5%

In general, an interested stockholder is any entity or person beneficially owning 15% or more of the company's stock and any entity or person affiliated with or controlling, or controlled by, such entity or person. A public company incorporated in Delaware is automatically subject to Section 203 unless it opts out in its original corporate charter or pursuant to a subsequent charter or bylaw amendment approved by stockholders.

Blank Check Preferred Stock

Should the board be authorized to designate the terms of series of preferred stock without obtaining stockholder approval?

When "blank check" preferred stock is authorized, the board has the right to issue shares of preferred stock in one or more series without stockholder approval under state corporate law, and has the discretion to determine the rights and preferences of each such series of preferred stock. Authorizing the board to issue preferred stock and determine its rights and preferences has the effect of eliminating delays associated with a stockholder vote on specific issuances. Having blank check preferred stock in place often facilitates the adoption of a stockholder rights plan, financings and the negotiation of strategic alliances. The issuance of preferred stock, however, can be used as an anti-takeover device.

Stockholder Rights Plans

Should the company establish a poison pill?

A stockholder rights plan, often referred to as a "poison pill," is a contractual right that allows all stockholders—other than a stockholder who acquires more than a specified percentage of the company's stock—to purchase additional securities of the company at a specified price. If someone triggers the rights plan, that person's economic and voting power will be significantly diluted. Supporters believe rights plans are an important planning and strategic device because they give the board time to evaluate unsolicited offers and to consider alternatives, and can deter abusive acquisition techniques such as partial offers and "two-tier" tender offers. Opponents view rights plans, which can generally be adopted by board action at any time and without stockholder approval, as an entrenchment device and believe that rights plans improperly give the board, rather than stockholders, the power to decide whether and on what terms the company is to be sold. When combined with a classified board, rights plans make an unfriendly takeover particularly difficult. ■

An IPO is a major milestone for any company, but it does not necessarily mean that all future equity capital will be raised through follow-on public offerings. Two popular financing transactions for public companies—PIPE and Rule 144A placements—involve private placements.

In 2009, PIPE deal volume dropped slightly, and dollar volume and average deal size returned to historical levels following the prior year's spike in very large deals by beleaguered financial institutions. The Rule 144A market was relatively stable in 2009, with the number of equity placements unchanged from 2008 and dollar volume down modestly. The flexibility of PIPE and Rule 144A placements in uncertain market conditions should remain attractive to many companies in 2010.

PIPE Financings

In 2009, the PIPE (Private Investment in Public Equity) market fell far short of the record dollar volume of 2008, but still produced the third-highest amount in history, while deal flow dipped from the prior year.

The number of PIPE deals (including registered direct offerings) edged down from 1,324 in 2008 to 1,265 in 2009. Dollar volume plunged from a record $121.2 billion to $40.7 billion—still the third-highest amount on record—and average deal size plummeted to $32.2 million from a record $91.6 million in the prior year, as mega-deals by financial institutions largely disappeared from the PIPE market.

In 2009, there were only six PIPE financings raising more than $1 billion each, compared to 19 billion-dollar deals in 2008. The largest PIPE financing in 2009 raised $4 billion and the 10 largest deals totaled $15.5 billion. This contrasts with more than $71 billion produced by the 10 largest deals in 2008, including one PIPE financing that raised $12.5 billion.

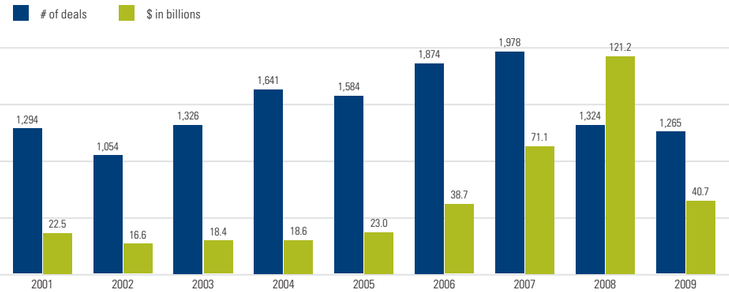
Companies with market capitalizations under $250 million were responsible for 83% of all PIPE financings in 2009, down slightly from 84% in 2008, while companies with market caps below $50 million accounted for 47% of all PIPEs, compared to 52% in the prior year.

Health care was the most active PIPE sector in 2009, with 32% of all deals and an average deal size of $15.0 million, followed by technology, with 16% of all deals and an average deal size of $15.6 million. Financial services companies contributed 6% of the year's deals, down from 9% of all PIPEs in 2008, while average deal size in this sector returned to a more normal $88.8 million from a whopping $905.2 million in 2008.

Of all PIPE financings in 2009, 60% were common stock (average deal size of $31.7 million). The next-largest segments were convertible preferred stock (13% of all PIPEs and $58.2 million average size) and convertible debt (13% of all PIPEs and $28.9 million average size). This breakdown reflects a shift toward common stock deals from convertible debt deals.

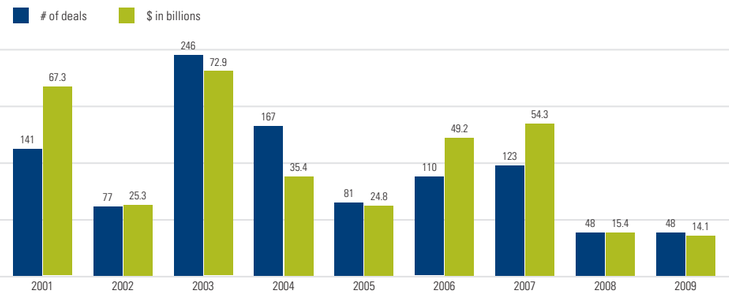
Fixed-price deals represented 89% of all PIPE deals in 2009, unchanged from 2008. The percentage of deals with variable pricing inched up to 7% from 6% in the prior year. Reset pricings accounted for the balance of the deals in both years.

PIPE Financings – 2001 to 2009



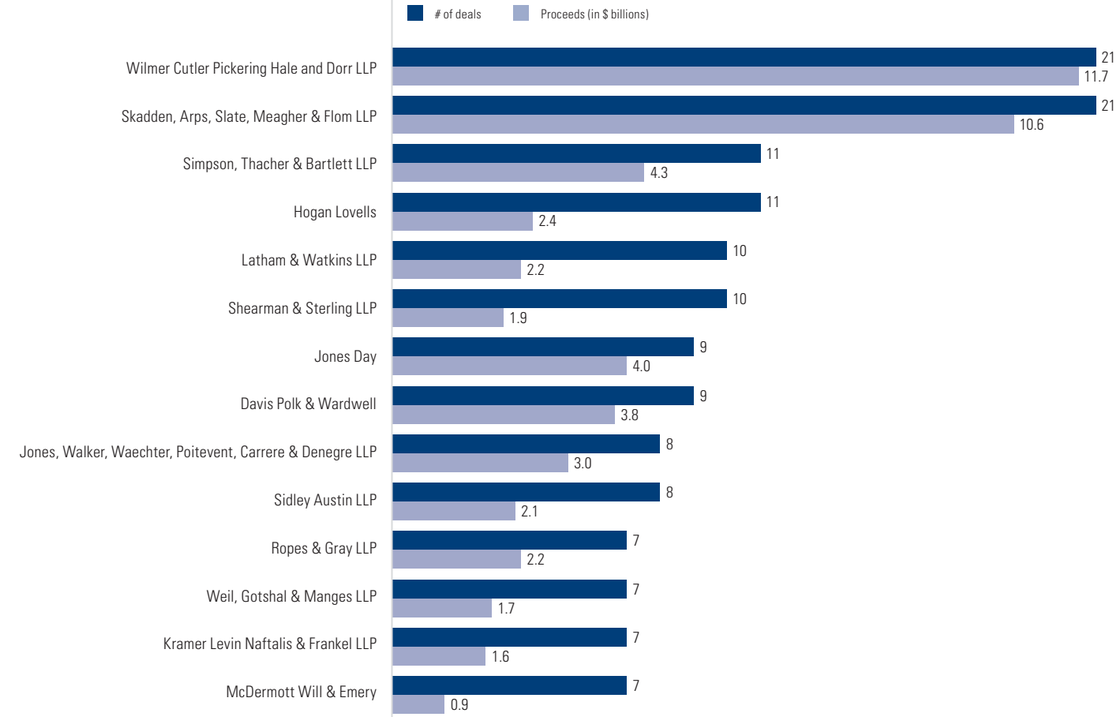
Includes closed deals only.
Source: PrivateRaise

Rule 144A Equity Placements – 2001 to 2009



Includes closed deals only.
Source: PrivateRaise

Company Counsel in Eastern US Rule 144A Equity Placements – 2001 to 2009



The above chart is based on companies located east of the Mississippi River.
Source: PrivateRaise

Deal Metrics in Fixed-Price PIPE Financings in 2009

**Deals with warrants*

Type of Security	Median Discount from Market Price (%)	Median Term (Years)	Median Dividend/ Interest Rate (%)	Median Conversion Premium/ (Discount) (%)	Deals with Registration Rights (%)	Deals with Anti-Dilution Protection (%)	Deals with Warrants (%)	Median Warrant Coverage* (%)	Median Warrant Exercise Premium* (%)
Common Stock	9.3	NA	NA	NA	72.2	4.7	47.8	68.5	16.1
Convertible Preferred Stock	NA	3	6.0	(0.2)	47.1	67.3	56.7	55.0	4.0
Convertible Debt	NA	2	8.0	0.8	34.9	52.2	57.1	50.0	0.3

Rule 144A Placements

After contracting sharply in 2008, the Rule 144A market for equity securities (including convertible debt) was essentially flat in 2009.

The number of Rule 144A equity placements was unchanged, at 48, while gross proceeds dipped from $15.4 billion to $14.1 billion. Average deal size also dropped, to $294.1 million in 2009 from $320.5 million the year before. There was only one billion-dollar placement in 2009.

Rule 144A issuers tend to be larger than issuers in the PIPE market. Companies with market caps above $250 million accounted for 91% of Rule 144A equity placements in 2009 but only 17% of PIPE deals.

Technology, industrial and consumer retail were the most active sectors of the Rule 144A equity market in 2009, each with 15% of all deals. At $434.5 million, the average technology deal size was the largest of the three.

In 2009, 91% of all Rule 144A equity placements involved the issuance of convertible debt securities, while convertible preferred stock deals accounted for the other 9%.

The year's convertible debt placements had a median term of five years, median interest rate of 4.8% and median conversion premium of 25%. Of these deals, 11.6% included registration rights and 100% had anti-dilution protection.

Seasoned public companies have long recognized that Rule 144A placements offer faster execution time and greater flexibility than traditional public offerings. With the advent of automatically effective registration statements for large companies that qualify as "well-known seasoned issuers," however, eligible companies have increasingly opted to structure convertible debt offerings as registered public offerings rather than Rule 144A placements. ■

Updated Edition

Initial Public Offerings: A Practical Guide to Going Public

Drawing on WilmerHale's decades of IPO leadership, this book presents a comprehensive yet practical guide to the going-public process.

Preparation, planning and crisp execution have never been more vital to your chances of IPO success. Now there's a guide that charts every twist and turn on the path to a winning IPO. Hailed by executives, entrepreneurs, general counsel, investment bankers, venture capitalists and accountants alike as the first comprehensive IPO resource, *Initial Public Offerings: A Practical Guide to Going Public* demystifies the IPO process with real-world advice straight from the IPO trenches. Packed with practical guidance, planning tips, best practices and empirical data, this readable guide will help you avoid roadblocks, frame smart questions and make better decisions on every step of the IPO journey.

"[This book] is quickly becoming the bible of the I.P.O. market."
— The New York Times *(The Deal Professor, January 19, 2010)*

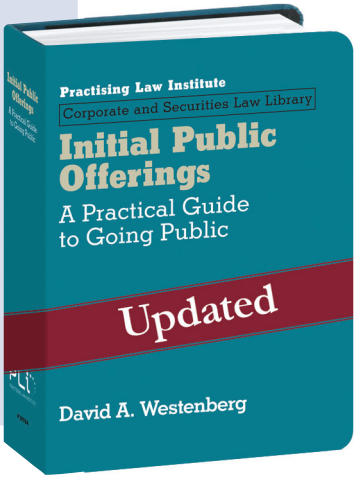
"CEOs should keep this book at their side from the moment they first seriously consider an IPO… and will soon find it dog-eared with sections that inspire clarity and confidence."
— Don Bulens, CEO of EqualLogic at the time it pursued a dual-track IPO

"There's nothing I like more than practical guidance. And this book sure fits the bill as a detailed step-by-step guide that every practitioner should have. A perfect starter's kit."
— Broc Romanek, Editor of TheCorporateCounsel.net

"This book sets the standard against which any future IPO guide will be measured, and should be required reading for management and boards of any company contemplating a public offering."
— David B. Elsbree, public company director and retired audit partner

"This book demystifies the entire IPO process, from A to Z. It is incredibly easy to find what you are looking for and, most importantly, to quickly understand the subject matter."
— Greg Beecher, CFO, Teradyne

"The most complete book about going public ever written—almost everything a company's management needs to know."
— Jay R. Ritter, Cordell Professor of Finance, University of Florida



How to Order:

The book may be purchased from the publisher at www.pli.edu or by calling (800) 260-4754.
A 20% discount is available to WilmerHale clients and friends by specifying the code KAD9-8WEB1.

For more information, visit **www.IPOguidebook.com**.

PLI
PRACTISING LAW INSTITUTE

Want to know more about the venture capital and M&A markets?

Our *2010 Venture Capital Report* offers an in-depth analysis of, and outlook for, the US and European venture capital markets. The report features industry and regional breakdowns, an analysis of the VC fund formation climate, an overview of trends in venture capital financing and VC-backed company M&A deal terms, and a discussion of important actions a start-up company should take to groom itself for an eventual IPO.

See our *2010 M&A Report* for a detailed review of, and outlook for, the global M&A market. In other highlights, we discuss the FTC's new Horizontal Merger Guidelines, summarize the principal differences between public and private acquisitions, examine the challenges posed by pre-IPO acquisitions, and present a survey of key terms in sales of VC-backed companies.

To request a copy of any of the reports described above, or to obtain additional copies of the *2010 IPO Report*, please contact the WilmerHale Marketing Department at marketing@wilmerhale.com or call +1 617 526 5600. An electronic copy of this report can be found at www.wilmerhale.com/2010IPOreport.

Data Sources

WilmerHale compiled all data in this report unless otherwise noted. Offerings by REITs, bank conversions, closed-end investment trusts and special purpose acquisition companies are excluded. Offering proceeds exclude proceeds from exercise of underwriters' over-allotment options, if applicable. For law firm rankings, IPOs are included under the current name of each law firm. Venture capital data is sourced from Dow Jones VentureOne. PIPE and Rule 144A data is sourced from PrivateRaise.

Mixed Sources
Product group from well-managed forests, controlled sources and recycled wood or fiber
www.fsc.org Cert no. BV-COC-970904
© 1996 Forest Stewardship Council
FSC
30% PCW
PRINTED WITH SOY INK
10_478 UNI 11/10 9,000

WilmerHale recognizes its corporate responsibility to environmental stewardship.

wilmerhale.com