

2014 IPO Report

CORPORATE



WILMERHALE® 

2	US Market Review and Outlook
6	Regional Market Review and Outlook <ul style="list-style-type: none">– California– Mid-Atlantic– New England– Tri-State
8	How Do You Compare? Some Facts About the IPO Market
9	JOBS Act Relief: An Update on EGC Elections
10	Selected WilmerHale Public Offerings
12	Law Firm Rankings
14	The CEO’s Expanded Role in an IPO
15	“Flash Results” in IPO Prospectuses
16	Venture Capital–Backed IPOs: A Primer
17	Private Equity–Backed IPOs: A Primer
18	An Overview of Cross-Border IPOs
20	<i>Initial Public Offerings: A Practical Guide to Going Public</i>

2 US Market Review and Outlook

REVIEW

The IPO market regained its luster in 2013, ending the year with a total of 178 IPOs—a 75% increase from the 102 IPOs in 2012. The 2013 total was 66 higher than the average of 112 IPOs per year that prevailed from 2010 to 2012, and only eight IPOs below the annual average of 186 IPOs recorded between 2004 and 2007.

The final three quarters of 2013 each produced 50 or more IPOs—a level of consistently high activity not seen since 2000.

Gross proceeds increased 18%, from \$35.11 billion in 2012 to \$41.27 billion in 2013—the second-highest tally since 2000, trailing only the \$43.33 billion in 2007. The six billion-dollar IPOs in 2013, led by Hilton's \$2.35 billion IPO, represented the highest annual number of billion-dollar IPOs since 2004, when there were seven. Other large offerings in 2013 came from Zoetis (\$2.24 billion) and Twitter (\$1.82 billion).

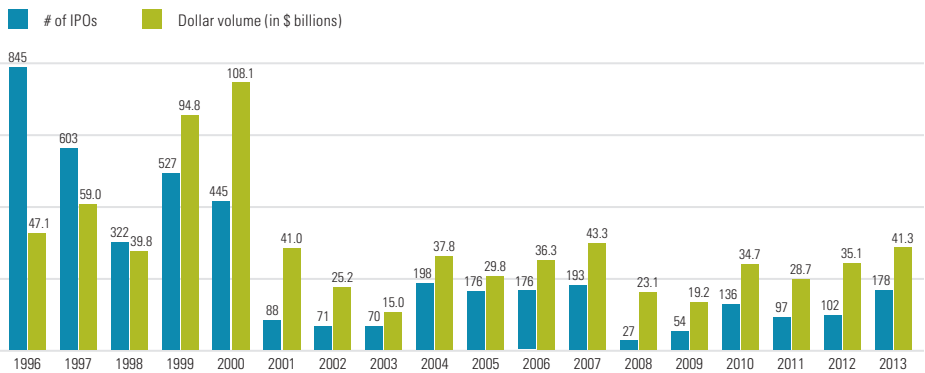
The fourth quarter's gross proceeds of \$15.4 billion represented the fifth-highest quarterly total since 2000. The four quarterly tallies since 2000 that have surpassed this total were buoyed by mega-sized IPOs—Visa, Facebook, General Motors and Kraft Foods, which were also the four largest US IPOs in history.

The 2013 IPO market was dominated by emerging growth companies (EGCs), which produced 82% of all IPOs—slightly higher than the 76% market share for EGC IPOs in 2012 following the enactment of the JOBS Act.

The median offering size of \$107.4 million in 2013 was 14% higher than the median offering size of \$94.3 million in 2012. The median size for EGC IPOs, at \$95.9 million, was less than a quarter of the \$419.1 million median deal size for other IPOs in 2013.

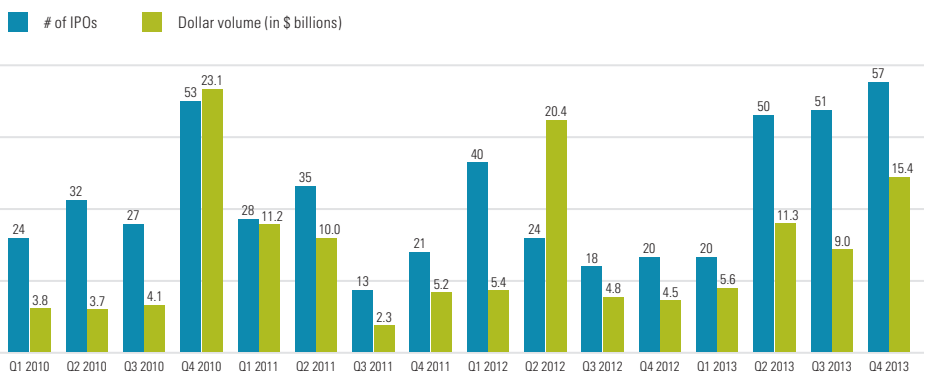
The average 2013 IPO gained 21% from its offering price on its first trading day—surpassing the 16% average first-day gain for all IPOs in 2012—and was the highest such tally since the 53% average first-day gain in 2000. There were six “moonshots” (IPOs that double in price on their opening day) in 2013, led by Sprouts Farmers

US IPOs by Year – 1996 to 2013



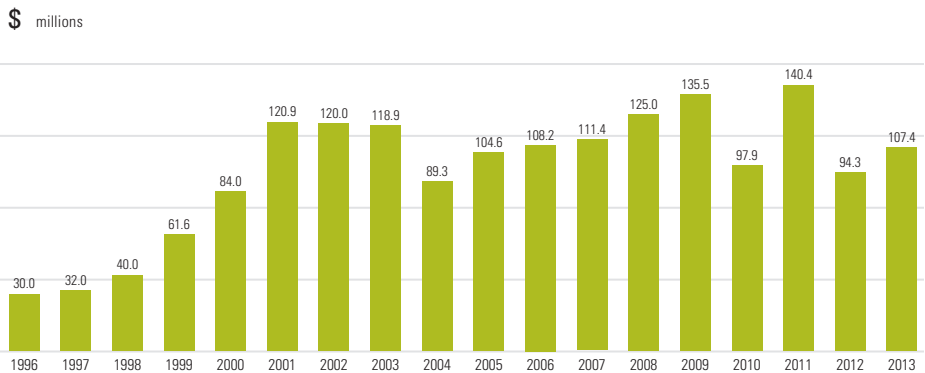
Source: SEC filings

US IPOs by Quarter – 2010 to 2013



Source: SEC filings

Median IPO Offering Size – 1996 to 2013



Source: SEC filings

Market (up 123%) and Voxeljet (up 122%). Since the year 2000, which generated 85 moonshots, no year had produced more than a pair of moonshots until 2013, and there had been a total of only 11 moonshots in the intervening 12-year period.

In 2013, 22% of all IPOs were “broken” (IPOs whose stock closes below the offering price on their opening day), compared to 20% in 2012, but this percentage still represents the second-lowest level of broken IPOs since 2006.

The average 2013 IPO gained 22% from first-day close through year-end—the highest figure seen since the dot-com era—and ended the year 47% above its offering price, topping the annual gains in the major market indices.

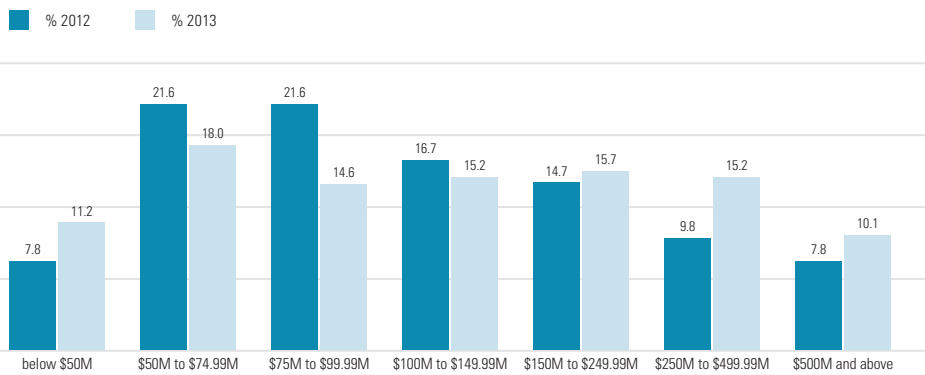
At year-end 2013, 81% of the year’s IPOs were trading above their offering price (with one company having been acquired), compared to 64% in 2012—also the average for the 10-year period from 2003 to 2012.

The 10 best-performing IPOs of 2013 included offerings from both tech and non-tech companies in a variety of industries. The year’s best performer was Insys Therapeutics, which was trading 384% above its offering price at year-end, followed by GW Pharmaceuticals (up 367%), ExOne (up 236%) and QIWI (up 229%).

The median annual revenue of IPO companies decreased by one-third, from \$133.6 million in 2012 to \$89.9 million in 2013—the lowest figure since the \$74.5 million median in 2007. In 2013, EGCs had median annual revenue of \$61.5 million, compared to \$2.54 billion for other companies. Median annual revenue for EGCs represented a 43% decline from the prior year, in part due to the higher number of life sciences IPOs in 2013.

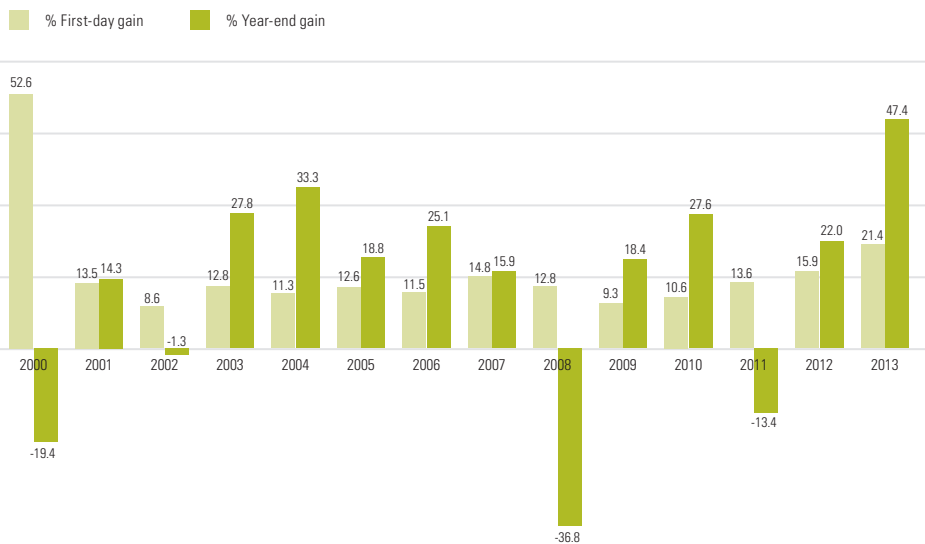
With interest rates at historic lows and investors more eager for growth than profitability, the percentage of profitable IPO companies declined from 55% in 2012 to 43% in 2013—the lowest level since the 26% in both 1999 and 2000. Only 27% of the year’s life sciences and technology-related IPO companies were profitable.

Distribution of IPO Offering Size – 2012 and 2013

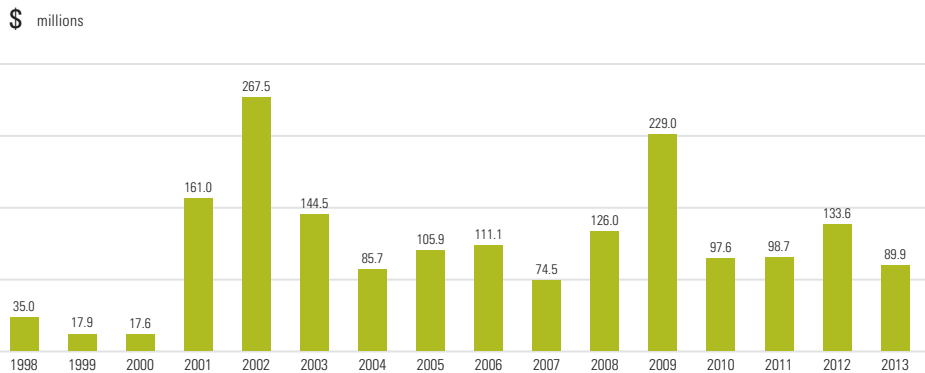


Source: SEC filings

Average IPO First-Day and Year-End Gain by Year – 2000 to 2013



Median Annual Revenue of IPO Companies – 1998 to 2013



Source: SEC filings and IPO Vital Signs

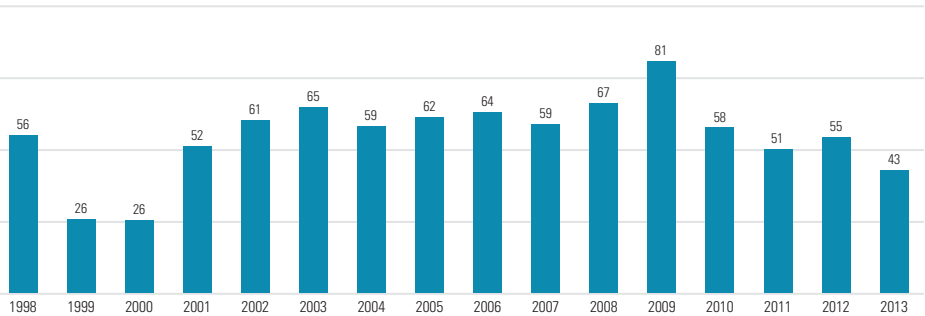
4 US Market Review and Outlook

Individual components of the IPO market fared as follows in 2013:

- VC-Backed IPOs:** The number of IPOs by venture capital-backed US issuers increased 39%, from 51 in 2012 to 71 in 2013—falling just one IPO short of 2007’s post-boom peak of 72. VC-backed IPOs accounted for 50% of all US issuer IPOs in 2013—down from the 57% average that prevailed between 2010 and 2012. The median deal size for VC-backed companies was \$78.0 million—the lowest level since the \$72.0 million median in 2006—while the median deal size for non-VC-backed companies was \$226.7 million. The average 2013 US issuer VC-backed IPO gained 51% from its offering price through year-end—double the 25% average gain seen in 2012 for the prior year’s class.
- PE-Backed IPOs:** Private equity-backed IPOs surged, their numbers increasing by 75%, from 28 in 2012 to 49 in 2013, only three below the total of 52 in 2006. PE-backed US issuers commanded a 35% share of all US-issuer IPOs in 2013, up from 31% in 2012. Excluding limited partnerships, Hilton’s IPO was the third-largest PE-backed IPO in US history, behind only HCA Holdings’ \$3.79 billion IPO in March 2011 and Kinder Morgan’s \$2.86 billion IPO the month before. The median deal size for PE-backed IPOs in 2013 was \$252.6 million—more than triple the \$78.8 million deal size for all other IPOs. The average PE-backed IPO in 2013 gained 36% from its offering price through year-end—an impressive gain given the larger average market caps of PE-backed IPOs.
- Life Sciences IPOs:** Life sciences companies captured 28% of the US IPO market in 2013, with 50 IPOs—seven more than the annual total of 43 life sciences IPOs that prevailed in the three years from 2010 to 2012. Life sciences IPO companies in 2013 had median annual revenue of just \$10.0 million, although this was more than quadruple the \$2.4 million figure over the prior three-year period. At year-end, 82% of the year’s crop of life sciences IPO companies were trading above their offering price, with the average 2013 life sciences IPO company enjoying a year-end gain of 56%.

Percentage of Profitable IPO Companies – 1998 to 2013

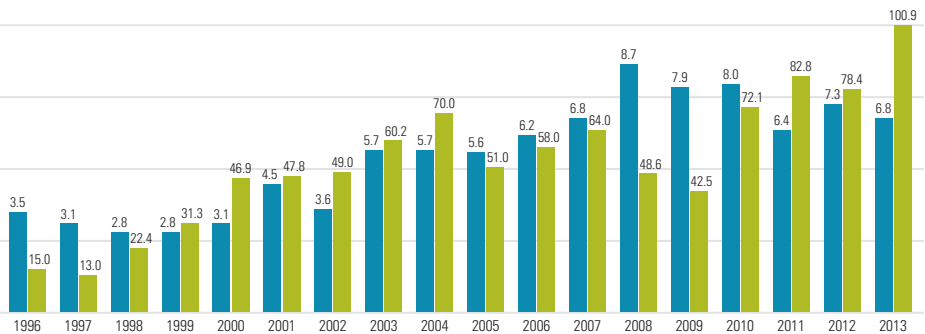
%



Source: SEC filings and IPO Vital Signs

Median Time to IPO and Median Amount Raised Prior to IPO – 1996 to 2013

of years Median amount raised prior to IPO (in \$ millions)



Source: Dow Jones VentureSource and SEC filings

- Tech IPOs:** Deal flow in the broadly defined technology sector remained strong in 2013. Tech-related companies accounted for 61% of the year’s IPOs, slightly above the 58% average of the preceding three years. Tech IPOs performed better in the aftermarket than IPOs in other sectors, with an average gain through year-end of 57%, compared to the average gain of 33% for non-tech IPOs.
- Foreign IPOs:** The number of foreign issuer IPOs climbed from 12 in 2012 (13% of the market) to 36 in 2013 (20% of the market)—the third-highest total since 2000. With concerns about the reliability of financial information provided by Chinese issuers receding, the number of US IPOs by Chinese issuers rebounded from two in 2012

to eight in 2013—all but one coming in the latter half of the year—although their total remained well short of the high water mark of 40 IPOs in 2010 (29% of that year’s total). The average first-day gain of 41% for Chinese issuer IPOs in 2013 and the 79% average year-end gain (only one Chinese issuer IPO ended the year below its offering price) bodes well for continued investor interest in Chinese issuer IPOs in 2014.

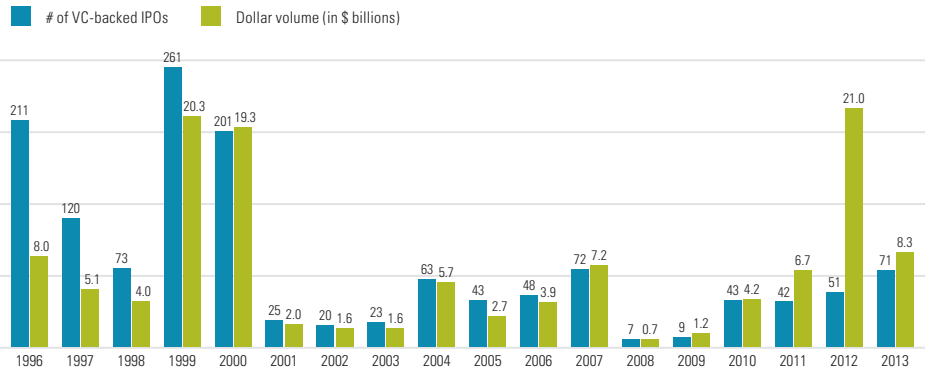
In 2013, 71 companies based in the eastern United States (east of the Mississippi River) completed IPOs, equal to the number of IPOs by western US-based issuers. California led the state rankings with 44 IPOs, followed by Massachusetts and New York (each with 12 IPOs), North Carolina (with 10 IPOs) and Texas (with 9 IPOs).

OUTLOOK

IPO market activity in the coming year will depend on a number of factors, including the following:

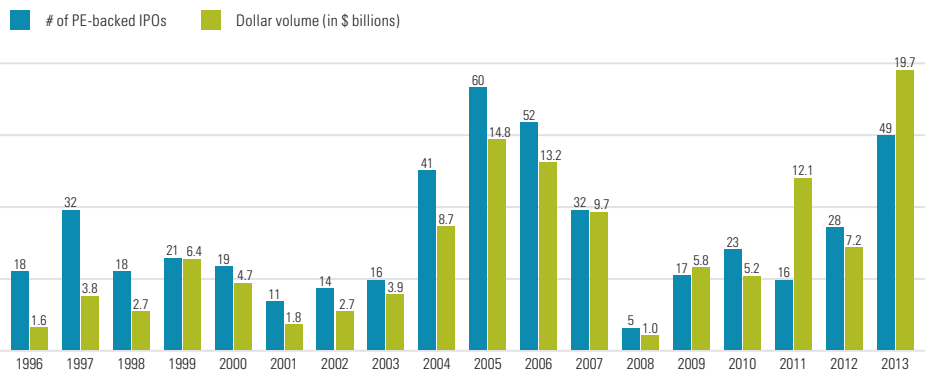
- **Economic Growth:** While the US economy has seen improvements in a number of key metrics, job creation remains inconsistent and the workforce participation rate—the labor force as a percentage of the whole population—is at its lowest level since 1978. Moreover, the impact of the Fed’s decision to begin pulling back on its bond-buying program remains to be seen. Sustained economic growth will be key if the IPO market is to maintain or increase the pace that prevailed in 2013.
- **Capital Market Conditions:** Stable and robust capital markets remain a precursor to IPO activity. The major US indices posted impressive annual gains yet again in 2013, with the Dow Jones Industrial Average, Nasdaq Composite Index and S&P 500 increasing 26%, 38% and 30%, respectively. Similar gains may not be realistic in 2014—since 1927, the S&P 500 has only seen year-over-year gains of more than 20% in the period from 1995 to 1998—but a reduction in the market volatility that has periodically stalled IPO deal flow in recent years would boost the market.
- **Venture Capital Pipeline:** Venture capitalists depend on IPOs—along with company sales—to provide liquidity to their investors. There has been a resurgence in VC-backed IPOs over the last four years, including IPOs by a number of high-profile technology and social media–related companies, and the pool of attractive VC-backed IPO candidates remains large. Although venture capital investors often prefer a sale over an IPO because a sale usually can be completed faster and with greater certainty than an IPO, the outsized valuations that can be achieved in the public market may be shifting the sale/IPO pendulum back toward IPO exits for the most valuable VC-backed companies.
- **Private Equity Impact:** Private equity investors also seek to divest portfolio companies or achieve liquidity through IPOs. With private equity firms holding near-record levels of “dry powder” (unspent capital that investors have

Venture Capital–Backed IPOs – 1996 to 2013



Source: Dow Jones VentureSource and SEC filings
Based on US IPOs by VC-backed US issuers.

Private Equity–Backed IPOs – 1996 to 2013



Source: Thomson Reuters and SEC filings
Based on US IPOs by PE-backed US issuers.

committed to provide), and general partners facing deadlines as the investment window starts to close on funds raised in 2007 and 2008, private equity sponsors can be expected to pursue IPOs aggressively in 2014.

- **Impact of JOBS Act:** Enacted with great fanfare in April 2012, the JOBS Act is intended to improve access to the public capital markets for EGCs. The vast majority of all IPO candidates can qualify as EGCs, but the extent to which the JOBS Act is responsible for the increase in the number of IPOs in 2013 is unclear. In any event, the confidential submission provisions of the act and the significant increase in the maximum number of stockholders that a private company may have without registering as a public

company has given emerging companies more flexibility in timing their IPOs.

The IPO market has continued its strong momentum into 2014, producing a total of 60 IPOs with gross proceeds of \$9.53 billion in the first quarter of 2014—the highest quarterly number of IPOs since the fourth quarter of 2007. If favorable market and economic tailwinds continue to prevail, a stream of new offerings should continue throughout the year, although some high-profile companies are likely to be acquired before they go public. The start of 2014 has already seen Google’s \$3.2 billion acquisition of Nest and VMware’s \$1.54 billion acquisition of AirWatch—the recipient of a \$225 million venture financing in 2013—followed by Facebook’s proposed acquisition of WhatsApp for a stunning \$19 billion. ■

6 Regional Market Review and Outlook

CALIFORNIA

The number of California IPOs increased 38%, from 32 in 2012 to 44 in 2013—the highest number in the state since the 53 IPOs in 2004.

Gross proceeds declined by two-thirds, from \$19.89 billion in 2012 to \$6.64 billion in 2013, although the 2012 figure was buoyed by Facebook's \$16.0 billion IPO. Gross proceeds in 2013 represented the third-highest annual total since 2000.

The largest California IPO in 2013 came from Twitter (\$1.82 billion), followed by Pattern Energy Group (\$352 million) and FireEye (\$304 million).

The California IPO market remains dominated by technology-related and VC-backed companies. All California IPOs but one in 2013 were by emerging growth companies (EGCs), and technology-related companies accounted for 80% of the state's offerings, compared to 61% of the overall US market. The number of venture-backed California IPOs increased from 27 in 2012 to 32 in 2013—representing 45% of all US issuer VC-backed IPOs.

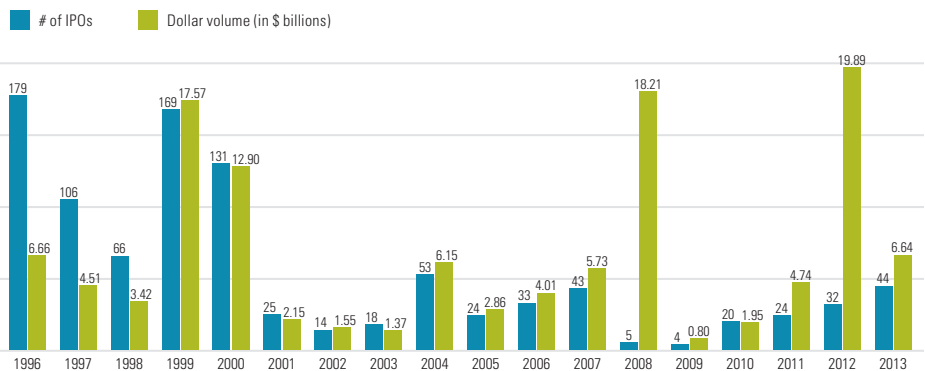
The state's average IPO in 2013 ended the year 33% above its offering price. Marketo and Twitter produced the largest gains, up year-end by 185% and 145% from their offering price, respectively. Only 66% of the state's IPOs ended 2013 above their offering price, compared to 87% of all other IPOs in 2013.

With the largest pool of venture capital-backed companies in the country and a wealth of entrepreneurial talent, California should continue to produce significant IPO activity in 2014, including offerings from Internet and biopharmaceutical companies, as well as providers of other exciting new products and technologies. The year is off to a very strong start, with the first quarter of 2014 already producing 15 IPOs by California-based issuers—up from six in the first quarter of 2013.

MID-ATLANTIC

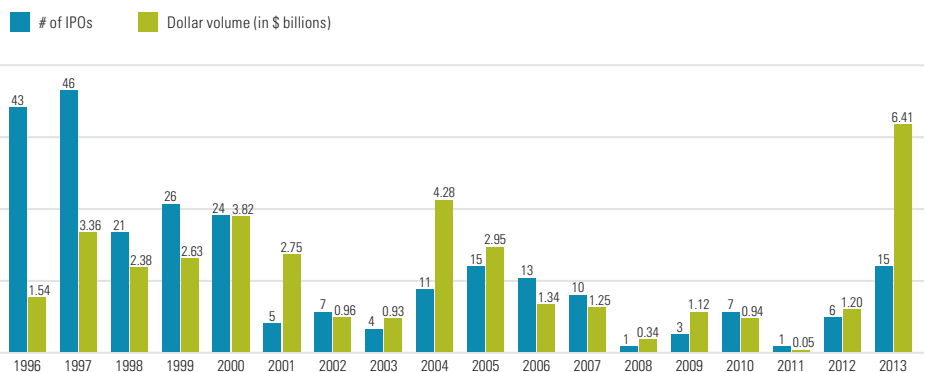
The number of IPOs in the mid-Atlantic region of Virginia, Maryland, North Carolina, Delaware and the District of Columbia soared from six

California IPOs – 1996 to 2013



Source: SEC filings

Mid-Atlantic IPOs – 1996 to 2013



Source: SEC filings

in 2012 to 15 in 2013—equal to the 2005 figure, and the highest number in the region since the 24 in 2000.

North Carolina led the region with 10 IPOs—the fourth-highest state tally of the year and a figure equal to the state's combined total for the preceding seven years. Maryland contributed three IPOs, with the remaining pair coming from Virginia.

Boosted by Hilton's \$2.35 billion IPO—the nation's largest IPO of 2013—gross proceeds in the region jumped from \$1.20 billion in 2012 to \$6.41 billion in 2013, a total that eclipses the region's previous high of \$4.28 billion in 2004 and is larger than the prior seven years' proceeds combined. The region also

produced the ninth- and tenth-largest US IPOs of the year: Quintiles Transnational (\$947 million) and Premier (\$760 million).

The average mid-Atlantic IPO in 2013 ended the year 31% above its offering price. The region's best-performing IPOs came from ChannelAdvisor, Cvent and MacroGenics, which produced gains of 198%, 73% and 71%, respectively, at year-end.

The mid-Atlantic region saw six IPOs by life sciences companies in 2013—40% of the region's total. Life sciences company IPO deal flow should remain robust in 2014. The mid-Atlantic region has already produced five IPOs in the first quarter of 2014—including three by life sciences companies—compared to a solitary IPO in the first quarter of 2013.

NEW ENGLAND

The number of IPOs in New England increased from eight in 2012 to 12 in 2013. Massachusetts, which accounted for all of the region's IPOs, tied with New York for the second-highest IPO state total in 2013 after California.

Gross proceeds increased from \$648 million in 2012 to \$1.48 billion in 2013. The largest New England IPO in 2013 was by Endurance International Group (\$253 million)—the largest IPO by a technology company in the region over the last four years. The region's two largest life sciences IPOs came from Karyopharm Therapeutics (\$109 million) and Agios Pharmaceuticals (\$106 million).

The median offering size of New England IPOs increased 22%, from \$84.5 million in 2012 to \$103.5 million in 2013—in line with the \$107.4 million median figure for all US IPOs in 2013.

Life sciences companies accounted for three-quarters of the region's IPOs in 2013. All but one of the region's IPOs in 2013 were by EGCs.

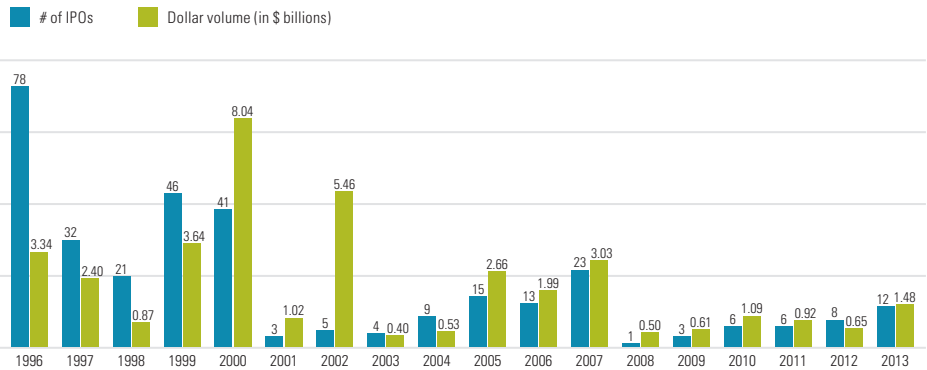
Every New England IPO in 2013 ended the year above its offering price, with the average IPO gaining 54% by year-end. The best-performing New England IPOs of 2013 were from Acceleron Pharma, Enanta Pharmaceuticals and Tetrphase Pharmaceuticals, which ended the year 164%, 95% and 93% above their offering prices, respectively.

With its strong levels of venture capital investment and world-renowned universities and research institutions, New England should continue to generate a vibrant crop of IPO candidates in the coming year. Although dominated by life sciences companies in 2013, the New England IPO market in 2014 should include offerings from the Internet, software and information technology sectors. The first quarter of 2014 has already seen eight New England IPOs, up from three IPOs in the first quarter of 2013.

TRI-STATE

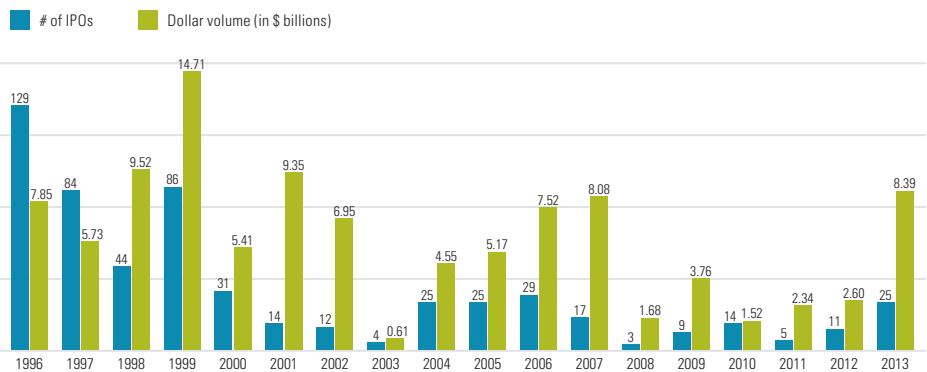
The number of IPOs in the tri-state region of New York, New Jersey and Pennsylvania more than doubled for

New England IPOs – 1996 to 2013



Source: SEC filings

Tri-State IPOs – 1996 to 2013



Source: SEC filings

the second year in a row, increasing from 11 in 2012 to 25 in 2013—the second-highest number of IPOs in the region since 2000, trailing only the 29 in 2006.

With a trio of billion-dollar offerings—Zoetis (\$2.24 billion), ING U.S. (\$1.25 billion) and Coty (\$1 billion)—gross proceeds in the region more than tripled from \$2.60 billion in 2012 to \$8.39 billion in 2013.

EGCs accounted for 72% of the tri-state region's IPOs in 2013, compared to 84% for all other US IPOs. Life sciences companies represented one-third of the region's IPOs in 2013, and tri-state companies were responsible for the country's first- and third-largest life sciences IPOs—Ophthotech (\$167 million) and PTC Therapeutics (\$126 million).

The region's average IPO ended the year up 41% from its offering price. The best-performing tri-state IPO of 2013 was by ExOne, which was trading 236% above its offering price at year-end—the third-best-performing IPO of 2013.

The tri-state region has long been home to IPOs by large, well-established companies, including private equity-backed companies. With venture capital activity in the region now trailing only that of California, the tri-state region should produce a growing number of venture-backed IPOs in 2014 from the Internet, software and life sciences sectors. The year has begun on a strong note, with the region producing 11 IPOs in the first quarter—its highest quarterly tally since the 13 IPOs in the final quarter of 2006. ■

8 How Do You Compare? Some Facts About the IPO Market

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 generally 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.


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 2013, unless otherwise stated (EGC data for period following enactment of JOBS Act).

Percentage of IPO companies qualifying as "emerging growth companies" under JOBS Act	80%
Median offering size	\$110.9 million (12% below \$50 million and 10% above \$500 million)
Median annual revenue of IPO companies	\$100.9 million (31% below \$50 million and 19% above \$500 million)
Percentage of IPO companies that are profitable	56%
State of incorporation of IPO companies	Delaware—93% No other state over 1%
Percentage of IPOs including selling stockholders, and median percentage of offering represented by those shares	Percentage of IPOs—51% Median percentage of offering—30%
Percentage of IPOs including directed share programs, and median percentage of offering represented by those shares	Percentage of IPOs—41% Median percentage of offering—5%
Percentage of IPO companies disclosing adoption of ESPP	32%
Percentage of IPO companies using a "Big 4" accounting firm	81%
Stock exchange on which the company's common stock was listed	Nasdaq—58% NYSE—41% Other—1%
Median underwriting discount	7%
Median number of Form S-1 amendments (excluding exhibits-only amendments) filed before effectiveness	Five
Time elapsed from initial confidential submission to initial public filing of Form S-1 (EGCs only)	Median—62 calendar days 25th percentile—42 calendar days 75th percentile—99 calendar days
Time elapsed from initial filing to effectiveness of Form S-1	Median—118 calendar days 25th percentile—92 calendar days 75th percentile—187 calendar days
Median offering expenses (2013 IPOs)	Legal—\$1,500,000 Accounting—\$800,000 Total—\$3,300,000

Other factors can vary based on a company's industry and size. For example, many life sciences 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 accounting preparation; corporate governance; financial and disclosure controls and procedures; external communications; and a variety of corporate housekeeping tasks. ■

 The cornerstone of the JOBS Act is the creation of an “IPO on-ramp” that provides “emerging growth companies” (EGCs) with a phase-in period, which can last until the last day of the fiscal year following the fifth anniversary of an IPO, to come into full compliance with certain disclosure and accounting requirements. Although the overwhelming majority of all IPO candidates are likely to qualify as EGCs—80% of all IPO companies since the enactment of the JOBS Act have been EGCs—the extent to which EGC standards are being adopted in IPOs varies. Moreover, practices differ between life sciences companies and other types of IPO companies.

CONFIDENTIAL SUBMISSION OF FORM S-1

An EGC is able to submit a draft Form S-1 registration statement to the SEC for confidential review instead of filing it publicly on the SEC’s EDGAR system. A Form S-1 that is confidentially submitted must be substantially complete, including all required financial statements and signed audit reports. The SEC review process for a confidential submission is the same as for a public filing. A confidentially submitted Form S-1 must be filed publicly no later than 21 days before the road show commences.

Confidential submission enables an EGC to maintain its IPO plans in secrecy and delay disclosure of sensitive information to competitors and employees until much later in the process. Depending on the timing, confidential review also means that the EGC can withdraw the Form S-1 without any public disclosure at all if, for example, the SEC raises serious disclosure issues that the EGC does not want made public or market conditions make it apparent that an offering cannot proceed. Confidential submission will, however, delay any perceived benefits of public filing, such as the attraction of potential acquirers in a “dual-track” IPO process.

REDUCED FINANCIAL DISCLOSURE

In the Form S-1, EGCs are required to provide only two years of audited financial statements (instead of three years), plus unaudited interim financial statements,

and need not present selected financial data for any period prior to the earliest audited period (instead of five years). Similarly, an EGC is only required to include MD&A for the fiscal periods presented in the required financial statements.

Many investors prefer to continue to receive three full years of audited financial statements and five years of selected financial data, and an EGC may be disadvantaged if it provides less financial information than its non-EGC peers. These deviations from historical norms are more likely to be acceptable to investors in the case of EGCs for which older financial information is largely irrelevant, such as startups in the life sciences industry.

ACCOUNTING AND AUDITING RELIEF

EGCs may choose not to be subject to any accounting standards that are adopted or revised on or after April 5, 2012, until these standards are required to be applied to non-public companies. This election must be made on an “all or nothing” basis, and a decision not to adopt the extended transition is irrevocable. Although appealing, this decision could make it harder for a company to transition out of EGC status, both from a technical accounting perspective and due to the potential need to reset market expectations. Moreover, the benefits are difficult to assess, as it is hard to predict which accounting standards will be affected in the future, and an EGC’s election to take advantage of the extended transition period could make it more difficult for investors to compare its financial statements to those of its non-EGC peers.

In addition, EGCs are automatically exempt from any future mandatory audit firm rotation requirement and any rules requiring that auditors supplement their audit reports with additional information about the audit or financial statements of the company (a so-called auditor discussion and analysis) that the PCAOB might adopt. Any other new auditing standards will not apply to audits of EGCs unless the SEC determines that application of the new rules to audits of EGCs is necessary or appropriate in the public interest.

REDUCED EXECUTIVE COMPENSATION DISCLOSURE

An EGC need not provide Compensation Discussion and Analysis (CD&A); compensation information is required only for three named executive officers (including the CEO); and only three of the seven compensation tables otherwise required must be provided. Investors generally appear willing to accept reduced compensation disclosures in IPOs.

SECTION 404(B) EXEMPTION

EGCs are exempt from the requirement under Section 404(b) of the Sarbanes-Oxley Act that an independent registered public accounting firm audit and report on the effectiveness of a company’s internal control over financial reporting (ICFR), beginning with the company’s second Form 10-K. It seems likely that many EGCs will adopt this exemption, although the election need not be disclosed in advance in the Form S-1. ■

EGC Elections

































Based on IPOs initiated after enactment of the JOBS Act and completed by EGCs in 2012 and 2013, below are the rates of adoption with respect to several key items of EGC relief:

ITEM	LIFE SCIENCES COMPANIES	TECH COMPANIES	OTHER COMPANIES
Confidential submission of Form S-1	90%	91%	78%
Two years of audited financial statements	78%	24%	36%
Deferred application of new or revised accounting standards	12%	22%	14%
Omission of CD&A	100%	96%	88%

Counsel of Choice for Public Offerings

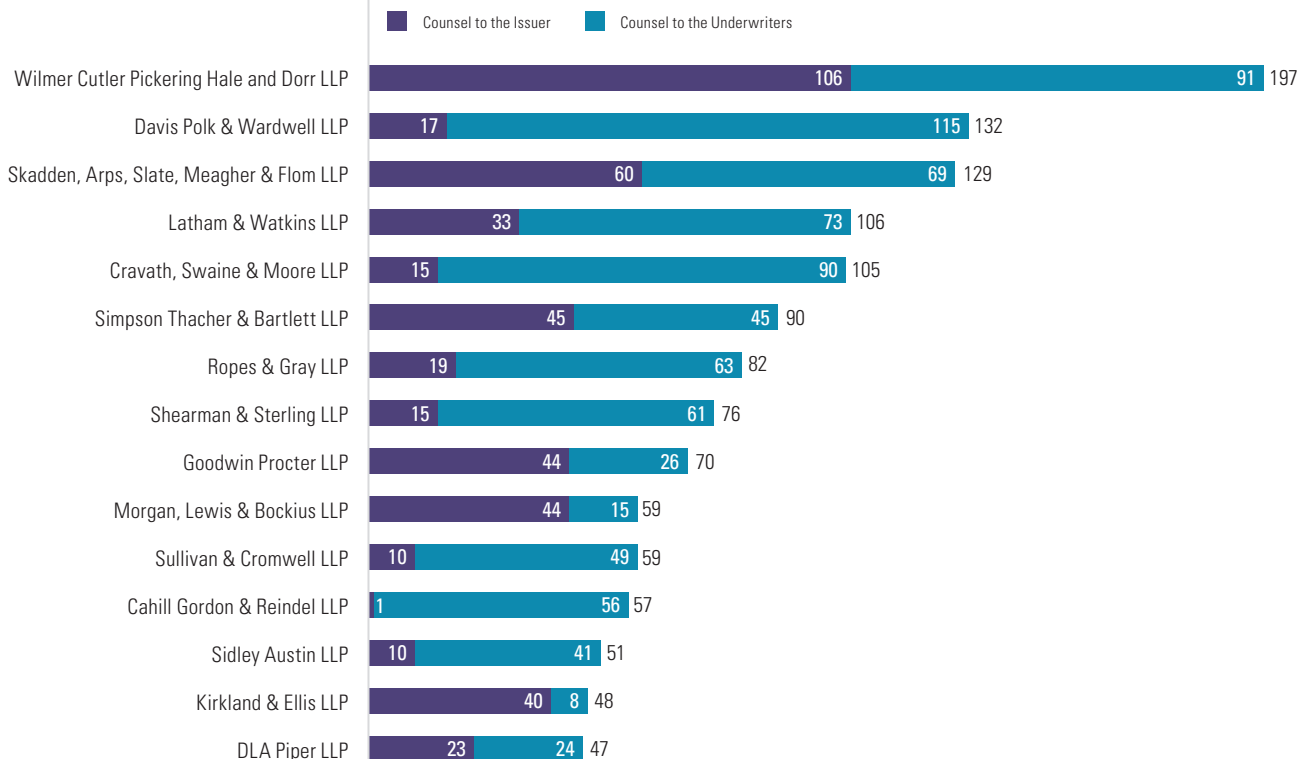
SERVING INDUSTRY LEADERS IN TECHNOLOGY, LIFE SCIENCES, ENERGY AND CLEANTECH, FINANCIAL SERVICES, COMMUNICATIONS AND BEYOND



 ENDURANCE <small>DRUGS AND BIOTECHNOLOGY</small> Initial Public Offering of Common Stock \$252,612,000 Counsel to Issuer October 2013	 Epizyme Initial Public Offering of Common Stock \$88,700,000 Counsel to Issuer June 2013	 MERRIMACK <small>PHARMACEUTICALS</small> Public Offering of Convertible Senior Notes \$125,000,000 Counsel to Issuer July 2013	 Yandex Public Offering of Class A Ordinary Shares \$606,956,000 Counsel to Issuer March 2013	 CERULEAN <small>BIOTECHNOLOGY</small> Initial Public Offering of Common Stock \$59,500,000 Counsel to Issuer April 2014	 channeladvisor Initial Public Offering of Common Stock \$92,575,000 Counsel to Underwriters May 2013	 Intercept <small>PHARMACEUTICALS</small> Public Offering of Common Stock \$320,000,000 Counsel to Issuer April 2014	 agios Initial Public Offering of Common Stock \$121,900,000 Counsel to Issuer July 2013	
 Karyopharm <small>PHARMACEUTICALS</small> Initial Public Offering of Common Stock \$125,120,000 Counsel to Issuer December 2013	 WhiteWave Public Offering of Common Stock \$610,600,000 Counsel to Issuer July 2013	 Idenix <small>PHARMACEUTICALS</small> Public Offering of Common Stock \$106,732,000 Counsel to Issuer January 2014	 wex Rule 144A Placement of Senior Notes \$400,000,000 Counsel to Issuer January 2013	 uniQure Initial Public Offering of Common Shares \$91,800,000 Counsel to Issuer February 2014	 PTC <small>BIOTECHNOLOGY</small> Initial Public Offering of Common Stock \$144,417,000 Counsel to Issuer June 2013	 MACROGENICS Initial Public Offering of Common Stock \$92,000,000 Counsel to Underwriters October 2013	 ACHILLION Public Offering of Common Stock \$141,913,000 Counsel to Issuer February 2013	 Sensata <small>TECHNOLOGY</small> Public Offerings of Ordinary Shares \$1,540,250,000 Counsel to Underwriters February, May and December 2013
 OPHTHOTECH Initial Public Offering of Convertible Senior Notes \$192,280,000 Counsel to Issuer September 2013	 PACIRA <small>PHARMACEUTICALS</small> Rule 144A Placement of Convertible Senior Notes \$120,000,000 Counsel to Issuer January 2013	 demandware Public Offering of Common Stock \$216,977,000 Counsel to Issuer November 2013	 Infinity <small>PHARMACEUTICALS</small> Public Offering of Common Stock \$456,663,000 Counsel to Issuer April 2013	 Argos <small>PHARMACEUTICALS</small> Initial Public Offering of Common Stock \$45,000,000 Counsel to Issuer February 2014	 The Medicines Company Public Offering of Common Stock \$201,250,000 Counsel to Issuer August 2013	 CoNCERT Initial Public Offering of Common Stock \$93,096,000 Counsel to Issuer February 2014	 ANALOG DEVICES Public Offering of 2.875% Senior Notes \$500,000,000 Counsel to Issuer June 2013	
 TETRAPHASE <small>PHARMACEUTICALS</small> Initial Public Offering of Common Stock \$75,000,000 Counsel to Issuer March 2013	 STATE STREET Public Offering of Non-Cumulative Perpetual Preferred Stock \$750,000,000 Counsel to Issuer March 2014	 STAPLES Public Offering of Senior Notes \$1,000,000,000 Counsel to Issuer January 2013	 Discovery <small>COMMUNICATIONS</small> Public Offering of Senior Notes \$1,200,000,000 Counsel to Issuer March 2013	 ELEVEN <small>BIOTECHNOLOGY</small> Initial Public Offering of Common Stock \$57,500,000 Counsel to Issuer February 2014	 ThermoFisher <small>SCIENTIFIC</small> Public Offering of Senior Notes \$3,200,000,000 Counsel to Issuer December 2013	 SSiC Public Offerings of Common Stock \$724,089,000 Counsel to Issuer March, May and September 2013		

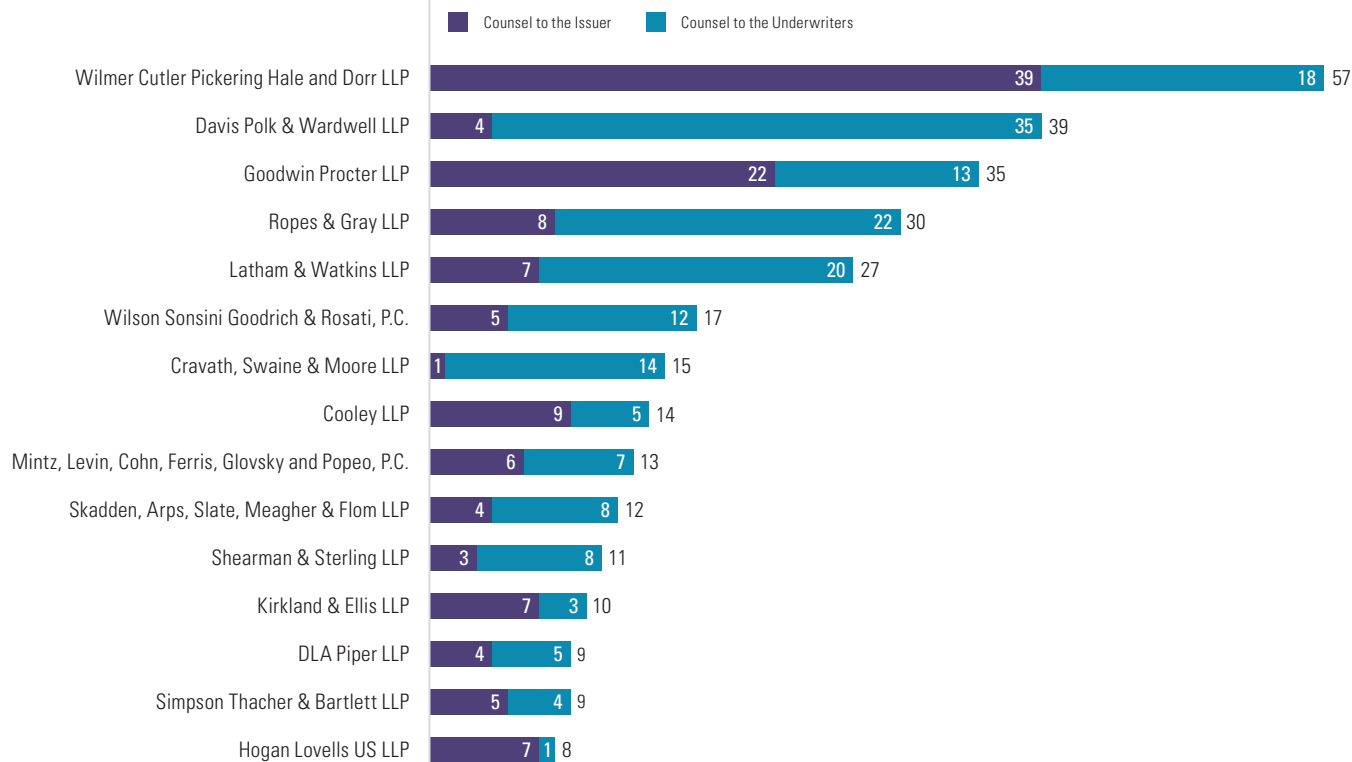
12 Law Firm Rankings

Eastern US IPOs – 1996 to 2013



Source: SEC filings

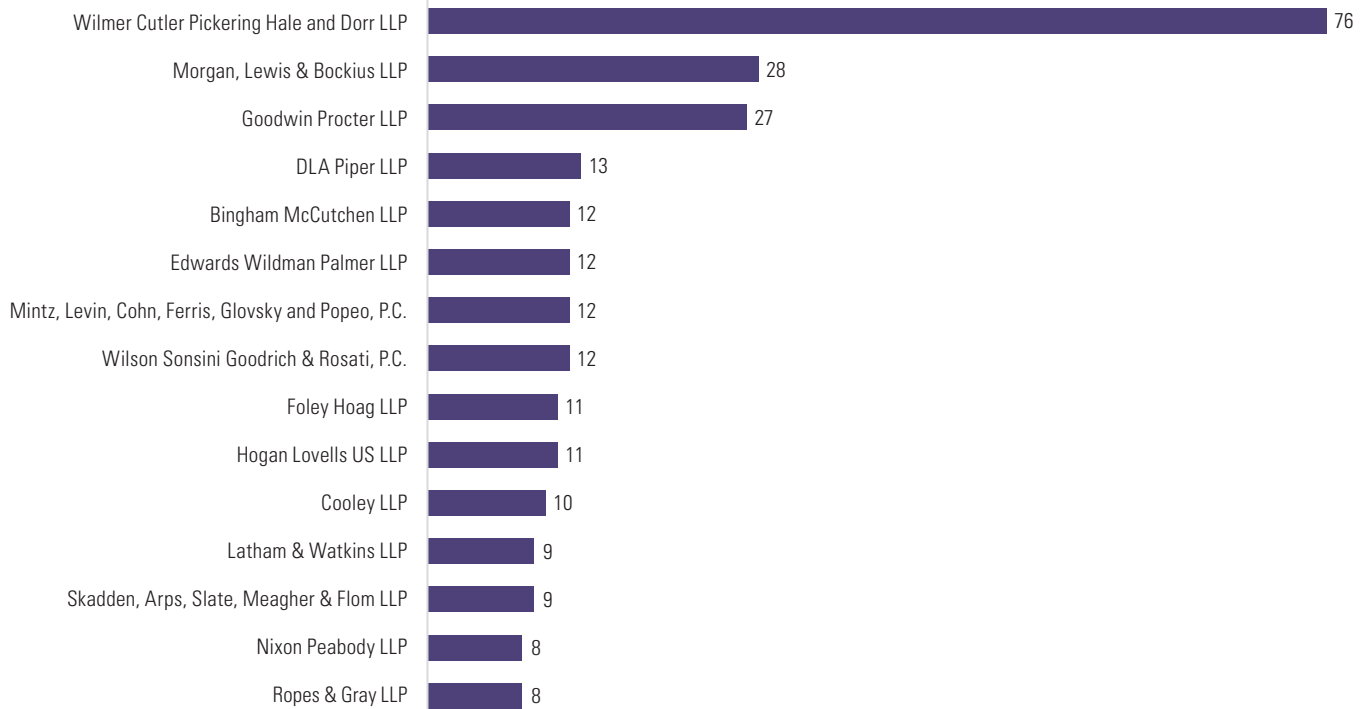
Eastern US Technology Company IPOs – 2004 to 2013



Source: SEC filings

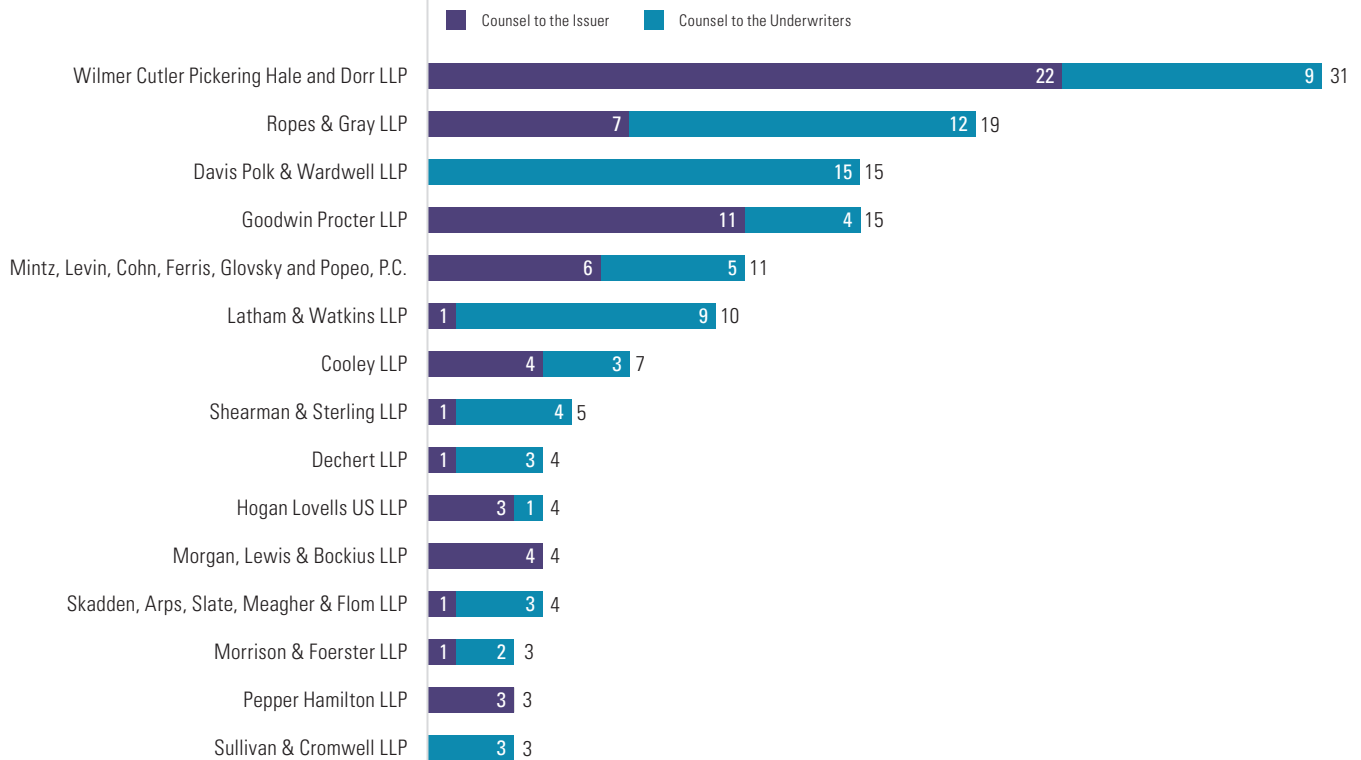
The above charts are based on companies located east of the Mississippi River.

Eastern US VC-Backed Company IPOs – 1996 to 2013



Source: Dow Jones VentureSource and SEC filings

Eastern US Life Sciences Company IPOs – 2004 to 2013



Source: SEC filings

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

BACKGROUND

Given current favorable market conditions, many private companies are considering the possibility of an IPO. The CEO has always played a vital role in several key areas of the IPO process, such as the decision to go public, the company's strategic positioning, and road show presentations. In recent years, disclosure requirements have mushroomed, market expectations for IPO companies have increased, and CEOs of public companies have become subject to greater personal risk. As a result, the CEO must now be more deeply involved in the IPO process than ever before.

Over the past dozen years or so, IPOs have become much more demanding for everyone involved. Far more preparation is necessitated by new and expanded requirements—particularly in the areas of operating results, internal controls, corporate governance, executive compensation and risk factors (although the JOBS Act has eased some requirements for “emerging growth companies”). SEC review of the registration statement now takes longer and is more rigorous, and the overall timeline from formal kickoff at an “org meeting” to pricing has doubled for many offerings. This extra work and time comes at a cost: in addition to paying an underwriting discount of up to 7% of the offering proceeds, a company typically incurs between \$2.5 million and \$4 million in expenses to go public.

At the same time, the bar has been raised for aspiring public companies. In 1999–2000, the median annual revenue of all US-issuer IPO companies was \$18 million, only 26% of these companies were profitable, and the median offering size was \$72.0 million. By 2012–2013, median annual revenue had soared to \$108.6 million, 48% of IPO companies were profitable, and the median offering size was \$103.5 million. These increases in key IPO metrics have occurred even though the JOBS Act relaxed various disclosure, accounting and other requirements for “emerging growth companies” beginning in April 2012.

Moreover, the specter of personal liability for the CEO has never been more real. The CEO (along with the CFO and

directors) can be held liable for material misstatements or omissions in the IPO registration statement. D&O insurance can mitigate the financial risk, but cannot fully compensate for the distraction and reputational harm that often accompany securities litigation. And although indemnification arrangements are commonplace, the SEC's position—which the SEC requires every IPO company to acknowledge—is that indemnification of directors, officers and controlling persons for liabilities arising under the federal securities laws is against public policy and thus unenforceable.

Following the IPO, liability can arise for material misstatements or omissions in the company's periodic SEC reports, and incentive compensation paid to the CEO (and the CFO) is subject to “clawback” in the event of an accounting restatement due to misconduct, regardless of whether the misconduct involves the CEO. Subject to future SEC rulemaking, the Dodd-Frank Act imposes even more stringent clawback obligations. In addition, SEC rules require the CEO and CFO to personally certify that the disclosures and financial statements contained in each annual and quarterly report filed with the SEC are materially accurate.

IMPLICATIONS FOR IPO PROCESS

Against this backdrop, the CEO needs to be directly involved in all key aspects of the IPO process, including:

Prospectus: The IPO prospectus seeks to tell the company's story in a compelling manner while minimizing the risk of investor claims. Historically, the CEO tended to focus primarily on the portions of the prospectus describing the company's business and strategy. With the substantial expansion in disclosure requirements, including some topics on which the CEO's input is indispensable (such as compensation disclosures), the CEO should now anticipate more extensive involvement with the preparation of the prospectus.

Corporate Governance: The corporate governance revolution of recent years has spawned numerous new requirements and a steady stream of “best practices.” Some of these matters fundamentally

affect the CEO's relationship with the board (for example, should the CEO also be the board chair?), while others involve the relationship of the company to its stockholders (for example, should the company adopt a multi-class capital structure under which pre-IPO stockholders hold high-vote shares?). The CEO's voice on all these topics is essential.

Financial Matters: As stated in every audit opinion, financial statements are the responsibility of management. This truism has taken on even more meaning with the higher stakes posed by larger and larger IPOs and the post-IPO personal certification requirements of the CEO and CFO. In addition, the company should be confident of hitting its financial targets following the IPO, since a shortfall could batter the stock price and attract lawsuits.

Controls: New financial reporting and control requirements must be factored into IPO planning. Although full implementation is not required before the IPO, advance preparation is necessary so that the company can comply once it is public. Together with the CFO, the CEO oversees the development of internal and disclosure controls—and is required to provide personal certifications as to the establishment and effectiveness of these controls in the company's post-IPO filings.

Investor Relations: The CEO inevitably becomes the company's chief IR evangelist, beginning with the road show and continuing in earnest once the company is public. As part of the company's IPO preparations, the CEO must become conversant with the evolving requirements that govern communications with investors, securities analysts and the media, including Regulation FD's prohibition on selective disclosure of material information. IR is not a new role for the CEO, but it has grown in importance with the increasing influence of institutional investors and has become more complicated with the migration of social media into corporate settings.

Bottom line, the IPO world has become more difficult and complex. In discharging his or her responsibility for oversight of the IPO process, the CEO must wear more hats than ever before. ■

Although the financial statements contained in the preliminary prospectus for an IPO need not be updated as long as the most recent balance sheet is less than 135 days old, beginning the road show after the completion of a fiscal quarter but prior to the availability of financial statements for that quarter is often problematic. Prospective investors will be curious about the quarter’s financial results, but the company (and the underwriters) will be reluctant to include preliminary information prematurely, and the SEC staff will scrutinize any estimated financial results for a recently completed fiscal period—often called “flash results”—that are included in the preliminary prospectus. Satisfying all these constituencies under the time pressure of launching the road show can present difficult challenges.

Inclusion of flash results in the preliminary prospectus will depend on, among other factors, the length of time since the end of the quarter and the status of the company’s normal quarter-end closing procedures; the availability of reliable estimates of the quarter’s financial results prior to completion of closing procedures; the ability of the underwriters to conduct due diligence on the flash results; the extent (if any) to which the company’s auditor can provide comfort on the preliminary financial information; the time required to resolve any staff comments on the related disclosures; and whether flash results are considered important to the marketing of the offering. The outcome of this analysis may be to forgo flash results. In this event, the company may need to delay the offering until financial statements for the quarter are available.

The following matters must be considered if flash results are to be included in the preliminary prospectus:

- *Due Diligence:* As a threshold matter, due diligence must be satisfactorily addressed. The underwriters will need to fashion appropriate due diligence procedures, such as a review of the available financial information for the quarter, discussions with the company’s finance personnel, and an assessment of the company’s track record in developing reliable estimates of a quarter’s financial results prior to

completion of closing procedures. The nature of due diligence will depend in part on the availability of comfort on the flash results from the company’s auditor.

- *Auditor Comfort:* If the flash results include specific numbers extracted from the company’s accounting records, agreed-upon comfort may be available from the auditor, but if the flash results consist of ranges, the auditor cannot provide any comfort. When comfort is not available, the underwriters may require the company’s CFO to provide a closing certificate covering the flash results.
- *Nature of Flash Results:* Based in part on due diligence and auditor comfort considerations, the company needs to determine whether to present estimated revenue only, or both estimated revenue and income (or another P&L measure), and whether to present ranges or specific numbers. Revenue estimates are usually easier and faster to develop than income estimates, but the omission of an income measure may be misleading if inconsistent with estimated revenue or past income levels. If a non-GAAP financial measure, such as EBITDA, is presented, SEC rules require the company to reconcile the measure to GAAP income. A brief discussion of the quarter’s results (a “mini MD&A”) is often included. Other reliable financial or operating data may also be included in flash results. In general, the use of ranges that are narrow and meaningful under the circumstances is considered acceptable.
- *Related Disclosures:* The basis and limitations of the flash results should be explained in the preliminary prospectus. The company may alert investors that the final results may vary from the estimated results, but should not attempt to disclaim responsibility for the estimates. The disclosure may also state that the company’s auditor has not audited, reviewed or compiled the flash results.
- *Year-End Considerations:* If the company has completed its closing procedures for the fourth quarter and financial results for the quarter and year are available, but the year-end audit is not yet complete, the auditor cannot perform a SAS 100 review of that information (because SAS 100 is limited to interim periods), but the

auditor may be able to provide comfort on aspects of the financial information.

- *SEC Review:* In reviewing flash disclosures, the SEC staff will focus on whether the presentation is balanced and not misleading. In this regard, inclusion of both revenue and income metrics typically is necessary. The examiner may also ask the company to justify the use of ranges, to explain the basis of the preliminary results, and to eliminate or revise excessive disclaimers. Proposed flash disclosures are submitted for review either as part of an amendment to the Form S-1 or separately to the examiner in advance of public filing.
- *Timing Impact:* In order to avoid the awkwardness of circulating updated flash disclosures during the road show, underwriters generally prefer to clear the proposed disclosures with the SEC examiner prior to printing the preliminary prospectus. Several days, or more, can be required to resolve staff comments on flash disclosures, which must be factored in when planning the road show launch. If necessary, flash results can also be introduced for the first time during the road show through the use of a free writing prospectus, but this approach is generally disfavored.
- *Updating:* If financial statements for a period for which flash results are included in the preliminary prospectus become available prior to pricing, the Form S-1 must be updated with those financial statements and related disclosures (such as MD&A). This circumstance can trigger the need to prepare and disseminate a free writing prospectus and delay completion of the offering. In most cases, however, the company should be able to predict when updated financial statements will become available and plan accordingly.

The frequency with which flash results appear in prospectuses, although low overall, has increased substantially in recent years, from less than 4% in the period 2007 to 2009, to 7% in 2010, 17% in 2011, 23% in 2012, and 24% in 2013. This increase probably reflects the perceived need, in a choppy market, to commence the road show as soon as conditions seem receptive, even if the road show falls between quarter-end and the availability of financial statements for that quarter. ■

BACKGROUND

IPOs and company sales are the lifeblood of the venture capital industry. Venture capitalists fund, groom, encourage and sometimes prod their portfolio companies to go public, since the venture capital business model depends on IPOs as one of the two principal means to provide liquidity to investors (the other being acquisitions). When John or Jane Q. Public thinks of an IPO company today, he or she probably envisions a venture capital–backed company, since it possesses at least three of the characteristics that epitomize an IPO to the general public: innovation, entrepreneurship and potential wealth.

MARKET SIZE

Venture capital–backed IPOs ebb and flow with overall market conditions and tend to enjoy their greatest prosperity when the IPO market is most receptive to smaller, higher-growth companies, particularly the technology and life sciences companies that dominate venture capital investing. At the peak of the dot-com boom of 1999 to 2000, VC-backed companies spawned more than 200 IPOs annually and accounted for nearly half of the IPO market—before VC-backed IPOs plunged by 90% in the following three years. Between 2004 and 2007, the market share for VC-backed IPOs returned to historical norms, although the number of deals was smaller due to reduced volumes in the overall IPO market. After nearly disappearing in 2008 and 2009, VC-backed IPOs returned in droves in the ensuing four years, with an annual average of 52 IPOs and a 54% market share. Annual data for the venture capital–backed IPO market is set forth on page 5.

IPO CONSIDERATIONS

In many ways, a VC-backed company is “pre-wired” to go public. Although often complex, its pre-IPO capital structure is usually set up to become streamlined in an IPO. Similarly, the company’s investor agreements (other than registration rights) and covenants ordinarily terminate in an IPO. The company often has in place a board that meets the initial standards for Nasdaq or NYSE listing. In many cases, the board is already operating with audit

and compensation committees, easing the transition to public company governance requirements. Due diligence in prior financings should have helped the company to identify and remediate issues and prepare it for an IPO. For all these reasons, a VC-backed company with the proper financial profile and growth prospects is generally well-suited for an IPO.

The IPO process for a VC-backed company does, however, present several issues that do not arise as frequently in other IPOs:

- *Heightened Urgency:* A VC-backed company often feels a heightened urgency to pursue an IPO, partly because of the existence of demand registration rights. This is not necessarily a bad thing, since the interests of management and the investors are generally aligned when evaluating a public offering; but it does mean a VC-backed company mulling an IPO is likely to move briskly as soon as there is a market opportunity.
- *Investor Involvement:* Venture capitalists usually control the board and the stockholder votes that are required to complete an IPO. They generally also have the most to gain from a successful offering and the most to lose if it is fumbled. As a result, the investors in VC-backed companies tend to be closely involved with the IPO process, from the initial decision to go public to the selection of the managing underwriters to the pricing of the offering.
- *Selling Stockholders:* VC-backed companies are very likely to have registration rights agreements and investors who are interested in selling a portion of their holdings. If investors are selling shares in the IPO, they will take a keen interest in the representations and indemnities to be provided by the selling stockholders under the underwriting agreement.
- *Committee Membership:* Under SEC rules, all audit committee members must be independent and an “affiliate” of the company cannot qualify as independent. It is unlikely that a director affiliated with a venture capital investor owning more than 20% of the company’s stock at the time of the IPO will qualify as independent for audit committee membership. As a result, the composition

of the company’s audit committee may need to be modified in conjunction with the IPO, either immediately or over time in compliance with stock exchange phase-in rules. Membership by VC-affiliated directors on the company’s compensation committee also must be carefully evaluated under enhanced independence requirements that went into effect on July 1, 2013.

- *Transition in Board Membership:* Investor agreements permitting venture capital investors to appoint board members almost always terminate in an IPO. Even if they remain on the board following the IPO, VC-affiliated directors often depart after the lockup agreement expires and their fund’s shares are distributed to their investors. VC-backed companies need to ensure that their boards and board committees meet all SEC and exchange requirements at the time of the IPO, while also planning for the likelihood of changes within the first year or so.
- *Section 16 Issues:* Section 16 of the Exchange Act and related SEC rules require directors, officers and 10% stockholders of a public company to disgorge to the company any “profit” realized through any purchase and sale (or any sale and purchase) of equity securities of the company within a period of less than six months. The application of these rules to a director affiliated with a 10% stockholder (such as a venture capital fund) can be tricky and merits close attention in VC-backed IPOs.

OUTLOOK

IPOs by VC-backed companies are likely to remain a fixture in the market as long as venture capital exists. Other than general market conditions that affect all IPO candidates, the most important factor affecting the flow of VC-backed companies into the IPO market is the availability of attractive sale opportunities in lieu of an IPO. Venture capital investors are generally indifferent between an IPO or company sale to achieve liquidity, but in many cases prefer a sale because it usually can be completed faster and with greater certainty than an IPO. The advantages of a company sale, however, must be weighed against the potential for a significant increase in post-IPO valuation if an IPO is pursued. ■

BACKGROUND

Private equity and venture capital firms share some common characteristics. Both are operated by partnerships that are usually private; raise substantial pools of capital from institutional investors; invest these funds in other companies and play active roles in their development and management; collect a management fee on contributed capital; earn a much larger fee (or “carry”) on successful investments; and must take public or sell their portfolio companies in order to sustain their business models.

The investment patterns of private equity and venture capital firms do, however, differ significantly. Most venture capital firms take minority ownership positions and rarely commit a total of more than \$20 million to \$25 million (or 10% to 15% of an investment fund) over several investments to a single company. Private equity firms usually seek outright control from the outset and routinely invest hundreds of millions of dollars or more in a single buyout transaction. Investment time frames also vary. In recent years, venture capitalists have waited an average of five to nine years for liquidity events, while private equity investors usually target a quicker payback.

MARKET SIZE

Although it has trailed the size of the venture capital–backed IPO market for many years, the private equity–backed IPO market produced an annual average of more than 50 IPOs between 2003 and 2006, on the heels of the boom in leveraged acquisitions. In response to the weakening credit market conditions that began in mid-2007 and worsened during 2008, leveraged buyout deal activity slowed substantially—and with it the pace of private equity–backed IPOs, which numbered only five in 2008. As market conditions improved, the number of private equity–backed companies going public increased from 17 in 2009 to 23 in 2010. After declining to 16 in 2011, the number of private equity–backed IPOs rebounded to 28 in 2012 and then to 49 in 2013. Annual data for the private equity–backed IPO market is set forth on page 5.

IPO CONSIDERATIONS

Not surprisingly, IPOs by companies that are controlled by private equity firms have some similarities to IPOs by venture capital–backed companies, but private equity–backed IPOs also exhibit important differences:


- *Company Profile:* Usually larger and more mature than venture capital–backed companies, private equity–backed companies are drawn from a wide spectrum of industries. Any company with attractive attributes—such as strong cash flow, competitive position, distribution strength, intellectual property or brand name—may be a candidate for a buyout transaction. In many cases the company is perceived to have problems that the private equity buyer believes it can fix.
- *Prior Public Company History:* Private equity–backed companies often were public companies before being acquired and taken private. Prior public company experience can facilitate the IPO—since the company should have solid disclosure precedents and likely retains some of its public company infrastructure—and expedite its preparations for returning to public company life.
- *Capital Structure and Needs:* Most private equity–backed companies incur substantial debt in their buyout transactions (hence the origin of the term “leveraged buyout”). This leverage can affect the company’s operations, profitability and even viability, and repayment of debt may be a motivation for the IPO. Private equity–backed companies often undergo restructurings and sell non-core assets to reduce costs, streamline operations and improve profitability. Because of their significant capital needs, private equity–backed companies tend to have large IPOs and sometimes pursue placements or registered public offerings of debt concurrently with IPOs.
- *Corporate Governance Exemptions:* If a private equity–backed company qualifies as a “controlled company” under applicable stock exchange rules—meaning a majority of its voting securities are held by one investor or a group of affiliated investors—the

company is entitled to exemptions from the corporate governance requirements that a majority of its directors be independent, that it have a separate compensation committee, and that it have a separate corporate governance and nominating committee (or, in the case of a Nasdaq-listed company, that a majority of its independent directors make board nominations).

- *Captive Relationships:* Private equity firms typically have pre-existing relationships with law firms, investment banking firms and commercial lenders. A private equity–backed company often inherits these relationships from its new owners, regardless of management’s wishes. As a result, a private equity–backed company undertaking an IPO may be working with professional advisors who are not deeply familiar with its history and business, may have deeply rooted loyalties to the private-equity sponsors, and may be less experienced in the IPO process.
- *Disclosure Issues:* The Form S-1 for a private equity–backed IPO will disclose the terms of the buyout transaction and other transactions between the company and its private equity backers. The company’s leverage and the implications for present and future operations also need to be discussed. Significant leverage is fertile ground for risk factors and forward-looking statements in the MD&A discussions of operating results and liquidity. Private equity–backed companies also tend to present non-GAAP financial measures to remove the effects of high leverage.

OUTLOOK

Private equity–backed companies are likely to remain eager IPO candidates as their sponsors seek liquidity. The JOBS Act, enacted in April 2012, loosened various IPO requirements for emerging growth companies (EGCs) with annual gross revenues of less than \$1 billion. EGCs now dominate the IPO market, but many private equity–backed companies will not qualify as EGCs because their annual gross revenues exceed \$1 billion. In general, however, private equity–backed companies that satisfy the \$1 billion annual revenue test are eligible for treatment as EGCs even if they previously were publicly held. ■

 The United States is generally considered to offer the largest, most liquid and most stable financial and market system with the strongest investor protections in the world. Foreign companies have been attracted to the US IPO market for generations and routinely contribute 15% to 30% of all IPOs in the United States each year. Below is an overview of “cross-border” IPOs by foreign companies in the United States.

“FOREIGN PRIVATE ISSUER” STATUS

In broad terms, a foreign company must follow the same procedures for an IPO in the United States as a domestic US company, but can benefit from several relaxed requirements. A foreign company that qualifies as a foreign private issuer (FPI) under SEC rules may register its shares on a Form F-1 registration statement, which requires somewhat less extensive disclosures than the Form S-1 applicable to US companies, and following effectiveness becomes subject to more limited ongoing reporting and other requirements under the Exchange Act than those that apply to US companies. Nearly 1,000 FPIs are currently subject to SEC reporting under the Exchange Act.

If it does not qualify as an FPI, a foreign company must register its shares on a Form S-1 and become subject to the same Exchange Act reporting obligations faced by a US company. In some circumstances,

What is an FPI?

A “foreign private issuer” is a company organized under the laws of a foreign country and in which 50% or less of its outstanding voting securities are directly or indirectly owned of record by US residents. If this ownership test is not met, the company still qualifies as an FPI unless a majority of its executive officers or directors are US citizens or residents, a majority of its assets are located in the United States, or its business is administered principally in the United States. A company tests its eligibility for FPI status once a year, as of the last business day of its second fiscal quarter.

a foreign company may voluntarily elect to register its shares on Form S-1, even if it is eligible to use Form F-1, because it believes this route will increase the appeal of its IPO in the United States or it does not wish to be perceived as a foreign company for marketing or political reasons.

AMERICAN DEPOSITARY SHARES

In an effort to enhance the marketability of their IPOs in the United States and to improve aftermarket liquidity, many FPIs choose to list American Depositary Shares (ADSs) on a US exchange rather than directly listing their underlying shares. An ADS is a separate security that evidences an interest in the FPI's underlying shares, which are deposited with a custodian for a US bank or trust company that acts as depositary. The ADSs, in turn, are represented by American Depositary Receipts (ADRs), which are transferable certificates, typically held in electronic form. The depositary (through its custodian) holds the underlying securities for as long as the ADSs are outstanding, and a holder of ADSs may exchange them at any time for the underlying securities represented by the holder's ADSs. The principal advantages of ADSs are that they trade in US dollars, trades are settled in accordance with US rules, dividends are paid in US dollars and information about the company can be furnished in English through the depositary. Most ADSs issued in IPOs represent common stock or the company's home-country equivalent of common stock.

RELAXED DISCLOSURE REQUIREMENTS

An FPI enjoys somewhat less stringent disclosure requirements in its IPO registration statement and subsequent Exchange Act reporting than a US company and has outright exemptions from several significant SEC rules. These differences are intended to show some deference to home-country practices on selected topics while maintaining adequate protection for investors in the United States.

IFRS Financial Statements

SEC rules permit FPIs to provide financial statements prepared in accordance

with International Financial Reporting Standards (IFRS), as issued by the International Accounting Standards Board, without providing a reconciliation to US GAAP. As an accommodation to first-time adopters of IFRS, the SEC permits FPIs in their first year of reporting under IFRS to file two years (rather than three years) of financial statements prepared in accordance with IFRS.

Modified Disclosure in Form F-1

The disclosure requirements for a Form F-1 are less extensive than for a Form S-1 in several areas, most notably as follows:

- Executive compensation information is disclosed on an aggregate rather than a named individual basis, unless individual information is required to be disclosed under home-country requirements or is otherwise made public, and there is no requirement for a CD&A.
- Although disclosure of individual stock and option ownership by directors and members of senior management is required in the Form F-1, beneficial ownership of less than 1% by a director or member of senior management need not be disclosed if that person's ownership previously has not been disclosed to stockholders or otherwise made public.
- Rather than the quantitative thresholds applicable to disclosure of related-person transactions in a Form S-1, a Form F-1 requires disclosure of transactions that are “material” to the company or “unusual in their nature or conditions” and disclosure of company loans to insiders (although FPIs often look to the Form S-1 rules as benchmarks).

At the same time, it should be noted that the disclosure rules applicable to FPIs are often less precise and more ambiguous than those applicable to US companies, which can result in additional SEC comments and greater debate with the SEC staff during the review process. Moreover, beneficial ownership disclosure requirements are broader for FPIs than for US companies. For US companies, beneficial ownership is based on voting and dispositive control over the securities. In the case of FPIs, however, beneficial ownership is based on the power to direct the voting or the disposition of the securities, or to receive

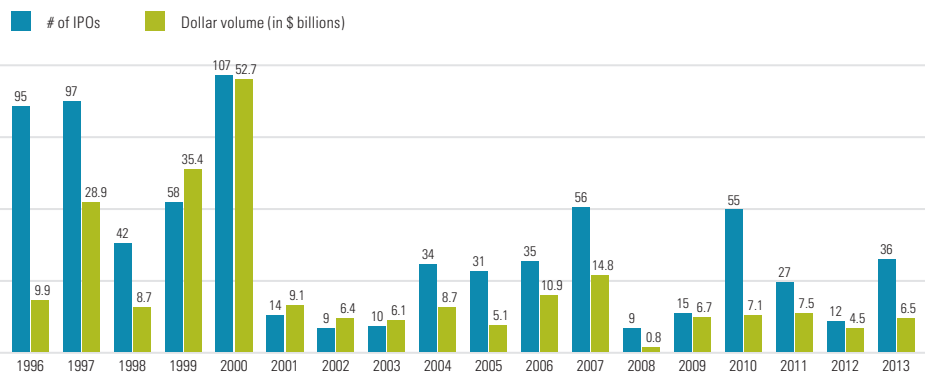
the economic benefit of ownership of the securities—in effect, a combination of the SEC’s voting, investment power and pecuniary interest tests for beneficial ownership in US companies.

Partial Relief from Corporate Governance Requirements

FPIs receive partial relief from the corporate governance requirements applicable to US companies:

- Nasdaq permits an FPI to follow its home-country practices in lieu of Nasdaq’s corporate governance requirements as long as the FPI satisfies Exchange Act requirements for audit committees and adheres to the Nasdaq rule regarding prompt public disclosure of a “going concern” audit opinion. An FPI that follows a home-country practice in lieu of one or more Nasdaq corporate governance requirements must disclose, in the Form F-1 for its IPO and thereafter in its annual reports on Form 20-F, or on its website, each requirement that it does not follow and must describe the home-country practice it follows in lieu of the requirement.
- Similarly, NYSE permits an FPI to follow its home-country practices in lieu of NYSE’s corporate governance requirements as long as the FPI satisfies Exchange Act requirements for audit committees. NYSE rules require a listed FPI to include in its annual report on Form 20-F a brief, general summary of the significant ways in which its corporate governance practices differ from those followed by US companies under NYSE listing standards. The disclosure can also be included in the Form F-1 voluntarily.
- An FPI listed on a US national securities exchange must include in its annual report on Form 20-F a concise summary of the significant ways in which the FPI’s corporate governance practices differ from the practices followed by US companies under the listing standards of the stock exchange on which it is listed. In effect, this requirement mandates Form 20-F disclosure of the information that Nasdaq and the NYSE already require.
- FPIs are not exempt from the Sarbanes-Oxley Act. However, SEC rules offer limited exemptions for FPIs from the audit committee independence standards

Foreign-Issuer IPOs and Dollar Volume – 1996 to 2013



Source: SEC filings

and the requirement that the audit committee be directly responsible for the appointment, compensation, retention and oversight of the FPI’s audit firm.

Less Extensive Exchange Act Reporting

Following its IPO, an FPI is subject to less extensive and less frequent periodic reporting than a US public company. An FPI must file an annual report on Form 20-F within four months after the end of its fiscal year, although many FPIs voluntarily adhere to the shorter deadlines followed by their US company peers. The contents of a Form 20-F are roughly similar to those of a Form 10-K, except for the differences outlined above. An FPI also must submit interim reports on Form 6-K to disclose material information it makes or is required to make public pursuant to the laws of its home country or other stock exchange on which its securities are traded, or material information it distributes or is required to distribute to its stockholders. Quarterly reports on Form 10-Q and current reports on Form 8-K are not required, although FPIs generally submit their quarterly financial results and earnings releases on Form 6-Ks that are not subject to the specific content requirements applicable to Form 10-Qs filed by US companies.

Officer certifications under Section 302 and Section 906 of the Sarbanes-Oxley Act are required to accompany Form 20-F filings but not Form 6-K submissions (including Form 6-K submissions containing quarterly results). The Form 20-F must also contain an evaluation and certification of an FPI’s disclosure controls and procedures, as with a US company.

Other Exemptions

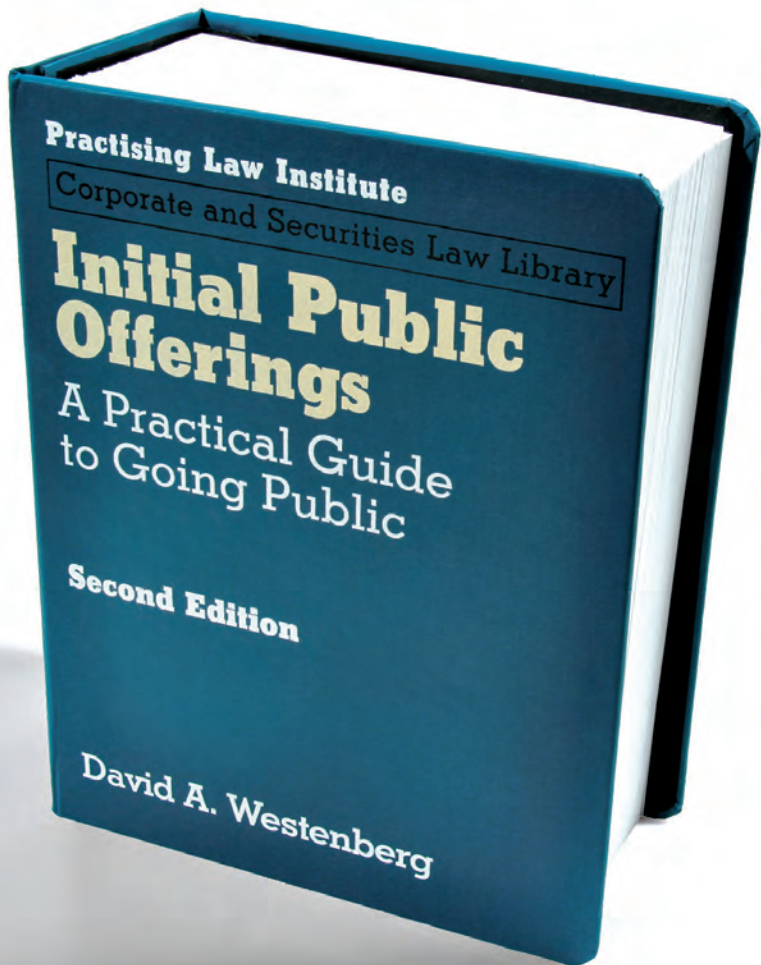
FPIs are exempt from the SEC’s proxy rules and Regulation FD, and the directors, officers and 10% stockholders of FPIs are exempt from the insider reporting and short-swing liability provisions of Section 16 (but are not exempt from the SEC’s antifraud rules). An FPI listed on Nasdaq or the NYSE must still comply with or obtain waivers of stock exchange requirements covering matters such as the prompt public disclosure of material developments, distribution of an annual report to stockholders, requirements to solicit proxies for annual meetings, quorum requirements and voting requirements for specified topics. An FPI should address these matters with the applicable exchange before listing. In addition, tender offers for FPIs are exempt from many requirements of the SEC’s tender offer rules if US residents own 40% or less of the securities sought, and are exempt from most of the requirements if US residents own 10% or less.

OUTLOOK

The United States is likely to remain an attractive market for IPOs by FPIs for the foreseeable future. In some industries, such as biotechnology, Internet and social media, the presence of sophisticated investors and research analysts may help companies achieve better valuations and greater liquidity. In addition, listing on a US exchange may offer greater flexibility in certain areas of corporate governance, such as the use of a multi-class capital structure and less stringent say-on-pay requirements. ■

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