2008 IPO Report

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2007 Review

With 207 offerings, gross proceeds of $46.5 billion and a median offering size of $119.4 million, the 2007 US IPO market was the largest since 2000, if only by a slim margin. Compared to 2006, results reflected a 5% increase in the number of offerings and a 15% jump in gross proceeds, as the median deal size reached the highest level on record.

While the annual deal totals over the last four years—averaging 200 IPOs per year—suggest that the IPO market may have reached a new plateau at roughly two and one-half times the level that prevailed between 2001 and 2003, the weakening market and economic conditions seen at year-end in 2007 have persisted into 2008, clouding this year's outlook.

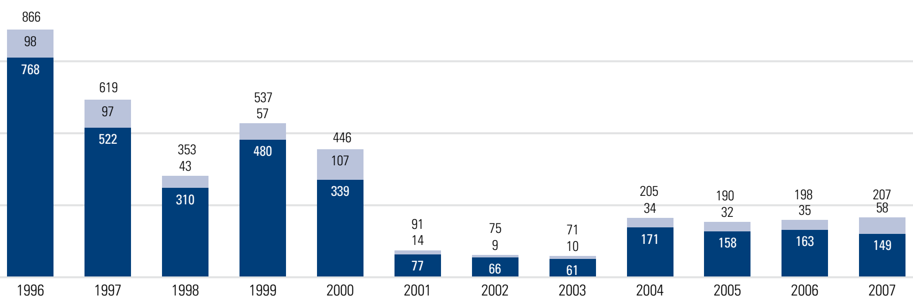
The number of offerings by US-based issuers declined 9%, from 163 in 2006 to 149 in 2007, reflecting the lowest total since 2003. Gross proceeds, however, increased 6%, from $29.4 billion in 2006 to $31.3 in 2007, due to a decline in smaller offerings and an increase in the dollar volume attributable to billion-dollar offerings. The number of IPOs below $50 million fell from 37 to 22, and median deal size by US issuers increased from $100.8 million to $105.0 million.

Despite concerns that the more stringent regulatory and compliance environment in the United States might discourage foreign-based issuers from listing on US exchanges, US IPOs by foreign issuers increased 66%, from 35 in 2006 to 58 in 2007—the highest annual total since 2000. Gross proceeds increased 40%, from $10.9 billion to $15.3 billion, while the median deal size declined from $200.0 million to $190.4 million.

Chinese issuers produced a whopping 31 IPOs in the US in 2007, with gross proceeds of $6.2 billion, representing more than half of all deals and proceeds from foreign-issuer IPOs. Two high-profile Chinese IPOs occurred outside of the United States, signaling the emerging strength of Chinese stock exchanges—China Railway Construction raised $5.4 billion on the Shanghai Stock Exchange, and Alibaba.com pocketed $1.49 billion on the Hong Kong Stock Exchange. Far behind China were the next-highest generators of foreign-issuer US IPOs, Bermuda and Israel, with six each, and Greece with four.

US IPOs – 1996 to 2007

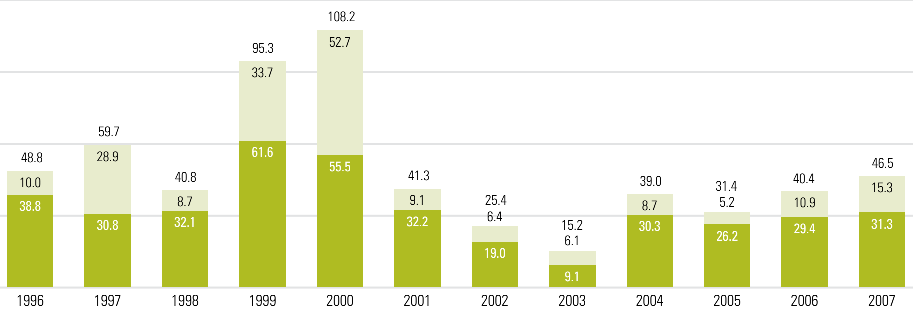
US issuers   Foreign issuers



Source: SEC filings

US IPO Dollar Volume – 1996 to 2007

US issuers   Foreign issuers $ billions



Source: SEC filings

Foreign Country Rankings – 2000 to 2007

China	72
Israel	34
Bermuda	31
Canada	24
Greece	15

The energy-related industry sector led the IPO market for the third consecutive year, with 35 IPOs, or 16% of the total—up from 30 IPOs (15% of the total) in 2006. Other leading sectors were biotechnology/pharmaceuticals with 25 IPOs (12%), healthcare/medical devices with 21 IPOs (10%), and software with 20 IPOs (also 10%).

The number of IPOs by technology-related companies increased 27%, from 84 in 2006 (42% of the total) to 107 in 2007 (52% of the total). Gross proceeds raised from tech-related IPOs soared by nearly 50%, from $9.9 billion (25% of the total) to $14.7 billion (32% of the total).

Venture-backed IPOs jumped from 56 in 2006 to 75 in 2007, representing half of all offerings by US-based issuers, and their gross proceeds doubled from $3.70 billion to $7.40 billion. On the other hand, IPOs by private equity–backed companies slumped in 2007.

The percentage of profitable companies going public decreased from 64% in 2006 to 62% in 2007, mirroring the average for the prior five years, and in sharp contrast to the 26% in both 1999 and 2000. The median annual revenue of IPO companies decreased from $111.1 million to $87.0 million, primarily due to an increase in smaller tech-related companies. When the IPO market was its most selective, between 2001 and 2003, the median annual revenue of IPO companies averaged $168.5 million.

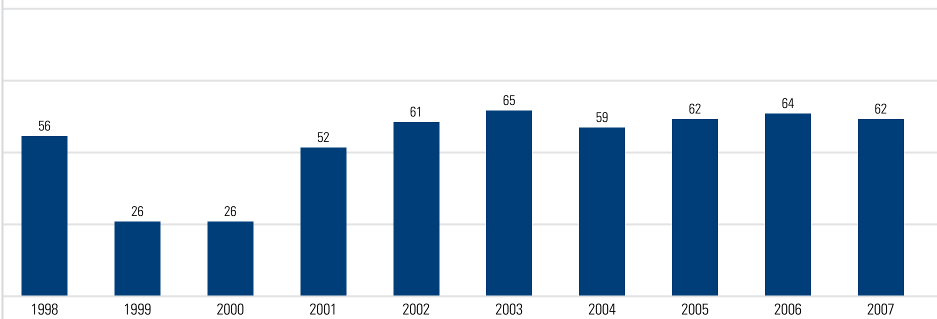
Although the capital markets shed some of their gains during the fourth quarter, the Dow gained 6.4% in 2007 and Nasdaq ended the year up 9.8%. The average 2007 IPO ended the year 14.8% above its offer price—well below the 24.4% return in 2006. The average first day gain, moreover, was 14.3%, leaving aftermarket performance essentially flat.

At year-end, 55% of 2007 IPOs were trading at or above their offering price, compared to 70% in 2006. In 2007, 40 deals were up more than 50% at year-end and 14 had doubled in price—almost exactly equal to the comparable numbers in 2006. Five of the ten best-performing IPOs of 2007 were by Chinese issuers, led by solar cell manufacturer JA Solar Holdings, which ended the year 365% above its IPO price. Rounding out the top three were Argentina's Mercadolibre, which hosts the largest online trading platform in Latin America (up 311%), and Chinese photovoltaic producer Yingli Green Energy (up 252%).

No company saw its stock price double on opening day, but athenahealth—which provides Internet-based business services for physician practices—came close (up 97%). An additional 18 companies saw their stock price increase at least 50% on the first day of trading.

Percentage of Profitable IPO Companies – 1998 to 2007

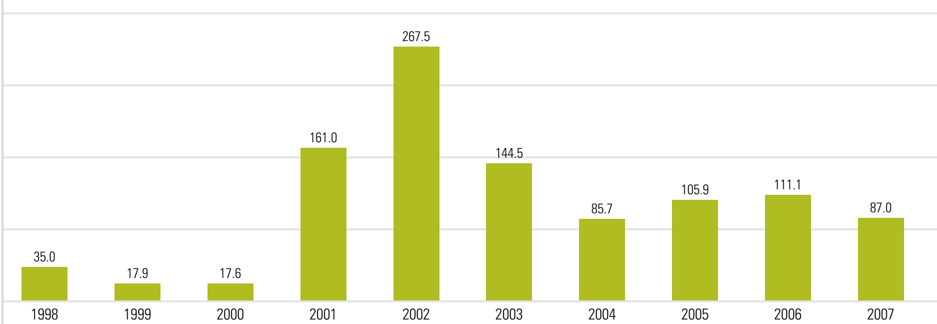
%



Source: IPO Vital Signs

Median Annual Revenue of IPO Companies – 1998 to 2007

$ millions



Source: IPO Vital Signs

The best-performing IPO sectors of 2007 were energy-related, with 35 IPOs gaining an average of 33% by year-end, and software, with 20 IPOs increasing 26% on average by year-end.

California maintained its dominant position atop the IPO state rankings with 44 offerings, followed by Massachusetts, which experienced a resurgent tech IPO market, with 20. Texas enjoyed a steady flow of energy-related IPOs, with 18, while New York produced seven IPOs, and Oklahoma and New Jersey generated six each.

State Rankings – 2000 to 2007

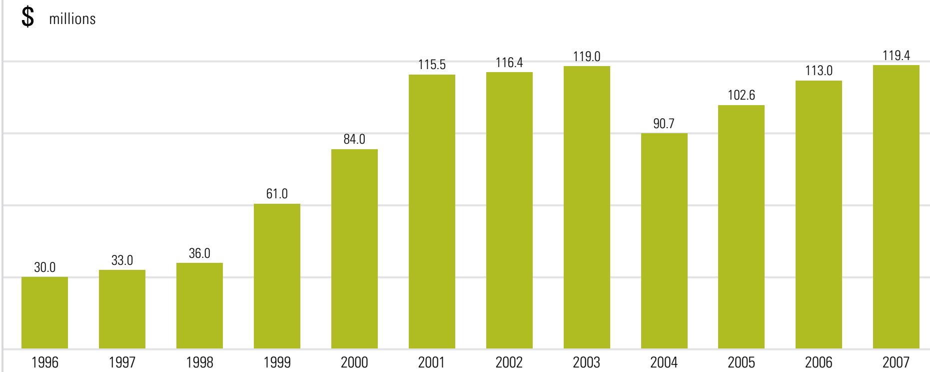
California	347
Texas	95
Massachusetts	89
New York	88
Illinois	45

In 2007, 68 IPOs (33% of the total) were completed by companies based in the eastern United States (east of the Mississippi River), while western US–based issuers accounted for 83 IPOs (40%), and foreign issuers accounted for the remaining 58 IPOs (28%). Eastern US IPOs raised

$15.6 billion (33% of the total), western US IPOs raised $16.8 billion (35%) and foreign issuer IPOs raised $15.3 billion (32%) of the year's IPO proceeds.

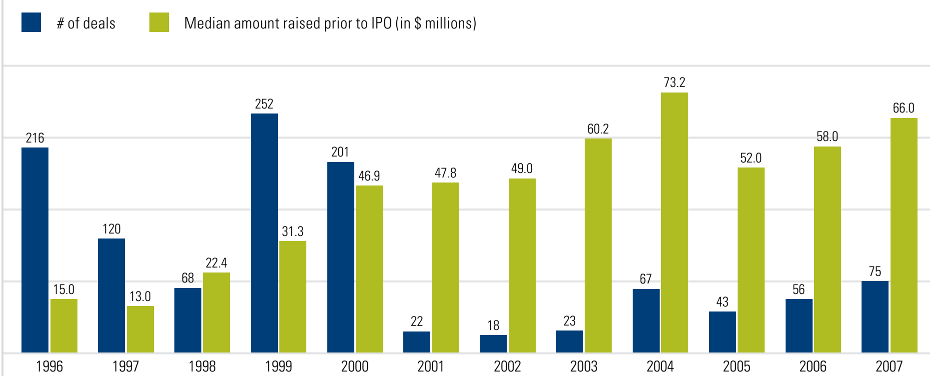
The percentage of IPO companies listing on Nasdaq—the preferred listing choice for many venture-backed and technology companies—edged down from 65% in 2006 to 62% in 2007, while the NYSE's market share increased from 31% to 36%. Average IPO offering size for companies listing on Nasdaq increased from $124.7 million in 2006 to $126.6 million in 2007, while the average IPO offering size for companies listing on the NYSE climbed from $387.4 million to $400.3 million.

Median IPO Offering Size – 1996 to 2007



Source: SEC filings

Venture Capital–Backed IPOs – 1996 to 2007



Source: Dow Jones VentureOne

2008 Outlook

In broad terms, the US IPO market of the past 15 years or so has gone through four phases:

- 1991 to 1998—Reasonably stable market, producing an average of more than 550 IPOs per year
- 1999 and 2000—Go-go market characterized by many unqualified IPO companies and rampant price euphoria (although annual deal volume was about 15% lower than in the preceding eight years)
- 2001 to mid-2003—Very selective market, in which deal volume fell to historic lows 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

Viewed through this lens, the IPO market of the late 1990s was as aberrant as the market that immediately followed it. We remain fundamentally optimistic about the long-term prospects for the IPO market, but 2008 is likely to be a challenging year for several reasons:

- ***Capital Market Conditions:*** Stable and robust capital markets are a leading indicator of IPO activity. In 2007, the Dow produced solid returns but fell short of its 2006 performance, due in part to a 4.5% decline in the fourth quarter, which followed an all-time high in early October. Despite a modest dip in the fourth quarter, Nasdaq topped its 2006 performance. The Dow shed another 7.5% in the first quarter of 2008, while Nasdaq plummeted 14.1%. Many observers consider the markets' prognosis for the balance of the year to be mixed.
- ***Economic Growth:*** Economic growth is a key determinant of strength in the capital markets. After the technology-fueled boom sputtered to an end in early 2001, economic recovery was largely driven by strong consumer spending, boosted by low interest rates, tax cuts and increased borrowing against home equity as housing values soared. By late 2007, however, the US economy began to sour. Currently adverse economic factors include record-high petroleum prices, rising food prices, the continuing decline in the housing market, ongoing turmoil in the credit markets, the persistence of some core inflation, and the expense of continuing overseas military conflicts.

Impact of Regulatory Environment

Corporate governance reforms in the United States 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.

In the near term, the new corporate governance environment may deter some IPO candidates, steer them to liquidity through acquisitions or incent them to pursue IPOs in markets outside of the United States. Offshore IPOs by US companies have grown as a percentage of all US company IPOs worldwide, increasing from less than 5% in each year prior to 2004, to 10.9% in 2006 and 13.4% in 2007. In the longer term, however, we believe that corporate governance changes will be assimilated into IPO planning and not pose a major impediment for most companies wishing to pursue IPOs in the United States.

Venture Capital Pipeline

Venture capitalists depend on IPOs—along with company sales—to provide liquidity to investors. Although a large number of VC-backed companies are in IPO registration, many of these offerings are on hold. 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 amount invested from initial equity financing to IPO increased from $58 million in 2006 to $66 million in 2007, and the time from initial equity financing to IPO increased from 6.2 years to 7.1 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. The turmoil in the credit markets and sharp reduction in buyout activity that began in late 2007 will probably dampen the flow of PE-backed IPO candidates in 2008. ■

Some Facts About the 2007 IPO Market

We reviewed all Form S-1 filings for IPOs by operating companies in 2007 in order to answer the following frequently asked questions:

FAQ	Answer
In what states were IPO companies incorporated?	Delaware—94% No other state over 1%
What percentage of all IPOs utilized at least one free writing prospectus during the offering process?	46%
What was the median number of Form S-1 amendments (excluding exhibits-only amendments) filed before effectiveness?	Five
What percentage of IPOs included selling stockholders, and in those offerings what was the median percentage represented by those shares?	Percentage of IPOs—52% Median percentage of offering—25%
What percentage of IPOs included directed share programs, and in those offerings what was the median percentage represented by those shares?	Percentage of IPOs—47% Median percentage of offering—5%
What percentage of IPO companies adopted an employee stock purchase plan (ESPP)?	27%
What percentage of IPO companies used a "Big 4" audit firm?	77%
In what form did IPO companies pay outside director compensation?	Cash only—10% Stock only—3% Cash and stock—87%
How much time was required from initial filing to effectiveness?	Median—110 calendar days 25th percentile—87 calendar days 75th percentile—161 calendar days
What were the median IPO expenses in an IPO?	Legal—$1,065,000 Accounting—$800,000 Total—$2,525,000

Source: WilmerHale review of SEC filings

Nature of IPO Candidates

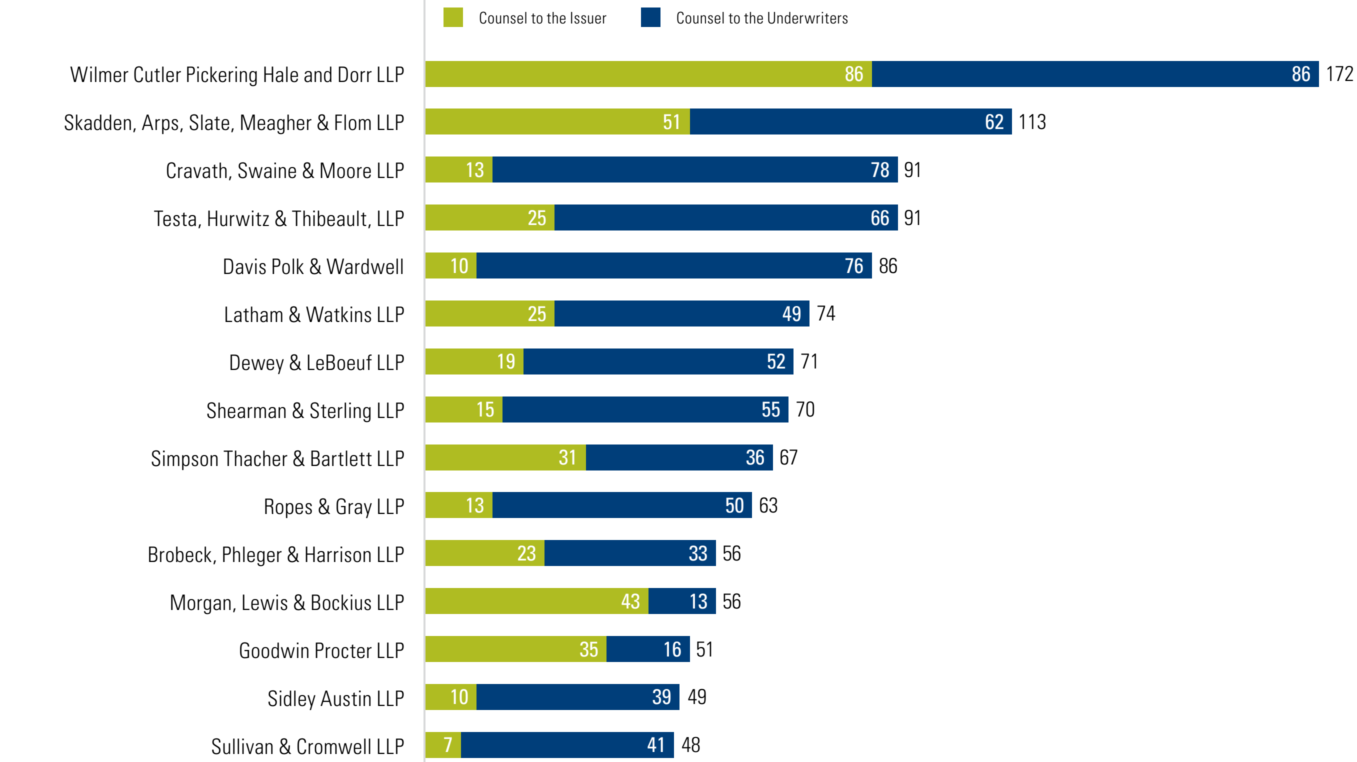
There is no single profile of a successful IPO company, but we expect that most IPO candidates in 2008 will have:

- Outstanding management
- A superior technology or product position in a large and growing market
- Substantial revenue—at least $50 million to $75 million annualized
- Strong revenue growth—25% or more annually
- Consistent profitability
- Potential market capitalization of at least $150–$200 million
- Experienced legal and accounting advisors

These factors can vary widely based on a company's industry and size. For example, most biotech companies will have much smaller revenue and not be profitable. More mature companies are likely to have greater revenue and market caps but slower growth rates.

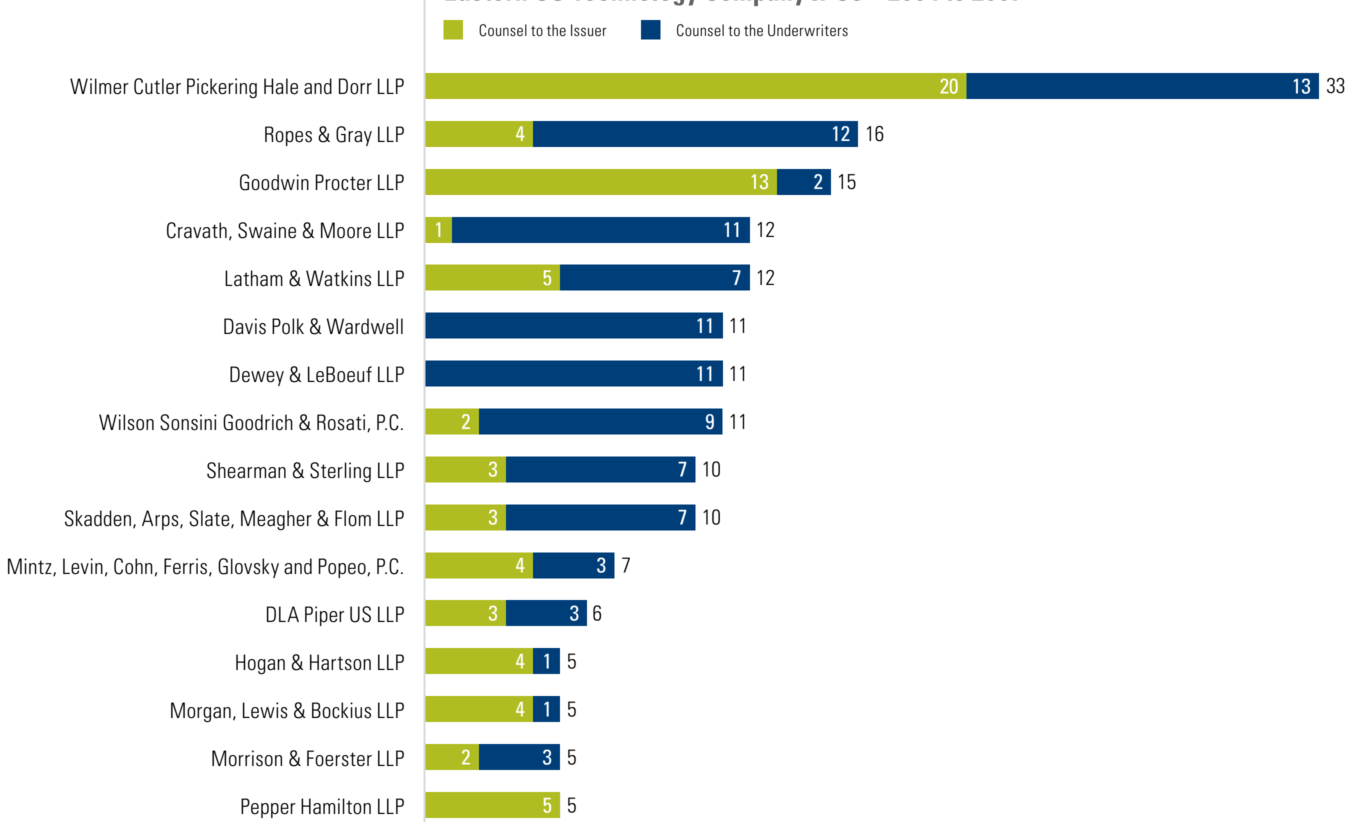
Law Firm and Underwriter Rankings

Eastern US IPOs – 1996 to 2007



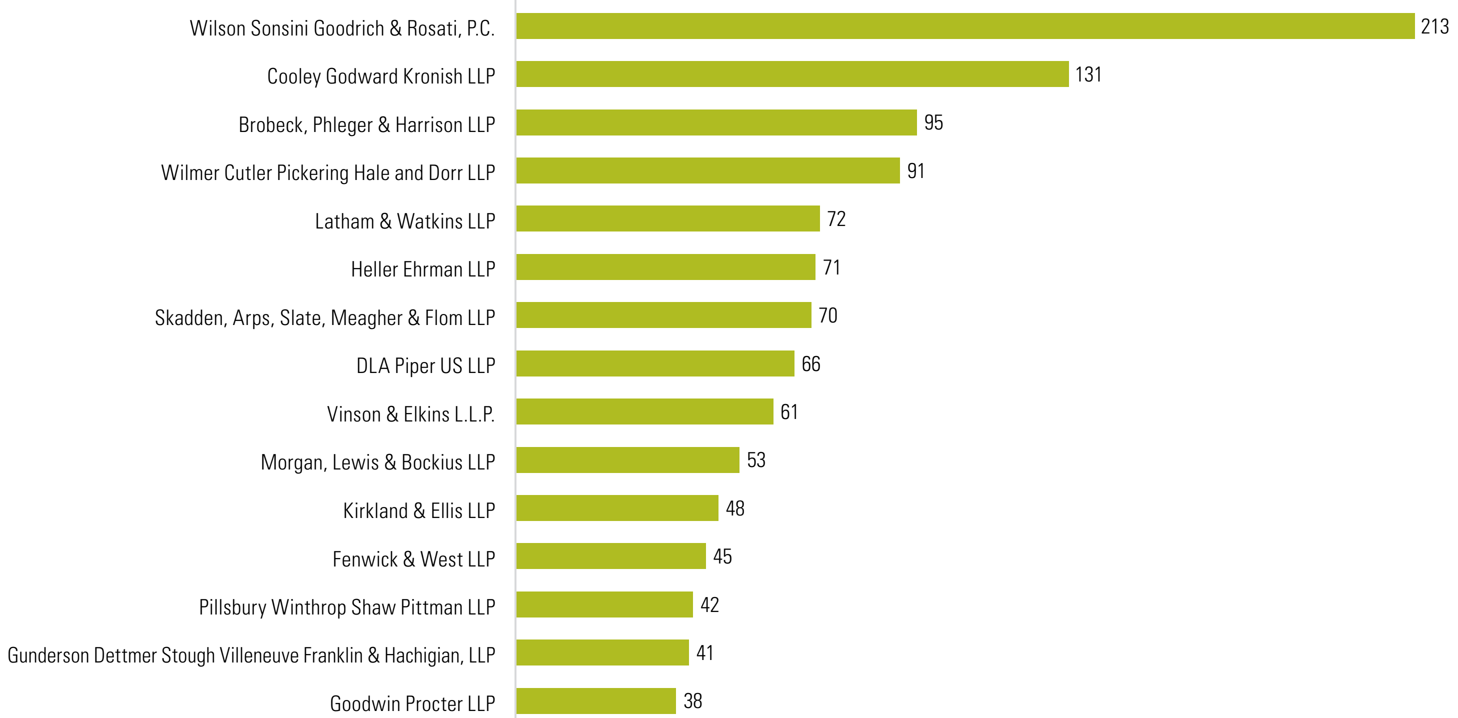
Source: SEC filings

Eastern US Technology Company IPOs – 2004 to 2007



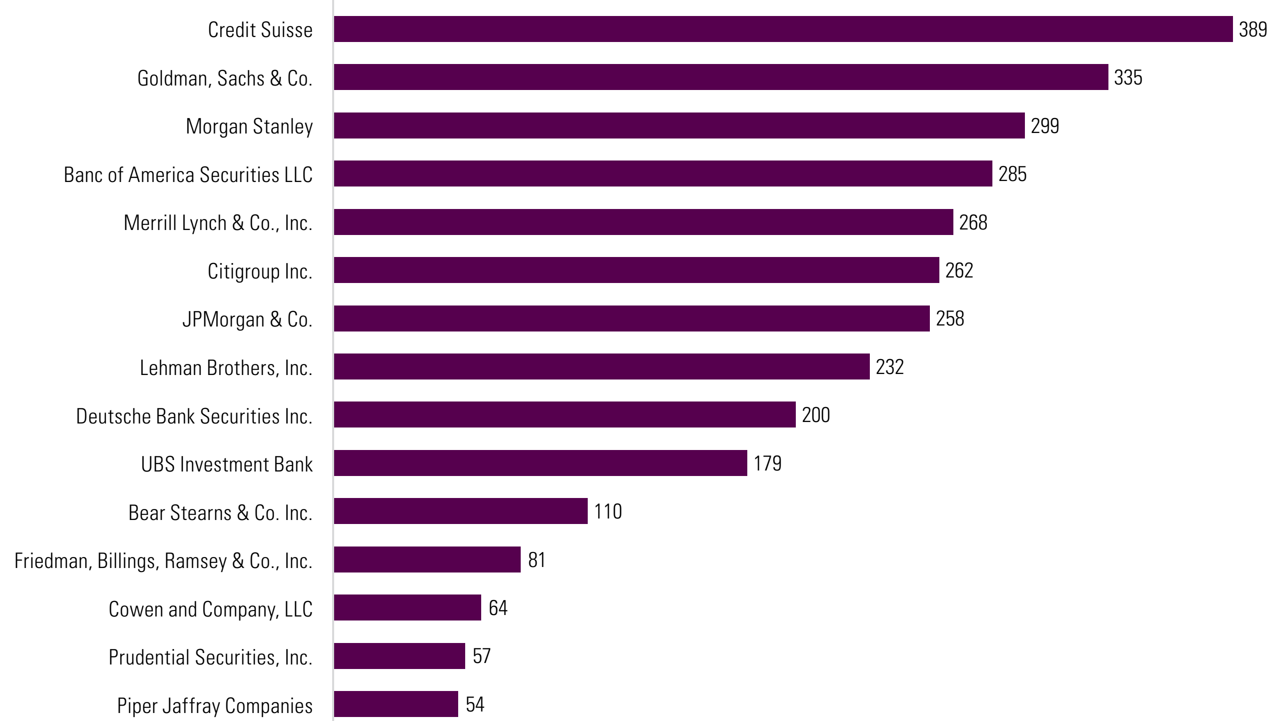
Source: SEC filings
The above charts are based on companies located east of the Mississippi River.

Issuer Counsel in US IPOs – 1996 to 2007



Source: SEC filings

Bookrunner in US IPOs – 1996 to 2007



Source: Thomson Reuters

California

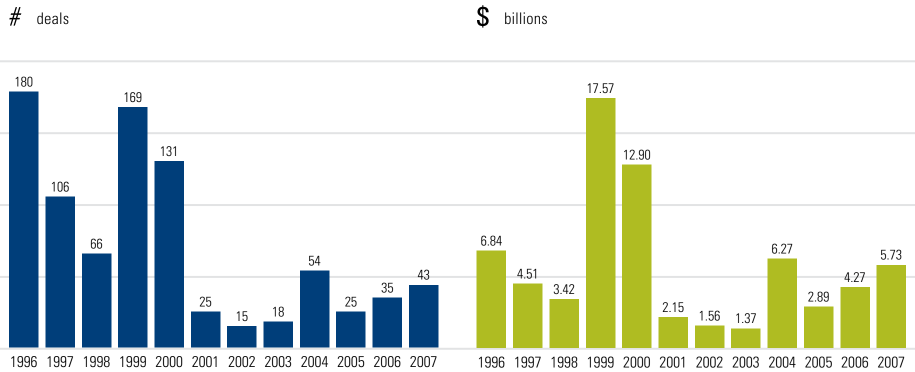
California produced 43 IPOs with gross proceeds of $5.73 billion in 2007. These results reflect a 23% increase in deals and a 34% jump in gross proceeds from 2006, but remain well below the levels of IPO activity between 1996 and 2000, when California averaged 130 IPOs and $9.05 billion in gross proceeds annually.

The California IPO market remains dominated by technology-related companies, with 37 tech IPOs accounting for 86% of the total number of offerings in 2007. California tech IPOs nearly matched the nationwide tech IPO aftermarket performance in 2007, but non-tech deals underperformed. The average California tech IPO ended the year 14% above its offering price, compared to the national average of 15%. Non-tech IPOs in California declined 2% on average, compared to an average gain of 16% for all non-tech IPOs nationwide.

While the perceived heavy burdens of public company compliance and an active M&A market for venture-backed companies continued to restrain IPO growth in 2007, the uptick in IPO activity suggests that the market is becoming more accustomed to the new regulatory regime. We believe it also reflects the strength and resiliency of the capital markets overall, the effect of private equity buyout activity and resultant portfolio company exits, an active venture capital investment climate, and stable earnings growth by more venture-backed companies.

Although 2008 began with some signs of a market correction and a significant decline in private equity buyout activity, we believe that California IPO activity will remain strong, as emerging companies demonstrate growth in revenue and profitability, and newer markets—such as biotechnology, clean energy technology, wireless applications and services, and cross-border US/Asia deals—expand and mature.

California IPOs – 1996 to 2007



Source: SEC filings

Mid-Atlantic

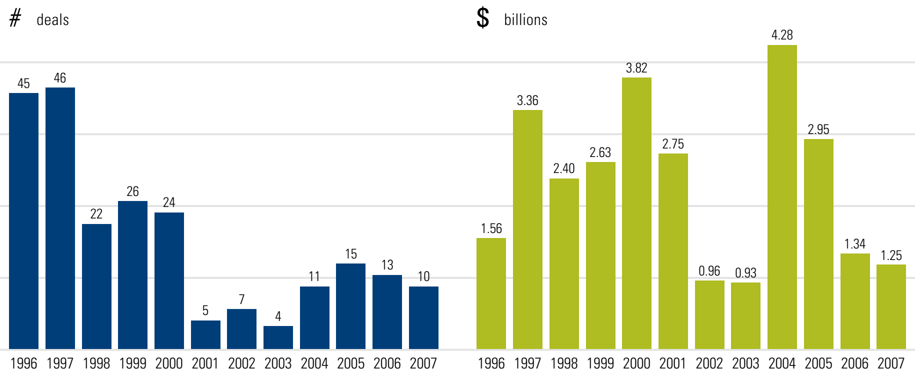
The number of IPOs in the mid-Atlantic region of Virginia, Maryland, North Carolina, Delaware and the District of Columbia declined from 13 in 2006 to 10 in 2007. Gross proceeds dipped from $1.34 billion in 2006 to $1.25 billion in 2007.

Virginia led the region with five IPOs in 2007, followed by Maryland and North Carolina with two each. The top-performing mid-Atlantic IPOs of the year were by comScore (up 98% from its offering price by year-end) and Sucampo Pharmaceuticals (up 59%).

There were seven technology-related IPOs in the mid-Atlantic region in 2007, representing 70% of the total, compared to 10 (77%) in 2006 and seven (47%) in 2005, demonstrating the region's continued focus on the IT and life sciences sectors. The average mid-Atlantic tech IPO ended the year up 16% from its offering price, while the average non-tech IPO saw a decrease of 23%.

In 2008, we expect the region's IPO candidates to include additional information technology and life sciences companies, as well as software and wireless companies.

Mid-Atlantic IPOs – 1996 to 2007



Source: SEC filings

New England

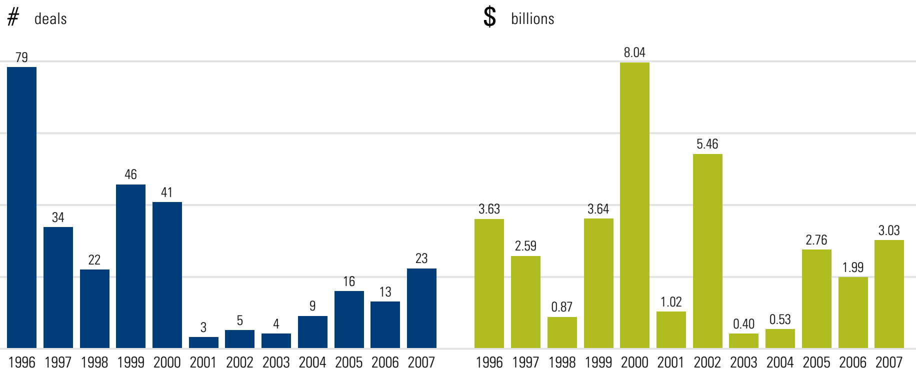
New England enjoyed its best year since 2000, producing 23 IPOs with $3.03 billion in gross proceeds in 2007, compared to 13 IPOs and $1.99 billion in gross proceeds in 2006. The number of New England IPOs in 2007 topped the number from 1998, the beginning of the bubble, and represented more than a five-fold increase over the level of IPO activity in the 2001–2003 period.

Massachusetts contributed the lion's share of the region's IPOs in 2006 (20 of the 23). New England retained its high concentration of technology-related activity, with 19 tech IPOs making up 83% of the region's total. Eight of the tech-related IPOs came from biotech or medical device companies and four were from software companies—two sectors of traditional strength in New England.

Underscoring the strength of tech-related IPOs in 2007, the region produced seven IPOs that had proceeds in excess of $100 million: athenahealth ($113.2 million), Constant Contact ($107.2 million), Insulet ($115.5 million), Monotype Imaging ($132.0 million), Netezza ($108.0 million), Starent Networks ($126.4 million) and TechTarget ($100.1 million). The average New England tech IPO ended the year up 21% from its offering price, while the average non-tech IPO in the region performed even better—up 23%.

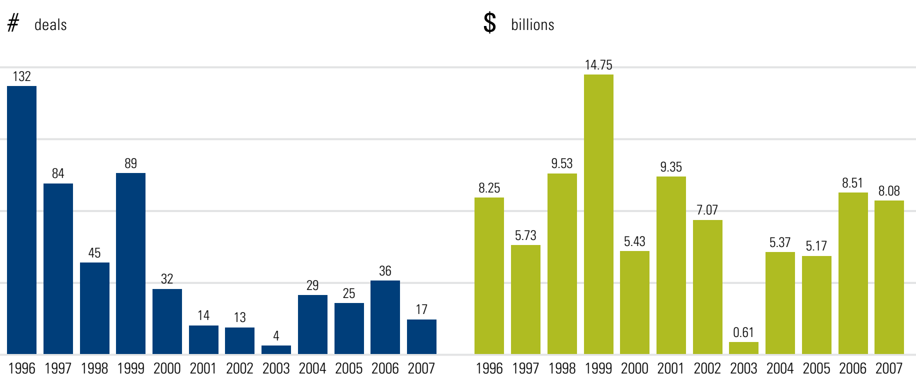
We expect that continued strong levels of venture capital investment in New England, along with the region's world-renowned universities and research institutions, will continue to provide a fertile environment for new companies and IPO candidates. If market conditions are conducive in 2008, we anticipate IPOs from technology and life sciences companies based in New England—and from Massachusetts in particular.

New England IPOs – 1996 to 2007



Source: SEC filings

Tri-State IPOs – 1996 to 2007



Source: SEC filings

Tri-State

The number of IPOs in the tri-state region of New York, New Jersey and Pennsylvania declined 53%, from 36 in 2006 to 17 in 2007, but gross proceeds edged down only 5%, from $8.51 billion to $8.08 billion. Average deal size in the region spiked from $236.4 million in 2006 to $475.3 million in 2007, boosted by three very large IPOs by private equity firms: Blackstone ($4.13 billion), Fortress ($634.3 million) and Och-Ziff ($1.15 billion).

In addition to six IPOs by financial services companies—the leading sector in the region—the tri-state region produced six IPOs in various technology sectors, including biopharmaceuticals, healthcare and wireless. The region also saw three energy-related IPOs, including Ocean Power Technologies, which became one of the few US companies to complete an IPO in the United States after initially listing on the London AIM market. The average tech IPO in the tri-state region ended the year down 9% from its offering price, while the average non-tech IPO in the region inched up 2%.

Venture capital activity in the tri-state region now trails only that of California and New England. We expect that the region's VC-backed companies—including technology and life sciences companies—as well as spinoffs from the region's established companies, will continue to produce a healthy crop of IPO candidates in 2008. ■

Counsel of Choice for Public Offerings

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

Starent Networks
Initial Public Offering of Common Stock
$135,204,000
Counsel to Issuer
June 2007

PS Business Parks
Public Offering of Preferred Stock
$143,750,000
Counsel to Underwriters
January 2007

Netezza
Initial Public Offering of Common Stock
$124,200,000
Counsel to Issuer
July 2007

TechTarget
Initial Public Offering of Common Stock
$115,115,000
Counsel to Underwriters
May 2007

Blackboard
Public Offering of 3.250% Convertible Senior Notes due 2027
$165,000,000
Counsel to Issuer
June 2007

Altus
Public Offering of Common Stock
$96,153,000
Counsel to Underwriters
April 2007

Constant Contact
Initial Public Offering of Common Stock
$107,200,000
Counsel to Issuer
October 2007

Progenics Pharmaceuticals
Public Offering of Common Stock
$60,190,000
Counsel to Underwriters
September 2007

Skyworks
Rule 144A Placement of 1¼% Convertible Subordinated Notes due 2010 and 1½% Convertible Subordinated Notes due 2012
$200,000,000
Counsel to Issuer
March 2007

SoundBite Communications
Initial Public Offering of Common Stock
$41,616,000
Counsel to Issuer
November 2007

Danaher
Public Offering of Common Stock
$567,525,000
Counsel to Issuer
November 2007

Delignit Aktiengesellschaft
Initial Public Offering of Common Stock
€6,000,000
Counsel to Issuer
September 2007

Virtusa
Initial Public Offering of Common Stock
$61,600,000
Counsel to Underwriters
August 2007

Bookham
Public Offering of Common Stock
$44,000,000
Counsel to Issuer
November 2007

Airvana
Initial Public Offering of Common Stock
$58,100,000
Counsel to Issuer
July 2007

Global BPO Services Corp.
Initial Public Offering of Common Stock
$250,000,000
Counsel to Issuer
October 2007

CIT
Public Offerings of Medium-Term Notes
$9,190,000,000
Counsel to Underwriters and Agents
Various Dates 2007

Pioneer Investments
Closed-End Mutual Fund Public Offering of Common Stock
$203,750,000
Counsel to Issuer
May 2007

Pharmion
Public Offering of Common Stock
$138,000,000
Counsel to Underwriters
May 2007

MED
Public Offering of Ordinary Shares
£7,500,000
Counsel to Issuer
October 2007

O. P. T. Ocean Power Technologies, Inc
Initial Public Offering of Common Stock
$100,000,000
Counsel to Issuer
April 2007

Ciena
Public Offering of 0.875% Convertible Senior Notes due 2017
$500,000,000
Counsel to Underwriters
June 2007

ORA Capital Partners Plc
Initial Public Offering of Ordinary Shares
£34,700,000
Counsel to Underwriters
April 2007

Aspect Medical Systems
Rule 144A Placement of 2.50% Convertible Senior Notes due 2014
$125,000,000
Counsel to Issuer
June 2007

Sucampo Pharmaceuticals, Inc.
Initial Public Offering of Common Stock
$49,594,000
Counsel to Issuer
August 2007

CAF Corporación Andina de Fomento
Public Offering of 5.75% Notes Due 2017
$250,000,000
Counsel to Underwriters
January 2007

NitroMed
Public Offering of Common Stock
$19,760,000
Counsel to Issuer
May 2007

Evercore Partners
Public Offering of Common Stock
$142,485,000
Counsel to Underwriters
May 2007

American Superconductor
Public Offering of Common Stock
$99,875,000
Counsel to Issuer
July 2007

Biodel
Initial Public Offering of Common Stock
$86,250,000
Counsel to Underwriters
May 2007

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Effective February 4, 2008, the SEC promulgated a new set of disclosure rules for "smaller reporting companies" to replace the former "small business issuer" rules. A smaller reporting company is eligible to use reduced, or "scaled," disclosure in the Form S-1 registration statement for its IPO and in subsequent SEC filings.

Eligibility

Under the new rules, a smaller reporting company must have a public float of less than $75 million. An IPO company determines its eligibility as of a date within 30 days of the initial Form S-1 filing. Public float is calculated by multiplying a bona fide estimate of the IPO offering price per share (which need not be disclosed) by the sum of the number of outstanding shares of common stock held by non-affiliates before the IPO plus the aggregate number of shares being registered for sale in the IPO.

An existing public company determines its eligibility by measuring its public float as of the last day of its most recently completed second fiscal quarter. Public float is calculated by multiplying the market price of its common stock by the number of shares held by non-affiliates of the company. If the company's public float is $75 million or more on that date, it cannot qualify as a smaller reporting company until such point as its public float as of the last day of a second fiscal quarter falls below $50 million.

If the public float of a smaller reporting company as of the last day of its second fiscal quarter rises to $75 million or more, the company can no longer use scaled disclosure beginning with the Form 10-Q for the first fiscal quarter of the next fiscal year. The company may, however, continue to use scaled disclosure through and including the filing of its Form 10-K for that fiscal year. To regain eligibility thereafter, the company's public float as of the last day of a second fiscal quarter must fall below $50 million.

If a company is unable to calculate its public float—for example, if it has no common stock outstanding or no market price exists for its outstanding common stock—it must have had less than $50 million in revenue in its most recent fiscal year to qualify as a smaller reporting company. Once its annual revenue exceeds $50 million, the company will lose its smaller reporting company status until it has annual revenue of less than $40 million in its most recent fiscal year.

Scaled Disclosure

The accompanying table summarizes the scaled disclosure that is available to smaller reporting companies under Regulation S-K—the source of many disclosure requirements in SEC filings. In addition, smaller reporting companies are permitted to provide one fewer year of audited statements of income, cash flows and changes in stockholders' equity. Smaller reporting companies are allowed to pick and choose on an item-by-item (referred to as "à la carte") basis the aspects of scaled disclosure they wish to follow, and can make this election quarterly.

Implications

Relatively few IPO companies will qualify as smaller reporting companies, since most IPOs—particularly underwritten ones—have an anticipated public float of at least $75 million. Over time, however, some post-IPO companies may find themselves eligible to provide scaled disclosure as their fortunes—and public floats—wane.

Scaled disclosure, if available, can provide significant savings in terms of expense and preparation time. The principal advantages relate to financial statements and executive compensation disclosure. Smaller reporting companies are not required to provide segment information, selected financial data, supplementary financial information or information about market risk, and can provide one fewer year of audited financial statements and the associated discussion in MD&A. Scaled disclosure permits much less extensive executive compensation information, including no CD&A, and requires only three of the seven compensation tables that would otherwise be required.

If a company qualifies as a smaller reporting company, it should consider the following questions when deciding whether, and to what extent, it will provide scaled disclosure:

- Does the company wish to be perceived by the market as a "smaller" company? If not, the company may wish to forego scaled disclosure.
- What disclosures does the company's investor base expect? If the company's investors are largely institutional, they may be dissatisfied by the less extensive disclosure permitted by the smaller reporting company rules.
- What disclosures are the company's competitors making? If the company's principal competitors prepare their SEC filings on the basis of the larger reporting company rules, the company may be disadvantaged if it does not do the same.
- Does the company believe that its status as a smaller reporting company is temporary? If so, the company may wish to eschew scaled disclosure to avoid any issues with the consistency and comparability of its disclosures before and after its stint as a smaller reporting company.
- Have there been any material changes to the company's financial position, business or executive compensation that would be masked by scaled disclosure? If so, the company should consider the SEC's antifraud rules and be mindful of any appearance that it is attempting to hide material information through the use of scaled disclosure.
- Would scaled disclosure subject the company to additional potential liability under the securities laws, or deny it the benefits of additional cautionary disclosures? For example, although smaller reporting companies may omit risk factors from Forms 10, 10-Q and 10-K, doing so may be unwise.

In the context of an IPO, the company's decision should be made in consultation with the lead underwriters. In many cases, the underwriters are likely to conclude that the marketing of the offering would be enhanced if the company were to provide more comprehensive disclosure in lieu of scaled disclosure. ■

Affected Regulation S-K Item	Scaled Disclosure Available to Smaller Reporting Companies
Item 101 (Description of Business)	▪ A description of the development of the business is only required for three years (as opposed to five). ▪ No segment information is required. ▪ An estimate of the amount spent on research and development activities is only required for two years (as opposed to three).
Item 201 (Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters)	▪ Stock performance graph is not required.
Item 301 (Selected Financial Data)	▪ Not required.
Item 302 (Supplementary Financial Information)	▪ Not required.
Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations)	▪ Only two years of analysis is required if only two years of financial statements are presented (as opposed to three years of analysis when three years of financial statements are presented). ▪ Tabular disclosure of contractual obligations is not required.
Item 305 (Quantitative and Qualitative Disclosures about Market Risk)	▪ Not required.
Item 402 (Executive Compensation)	▪ CD&A is not required. ▪ Compensation information is required only for three named executive officers, including the principal executive officer (as opposed to five named executive officers, including the principal executive officer and principal financial officer). ▪ Only three of the seven compensation tables required of larger companies must be provided—the Summary Compensation Table, Outstanding Equity Awards at Fiscal Year End Table and Director Compensation Table. ▪ The Summary Compensation Table is only required to cover two years (as opposed to three). ▪ Footnote disclosure of the grant date fair value of equity awards in the Director Compensation Table is not required.
Item 404 (Transactions with Related Persons, Promoters and Certain Control Persons)	▪ Disclosure of the policies and procedures for reviewing related person transactions is not required. ▪ Disclosure is required for related person transactions where the amount exceeds the lesser of $120,000 and 1% of the average of the company's total assets at the end of its last two completed fiscal years—this test is more stringent than the flat $120,000 threshold for other public companies—and additional specific information about underwriting discounts and corporate parents is required that is not required for other public companies. ▪ In registration statements, information is required for the last three completed fiscal years plus the current fiscal year—the same standard as for other public companies; in other SEC filings, information is required for the last two completed fiscal years plus the current fiscal year—one more year than is required for other public companies.
Item 407 (Corporate Governance)	▪ Compensation Committee Report is not required. ▪ "Compensation Committee Interlocks and Insider Participation" disclosure is not required. ▪ Disclosure of whether (or why not) the Audit Committee has at least one "Audit Committee Financial Expert" is not required in the first Form 10-K.
Item 503 (Prospectus Summary, Risk Factors, and Ratio of Earnings to Fixed Charges)	▪ Risk factors are not required in Forms 10, 10-Q and 10-K (but remain required in a Form S-1). ▪ Information regarding the ratio of earnings to fixed charges is not required when debt is issued, and information regarding the ratio of combined fixed charges and preferred dividends to earnings is not required when preferred stock is issued.
Item 504 (Use of Proceeds)	▪ If offering proceeds will be used to fund an acquisition, the relaxed financial statement requirements for a smaller reporting company under Regulation S-X are used to determine whether, and which, financial statements of the target company must be included.
Item 601 (Exhibits)	▪ Exhibit 12 (Statements re Computation of Ratios) is not required.

Sometimes, a company (or its investors) is torn between an IPO and a sale. The company may be qualified and willing to take on an IPO, yet enticed by the prospect of selling and unsure how to compare the relative ease and certainty of being acquired with the equity upside of an IPO. The choice can pose a quandary if IPO market conditions are choppy, creating execution risk for any IPO plan.

In these cases the optimum choice may be a "dual track," in which the company simultaneously pursues an IPO while entertaining—or even courting—suitors. Anecdotal evidence suggests dual track efforts are increasing in frequency, as the perceived burdens of public company life have increased and IPOs have become more difficult to complete. A dual track strategy presents various challenges:

- ***Importance of Confidentiality:*** Even more so than usual, the M&A process must be kept under wraps, to minimize the risk of premature disclosure and to avoid disruption to the effort and focus demanded of the IPO process.
- ***Disclosure Issues:*** Absent a leak, the sale process usually need not be publicly disclosed prior to an acquisition announcement. A dual track strategy can, however, result in thorny disclosure issues if the company opts for an IPO rather than a sale. For example, if an acquisition deal is reached and then falls apart, the company must consider whether the reasons for the busted deal must be disclosed in the IPO prospectus—this could prompt negative disclosures and delay an IPO while the prospectus is supplemented.
- ***Legal Advisor:*** The company will almost certainly utilize its IPO law firm for the M&A track as well—to use different counsel for the two tracks would squander the hard-earned institutional knowledge from the IPO process and create logistical and other challenges—but should make sure appropriate M&A expertise is available on the company counsel team for the potential sale.
- ***Selection of Financial Advisors:*** The company will ordinarily want financial advisors to handle the sale side of the dual track. The IPO lead underwriters will know the company best and be obvious choices for the M&A engagement. If one (but not all) of the lead underwriters is selected as the M&A advisor and the concurrent sale process is not disclosed to the other lead underwriters, complications can result. Also, the economic outcomes may be different for financial advisors on a sale transaction than for underwriters in an IPO, which may give the selected party or parties an incentive to steer the process one way or the other.
- ***Potential for Conflicted Motivations:*** The company's management and key employees may also have financial incentives to prefer one alternative over the other. A company sale will often result in the replacement of top management, particularly the CEO and CFO, but may also trigger equity acceleration and change-in-control and severance payments. On the other hand, an IPO will offer management continued employment and the potential for market appreciation, but without the immediate realization of change-in-control benefits. The company's board of directors needs to be conscious of the hazards posed by any skewed incentives, and in some cases may need to make adjustments to achieve the best outcome for stockholders.
- ***Board Duties:*** The board's fiduciary duties to stockholders obviously apply when considering the choice of an IPO or company sale and when evaluating acquisition offers. The board is not compelled to accept an acquisition offer that is within the estimated IPO price range, but the board will want to follow an appropriate process in a dual track, as it would in any sale process.
- ***Valuation Impact:*** A dual track can create tricky valuation issues for the company. If the company pursues an IPO after receiving one or more acquisition offers, it must consider the impact of these offers on its subsequent determinations of fair market value for option grants made prior to the IPO. Similarly, the company will need to evaluate whether the amount of any acquisition offers should—or must—be disclosed in response to cheap stock comments from the SEC.
- ***Timing Considerations:*** Although a company can pursue both sides of a dual track strategy for a long time, it eventually must select one alternative. In theory, the day of reckoning can be delayed until after the IPO road show and moments before inking the underwriting agreement. In reality, the choice is usually made before going on the road, because a road show is expensive and time-consuming and underwriters are leery of irritating fund managers with meaningless presentations. If an attractive acquisition offer does not seem imminent, the sale process is ordinarily shut down when the road show begins.
- ***Sale Terms:*** If an acceptable acquisition offer emerges from a dual track process, the focus will shift to a traditional M&A negotiation, but with two wrinkles. One, there will be a heightened urgency to sign a definitive agreement quickly, so that the company does not lose its IPO window in the event the sale cannot be concluded. Two, the company may seek to style the definitive agreement as if the transaction were a "public-public" merger, with no representations, indemnities or escrows following the closing.
- ***Unwinding the IPO:*** Assuming an acquisition agreement is signed after the Form S-1 has been filed, the company's IPO filings will need to be withdrawn prior to closing the sale. Since a deal can come undone for many reasons, it is usually advisable to keep the Form S-1 and exchange listing application on file until shortly before the closing.
- ***Extra Effort and Expense:*** A dual track combines the rigors of an IPO with the effort of a company sale process, and usually in a compressed time frame. A handful of key participants will bear the brunt of the extra burden, and the company should seize efficiency opportunities—such as a virtual data room where due diligence materials can be made available to underwriters' counsel and multiple bidders simultaneously—when available. Although both an IPO underwriting discount and an M&A success fee will not be paid, total transaction expenses in a dual track strategy usually exceed the expenses of either path alone. ■

IPOs by special purpose acquisition companies, or SPACs, made a big splash in 2007. SPACS are development-stage companies formed for the purpose of engaging in a merger or acquisition with an unidentified company or companies. Although the basic concept of a SPAC is not new, SPACs only recently began to enter the IPO market in droves.

The recent surge in popularity of SPAC IPOs can be attributed to several factors, including self-imposed restrictions to protect investors; the decision of Amex in 2005 to begin accepting SPACs for listing, enabling them to bypass state securities law review; an influx of high-caliber and experienced management teams and founding sponsors; the involvement of bulge-bracket investment banking firms and top-tier law firms, helping legitimize SPACs; significantly larger offering sizes, expanding the range of feasible acquisitions; and a receptive audience among hedge fund investors that are flush with cash.

Characteristics

As SPACs have moved into the IPO mainstream, their general characteristics have coalesced. A typical structure in 2007 consisted of the following, although early indications suggest that some key terms will evolve in 2008:

- ***Securities Offered:*** In the IPO, the SPAC sells units consisting of one share of common stock and a warrant to purchase one additional share. In a concurrent private placement, the SPAC's founding stockholders make a significant investment in the company.
- ***Underwriting Arrangements:*** The IPO's underwriters earn a normal underwriting discount but defer a portion of it until an acquisition is consummated. In addition to a standard over-allotment option, the underwriters sometimes are granted an option to purchase additional units.
- ***Offering Proceeds:*** At least 95%, and often as much as 97.5% or more, of the proceeds from the IPO, plus the proceeds of the founding stockholder investment and the deferred underwriting discount, are placed "in trust." The trust account is released to the company only if a business combination is approved.
- ***Trading Liquidity:*** SPAC shares and warrants are freely traded in the marketplace. Liquidity provides investors with an exit strategy, and helps management negotiate a business combination.
- ***Insider Ownership:*** Insiders own a substantial stake (often 20%) in the SPAC and agree to place their stock in escrow for a period of 6–12 months after the completion of an acquisition. No salaries, finder's fees or other kinds of cash compensation are paid to insiders prior to an acquisition.
- ***Proposed Acquisition:*** Following the IPO, management searches for an acquisition opportunity with a fair market value of at least 80% of the SPAC's net assets. The SPAC cannot pursue a smaller acquisition, but can issue additional stock or debt to facilitate a larger transaction. If a suitable target is identified, an acquisition agreement is negotiated and signed, subject to approval by the SPAC's stockholders.
- ***Stockholder Approval:*** The SPAC prepares and distributes a proxy statement to solicit stockholder approval. The SPAC cannot complete the acquisition if a majority of the outstanding shares are voted against the transaction, or if public stockholders owning a specified threshold of the outstanding shares elect to tender shares back to the SPAC in exchange for a pro rata distribution from the trust fund.
- ***Liquidation and Return of Funds:*** If a business combination is not consummated within 18–24 months after the IPO, the SPAC is dissolved, and the trust account is distributed to public investors. Insiders do not participate in this distribution, and the underwriters forfeit the deferred portion of their fees.

IPO Process

The IPO process for a SPAC is different than for a conventional IPO in various respects:

- Since a SPAC has no operating history, due diligence is simpler and focused primarily on the company's management arrangements and its targeted industry sector.
- The offering description—the unit structure, trust account and underwriting arrangements—is significantly more complicated than in a common stock IPO by an operating company.
- The SPAC's operating structure, including procedures for approving an acquisition, tendering shares back to the SPAC and liquidating the company if a business combination is not completed within the prescribed time, will be described in detail.
- The prospectus will provide extensive information about the company's proposed business and sector focus and the criteria to be applied in evaluating potential acquisitions.
- Detailed information about the company's arrangements with founding stockholders and management, including potential conflicts of interest, will be included.
- Assuming the SPAC was organized shortly before the initial Form S-1 filing, the prospectus will contain very limited financial and executive compensation information, and probably no MD&A or CD&A.
- The road show will be shorter (perhaps only one week) and will focus on the hedge fund investors who are the predominant buyers of SPAC IPOs.
- The SPAC will incur the burden and expense of updating its Form S-1 to reflect "fundamental changes" by filing post-effective amendments as long as the warrants remain exercisable.

Outlook

SPACs with the type of investor protections described above are a relatively recent phenomenon. A large percentage of SPACs are still in pre-acquisition mode, and the popularity of the SPAC vehicle may wane if many are liquidated. Other factors affecting the availability of hedge fund capital to fund SPACs, and the universe of suitable targets for SPACs to acquire, will also help determine the long-term prognosis for SPAC IPOs. ■

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—PIPEs and Rule 144A placements—involve private placements. PIPEs deal activity hit another record high in 2007, while the number of Rule 144A placements also increased from 2006. Both are likely to remain desirable and accessible financing techniques for many companies in 2008, particularly because of the flexibility they offer in uncertain market conditions.

PIPEs Financings

The PIPEs (Private Investments in Public Equity) market surged to record levels once again in 2007, boosted by several mega-deals for financial institutions hit hard by the subprime mortgage crisis. Deal volume, dollar volume and average deal size all jumped significantly, as public companies of all sizes increasingly tapped the PIPEs market to meet their capital needs.

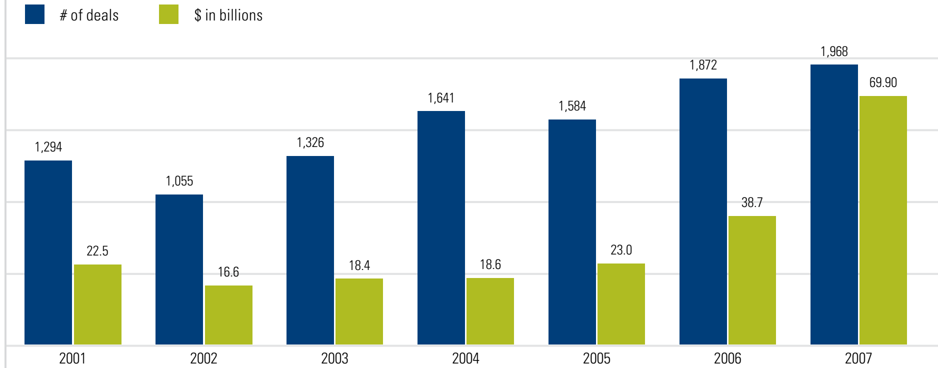
Pricing (measured in terms of fixed-price discounts and warrant terms) for PIPEs issuers improved modestly in 2007 compared to 2006.

The number of PIPEs deals (including registered direct offerings) increased from 1,872 in 2006 to a record 1,968 in 2007, and dollar volume soared from $38.7 billion to a new high of $69.9 billion—topping the size of the Rule 144A market for the first time. Average PIPEs deal size reached a record $35.5 million, up from $20.7 million in 2006.

In 2007, there were 11 PIPEs financings raising more than $1 billion each—the top five closed by financial institutions—compared to only four billion-dollar deals in 2006. The largest PIPEs financing in 2007 raised $7.5 billion.

Companies with market capitalizations under $250 million were responsible for 85% of all PIPEs financings in 2007, down from 89% in 2006, while companies with market caps below $50 million accounted for 49% of all PIPEs.

PIPEs Financings – 2001 to 2007



Includes closed deals only.

Source: PrivateRaise

Largest PIPEs Financings by Eastern US Life Sciences Companies – 2003 to 2007

Issuer	Proceeds	Issuer Counsel
2007		
Molecular Insight Pharmaceuticals, Inc.	$150,000,000	Foley & Lardner LLP
Inspire Pharmaceuticals, Inc.	$75,000,000	Reed Smith LLP
Athersys, Inc.	$65,000,000	Jones Day
2006		
Keryx Biopharmaceuticals, Inc.	$82,800,000	Alston & Bird LLP
Momenta Pharmaceuticals, Inc.	$75,000,000	Wilmer Cutler Pickering Hale and Dorr LLP
NitroMed, Inc.	$62,505,000	Wilmer Cutler Pickering Hale and Dorr LLP
2005		
Alnylam Pharmaceuticals, Inc.	$58,526,000	Wilmer Cutler Pickering Hale and Dorr LLP
Critical Therapeutics, Inc.	$54,500,000	Wilmer Cutler Pickering Hale and Dorr LLP
DrugMax, Inc.	$45,221,000	Sichenzia Ross Friedman Ference LLP
2004		
Neurogen Corporation	$100,000,000	Milbank, Tweed, Hadley & McCloy LLP
Genome Therapeutics Corp.	$88,200,000	Ropes & Gray LLP
Idenix Pharmaceuticals, Inc.	$75,600,000	Wilmer Cutler Pickering Hale and Dorr LLP
2003		
Penwest Pharmaceuticals Co.	$52,663,000	Wilmer Cutler Pickering Hale and Dorr LLP
Advanced Viral Research Corp.	$50,000,000	Kirkpatrick & Lockhart Nicholson Graham LLP
Regeneron Pharmaceuticals, Inc.	$48,000,000	Skadden, Arps, Slate, Meagher & Flom LLP

Based on companies located east of the Mississippi River and listed in the following PrivateRaise sectors: biotech and pharmaceuticals.

Source: PrivateRaise and SEC filings

The biotechnology and pharmaceutical sector produced 13% of all PIPEs deals, with an average deal size of $22.5 million, but was edged out for top billing by the metals, minerals and stones sector (14% of all deals and an average deal size of $12.9 million). Two other sectors each accounted for at least 5% of the PIPEs market in 2007:

energy (12% of the market with $56.2 million average deal size), and mining (8% and $23.2 million). Medical device companies, which historically have contributed at least 5% of the PIPEs market, slipped to just below 5% in 2007, as average deal size in the sector shrank to $9.1 million.

Of all PIPEs financings in 2007, 63% were common stock (average deal size of $28.7 million). The next largest segments were convertible debt (18% of all PIPEs and $17.1 million average size) and convertible preferred stock (8% of all PIPEs and $47.7 million average size). This breakdown reflects a continued shift to common stock deals from convertible deals, as investors seek more protection in uncertain capital markets.

Fixed-price deals continued to dominate the PIPEs market in 2007, representing 88% of all deals, up from 82% in 2006. The percentage of deals with variable pricing—after hovering between 10% and 11% each year between 2004 and 2006—dropped by nearly half, to 6% in 2007.

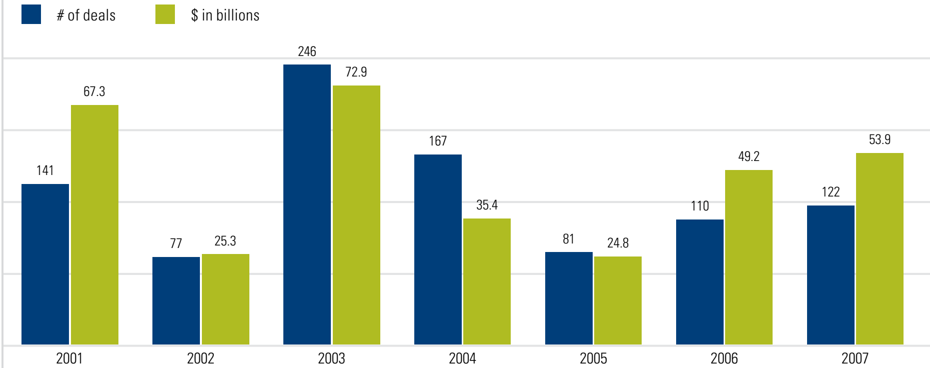
The average discount from market in fixed-price common stock PIPEs deals slipped to 8.3% in 2007 from 9.3% the prior year (compared to a hefty 16% in 2004). Warrant terms on these deals were largely unchanged in 2007. The percentage of deals that included warrants was 58% (compared to 56% in 2006), the average exercise premium was 19% (compared to 22% in 2006) and the average warrant coverage was 67% (compared to 65% in 2006).

With PIPEs deals firmly ensconced in the financing mainstream, particularly for small-cap and mid-cap issuers, the PIPEs market should continue to play an important corporate finance role in 2008.

Rule 144A Placements

The Rule 144A market for equity securities (including convertible debt) grew again in 2007. The number of placements and gross proceeds each increased 11% from 2006 levels. The market expansion occurred even though some convertible debt deals from very large companies—

Rule 144A Equity Placements – 2001 to 2007



Includes closed deals only.

Source: PrivateRaise

Largest Rule 144A Equity Placements by Eastern US Technology Companies – 2003 to 2007

Issuer	Proceeds	Issuer Counsel
2007		
NII Holdings Inc.	$1,200,000,000	Williams Mullen, P.C.
St. Jude Medical, Inc.	$1,200,000,000	Dorsey & Whitney LLP
General Cable Corporation	$475,000,000	Blank Rome LLP
2006		
Medtronic, Inc.	$4,400,000,000	Wilmer Cutler Pickering Hale and Dorr LLP
EMC Corporation	$3,450,000,000	Skadden, Arps, Slate, Meagher & Flom LLP
MedImmune, Inc.	$1,150,000,000	Dewey Ballantine LLP
2005		
L-3 Communications Holdings, Inc.	$700,000,000	Simpson, Thacher & Bartlett LLP
IVAX Corporation	$350,000,000	Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
NII Holdings Inc.	$350,000,000	Williams Mullen, P.C.
2004		
Red Hat, Inc.	$600,000,000	Wilmer Cutler Pickering Hale and Dorr LLP
ImClone Systems Incorporated	$600,000,000	Davis Polk & Wardwell
Sepracor Inc.	$500,000,000	Wilmer Cutler Pickering Hale and Dorr LLP
2003		
Bristol-Myers Squibb Company	$1,200,000,000	Cravath, Swaine & Moore LLP
Wyeth	$1,020,000,000	Simpson, Thacher & Bartlett LLP
Sepracor Inc.	$750,000,000	Wilmer Cutler Pickering Hale and Dorr LLP

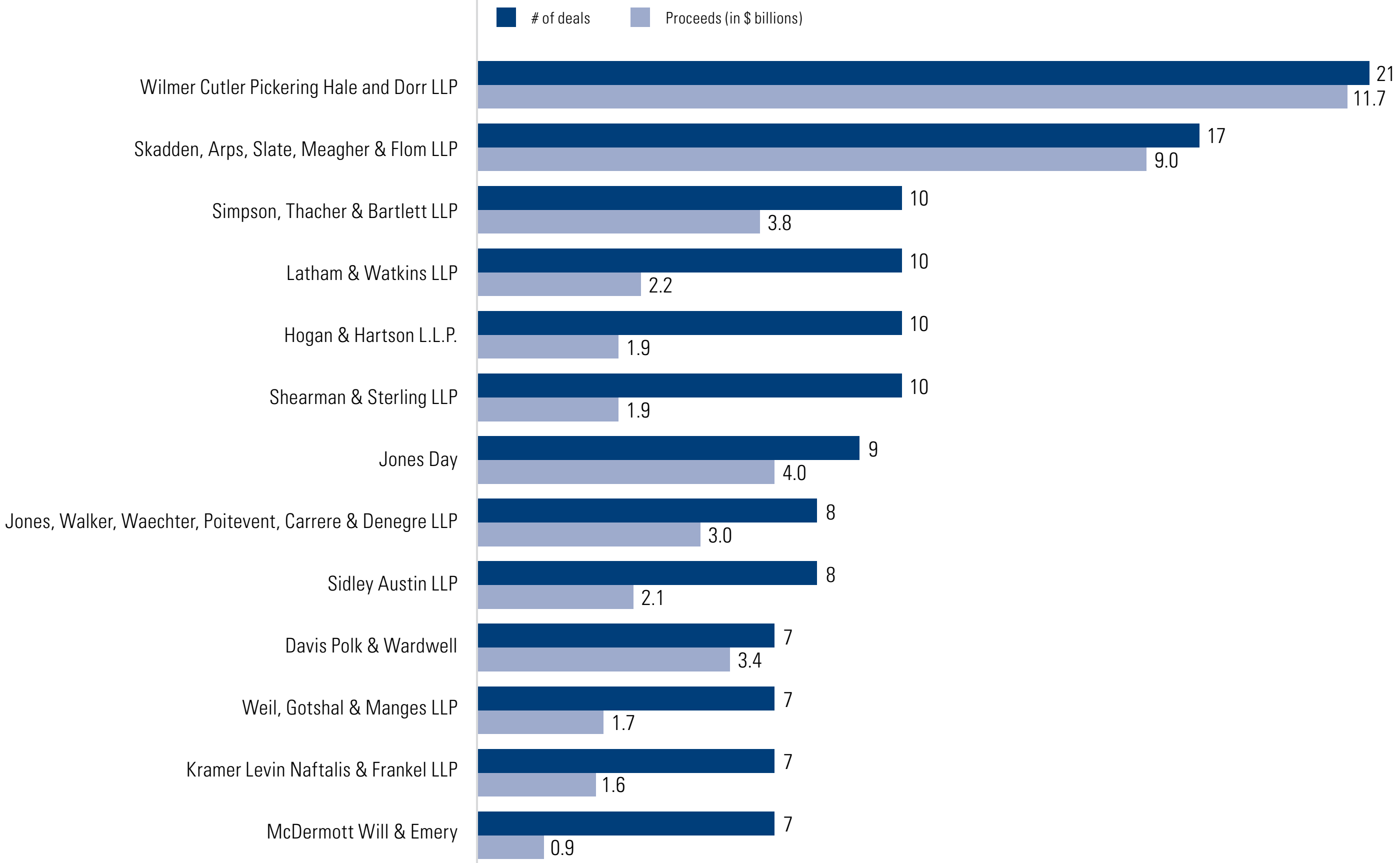
Based on companies located east of the Mississippi River and listed in the following PrivateRaise sectors: aerospace & defense, biotech, computers, Internet, medical devices, pharmaceuticals, semiconductors, software and telco.

Source: PrivateRaise and SEC filings

known as "well-known seasoned issuers" (WKSIs) under SEC rules—probably were redirected from the Rule 144A market to the registered public market.

The number of Rule 144A equity placements increased from 110 in 2006 to 122 in 2007, while gross proceeds grew from $49.2 billion to $53.9 billion.

Company Counsel in Eastern US Rule 144A Equity Placements – 2001 to 2007



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

Average deal size was down slightly, to $442.1 million in 2007 from $447.4 million the year before. Results in 2007 benefited from 17 billion-dollar placements, with two deals breaking the $2 billion barrier. Three of the four largest Rule 144A issuers were financial institutions shoring up their balance sheets.

Rule 144A issuers tend to be much larger and more mature than issuers in the PIPEs market. Companies with market caps above $1 billion accounted for 67% of Rule 144A placements in 2007 but only 3.5% of all PIPEs deals.

REITs led the Rule 144A equity market for the second consecutive year (with 16% of deals and an average deal size of $475.3 million), followed by the energy sector (13% and $203.2 million) and semiconductor companies (8% and $834.0 million). Biotechnology and pharmaceutical companies, which generally rank at the top of the Rule 144A market, slipped from 15% of all deals (with a $628.9 million average deal size) in 2006 to 7% of 2007 deals (with a $314.8 million average deal size). Telco companies also contributed 7% of the year's deals, with an average size of $420.6 million, followed by medical devices (5% and $320.0 million). No other sector accounted for as much as 5% of the market.

In 2007, 99% of all Rule 144A equity placements involved the issuance of convertible debt securities, up slightly from 98% in 2006. With only two placements, convertible preferred securities almost disappeared from the Rule 144A market in 2007. SEC rules do not permit public companies to offer common stock in Rule 144A placements.

Seasoned public companies have long recognized the faster execution time and greater flexibility afforded by Rule 144A placements. WKSIs can now enjoy these same advantages with registered public offerings, while avoiding the expense and effort of resale registration following a Rule 144A placement, and without any limitations on the types of securities offered. Convertible debt offerings by large-cap issuers can be expected increasingly to be structured as registered public offerings, but the Rule 144A market should remain an important source of capital for many companies. ■

Since late 2005, any well-known seasoned issuer (WKSI)—a company that is eligible to use Form S-3 or Form F-3 and either has a public float of at least $700 million or has issued at least $1 billion of debt securities in registered transactions in the past three years—has been able to file automatically effective shelf registration statements. As a result, WKSIs can make registered public offerings at will and reap the time-to-market advantage previously afforded only by Rule 144A placements.

Following its IPO, a newly public company becomes subject to the SEC's proxy rules.

In the 2008 proxy season, companies and shareholders will likely experience some important changes in the ways they communicate, influence and, on occasion, clash with one another due to evolving modifications of the SEC's proxy rules governing shareholder communications and proposals.

But the dam will not burst this year, because changes in two critically important areas will not occur until 2009 or later. Accordingly, 2008 will be a transitional year in which some—but not all—of the emerging regulatory changes will take effect and will interact with one another in ways that are now difficult to predict.

Regulatory Developments

What follows is a brief summary of some of the most important recent developments that will affect the rights and obligations of companies and shareholders in 2008 and subsequent years:

- ***Rule 14a-8 Proposals Relating to Shareholder Access:*** In late 2007 the SEC reaffirmed—for the 2008 proxy season—its longstanding position that companies may exclude from their proxy statements any Rule 14a-8 proposals (whether binding or precatory) that relate to "shareholder access" procedures allowing shareholders to place the names of their board nominees directly on the company's proxy card.
- ***Broker Discretionary Voting:*** The SEC appears likely to leave in abeyance until 2009 the New York Stock Exchange's proposal to prohibit the traditional practice of broker-dealers automatically voting street name shares in favor of companies' slates of director nominees in uncontested elections in the absence of specific instructions from the beneficial owners of the shares. Although this is an NYSE proposal, it affects Nasdaq companies as well, since the current rule applies to voting by all brokers and dealers that are members of the NYSE, regardless of where the shares being voted are listed.
- ***Public Statements Made on Electronic Forums:*** New Rules 14a-2(b)(6) and 14a-17 exempt statements made by shareholders on electronic shareholder forums from most requirements of the proxy rules. In particular, communications posted on an electronic forum more than 60 days prior to an annual meeting will be deemed to constitute an exempt solicitation of proxies, even if the shareholder subsequently commences a proxy contest.
- ***Electronic Delivery of Proxy Statements:*** New Rule 14a-16 permits all public companies to post their proxy materials on a website—and requires those that are "accelerated filers" to do so. The company may elect to have this instantaneous electronic access ("e-proxy") constitute delivery of its proxy materials if it notifies shareholders in writing about the website and offers to send a hard copy by mail upon request. E-proxy delivery can also be elected by dissident shareholders when mounting a proxy contest.

Practical Consequences

Each of these developments is likely to modify the cost/benefit analysis and probable outcomes of proxy contests and withhold vote campaigns:

- A shareholder access bylaw, if adopted, would typically require a company to include on its own proxy card the names of director candidates nominated by shareholders who held at least a specified threshold percentage of the company's outstanding shares, together with the same type of biographical and other information as required for the candidates recommended by the company's nominating committee and, typically, a short statement in support of the candidates. Shareholder access would permit eligible dissident shareholders to deliver their core message to all shareholders, side by side with the company's disclosures, at the company's expense, by whichever method of delivery (e-proxy or traditional) the company elected to use for its proxy materials.
- Broker discretionary voting has historically tended to automatically deliver large numbers of votes in favor of official slates of director nominees in uncontested elections. Eliminating this practice would require many companies to extend the solicitation period running up to their annual meeting and/or cause their proxy solicitors to be more proactive, in order to ensure that a quorum is obtained, and make it harder for companies that have implemented a majority voting requirement to obtain majority support for their nominees.
- The new exemption for public statements made on electronic forums more than 60 days prior to an annual meeting will encourage dissatisfied shareholders to begin to make their case against current management and company policies—at zero out-of-pocket cost—well in advance of proxy season without worrying about compromising their ability to subsequently commence a proxy contest and without having to make any SEC filings.
- The ability to deliver proxy materials by the e-proxy method may encourage full-fledged proxy contests (as distinct from withhold vote campaigns) because it offers dissident shareholders the possibility of reducing the printing and mailing costs involved in a full-fledged proxy contest down to a level not greatly in excess of some withhold vote campaigns. Use of e-proxy delivery by companies and/or dissident shareholders will also change the customary timeline for a proxy contest in ways that may benefit the dissidents.

These developments will not affect all companies in the same manner. For example, the abolition of broker discretionary voting will make incumbents' board seats more vulnerable to withhold vote campaigns at companies that have adopted majority voting, but will not have binding effects at companies that have not adopted majority voting. On the other hand, the potentially lower costs associated with e-proxy delivery and a more flexible timeline for beginning a publicity campaign against incumbent management on electronic forums may tend to encourage proxy contests universally and thereby increase the number of successful proxy contests. ■

The tenth anniversary of our annual *IPO Report* caused us to reflect a bit on the IPO market.

From a distance, today's IPO process looks much the same as that of a generation ago or even 5 to 10 years ago. In fundamental ways, the process has scarcely changed—you gather at an organizational meeting, hold multiple drafting and diligence sessions, file a Form S-1 registration statement with the SEC, resolve SEC comments, pitch investors on a road show, meet at a financial printer to finalize the prospectus, sign the underwriting agreement, and then price and close the deal. But below 30,000 feet, many changes become apparent:

- ***More Extensive Preparation:*** Far more preparation—legal, accounting, financial, governance and organizational—is now required for an IPO, and the work comes earlier in the process. IPO candidates used to select a lead underwriter and hold an organizational meeting to kick off the IPO process, with little advance preparation. Now, if the company has not invested several months or more in getting ready to go public, the IPO schedule will lag well behind underwriter expectations as well as the pace of other companies in the IPO queue.

- ***Additional Disclosure:*** Disclosure requirements have mushroomed in recent years. Companies need to provide much more extensive and elaborate disclosure in areas such as MD&A; executive compensation, including the new CD&A; risk factors; and the financial statements and footnotes. Much of this stems from new and expanded SEC and stock exchange rules, but other aspects reflect more demanding investor expectations. As a result of these changes, prospectuses have ballooned in length, routinely exceeding 150 pages and requiring summaries of 5–10 pages or more.

- ***Plain English:*** Prospectuses are now written in "plain English," a foreign language to old-school securities lawyers who trafficked in defined terms, legal jargon, long sentences and even longer paragraphs. Most practitioners will admit that plain English has been a rousing success, although it is more than a bit ironic that as prospectuses have become much simpler to read they have also become much longer.

- ***Lengthier (but More Transparent) SEC Review Process:*** SEC review now involves more comment letters and a lengthier process. Whereas it used to be possible to clear all SEC comments with as few as one or two letters, three or more sets of comments is now typical. As a result, it is almost unheard of to print red herrings and begin a road show based on the initial Form S-1 filing or the company's response to the first comment letter alone—a common practice well into the 1990s. The SEC now publicly releases comment letters and company responses after completing its review of registration statements, providing better visibility into the SEC review process.

- ***Changes in Underwriting Practices:*** Most IPOs now have three or four managing underwriters, but syndicates have become smaller as investment banking firms have become much larger through industry consolidation. Road shows are longer, and frequently include trips to Europe. Marketing reach is usually expanded with electronic road shows. The roles of investment bankers and securities analysts are now separated in the offering process, changing the way IPO companies interact with each. Free writing prospectuses can now be used to update information, and post-effective prospectus delivery obligations can be satisfied with a notice that the sale was made pursuant to a registration statement. Standard lockup agreements usually can be extended if the company announces earnings or material developments toward the end of the initial lockup period.

- ***Longer Timeline:*** The timeline from initial Form S-1 filing to closing has become much longer. Prior to 2000 or so, an IPO candidate could reasonably expect to complete the IPO within 45–60 days after filing. Today's norm is twice that. The longer the IPO process, the more opportunities for the offering to be delayed or scuttled due to market conditions or company developments, causing many proposed IPOs to proceed in fits and starts.

- ***Streamlined Filing and Pricing:*** The SEC's EDGAR system has made filing simpler—no more hand deliveries of registration statements—and the information instantly available to everyone—no more "quiet" filings. Rule 430A permits a Form S-1 to be declared effective without including final pricing information, eliminating the mad scramble to get a pricing amendment on file before the markets open on the first trading day. Rule 462(b) provides for immediate registration of additional shares, allowing an IPO to be readily upsized by up to 20% in aggregate gross proceeds.

- ***Heightened Scrutiny and Potential Liability:*** Each director can be held liable for a material inaccuracy or omission in the Form S-1, subject to a "due diligence defense." Following an IPO, the company's officers signing a periodic SEC report can likewise be held liable for a material inaccuracy or omission in the report. Now, conduct of directors and officers is increasingly scrutinized, and the Sarbanes-Oxley Act and related SEC rules require the company's CEO and CFO to provide personal certifications in connection with the filing of each Form 10-Q and Form 10-K. Willful false certifications can result in a fine of up to $5 million and imprisonment for up to 20 years.

- ***New Exchanges and Offering Formats:*** Nasdaq has split the Nasdaq National Market into the Nasdaq Global Market and the Nasdaq Global Select Market, and renamed the Nasdaq SmallCap Market as the Nasdaq Capital Market. NYSE has added the "Arca" market for smaller companies and become more aggressive in recruiting small-cap and mid-cap companies. Both Nasdaq and NYSE have become larger and more global through acquisitions. Overseas, various exchanges have come and gone. In all markets, online and auction formats have grown with the expansion of the Internet.

- ***Elimination of Blue Sky Regulation:*** State securities regulation of IPOs has been largely eliminated, as long as the company qualifies for listing on a national securities exchange. Lengthy blue sky memoranda and associated state filings thus are a thing of the past in most IPOs. ■

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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. PIPEs and Rule 144A data is sourced from PrivateRaise.

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