



2009 IPO Report

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2 US IPO Market Review and Outlook

2008 Review

Facing the combined burden of an economic recession and plunging capital markets, the IPO market turned in its worst performance in a generation. In 2008, there were only 31 IPOs—the lowest annual total since 1975—with gross proceeds of \$24.1 billion (of which \$17.9 billion came from a single offering). The year's tallies were down 85% in deal volume and 48% in gross proceeds from 2007, ending a run of four strong years that had averaged about 200 IPOs annually.

While 2008 was a down year across the board, the second half of the year was even slower than the first. The IPO market virtually dried up in the second half of the year, producing a mere six offerings raising just \$1.0 billion. As discussed further below, the market drought continued into 2009, before beginning to show signs of recovery in the second quarter.

Economic conditions soured throughout 2008 in the face of ongoing turmoil in the credit markets, the continuing decline in the housing market and a stiff drop in consumer confidence—and the capital markets followed suit. The Dow Jones Industrial Average experienced the third-worst year in its history, dropping by 34%, and the Nasdaq Composite declined by 41%.

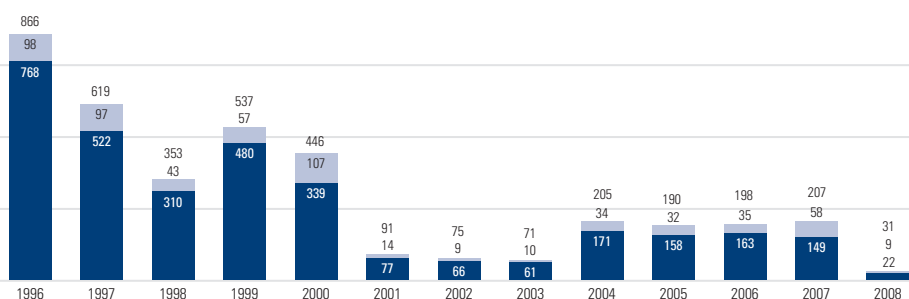
Every segment of the IPO market suffered in 2008. The number of offerings by US-based issuers fell from 149 in 2007 to 22 in 2008, the number of IPOs by foreign-based issuers decreased from 58 to 9, and the number of offerings by technology-related companies declined from 107 to 9.

IPOs by venture capital and private equity backers dropped precipitously in 2008. The number of IPOs by US VC-backed companies plummeted from 76 to 7—the lowest annual count in memory. Similarly, the number of US buyout-backed IPOs fell from 46 to 7.

Among the year's few bright spots was Visa's mammoth \$17.9 billion IPO—the largest US-issuer IPO in history. Other large IPOs in 2008 came from American Water Works (\$1.25 billion), Intrepid Potash (\$960 million) and GT Solar (\$500 million). Safe Bulkers produced the largest

US IPOs – 1996 to 2008

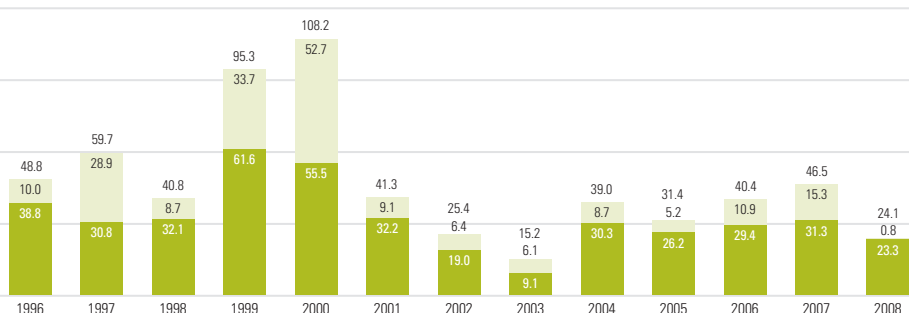
■ US issuers ■ Foreign issuers



Source: SEC filings

US IPO Dollar Volume – 1996 to 2008

■ US issuers ■ Foreign issuers \$ billions



Source: SEC filings

foreign-based-issuer IPO of 2008, with gross proceeds of \$190 million, although its price declined 65% for the year.

Despite gaining 10% on its first trading day, the average 2008 IPO ended the year 36% below its offering price. In 2007, the average IPO appreciated 15% by the end of the year. Only 16% of 2008 IPOs were trading at or above their offering price at year-end, compared to 55% in 2007. The best-performing IPOs of 2008 were Grand Canyon Education (up 57%), CardioNet (up 37%) and Visa (up 19%).

Two 2008 IPOs more than doubled in price on their opening days—Asia Time (up 143%) and Hong Kong Highpower Technology (up 110%)—but both ended the year below their offering prices.

The percentage of profitable companies going public increased from 62% in 2007 to 71% in 2008, while the median annual revenue of IPO companies increased from \$87.0 million to \$113.5 million. Both metrics evidenced the high standards demanded of IPOs in 2008.

In 2008, 9 IPOs (29% of the total) were completed by companies based in

the eastern United States (east of the Mississippi River), western US-based issuers accounted for 13 IPOs (42% of the total), and foreign issuers accounted for the remaining 9 IPOs (29% of the total). Eastern US IPOs raised \$2.8 billion in gross proceeds (12% of the total), western US IPOs raised \$20.5 billion (85%), and foreign-issuer IPOs raised \$0.8 billion (3%) of the year's IPO proceeds.

California maintained its position atop the IPO state rankings with five IPOs, followed by Texas with four. China led among foreign-based issuers, with five IPOs, followed by England with two.

The percentage of IPO companies listing on Nasdaq—the preferred listing choice for many venture-backed and technology companies—decreased from 62% in 2007 to 39% in 2008, while the NYSE's market share increased from 36% to 55%. Surprisingly, and probably due to the small sample size, the average IPO offering size was larger for companies listing on Nasdaq (\$111.7 million) than for companies listing on the NYSE (\$78.6 million).

2009 Outlook

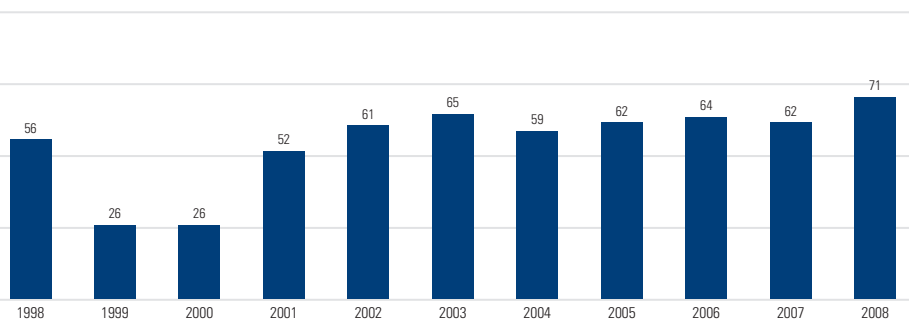
In broad terms, the US IPO market has gone through five phases over the past two decades or so:

- 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 volumes fell substantially and IPO candidates were held to much higher standards
- Mid-2003 through 2007—Solid market recovery, although not approaching the deal volumes that prevailed for most of the 1990s
- 2008—Market hits historic lows

By historical measures, the year 2008 was an anomaly for the IPO market. In the first half of 2009, however, the IPO outlook

Percentage of Profitable IPO Companies – 1998 to 2008

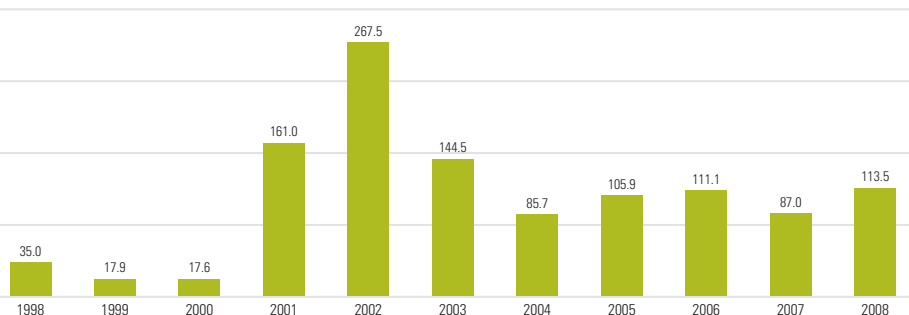
%



Source: IPO Vital Signs

Median Annual Revenue of IPO Companies – 1998 to 2008

\$ millions



Source: IPO Vital Signs

began to brighten amid a modest rebound in the capital markets and some signs that the recession was beginning to abate.

After only one IPO in the first quarter of the year, ten companies went public in the second quarter of 2009—nine of these priced at or above the top of their ranges, and all but one of the ten was trading above its offering price at mid-year. On a hopeful note for the beleaguered venture capital and private equity industries, six of the IPOs in the second quarter were by VC-backed companies, and another one was buyout-backed.

We remain fundamentally optimistic about the long-term prospects for the IPO market. The exact pace of the market recovery, however, is impossible to predict. Important factors include:

- **Economic Conditions:** Economic growth is a key determinant of strength in the capital markets. By late 2007, five years of economic expansion—largely driven by strong consumer spending and boosted by low interest rates, tax cuts and increased borrowing against home equity as housing values soared—had sputtered to an end. The following recession has been longer and more

severe than almost anyone anticipated. At mid-year 2009, there are some signs of recovery, but the timing and extent of the return of economic growth is uncertain.

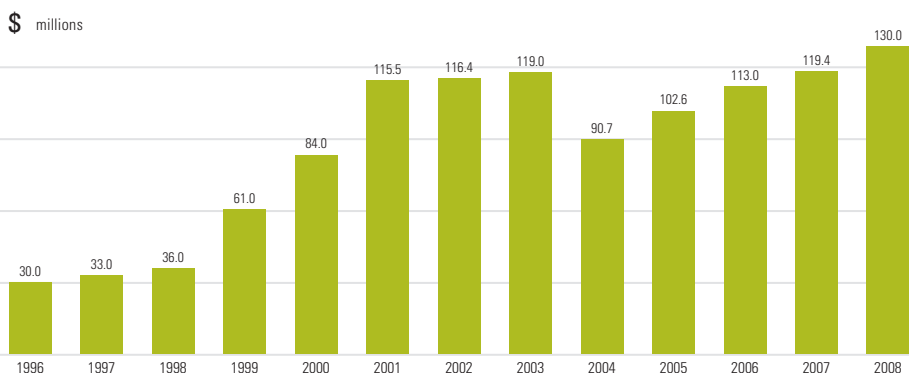
- Capital Market Conditions:** Stable and robust capital markets are a leading indicator of IPO activity. After sharply declining in 2008, the Nasdaq stabilized in the first quarter of 2009 and then increased by 20% in the second quarter. The Dow dropped another 13% in the first quarter, before adding 11% in the second quarter, to approach breakeven for the year to date. Most observers consider the markets' prognosis for the balance of the year to be mixed.
- 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.

The more rigorous corporate governance environment may deter some IPO candidates, steer them to liquidity through acquisitions, incent them to pursue IPOs in markets outside of the United States, or cause them to pursue more unusual capital-raising transactions. There is some evidence to support each of these suppositions.

For most companies, however, these corporate governance changes can be assimilated into IPO planning and should not pose a major impediment to going public. The choppiness of the IPO market for much of this decade has far more to do with economic and capital market conditions than regulatory changes.

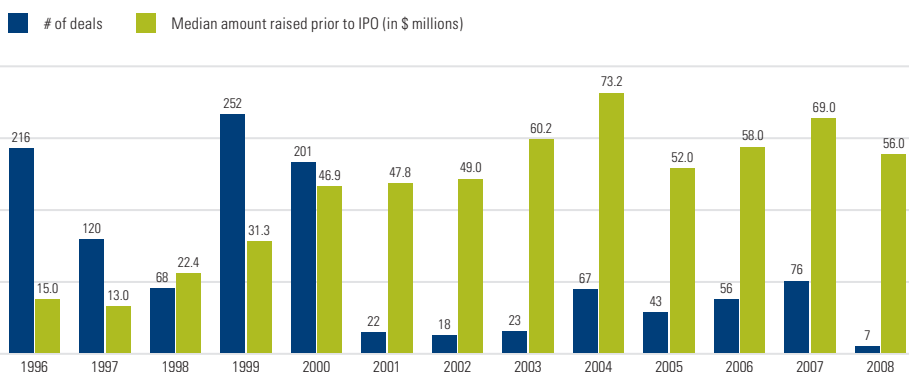
- Venture Capital Pipeline:** Venture capitalists depend on IPOs—along with company sales—to provide liquidity to their investors. Only 13 VC-backed companies were in IPO registration at mid-year 2009, according to Dow Jones VentureOne. With the uptick in IPOs by venture capital-backed companies in the second quarter of 2009, the number of such companies entering

Median IPO Offering Size – 1996 to 2008



Source: SEC filings

Venture Capital-Backed IPOs – 1996 to 2008



Source: Dow Jones VentureOne

IPO registration, or resuscitating dormant filings, is likely to increase over the balance of the year.

Longer term, the pool of IPO candidates will be affected by current trends in venture capital investing, including the timeline from initial funding to IPO. According to Dow Jones VentureOne, the median time from initial equity financing to IPO increased from 7.2 years in 2007 to 8.3 years in 2008—lengthening the period of time during which VC-backed companies must be privately funded. As recently as 2004 and 2005, this figure hovered around 5.5 years.

- Private Equity Impact:** Private equity investors also seek to divest portfolio companies or achieve liquidity through IPOs. PE-backed companies are usually larger and more seasoned than VC-backed companies or other start-ups pursuing IPOs, and thus can be strong candidates in a demanding IPO market. Although largely shut out of the 2008 IPO market, buyout-backed companies—especially large and profitable ones—can be expected to return to the IPO market as conditions permit. ■

Profile of Successful IPO Candidates

What does it really take to go public?

There is no single profile of a successful IPO company, but in general the most attractive candidates have the following attributes:

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

All IPO companies need top executive talent, a strong competitive position, adequate market

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 in 2007 and 2008.

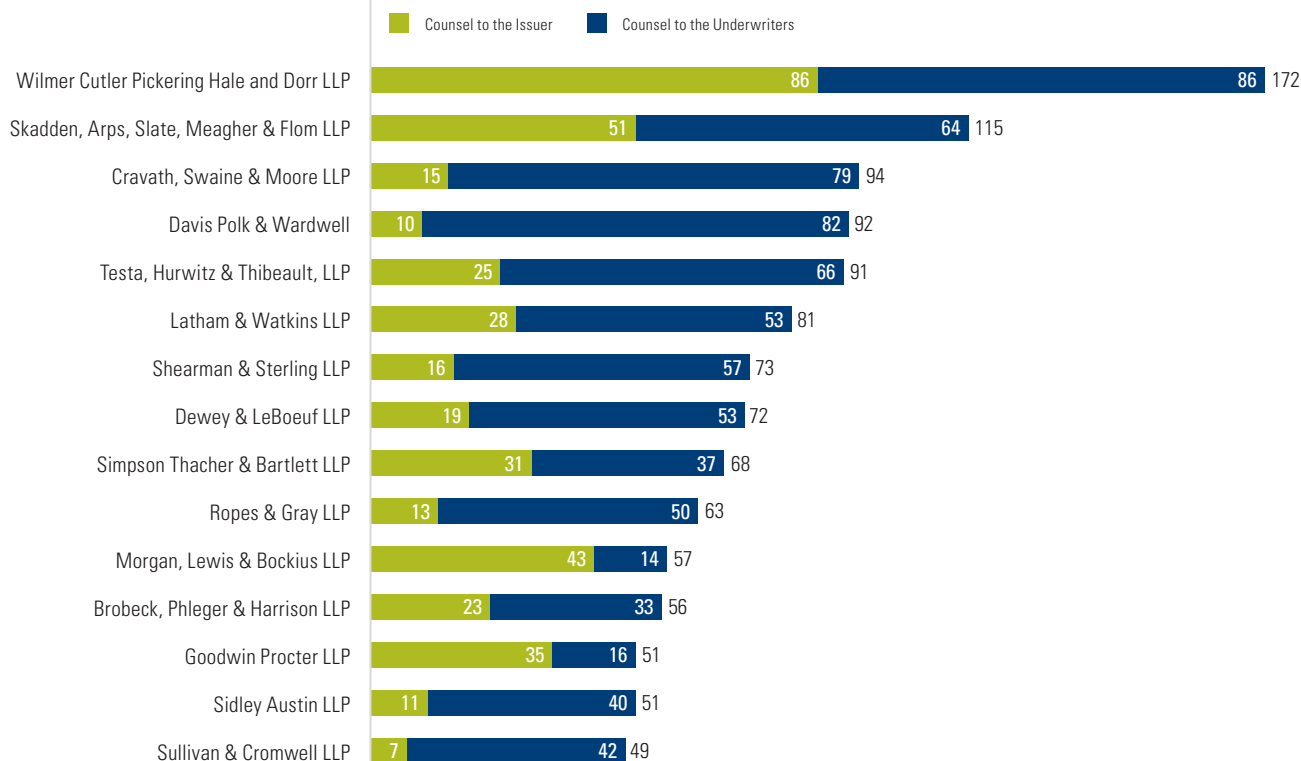
Median offering size	\$120.5 million (13% below \$50 million and 8% above \$500 million)
Median annual revenue of IPO companies	\$87 million (34% below \$50 million and 13% above \$500 million)
Percentage of IPO companies that are profitable	62% in 2007 and 71% in 2008
Aftermarket performance	By year-end, average IPO price increased 15% in 2007 and decreased 36% in 2008
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—26%
Percentage of IPOs including directed share programs, and median percentage of offering represented by those shares	Percentage of IPOs—47% Median percentage of offering—5%
Percentage of IPO companies disclosing adoption of ESPP	28%
Percentage of IPO companies using a "Big 4" accounting firm	77%
Form of outside director compensation paid by IPO companies	Cash only—10% Equity only—3% Cash and equity—87%
Stock exchange on which the company's common stock was listed	Nasdaq—65% NYSE—32% Amex—3%
Median number of Form S-1 amendments (excluding exhibits-only amendments) filed before effectiveness	Five
Median IPO expenses	Legal—\$1,200,000 Accounting—\$810,000 Total—\$2,760,000
Median underwriting discount	7%
Time elapsed from initial filing to effectiveness of the Form S-1	Median—117 calendar days 25th percentile—89 calendar days 75th percentile—170 calendar days

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

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

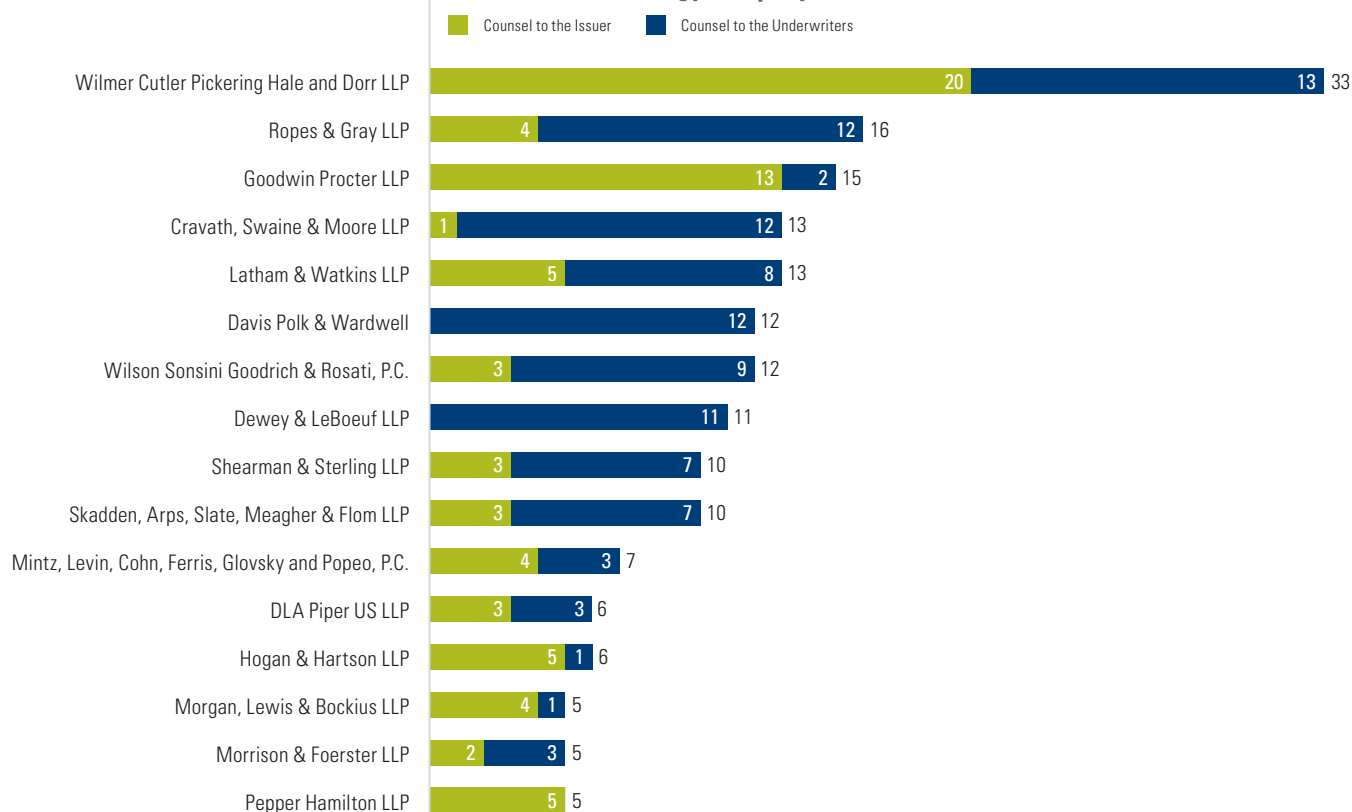
6 Law Firm and Underwriter Rankings

Eastern US IPOs – 1996 to 2008



Source: SEC filings

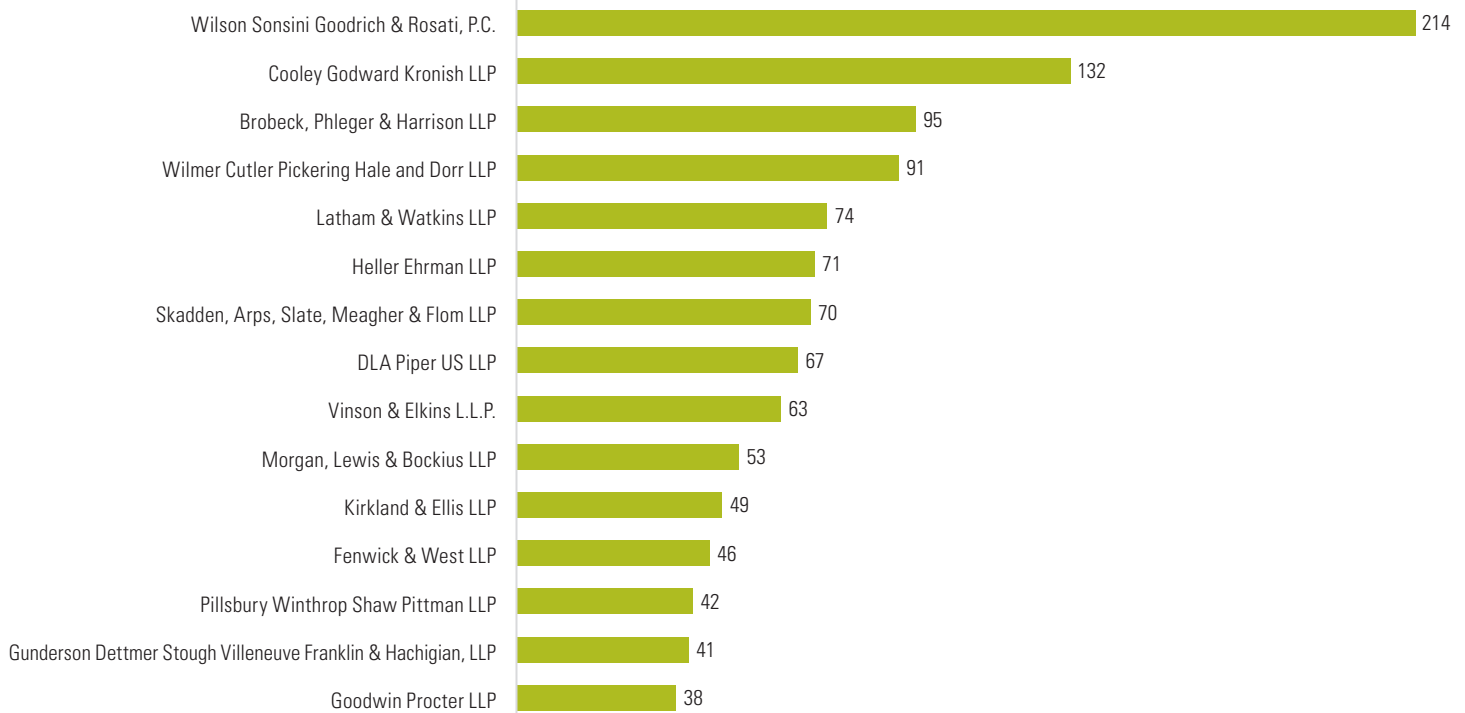
Eastern US Technology Company IPOs – 2004 to 2008



Source: SEC filings

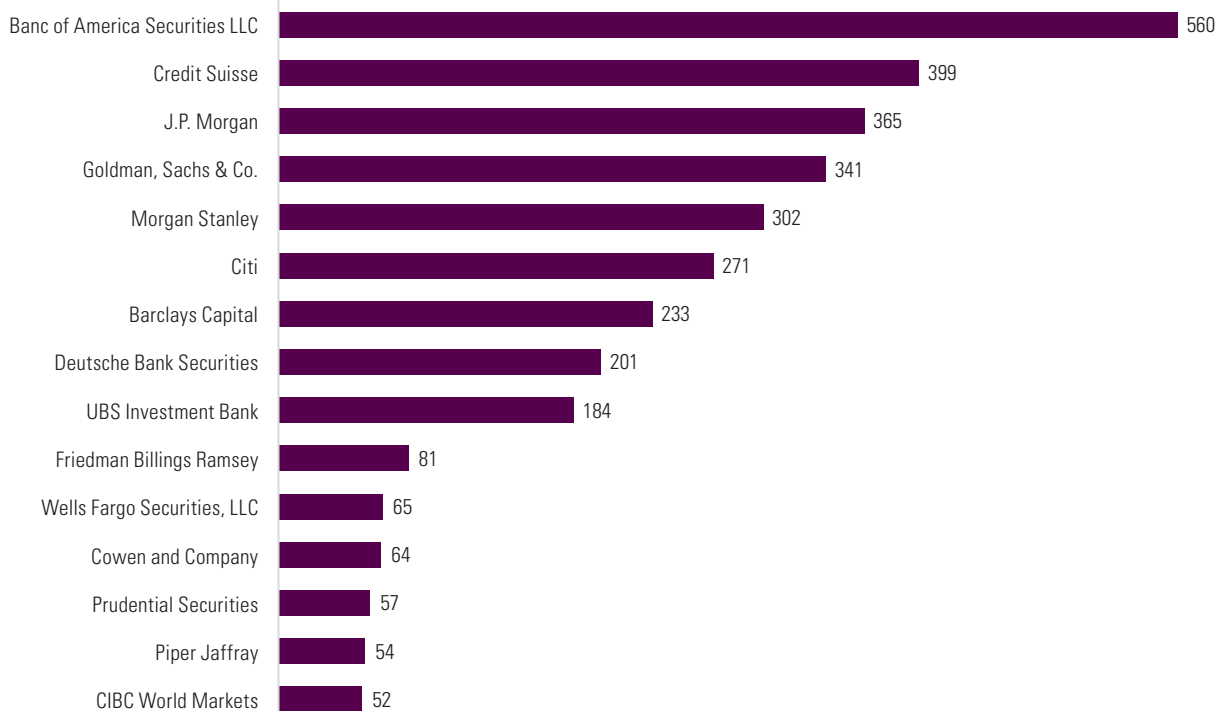
The above charts are based on companies located east of the Mississippi River.

Issuer Counsel in US IPOs – 1996 to 2008



Source: SEC filings

Bookrunner in US IPOs – 1996 to 2008



Source: Thomson Reuters
















Counsel of Choice for

SERVING INDUSTRY LEADERS IN TECHNOLOGY, LIFE SCIENCES, CLE

 <p>STATE STREET</p> <p><i>Public Offerings of Common Stock and Senior Notes</i></p> <p>\$6,750,000,000</p> <p>Counsel to Issuer</p> <p>March and May 2009</p>	 <p>ANALOG DEVICES</p> <p><i>Public Offering of 5.00% Notes Due July 1, 2014</i></p> <p>\$375,000,000</p> <p>Counsel to Issuer</p> <p>June 2009</p>	 <p>LogMeIn®</p> <p><i>Initial Public Offering of Common Stock</i></p> <p>\$122,667,000</p> <p>Counsel to Issuer</p> <p>July 2009</p>	 <p>Constant</p> <p><i>Public O Comm</i></p> <p>\$87,000,000</p> <p>Counsel</p> <p>April</p>
 <p>Airvana</p> <p><i>Initial Public Offering of Common Stock</i></p> <p>\$58,100,000</p> <p>Counsel to Issuer</p> <p>July 2007</p>	 <p>Discovery COMMUNICATIONS™</p> <p><i>Public Offering of 5.625% Senior Notes due 2019</i></p> <p>\$500,000,000</p> <p>Counsel to Issuer</p> <p>August 2009</p>	 <p>Global BPO Services Corp.</p> <p><i>Initial Public Offering of Common Stock</i></p> <p>\$250,000,000</p> <p>Counsel to Issuer</p> <p>October 2007</p>	 <p>SKYWORKS®</p> <p><i>Rule 144A Placement of 1¼% Convertible Subordinated Notes due 2010 and 1½% Convertible Subordinated Notes due 2012</i></p> <p>\$200,000,000</p> <p>Counsel to Issuer</p> <p>March 2007</p>
 <p>American Superconductor™</p> <p><i>Public Offering of Common Stock</i></p> <p>\$99,875,000</p> <p>Counsel to Issuer</p> <p>July 2007</p>	<p>EVERCORE PARTNERS</p> <p><i>Public Offering of Common Stock</i></p> <p>\$81,242,000</p> <p>Counsel to Underwriters</p> <p>August 2009</p>	 <p>CAF</p> <p>Corporación Andina de Fomento</p> <p><i>Public Offering of 8.125% Notes Due 2019</i></p> <p>\$1,000,000,000</p> <p>Counsel to Underwriters</p> <p>June 2009</p>	 <p>Book</p> <p><i>Public O Comm</i></p> <p>\$44,000,000</p> <p>Counsel</p> <p>Novemb</p>
 <p>STARENT NETWORKS</p> <p><i>Initial Public Offering of Common Stock</i></p> <p>\$135,204,000</p> <p>Counsel to Issuer</p> <p>June 2007</p>	 <p>SAVIENT PHARMACEUTICALS, INC.</p> <p><i>Public Offering of Common Stock</i></p> <p>\$31,000,000</p> <p>Counsel to Issuer</p> <p>April 2009</p>	 <p>Virtusa™</p> <p>Conceive. Transform. Optimize.</p> <p><i>Initial Public Offering of Common Stock</i></p> <p>\$61,600,000</p> <p>Counsel to Underwriters</p> <p>August 2007</p>	

for Public Offerings

TECH, FINANCIAL SERVICES, COMMUNICATIONS AND BEYOND

 <p>Offering of Common Stock</p> <p>\$100,000,000</p> <p>Counsel to Issuer</p> <p>April 2008</p>	 <p>Rule 144A Placement of 11% Senior Secured Second Lien Notes due 2014</p> <p>\$180,000,000</p> <p>Counsel to Issuer</p> <p>July 2009</p>	 <p>Public Offering of 4.50% Convertible Senior Notes due 2014</p> <p>\$190,000,000</p> <p>Counsel to Issuer</p> <p>April 2009</p>	 <p>Rights Offering of ADRs Representing Ordinary Shares</p> <p>\$1,037,000,000</p> <p>US Counsel to Issuer</p> <p>August 2009</p>
 <p>Initial Public Offering of Common Stock</p> <p>\$100,000,000</p> <p>Counsel to Issuer</p> <p>April 2007</p>	 <p>Initial Public Offering of Common Stock</p> <p>\$41,616,000</p> <p>Counsel to Issuer</p> <p>November 2007</p>	 <p>Initial Public Offering of Common Stock</p> <p>\$124,200,000</p> <p>Counsel to Issuer</p> <p>July 2007</p>	 <p>Initial Public Offering of Debt Securities</p> <p>\$600,000,000</p> <p>Counsel to Issuer</p> <p>October 2008</p>
 <p>Offering of Common Stock</p> <p>\$100,000,000</p> <p>Counsel to Issuer</p> <p>October 2007</p>	 <p>Public Offering of Common Stock</p> <p>\$45,517,000</p> <p>Counsel to Placement Agent</p> <p>February 2009</p>	 <p>Rule 144A Placement of 2.50% Convertible Senior Notes due 2014</p> <p>\$125,000,000</p> <p>Counsel to Issuer</p> <p>June 2007</p>	 <p>Public Offering of Common Stock</p> <p>\$47,195,000</p> <p>Counsel to Issuer</p> <p>February 2008</p>
 <p>Public Offerings of Senior Notes</p> <p>\$2,000,000,000</p> <p>Counsel to Issuer</p> <p>January and March 2009</p>	 <p>Initial Public Offering of Common Stock</p> <p>\$115,115,000</p> <p>Counsel to Underwriters</p> <p>May 2007</p>	 <p>Public Offering of Common Stock</p> <p>\$463,641,000</p> <p>Counsel to Issuer</p> <p>May 2009</p>	

California

California produced only five IPOs in 2008, compared to 43 in 2007, but gross proceeds soared from \$5.73 billion to \$18.21 billion because of Visa's record-sized IPO in 2008. Without Visa's \$17.9 billion IPO, however, proceeds from California IPOs would have plummeted by 94%. These results reflect the lowest level of IPO activity in California in decades, mirroring national trends in 2008.

In addition to Visa, the other California IPOs of 2008 were from healthcare companies CardioNet (\$81.0 million) and IPC The Hospitalist Company (\$83.2 million); security and compliance management solutions provider ArcSight (\$61.8 million); and energy recovery device maker Energy Recovery (\$119.0 million).

The average California IPO in 2008 ended the year 8% above its offering price—boosted by strong aftermarket performances by CardioNet and Visa—compared to the 36% average decline experienced by all IPOs nationwide.

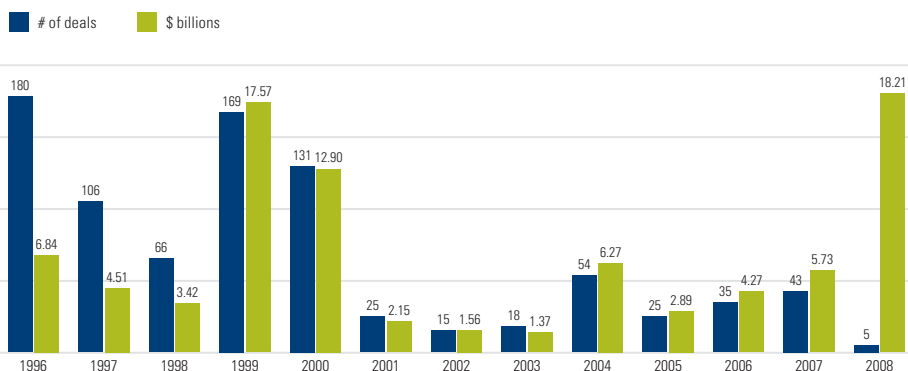
The California IPO market historically has been dominated by technology-related companies, with tech IPOs routinely accounting for 80% to 90% of the total number of the state's offerings. This trend is likely to resume as IPO activity returns to more normal levels.

With capital market conditions improving and signs of economic recovery appearing, we expect that California IPO activity will pick up in 2009. The second quarter of this year saw successful IPOs by Bridgepoint Education (\$98.2 million) and OpenTable (\$60.0 million). Additional emerging companies that demonstrate strong growth in revenue and profitability can also be expected to come to market this year.

Mid-Atlantic

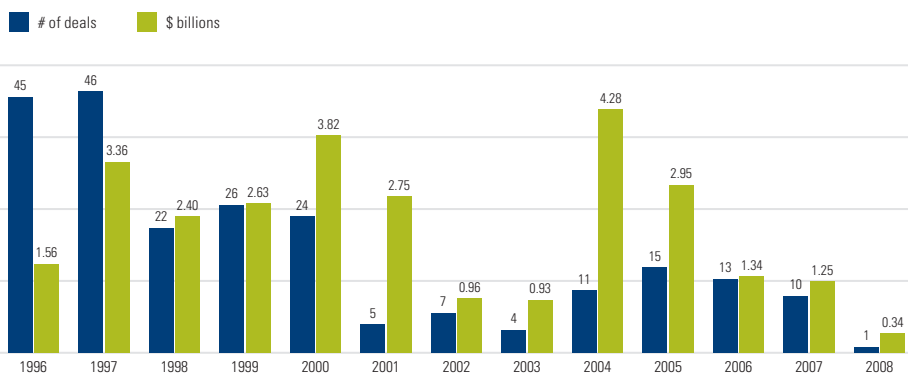
The mid-Atlantic region of Virginia, Maryland, North Carolina, Delaware and the District of Columbia produced just a single IPO in 2008, compared to 10 in 2007. Gross proceeds dipped from \$1.25 billion to \$0.34 billion.

California IPOs – 1996 to 2008



Source: SEC filings

Mid-Atlantic IPOs – 1996 to 2008



Source: SEC filings

The region's sole IPO of 2008 was the \$337.5 million offering of Colfax, a supplier of fluid handling products. Priced at \$18.00 per share in May, the stock was pulled down 42% by year-end, only modestly worse than the overall decline in capital markets over this period.

Technology-related companies historically have contributed a significant portion of the mid-Atlantic region's IPO deal flow. We expect this pattern to resume with improvements in the IPO market in 2009.

Rosetta Stone, a provider of technology-based language learning solutions, completed a \$52.3 million IPO in April 2009, and its stock appreciated 52% by the end of the second quarter.

As conditions permit, the region's IPO candidates in the balance of the year should include information technology and life sciences companies, as well as software and wireless companies.

New England

New England suffered a precipitous drop in IPOs in 2008. The region generated just one IPO, with proceeds of \$0.5 billion, in 2008, after producing 23 IPOs with \$3.03 billion in gross proceeds in the prior year. These figures represent the region’s lowest annual IPO proceeds since 2003, and the smallest number of deals in many years.

Even in a year with historically low levels of IPO activity throughout the country, New England’s performance in 2008 was surprising. In the last market trough of 2001–2003, the region produced an annual average of four IPOs. And in the giddy days of 1996–2000, New England was home to an annual average of 44 offerings.

In 2008, the region’s only IPO came from New Hampshire–based GT Solar, a provider of specialized manufacturing equipment and services essential for the production of photovoltaic wafers, cells and modules, and polysilicon. GT Solar’s IPO was unusual in that it consisted entirely of shares sold by its controlling stockholder.

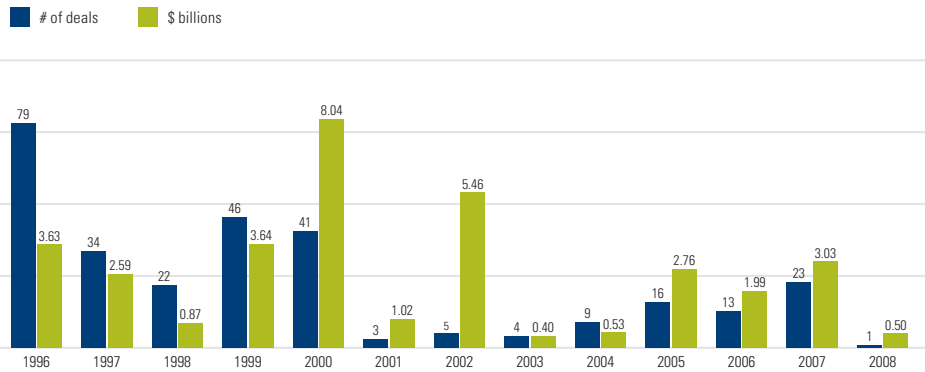
LogMeIn, a provider of on-demand, remote-connectivity solutions, raised \$106.7 million in a late June 2009 IPO, and its stock immediately appreciated by 25%. We expect New England’s IPO candidates in the remainder of 2009 to be drawn primarily from the technology sectors that have been the region’s areas of strength for decades.

Longer term, 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.

Tri-State

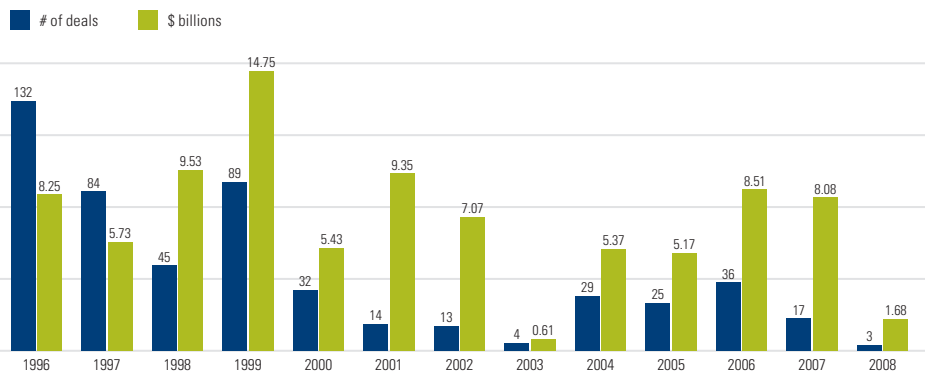
The number of IPOs in the tri-state region of New York, New Jersey and Pennsylvania declined from 17 in 2007 to 3 in 2008. Gross proceeds followed a similar course, dropping from \$8.08 billion to \$1.68 billion. Average deal size in the region increased again, from \$475.3 million in 2007 to \$560.3 million in 2008.

New England IPOs – 1996 to 2008



Source: SEC filings

Tri-State IPOs – 1996 to 2008




Source: SEC filings

The region’s IPOs in 2008 were by American Water Works (\$1.25 billion), a water and wastewater utility company; RHI Entertainment (\$189.0 million), a developer, producer and distributor of television programming; and RiskMetrics Group (\$245.0 million), a provider of risk management and corporate governance products and services. All three IPOs declined in the aftermarket. At year-end, American Water Works was trading 3% below its offering price, followed by RiskMetrics Group (down 15%) and RHI Entertainment (down 42%).

Venture capital activity in the tri-state region now trails only that of California and New England. VC-backed Medidata Solutions, a provider of hosted clinical development solutions, completed an \$88.2 million IPO in June 2009, and its stock increased 17% by the end of the second quarter. We expect that other VC-backed companies—including those from the technology and life sciences sectors—as well as spinoffs from the region’s established companies, will be IPO candidates in the balance of the year. ■

12 Takeover Defenses in IPO Companies

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

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

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

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

Classified Boards

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

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

better competitive position and maximizing stockholder value.

Limitation of Stockholders' Right to Remove Directors

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

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

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

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

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

Supermajority Voting Requirements

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

Opponents of supermajority vote requirements believe that simple-majority provisions make the company more accountable to stockholders, leading to better performance. In addition,

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

Prohibition of Stockholders' Right to Act by Written Consent

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

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

Limitation of Stockholders' Right to Call Special Meetings

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

Many public companies provide that only the board or specified officers or directors are authorized to call special meetings of stockholders. This could have the effect of delaying until the next annual meeting actions that are favored by holders of a majority of the company's stock. Other companies allow stockholders holding more than a specified threshold

of the outstanding shares—commonly 10% to 40%—to call special meetings. Companies that allow stockholders to call special meetings, however, often authorize the board to set the precise location and date of such meetings and sometimes preclude stockholders from calling for a special meeting close in time to an annual meeting.

Advance Notice Requirements

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

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

State Anti-Takeover Laws

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

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

The following table sets forth the percentages of all IPO companies in 2007 and 2008 that adopted specified types of takeover defenses prior to or in conjunction with going public:

Takeover Defense	Percentage of IPO Companies
Classified board	60%
Supermajority voting requirements to approve mergers or change corporate charter and bylaws	53%
Prohibition of stockholders’ right to act by written consent	69%
Limitation of stockholders’ ability to call special meetings	74%
Advance notice provisions	80%
Section 203 of the Delaware corporation statute (chose not to opt out)	90%
Blank check preferred stock	76%
Stockholder rights plan (“poison pill”)	6%

of more than 10% of the company’s assets. In general, an interested stockholder is any entity or person beneficially owning 15% or more of the company’s stock and any entity or person affiliated with or controlling, or controlled by, such entity or person. A public company incorporated in Delaware is automatically subject to Section 203 unless it opts out in its original corporate charter or pursuant to a subsequent charter or bylaw amendment approved by stockholders.

Blank Check Preferred Stock

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

When “blank check” preferred stock is authorized, the board has the right to issue shares of preferred stock in one or more series without stockholder approval under state corporate law, and has the discretion to determine the rights and preferences of each such series of preferred stock. Authorizing the board to issue preferred stock and determine its rights and preferences has the effect of eliminating delays associated with a stockholder vote on specific issuances. Having blank check preferred stock in place often facilitates the adoption of a stockholder rights plan, financings and

the negotiation of strategic alliances. The issuance of preferred stock, however, can be used as an anti-takeover device.

Stockholder Rights Plans

Should the company establish a poison pill?

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

Following an IPO, a public company may raise additional equity capital through follow-on public offerings, or through private placements known as PIPE or Rule 144A placements. Activity in 2008 for both types of private placements reflected broader market trends—PIPE deal volume dropped by one-third, but dollar volume and average deal size more than doubled to record highs, while the number and dollar volume of Rule 144A placements fell to their lowest levels in at least seven years. The flexibility of PIPE and Rule 144A placements in uncertain market conditions should remain attractive to many companies in 2009.

PIPE Financings

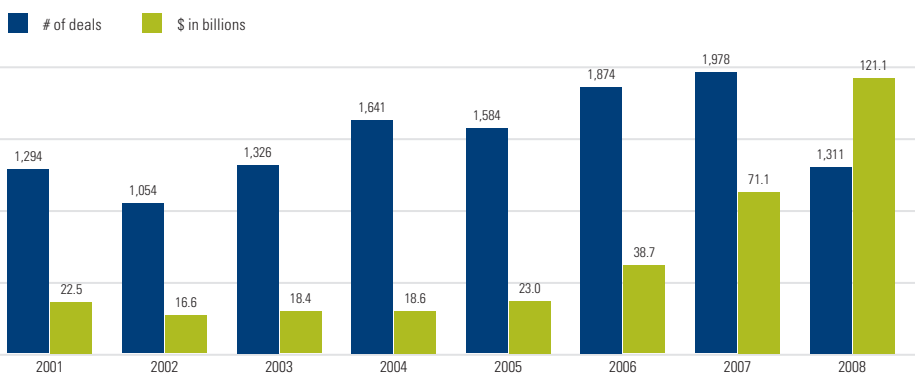
The composition of the PIPE (Private Investment in Public Equity) market changed significantly in 2008 in response to broader trends in the capital markets. PIPE deal volume dropped by 34% from 2007, but dollar volume and average deal size soared to record highs as beleaguered financial institutions sought large capital infusions.

The number of PIPE deals (including registered direct offerings) dropped from a record 1,978 in 2007 to 1,311 in 2008. Dollar volume, however, surged from \$71.7 billion to a new high of \$121.1 billion—nearly eight times the size of the Rule 144A market. Multi-billion-dollar PIPE financings in the financial services sector pushed average deal size to a record \$92.4 million, two-and-a-half times the prior record of \$36.2 million set in 2007.

In 2008, there were 19 PIPE financings that raised more than \$1 billion each, compared to 11 billion-dollar deals in 2007. The largest PIPE financing in 2008 raised \$12.5 billion, and the top 10 deals—all by financial institutions—collectively raised more than \$71 billion.

Companies with market capitalizations under \$250 million were responsible for 84% of all PIPE financings in 2008, down slightly from 85% in 2007, while companies with market caps below \$50 million accounted for 52% of all PIPEs—up from 49% in the prior year.

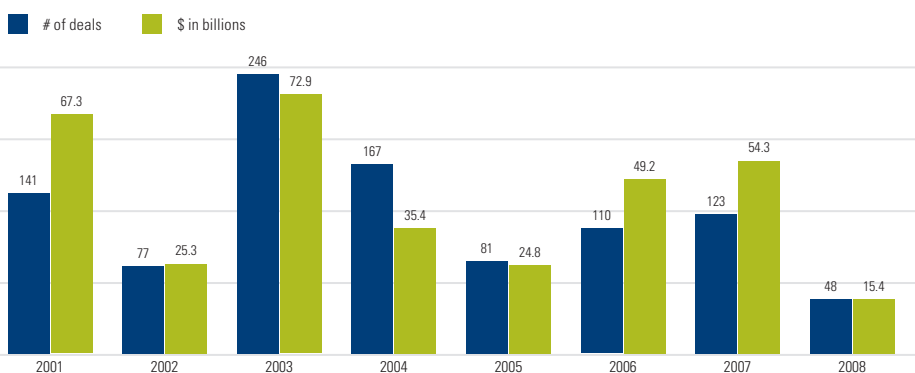
PIPE Financings – 2001 to 2008



Includes closed deals only.

Source: PrivateRaise

Rule 144A Equity Placements – 2001 to 2008



Includes closed deals only.

Source: PrivateRaise

Healthcare was the most active PIPE sector in 2008, with 25% of all deals and an average deal size of \$14.7 million, followed by technology (18% and \$13.7 million) and energy (12% and \$41.4 million). Financial services companies contributed 12% of the year's deals and a whopping 76% of the gross proceeds, resulting in an average deal size of \$672.9 million.

Of all PIPE financings in 2008, 52% were common stock (average deal size of \$50.7 million). The next-largest segments were convertible debt (21% of all PIPEs and \$101.1 million average size) and convertible preferred stock (13% of all PIPEs and \$319.8 million average size). This deal breakdown reflects a shift from common stock deals to convertible deals that offer more downside protection in uncertain conditions.

Fixed-price deals represented 89% of all PIPE deals in 2008, up slightly from 88%

in 2007. The percentage of deals with variable pricing was unchanged at 6%.

The average discount from market in fixed-price common stock PIPE deals was 2% in 2008. The percentage of deals that included warrants was 51%, the average warrant exercise premium was 36%, and the average warrant coverage was 71%.

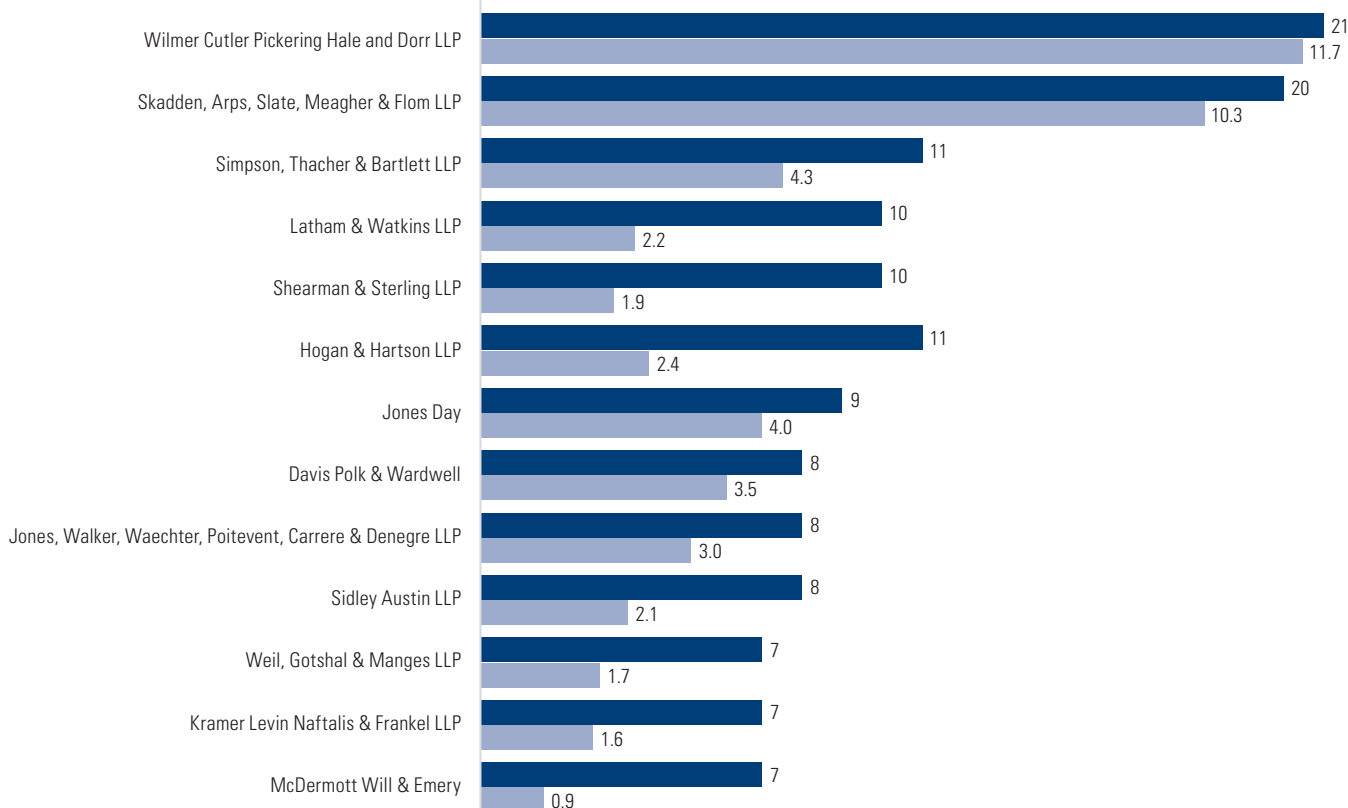
Among fixed-price convertible debt PIPE deals in 2008, the average conversion premium was 38%, the average term was three years, and the average interest rate was 8.8%. Warrants were included in 65% of the deals—the average warrant exercise premium was 21% and the average warrant coverage was 81%.

Rule 144A Placements

The Rule 144A market for equity securities (including convertible debt) contracted sharply in 2008. The number of placements

Company Counsel in Eastern US Rule 144A Equity Placements – 2001 to 2008

■ # of deals ■ Proceeds (in \$ billions)



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

dropped 61% from 2007 and gross proceeds plummeted by 72%.

The number of Rule 144A equity placements decreased from 123 in 2007 to 48 in 2008, while gross proceeds shrank from \$54.3 billion to \$15.4 billion. Average deal size also dropped, to \$320.5 million in 2008 from \$441.7 million the year before. The number of billion-dollar placements plunged from 17 in 2007 to two, as most very large equity placements in 2008 were structured as PIPE deals.

Rule 144A issuers tend to be much larger and more mature than issuers in the PIPE market (although, as discussed above, large financial institutions flocked to the PIPE market in 2008). Companies with market caps above \$1 billion accounted for 69% of all Rule 144A placements in 2008, but only 6% of all PIPE deals.

The healthcare sector led the Rule 144A equity market in 2008, with 19% of all

deals and an average deal size of \$296.6 million, followed by energy (17% and \$284.6 million) and financial services (13% and \$314.2 million).

In 2008, all but one Rule 144A equity placement involved the issuance of convertible debt securities, essentially unchanged from 2007. SEC rules generally do not permit public companies to offer common stock in Rule 144A placements, and convertible preferred stock placements have all but disappeared from the market.

Among all Rule 144A convertible debt placements in 2008, the average conversion premium was 29%, the average term was 11 years, and the average interest rate was 4.3%. Warrants were included in only 7% of these placements.

Seasoned public companies have long recognized the faster execution time and greater flexibility afforded by Rule 144A

placements. The Rule 144A market decline in 2008 probably reflects overall capital market conditions, as well as the decision by large companies that qualify as “WKSIs” to structure convertible debt offerings as registered public offerings rather than Rule 144A placements. ■

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.

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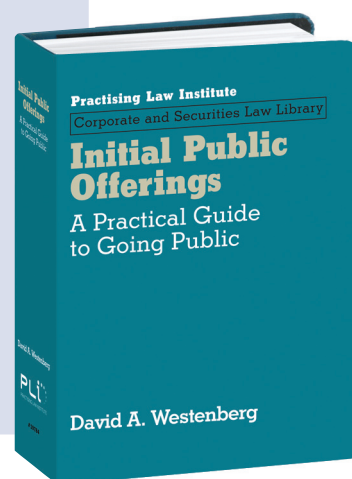
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Data Sources

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



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