WILMER CUTLER PICKERING
HALE AND DORR LLP

2004 IPO REPORT

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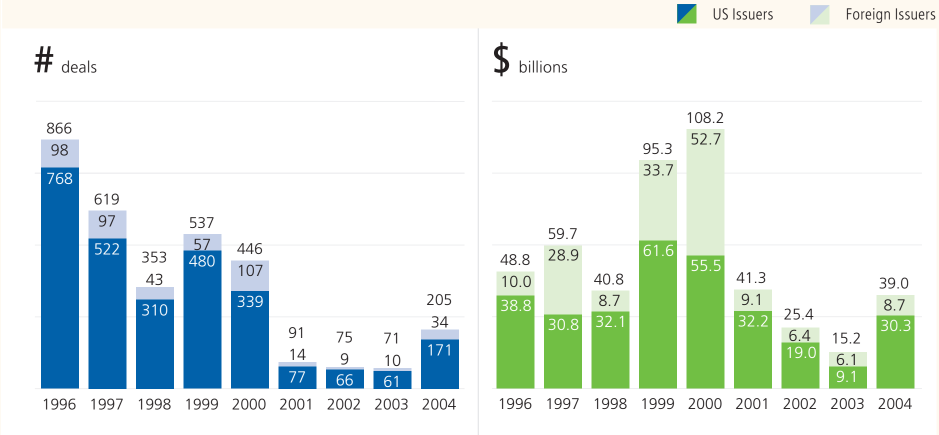
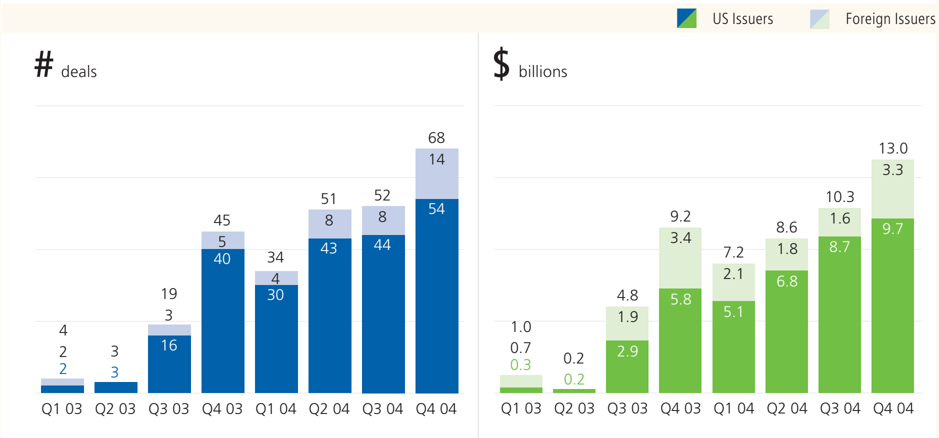
US IPOs – 1996 to 2004



US IPOs by Quarter – 2003 and 2004



2004 Review

IPO deal volume increased in each quarter of 2004, as the IPO market finally enjoyed the upswing that many observers had predicted for several years. In 2004, there were 205 IPOs in the US with gross proceeds of $39.0 billion, compared to 71 IPOs raising $15.2 billion in 2003 and 75 IPOs raising $25.4 billion in 2002.

Given the stagnant capital market conditions that prevailed for much of the year and the continued turbulence in the Middle East, the resurgent IPO market is impressive and bears testament to investors' renewed appetite for IPOs—and for offerings by technology and life sciences companies in particular.

The number of US issuer IPOs increased from 61 in 2003 to 171 in 2004, and gross proceeds more than tripled, from $9.1 billion to $30.3 billion. Average US issuer deal size increased 18%, from $149.6 million in 2003 to $177.2 million in 2004. The increase was largely attributable to an increase in the number of billion-dollar IPOs by US issuers, and obscures the large increase in IPOs by smaller, venture-backed companies.

In 2004, there were seven billion-dollar offerings—five by US issuers—led by the $2.83 billion IPO by insurance company Genworth Financial (a General Electric spinoff). Together, the five billion-dollar offerings by US issuers accounted for $8.84 billion, or almost 30%, of total US issuer gross proceeds. In 2003, there were only two billion-dollar offerings—both by non-US issuers.

The median IPO size showed the shift to smaller offerings more clearly. The median size of 2004 IPOs was $90.7 million—24% below the median deal size of $119.0 million in 2003. The number of IPOs with gross proceeds under $100 million increased from 46% of all IPOs in 2003 to 55% in 2004.

Consistent with these trends, the median annual revenue of companies going public in 2004 was $85.7 million, compared to $144.5 million in 2003 and $267.5 million in 2002. Among companies going public in 2004, the percentage that were profitable declined to 59%, compared to 65% in 2003 and 61% in 2002—although still far above the 26% in both 1999 and 2000.

The biopharmaceutical sector led the 2004 IPO market, with 28 IPOs, or 14% of the year's total, followed by the healthcare/medical device and financial services sectors, each with 23 IPOs (11%), and the consumer products sector with 20 IPOs (10%). Overall, technology and life sciences companies produced 109 IPOs in 2004, or 53% of the year's total, representing a sharp increase from the 23 IPOs (32%) in 2003, but far short of the 395 IPOs (89%) in 2000. The largest—and most innovative—tech IPO of the year was Google ($1.67 billion).

Venture-backed IPOs continued their comeback from the dark days of 2001–2003, when an average of only 21 VC-backed companies completed IPOs each year. In 2004, there were 67 IPOs by VC-backed companies, raising gross proceeds of $4.99 billion. The percentage of venture-backed IPOs edged up to 33% in 2004 from 31% in 2003. The second quarter alone saw 24 IPOs by VC-backed companies, with gross proceeds of $1.35 billion—the highest quarterly total since 18 VC-backed IPOs produced gross proceeds of $1.45 billion in the fourth quarter of 2000.

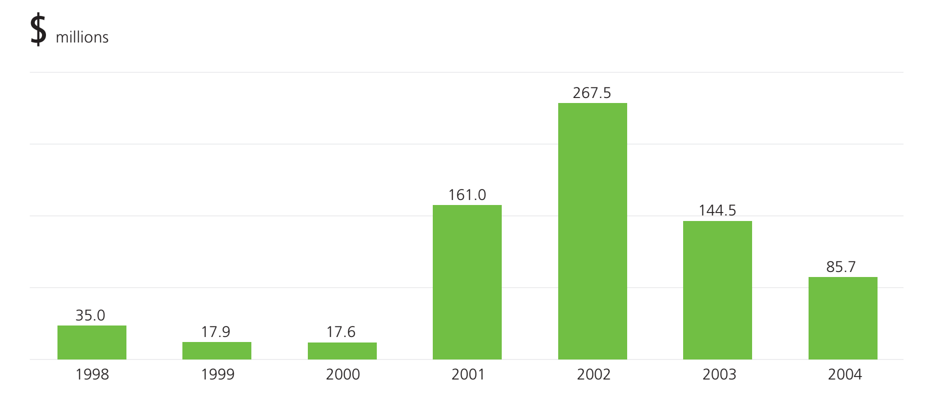
Similarly, the number of private equity–backed IPOs surged in 2004. According to *PE Week Wire*, there were 53 IPOs by private equity–backed companies raising $10.65 billion in 2004, more than 2001–2003 combined.

In 2004, the capital markets trended lower until mid-August before ending the year with a strong fourth quarter. The year ended with the Dow up 3.1% and the Nasdaq up 8.6%. The average 2004 IPO outperformed the market, with a solid 33% gain from its offering price through year-end. Aftermarket performance, however, varied widely depending on the quarter in which a company made its debut. Reflecting robust IPO pricing followed by generally lackluster aftermarket performance, the average Q1 IPO ended the year up only 14% from its offer price. By contrast, pricing pressure forced many Q3 IPOs to price below the midpoint of their filing range, but the Q4 market uptick enabled the average Q3 IPO to end the year 57% above its offer price.

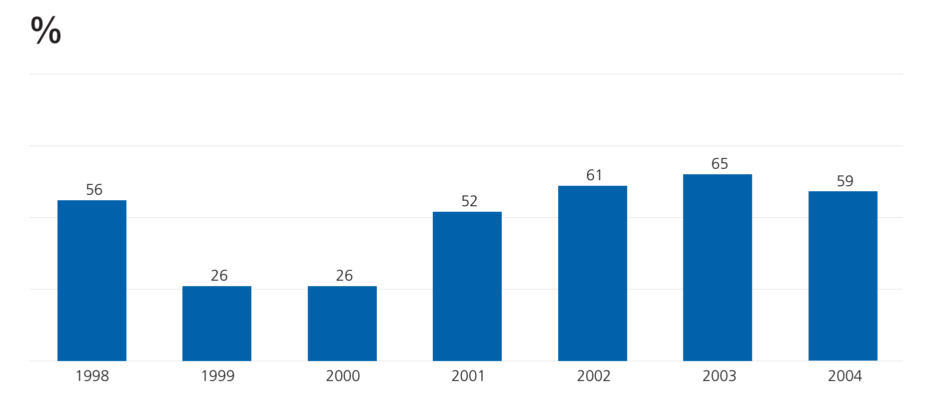
At year-end, 80% of 2004 IPOs were trading at or above their offering price—49 were up more than 50% and 21 were up over 100%. The best performing IPO of 2004 was that of Chinese online gaming company Shanda Interactive Entertainment, which ended the year a heady 286% above its IPO price, followed by that of human resource service provider 51Job—another Chinese company—up 271%, and online transaction service company Marchex, up 223%. The year also saw the first IPO to "shoot the moon" since the fourth quarter of 2000—Jed Oil gained 104% on its first trading day.

The best performing IPO sector of 2004 was information services, with nine IPOs gaining 65% on average by year-end, led by Marchex (up 223%) and Google (up 127%). The 12 IPOs by

Median Annual Revenue of IPO Companies – 1998 to 2004



Percentage of Profitable IPO Companies – 1998 to 2004



business services companies followed, ending the year up an average of 59%. The four IPOs by media/broadcasting companies increased an average of 57%, and the 11 IPOs by software companies traded up 53% on average. Notably, all industry sectors ended the year with a gain. The poorest performing sector was semiconductors, with its 11 IPOs up only 7% on average for the year.

In 2004, 82 IPOs (40% of the total) were completed by companies based in the eastern US (east of the Mississippi River). Western US–based issuers accounted for 89 IPOs (43%) and the remaining 34 IPOs (17%) were by non-US issuers. Eastern US IPOs raised $16.59 billion (43%), western US IPOs raised $13.71 billion (35%) and non-US issuer IPOs raised $8.69 billion (22%) of the year's IPO proceeds.

Buoyed by the increased receptivity to venture-backed and technology companies, California once again led the IPO state ranking with 54 IPOs—triple its number in 2003—followed by New York with 15, Texas with 12, Pennsylvania with nine and Massachusetts with eight. Over the past five years, the state IPO leaders are California (243), Massachusetts (47), New York (46), Texas (45) and Pennsylvania (27). Over the same period, China leads among non-US issuers with 24 IPOs, followed by Israel (21), Canada (18), Bermuda (17) and England (11).

The percentage of IPO companies listed on Nasdaq—the preferred listing choice for many venture-backed and technology companies—grew to 68% in 2004, up from 65% in 2003 but still well short of the 88% in both 1999 and 2000. Average IPO offering size for companies listing on Nasdaq was $93 million, compared to $450 million for companies listing on the NYSE.

2005 Outlook

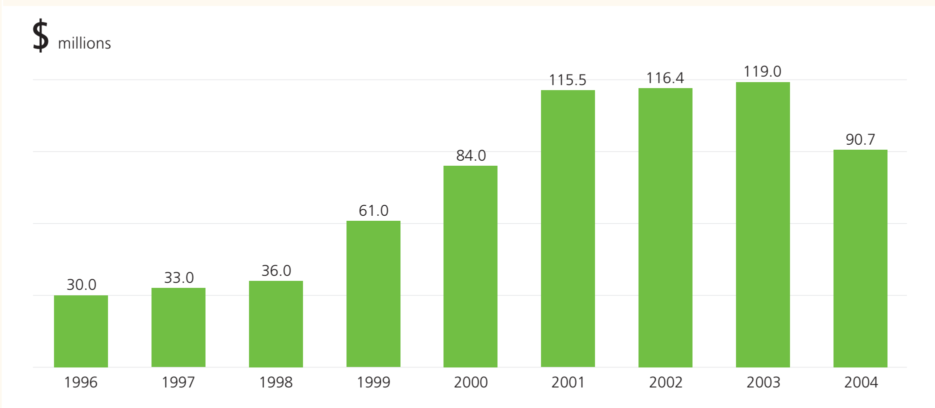
By historical measures, the go-go IPO market of the late 1990s was as aberrant as the tepid IPO market that prevailed from 2001 until the middle of 2003. The IPO market recovery that began in the second half of 2003 continued in 2004, although it did not reach the level of activity that prevailed for most of the 1990s. Despite the fact that we do not expect the 2005 IPO market to rival the volume of the boom years, it enters 2005 with solid momentum and should produce a steady stream of new offerings. A number of factors will influence the 2005 IPO market.

Capital Market Conditions

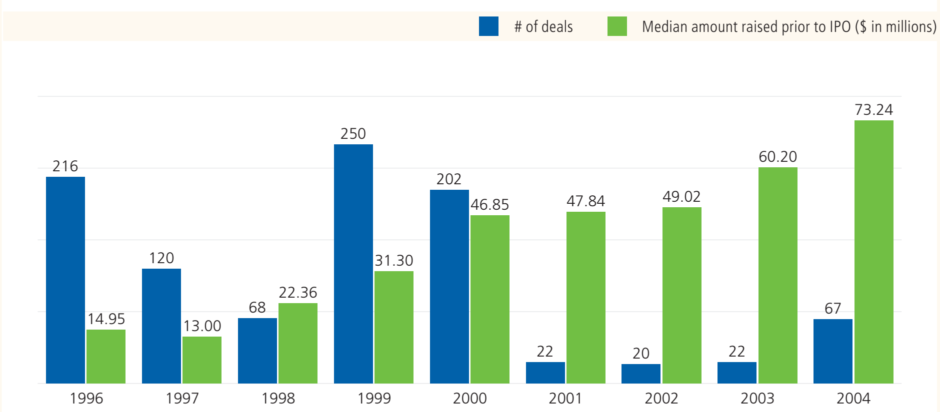
Stable and robust capital markets are a leading indicator of IPO activity. In 2004, the Dow and Nasdaq enjoyed only modest gains compared to 2003's increases of 25% and 50%, but it was another welcome up-year after the three-year losing streak of 2000–2002. However, the market was choppy for much of the year, and it was only a strong fourth quarter that pushed both the Dow and Nasdaq above 2003 levels. Most analysts expect the market to post at least moderate gains in 2005, despite January's decline.

Another encouraging sign is increased investor interest in the stock market in spite of continuing announcements of investigations and scandals affecting public companies. According to the Investment Company Institute, the total amount

Median IPO Offering Size – 1996 to 2004



Venture-Backed IPOs – 1996 to 2004



Source: VentureOne

invested in stock mutual funds increased by $178 billion in 2004, topping the gain of $152 billion in 2003 and in stark contrast to the net outflow of $28 billion in 2002.

Economic Growth

Economic growth will continue to be a key determinant of market strength in 2005. Fueled by the technology sector, the US economy enjoyed a remarkable ten-year period of growth that finally sputtered to an end in early 2001. The economy recovered in fits and starts in 2002, largely on the back of strong consumer spending, and despite sharp declines in business investment from the levels of the late 1990s. The economy improved further in 2003, with continued low interest rates and boosts from tax cuts and increased government spending on homeland security. Consumer spending drove further growth in 2004.

The general consensus appears to be that the economy will grow at a healthy rate in 2005, with only modest increases in interest rates, moderate price inflation, and declining or stabilizing oil prices. Consumer confidence edged up in late 2004 and early 2005 after falling in late summer and fall, suggesting that consumers—whose consumption accounts for two-thirds of the entire economy—are not ready to reign in their spending. With aging capital equipment and pent-up demand for new IT systems, business investment is expected to grow even if consumer spending slows.

Risks to short-term economic growth include the continuing military conflict in Iraq and the threat of terrorist attacks. Other concerns—such as low household savings and the nation's budget and international trade deficits—are viewed as longer-term threats to the economy.

Corporate Governance

The Sarbanes-Oxley Act in 2002 and the resultant rules from the SEC and stock exchanges have created new responsibilities for public companies and their directors and officers. Although these changes have increased the cost of being public—both in terms of potential liability and the expense of compliance—they have also helped improve accountability to stockholders, board oversight of management, board member qualifications and investor confidence.

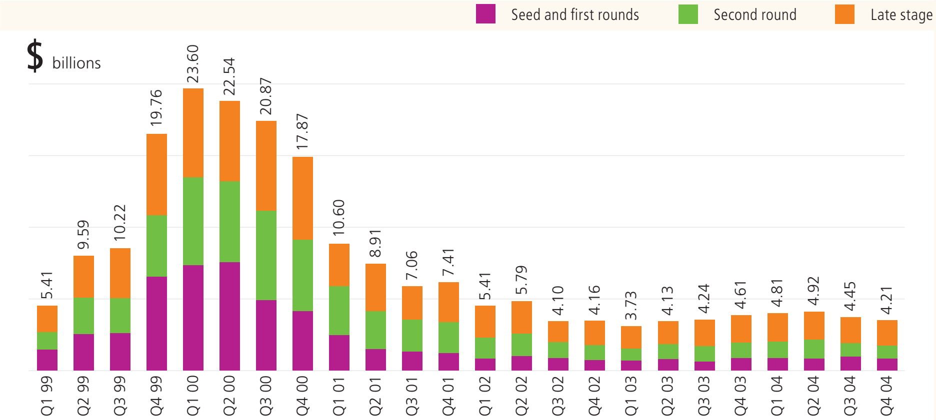
In the near term, the new corporate governance environment may deter some IPO candidates or steer them to liquidity through acquisitions, but we believe that, in the longer term, the recent corporate governance changes will be assimilated into IPO planning and not pose a major impediment for most companies.

Nature of IPO Candidates

There is no single profile of a successful IPO company, but we expect that most IPO candidates in 2005 will need:

- Experienced management
- A superior technology or product position in a large and growing market
- Substantial revenue—at least $40–$50 million annualized

Venture Capital Financings by Company Stage – 1999 to 2004



Source: VentureOne

- Strong revenue growth—25%–50% annually
- Profitability—historical or imminent
- Potential market capitalization of at least $150–$200 million

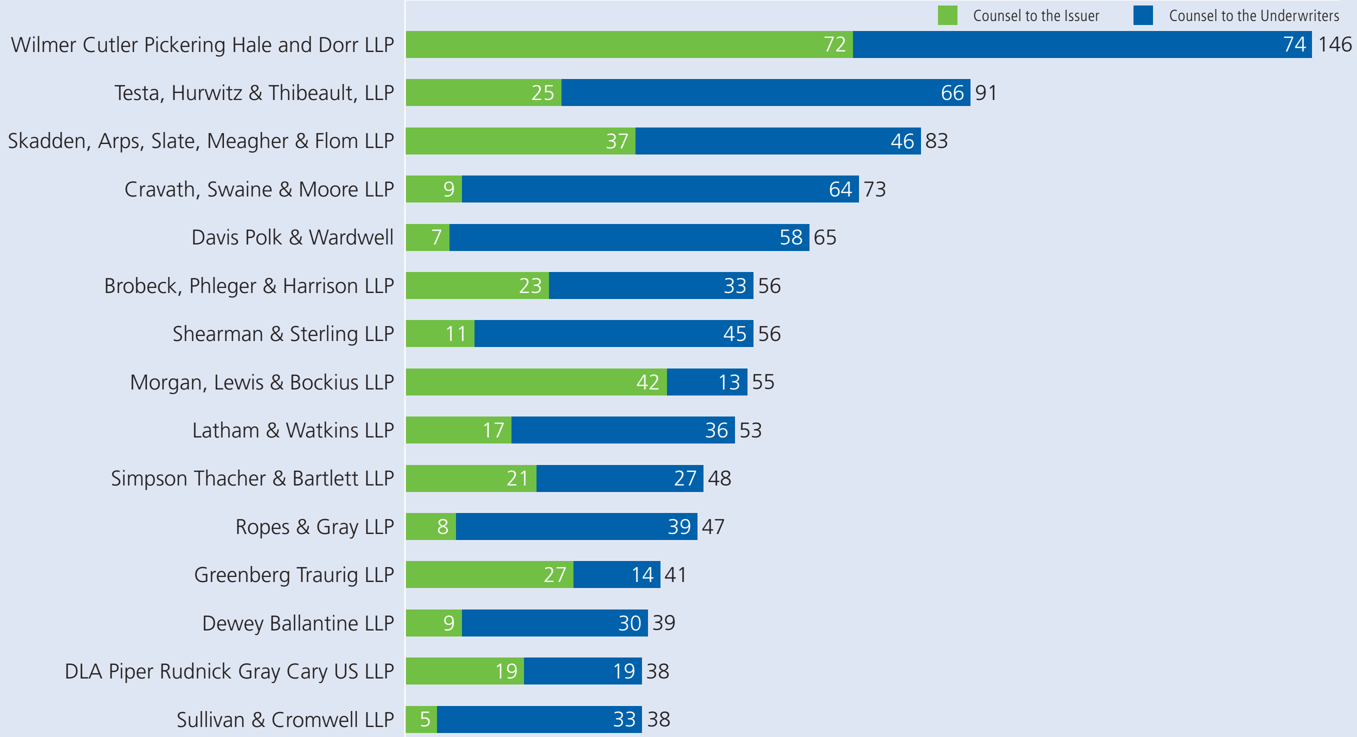
Needless to say, these factors can vary widely based on a company's industry and size. For example, most biotech companies will have much smaller revenue and not be profitable. In contrast, more mature companies are likely to have greater revenue and market caps but slower growth rates.

Venture Capital Pipeline

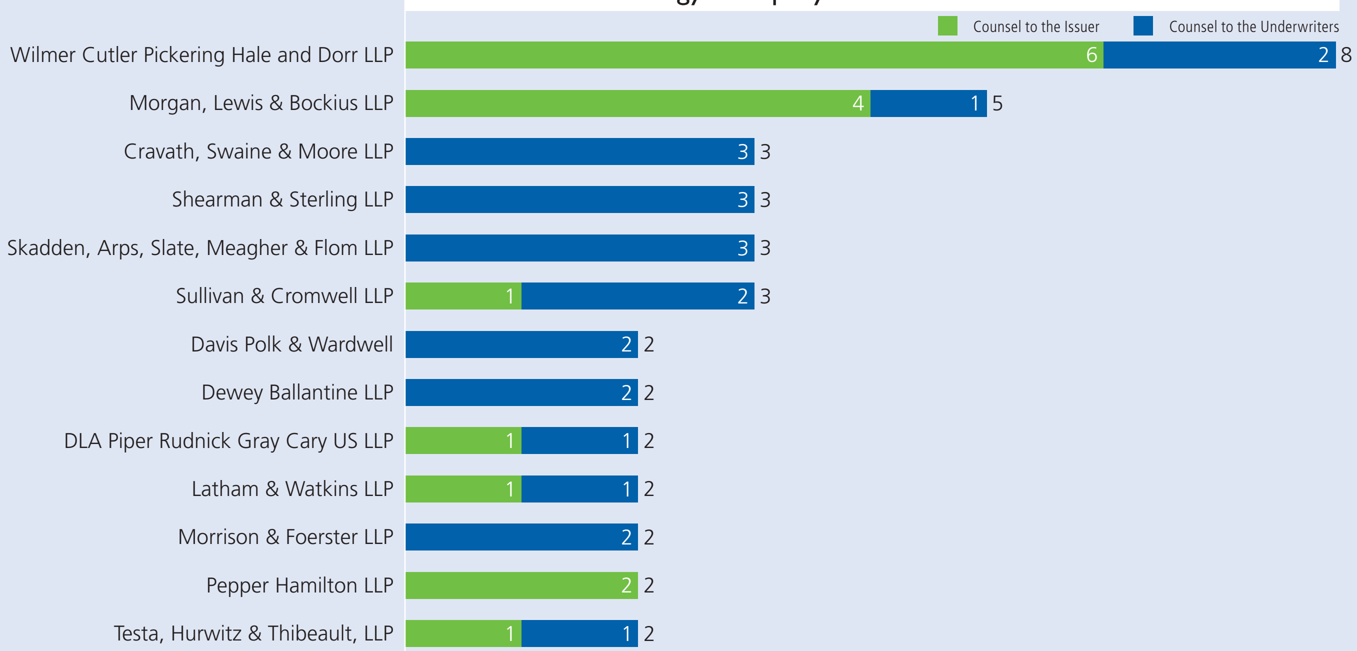
According to VentureOne, at the end of 2004 there were 29 VC-backed companies in IPO registration, of which 16 were biopharmaceutical or medical information companies, six were information technology companies, five provided business services and two were retailers. Longer term, the pool of IPO candidates will be affected by current trends in venture capital investing, including the lengthening timeline—in 2004, the median time from initial equity funding to an IPO (5.7 years) was the longest in at least ten years. ■

January 2005

Eastern US IPOs – 1996 to 2004

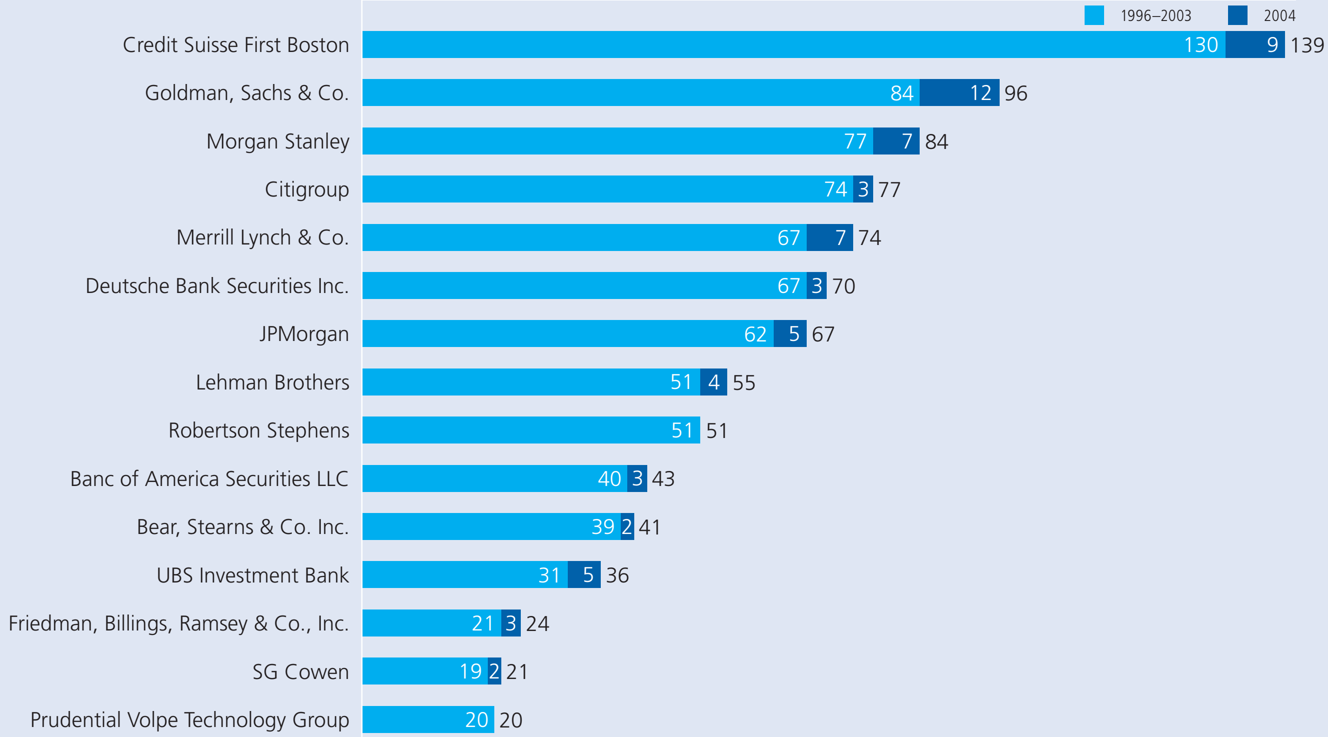


Eastern US Technology Company IPOs – 2004



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

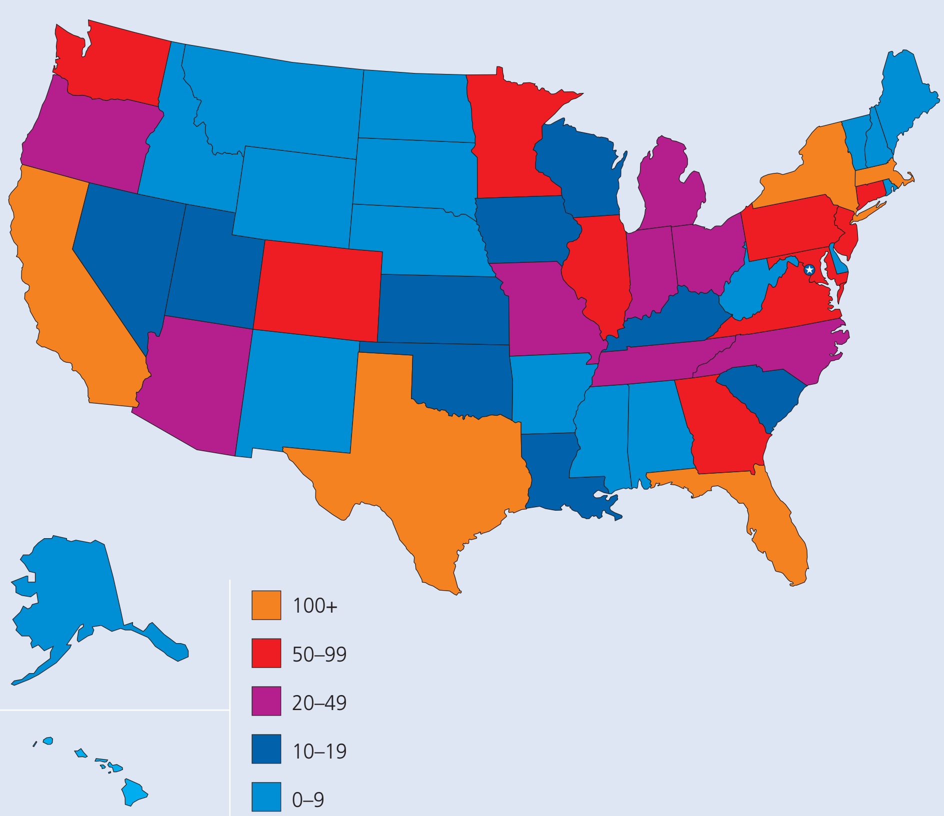
Lead Underwriter in Eastern US IPOs – 1996 to 2004



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

IPOs by State – 1996 to 2004

State	#	$ millions	State	#	$ millions
AK	1	140.0	MT	2	84.1
AL	7	442.5	NC	31	1,569.1
AR	4	168.0	ND	2	113.1
AZ	36	1,998.4	NE	7	584.1
CA	764	56,577.5	NH	9	402.9
CO	84	7,446.7	NJ	91	11,592.2
CT	55	10,325.6	NM	5	678.4
DC	17	1,616.5	NV	13	1,890.2
DE	4	505.9	NY	259	43,417.3
FL	161	10,401.5	OH	43	3,461.0
GA	78	11,196.0	OK	17	2,565.9
HI	2	60.5	OR	27	1,822.4
IA	14	3,205.2	PA	92	11,088.0
ID	3	662.5	RI	7	565.9
IL	93	19,781.2	SC	13	1,204.3
IN	21	3,160.3	SD	1	6.4
KS	14	1,162.7	TN	29	2,135.2
KY	10	1,381.0	TX	225	28,571.2
LA	12	713.1	UT	15	701.1
MA	163	13,555.3	VA	85	12,443.3
MD	53	6,550.6	VT	2	131.7
ME	6	752.5	WA	75	15,357.4
MI	35	4,398.7	WI	18	1,635.6
MN	60	3,174.2	WV	2	125.2
MO	21	7,028.2	WY	1	8.4
MS	5	310.1			



Initial Public Offerings

eyetech Pharmaceuticals
Initial Public Offering of Common Stock
$156,975,000
Counsel to Issuer
February 2004

GTx The Men's Health Biotech Company
Initial Public Offering of Common Stock
$78,300,000
Counsel to Underwriters
February 2004

Gatekeeper Systems
Initial Public Offering of Common Stock
£8,112,000
Counsel to Issuer
December 2004

Alnylam Pharmaceuticals
Initial Public Offering of Common Stock
$32,085,000
Counsel to Issuer
June 2004

Civica
Initial Public Offering of Ordinary Shares
£45,000,000
Counsel to Underwriters
February 2004

Critical Therapeutics
Initial Public Offering of Common Stock
$42,770,000
Counsel to Issuer
June 2004

Momenta
Initial Public Offering of Common Stock
$39,991,250
Counsel to Issuer
June 2004

Blackboard
Initial Public Offering of Common Stock
$88,550,000
Counsel to Issuer
June 2004

Barrier Therapeutics
Initial Public Offering of Common Stock
$75,000,000
Counsel to Underwriters
May 2004

Idenix Pharmaceuticals
Initial Public Offering of Common Stock
$81,200,000
Counsel to Issuer
July 2004

Other Selected Public Offerings

redhat
Rule 144A Placement of 0.50% Convertible Senior Debentures due 2024
$600,000,000
Counsel to Issuer
January 2004

Cubist Pharmaceuticals
Public Offering of Common Stock
$119,999,040
Counsel to Underwriters
November 2004

NitroMed
Public Offering of Common Stock
$87,553,982
Counsel to Issuer
December 2004

CIT
Public Offerings of Medium-Term Notes
$12,040,000,000
Counsel to Underwriters and Agents
Various dates 2004

First Marblehead
Public Offering of Common Stock
$270,330,388
Counsel to Issuer
June 2004

Pioneer Investments
Initial Public Offerings of Common Stock and Preferred Stock of Closed-End Funds
$1,036,553,000
Counsel to Issuer
January, April and December 2004

Sepracor
Rule 144A Placement of 0% Convertible Senior Subordinated Notes due 2024
$500,000,000
Counsel to Issuer
September 2004

open solutions vision . technology . service
Public Offering of Common Stock
$90,614,328
Counsel to Issuer
May 2004

casella waste systems, inc.
Rule 144A Placement of 9.75% Senior Subordinated Notes due 2013
$51,100,000
Counsel to Issuer
February 2004

SS&C
Public Offering of Common Stock
$100,912,500
Counsel to Issuer
June 2004

Essex Corporation
Public Offering of Common Stock
$114,000,000
Counsel to Underwriters
November 2004

EPIX
Rule 144A Placement of 3.00% Convertible Senior Notes due 2024
$100,000,000
Counsel to Initial Purchasers
June 2004

LTX Corporation
Public Offerings of Common Stock
$132,825,000
Counsel to Issuer
February 2004

CAF Corporación Andina de Fomento
Public Offerings of Floating Rate Notes
$350,000,000
Counsel to Underwriters
January and February 2004

Timberland
Public Offerings of Common Stock
$399,173,389
Counsel to Underwriters
March and May 2004

CapitalSource
Rule 144A Placements of Senior Convertible Debentures due 2034
$555,000,000
Counsel to Initial Purchasers
March and July 2004

PS Business Parks
Public Offerings of Preferred Stock
$395,000,000
Counsel to Underwriters
Various dates 2004

John Hancock Funds
Initial Public Offerings of Common Stock and Preferred Stock of Closed-End Funds
$1,221,400,000
Counsel to Issuer
February and April 2004

TKT Transkaryotic Therapies
Public Offering of 1.25% Senior Convertible Notes due 2011
$94,000,000
Counsel to Issuer
May 2004

MapInfo
Public Offering of Common Stock
$47,437,500
Counsel to Issuer
April 2004

CBRE CB Richard Ellis
Public Offerings of Common Stock
$943,356,700
Counsel to Selling Stockholder
June and December 2004

amdocs
Rule 144A Placement of 0.50% Convertible Senior Notes due 2024
$450,000,000
Counsel to Issuer
March 2004

mks Technology for Productivity
Public Offering of Common Stock
$115,316,020
Counsel to Issuer
January 2004

THE LEADER IN TECHNOLOGY AND LIFE SCIENCES COMPANY **PUBLIC OFFERINGS.**

WILMER CUTLER PICKERING HALE AND DORR LLP

New England

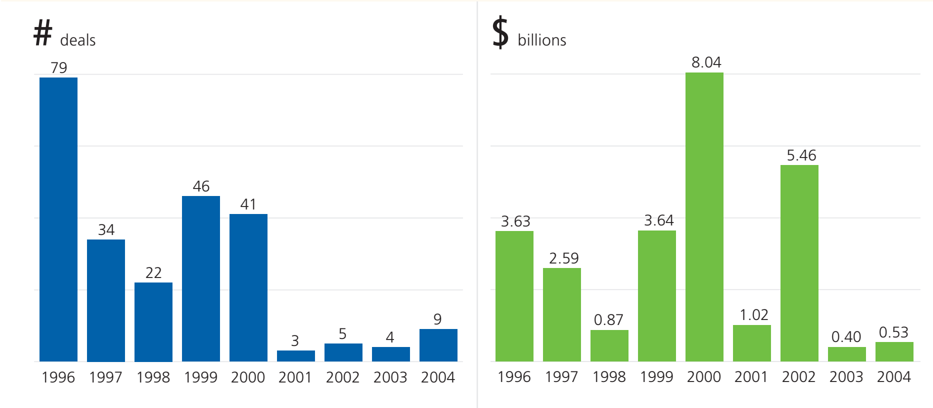
New England saw a mild upswing in IPO activity, with nine IPOs raising $532 million in 2004, compared to four IPOs in 2003 with gross proceeds of $403 million.

New England—and Massachusetts in particular—remains one of the leading regions in the United States for venture capital investment, and continues to see one of the highest concentrations of technology-related IPOs. In 2004, seven of the nine New England IPOs were technology related (78%), and five of those were by biopharmaceutical or medical devices companies: Alnylam Pharmaceuticals, Critical Therapeutics, Idenix Pharmaceuticals, Momenta Pharmaceuticals and NEUROMetrix.

The average New England IPO ended the year 36% above its offering price. New England biopharmaceutical and medical devices companies enjoyed an average gain of 30% by year-end, outperforming the national average of 12% for this sector.

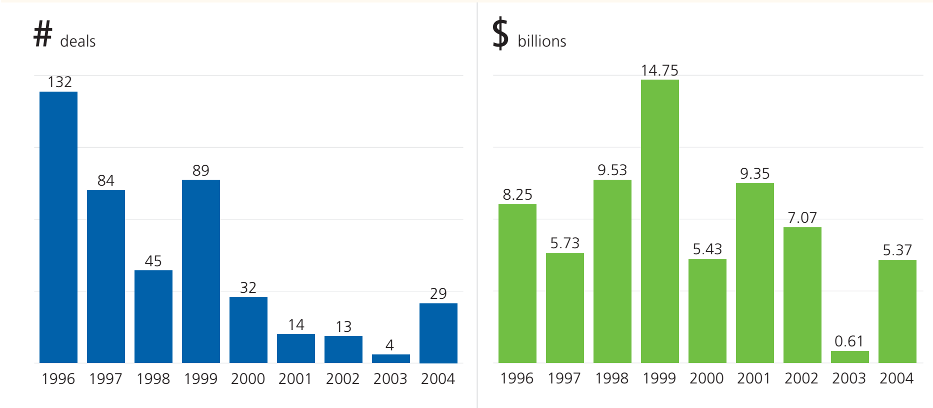
The large number of technology and life sciences companies in New England, along with the region's world-renowned universities and research institutions, should continue to provide a fertile environment for new companies and IPO candidates. If market conditions remain conducive, we anticipate a steady flow of IPOs by New England technology and life sciences companies in 2005.

New England IPOs – 1996 to 2004



Tri-State

Tri-State IPOs – 1996 to 2004



The tri-state region of New York, New Jersey and Pennsylvania saw a sevenfold increase in the number of IPOs in 2004. While the region produced only four IPOs with gross proceeds of $614 million in 2003, 2004 saw 29 IPOs—just two shy of the three-year total from 2001 to 2003—with gross proceeds of $5.37 billion. The region's share of the national IPO market increased to 17% in 2004 from 6% in 2003, but remained below the 20% it enjoyed in 2002.

Reflecting the region's concentration of Fortune 500 companies and its particular strength in the financial services industry, 66% of the region's IPOs were completed by companies that are not technology related. With venture capital activity in the region now trailing only that of California and New England, however, an increasing number of technology and life sciences companies are coming to market from the tri-state area, as evidenced by the eight IPOs by biopharmaceutical and medical devices companies in 2004. New York–based Eyetech Pharmaceuticals enjoyed the largest and best performing biopharmaceutical company IPO of the year nationally—ending the year up 117% from its offering price.

In 2005, we anticipate that the tri-state region will produce a steady flow of IPOs, including those of VC-backed companies and spinoffs from the region's established companies, but probably not at the pace seen in 2004.

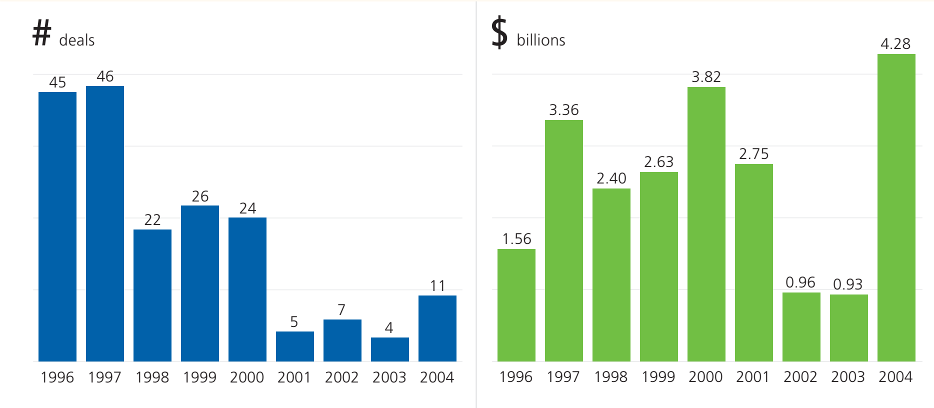
Mid-Atlantic

The mid-Atlantic region of Virginia, Maryland, North Carolina, Delaware and the District of Columbia produced 11 IPOs with gross proceeds of $4.28 billion in 2004, compared to four IPOs with gross proceeds of $929 million in 2003. Seven of the region's 2004 IPOs were by Virginia-based companies, and the $2.83 billion IPO by Virginia-based Genworth Financial accounted for 66% of the region's gross proceeds.

There were five technology-related IPOs in the mid-Atlantic region in 2004, including the first IPO by a mid-Atlantic software company (Blackboard) since 2001. The average technology-related mid-Atlantic IPO ended the year up 38%, compared to 15% for all IPOs that were not technology related.

Although there were no offerings by national security– and defense-related companies in 2004, we expect that the mid-Atlantic region will produce government-related IPO candidates in 2005. In the coming year, we also expect to see offerings by life sciences and medical devices companies—another area of strength for the mid-Atlantic region—particularly in the Research Triangle area.

Mid-Atlantic IPOs – 1996 to 2004



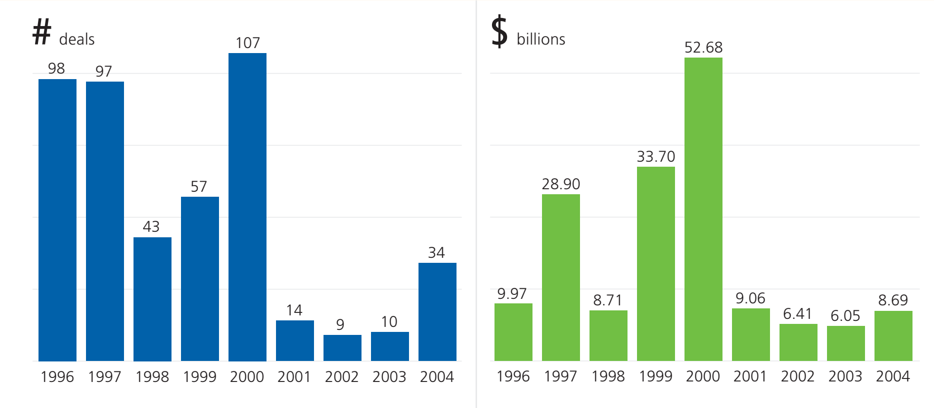
Non-US Issuers

Despite heightened disclosure requirements for companies listing on US markets and the related costs that observers suggested might deter non-US issuers from pursuing IPOs in the United States, the number of IPOs by non-US issuers increased to 34 in 2004 from 10 in 2003. There were 12 IPOs by Chinese issuers, six by Israeli companies and three from Bermuda-registered companies.

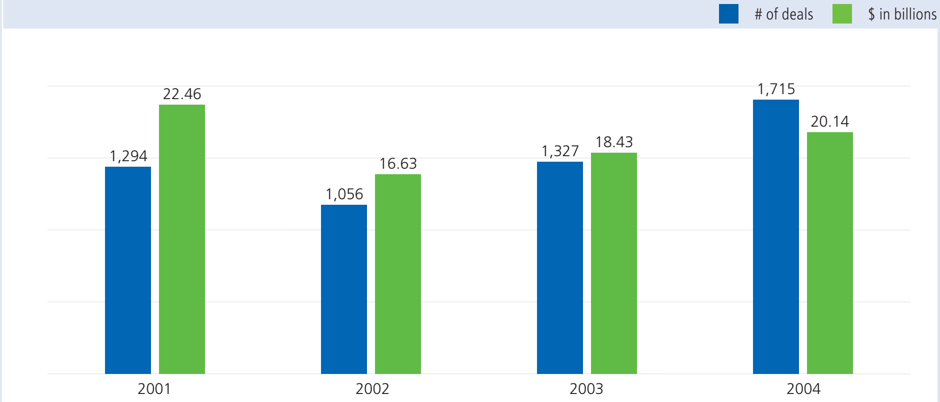
Gross proceeds increased from $6.05 billion in 2003 to $8.69 billion in 2004. The only billion-dollar offerings by non-US issuers in 2004 were by Chinese issuers—Semiconductor Manufacturing International ($1.71 billion) and fixed-line telecommunications operator China Netcom Group ($1.03 billion).

Many overseas markets still lack the stability, liquidity and transparency of US markets. Despite turbulent currency markets, we anticipate a steady flow of IPOs by non-US issuers in 2005, including offerings by Chinese companies and by insurance and reinsurance companies registered in Bermuda and the Cayman Islands. If capital markets continue to be hospitable to emerging companies, Israel is also likely to produce technology IPOs in 2005. ■

Non-US Issuer IPOs – 1996 to 2004

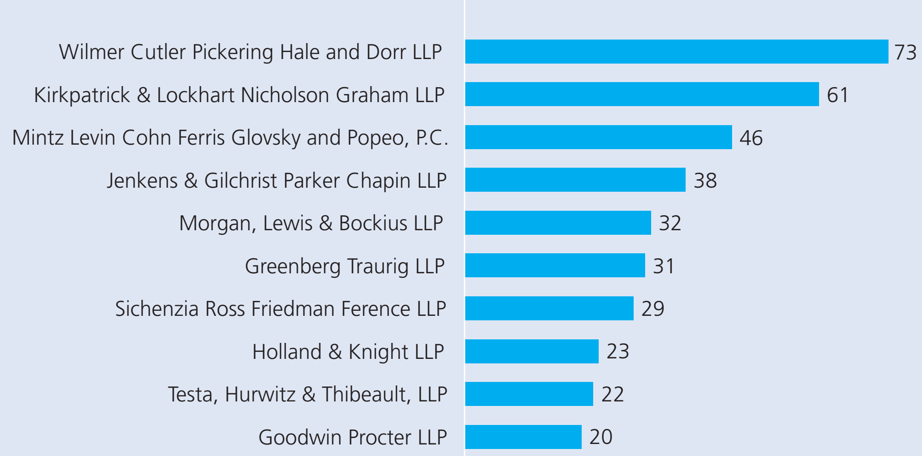


PIPEs Financings – 2001 to 2004



Source: PrivateRaise

Company Counsel in Eastern US PIPEs Financings – 2001 to 2004



The above chart is based on companies located east of the Mississippi River.
Source: Wilmer Cutler Pickering Hale and Dorr analysis of PrivateRaise data

Completing an IPO and having publicly traded stock is a major milestone for any company. However, it does not necessarily mean that all future 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 Financings

PIPEs, or Private Investments in Public Equity, proved once again in 2004 to be a popular financing tool for many public companies. Defying conventional wisdom that PIPEs prosper only in difficult market conditions, in 2004—a year of solid growth in the capital markets—the PIPEs market enjoyed record deal volume, and a 9% increase in dollar volume over 2003. However, individual PIPEs deals in 2004 were smaller and had less favorable pricing than in 2003.

In 2004, the PIPEs market grew 29% in deal volume, from 1,327 to 1,715 transactions, easily topping the previous record high of 1,500 deals in 2000. Dollar volume increased from $18.4 billion in 2003 to $20.1 billion in 2004, the highest total since the $22.5 billion in 2001. Average deal size declined for the third consecutive year, slipping to $11.7 million in 2004.

Consistent with recent years, companies with market capitalizations under $250 million were responsible for 91% of all PIPEs financings in 2004, while companies with market caps of less than $100 million accounted for 76%, and companies with market caps below $50 million accounted for 57% of all PIPEs.

Biotechnology and pharmaceutical companies led the PIPEs market again in 2004, generating 14% of all deals—down from 19% in 2003—with an average deal size of $13.4 million. Four other sectors each accounted for 9% of the PIPEs market in 2004: mining, metals and minerals ($10.1 million average deal size); energy ($17.0 million); Internet ($8.8 million); and healthcare ($8.4 million).

Of the year's PIPEs deals, 58% were common stock (average deal size of $11.6 million), 19% were convertible debt ($8.7 million), 11% were convertible preferred stock ($11.9 million), 8% were equity lines ($15.6 million), 2% were non-convertible debt ($18.9 million) and 2% were other instruments. This breakdown reflects a modest shift from common stock deals to convertible deals since 2003, as investors sought a greater level of protection in uncertain markets.

Reflecting the choppiness in general market conditions for much of the year—in contrast with the broad advances enjoyed in 2003—PIPEs deals with variable pricing jumped from 5% of all PIPEs transactions in 2003 to 12% in 2004. Likewise, the average discount in fixed-price common stock deals increased from 12% in 2003 to 14% in 2004.

Warrants also made PIPEs deals more expensive in 2004—59% of all PIPEs transactions included warrants, with average coverage (aggregate warrant exercise price as a percentage of deal size) of 61% and an average conversion premium of 11%. In 2003, 55% of PIPEs deals had warrants, with average coverage of 55% and an average conversion premium of 8%.

As the PIPEs market matures and continues to become part of the financing mainstream, issuers—particularly small- and mid-cap issuers with limited access to the broader public markets—should find PIPEs financing a desirable and accessible alternative in 2005.

Rule 144A Placements

Rule 144A placement activity declined sharply in 2004. Many issuers—on the heels of the record level of Rule 144A activity in 2003—sat on the sidelines or tapped the traditional public offering market as global stock and bond issuances hit a record high.

In 2004, the number of Rule 144A placements declined to 167 from 246 in 2003, still easily topping the 77 placements in 2002. Gross proceeds fell by half, to $35.3 billion in 2004 from $72.9 billion in 2003, but were greater than the total of $25.4 billion in 2002. Average deal size in 2004 was $211 million, compared to $296 million in 2003 and $329 million in 2002.

In contrast to issuers in the PIPEs and IPO markets, Rule 144A issuers tend to be much larger and more mature companies. Only 11% of Rule 144A placements in 2004 were completed by companies with market capitalizations under $250 million, compared to 91% of PIPEs transactions. On average, companies completing IPOs in 2004 had an initial market capitalization of $365 million, according to America's Growth Capital.

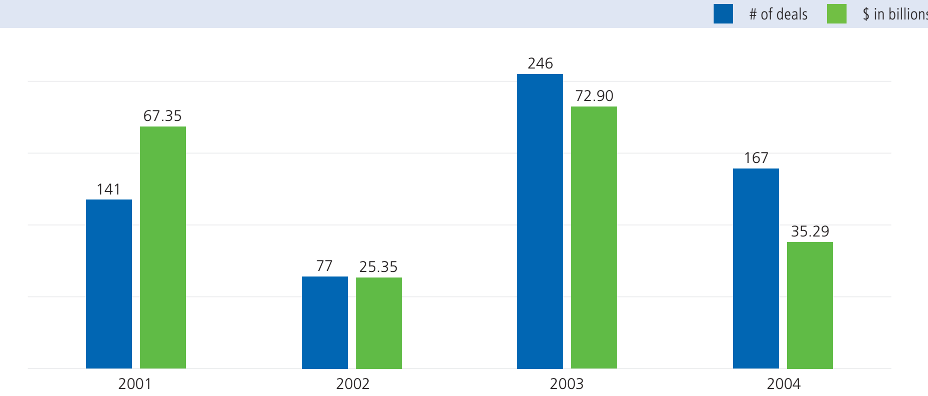
Biotechnology and pharmaceutical companies grabbed the largest share of the Rule 144A market again in 2004, representing 14% of all deals—compared to 17% in 2003—with an average deal size of $232 million. The next largest sectors were energy (8% market share with $182 million average deal size), semiconductors and electronics (6% with $138 million), healthcare (6% with $166 million) and telecommunications (5% with $245 million).

In 2004, 94% of all Rule 144A placements involved the issuance of convertible debt securities. This figure was down from 98% in 2003, but was consistent with other recent years. In 2004, convertible preferred stock deals represented 5% of the Rule 144A market—marking the first time such deals have exceeded 2% of the Rule 144A market in at least four years.

A recent SEC proposal would permit "well-known seasoned issuers" (WKSIs) to have automatically effective shelf registration statements. If adopted, the SEC's proposal—which could become effective as soon as the fall of 2005—would enable WKSIs to time registered public offerings at will. As proposed, a company will qualify as a WKSI if it is S-3 eligible 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. Many past participants in the Rule 144A market would qualify as WKSIs—companies with market capitalizations in excess of $1 billion accounted for 42% of all Rule 144A placements in 2004, and the percentage ranged from 52% to 80% in the prior three years.

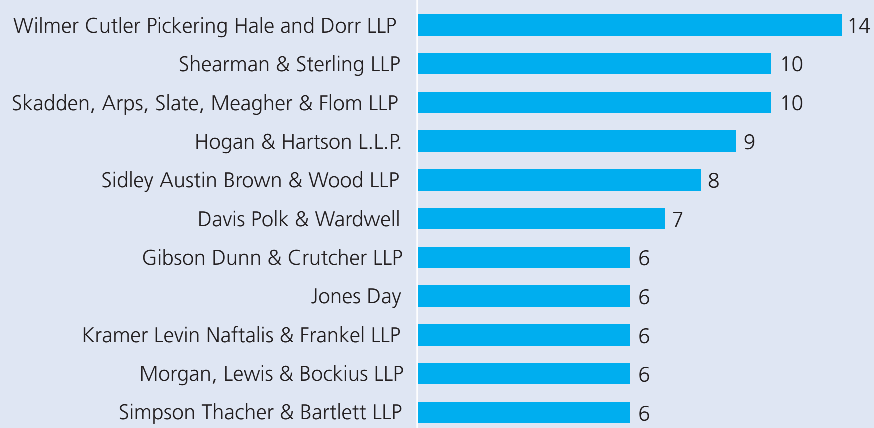
Seasoned companies have long recognized the faster time to market and greater flexibility afforded by Rule 144A placements. If the SEC's recent proposal is adopted, WKSIs could enjoy these same advantages with registered public offerings while avoiding the expense and effort of resale registration following a Rule 144A placement. As a result, we could see a significant shift from Rule 144A placements to registered public offerings in future years. ■

Rule 144A Placements – 2001 to 2004



Source: PrivateRaise

Company Counsel in Eastern US Rule 144A Placements of Equity Securities – 2001 to 2004



The above chart is based on companies located east of the Mississippi River.
Source: Wilmer Cutler Pickering Hale and Dorr analysis of PrivateRaise data

A tangled web of federal securities laws restricts public communications—including press releases, media interviews and website postings—by companies engaged in the IPO process. Company and underwriter counsel routinely lecture their clients about the restrictions on communications, and frequently require that counsel preview all of a company's proposed public communications throughout the IPO process.

There are ample reasons for these repeated warnings. Communications that are deemed to be "conditioning the market" during the IPO process can lead to offering delays. Improper public communications also can result in embarrassing or undesirable prospectus disclosures, and can even lead to SEC sanctions. Every year, IPO candidates violate the applicable restrictions. In 2004, the SEC required that Google add to its prospectus an appendix setting forth the full text of an interview given to *Playboy* by Google's management and a risk factor correcting erroneous statements in the interview. Salesforce.com had to delay its 2004 IPO after an article in *The New York Times* described a reporter's experiences trailing the company's CEO during the IPO process.

In many of the cases involving violations of IPO communications restrictions over the last decade, however, the real culprits have not been loose-lipped executives but outdated federal securities rules that have failed to keep up with fundamental changes in media communications, particularly communications over the Internet, and in the capital markets.

In November 2004, the SEC proposed modernizing the rules governing public communications during IPOs and other public offerings. This article provides an overview of the existing publicity restrictions applicable to IPOs and a summary of the changes that will apply to IPOs if the proposals are adopted.

Why the Quiet Period Exists

The principal restrictions on a company's publication of information during the IPO process emanate from the Securities Act of 1933, which regulates a company's ability to make an offer to sell its securities. The term "offer" is defined broadly to include most types of public communications by a company that have the effect or intent of promoting the company or its stock to prospective investors. As a result of this expansive definition, the SEC's restrictions limit a company's ability to publicly release information about itself; the restrictions apply even when the IPO is not mentioned in the communication.

The provisions of the Securities Act have the effect of imposing a "quiet period" on companies during the IPO process. The quiet period is divided into three segments—the pre-filing period, the waiting period and the post-effective period—each subject to different public communication restrictions.

Pre-Filing Period

The pre-filing period begins when a company formally commences work toward the IPO and continues until it files its registration statement with the SEC. While the pre-filing period has a clear end date, its beginning is less well-defined. The period generally is considered to begin no later than at the organizational meeting, but in some cases it may be deemed to begin earlier—when, for example, the investment bankers and the company hold a "pre-organization meeting."

During the pre-filing period, a company may not make oral or written offers to sell its stock. An impermissible public communication during this period is referred to as "gun-jumping." The SEC issued interpretive advice in 1971 clarifying that a company could continue to advertise products and services during an IPO quiet period, provided the type and frequency of those advertisements are consistent with the company's past practices. Even application of this limited guidance often requires judgment based on both the purpose and effect of a specific advertisement or campaign.

Proposed Changes

Pre-Filing Safe Harbor. A company would be permitted to communicate freely up to 30 days before filing a registration statement, provided the communications do not reference the IPO and the company takes reasonable steps to prevent further distribution of the communication after the safe harbor period. This proposal would resolve the uncertainty as to when the pre-filing period begins and thus facilitate planning of public communications while a company is considering, but not actively engaged in, an IPO. Although the proposal does not specify what steps the company should take to prevent further distribution, the company presumably should, at a minimum, remove the information from its website and instruct employees and third parties within its control to cease further distribution.

Factual Business Information. A company would be permitted to communicate information not only about its products and services but also about the company itself or aspects of its business. As with current practice, these releases would have to be consistent in type and frequency with the company's past communications, would not be permitted to include forward-looking information and could not be targeted to investors.

Waiting Period

The waiting period extends from the time the registration statement is filed to the time it is declared effective by the SEC shortly before the IPO pricing.

In general, during the waiting period, a company can make any public communication permitted during the pre-filing period. In addition, a company is permitted to make oral offers of its stock, but written offers may be made only by means of the "statutory prospectus" included in the registration statement. Although oral offers are permitted, companies should note that:

- Electronic communications via email, website postings, or radio or television broadcasts are treated as written communications
- Oral statements reduced to writing by a third party, such as an interview with a journalist, often will be viewed as written communications of the company
- Oral statements should not differ substantively from information contained in the statutory prospectus

In addition, SEC Rule 134 permits a company to distribute a press release or other communication notifying prospective investors of the proposed IPO. The information in a Rule 134 communication is limited to the company's name, a very brief description of the company's business, the number of shares being offered, the underwriters' names, and the names and addresses of underwriter representatives from whom prospectuses can be obtained.

Proposed Changes

Free Writing Prospectuses. The most significant SEC proposal would allow companies and underwriters to disseminate so-called "free writing prospectuses," which are written communications about the offering that constitute an offer of the shares, but do not meet all of the statutory requirements applicable to a prospectus filed as part of a registration statement. The following guidelines would apply:

- A free writing prospectus would need to be accompanied or preceded by a statutory prospectus that included the offering's price range and the number of shares being offered. The company could satisfy this delivery requirement by providing a hyperlink to the statutory prospectus.
- A written communication would include audiotapes, videotapes, facsimiles, CD-ROMs, emails, website postings and substantially similar messages widely distributed—rather than individually distributed—on telephone answering or voicemail systems, computer networks and other forms of computer data compilations.
- In most cases, a free writing prospectus disseminated by the company would have to be filed with the SEC. A free writing prospectus distributed by an underwriter, such as an internal sales memorandum, however, would need to be filed only if it is distributed in a manner designed to achieve broad unrestricted dissemination.
- A free writing prospectus would need to contain a specified legend that, among other things, would recommend that potential investors read the statutory prospectus, including the risk factors contained therein.

The SEC proposal also addresses two special types of free writing prospectuses:

- Electronic road shows would constitute free writing prospectuses, but neither a presentation nor a script would have to be filed if at least one version of the bona fide road show is made available to all potential investors and all material information used in the road show presentation, but not included in the registration statement, is filed.
- Media publications for which the company or underwriter provided information would constitute free writing prospectuses, but would not be subject to the prospectus delivery or legend requirements if a copy is filed with the SEC and no payment is made to the media outlet for the publication by the company or any underwriter.

Rule 134 Expansion. The SEC proposal would also expand the scope of a Rule 134 communication to:

- permit increased information about the company and its business; and
- broaden the scope of permitted factual information about the offering, including the anticipated road show schedule and procedures for submitting indications of interest and conditional offers to buy the offered stock.

This additional information could be included in a Rule 134 communication only after the inclusion, in the statutory prospectus, of an offering price range and the number of shares offered.

Post-Effective Period

The final segment of an IPO quiet period begins at the time the registration statement is declared effective by the SEC.

During the post-effective period, oral offers are permitted to the same extent as in the waiting period and written offers are permitted if accompanied or preceded by delivery of the final prospectus.

Proposed Change

Under the SEC's proposal, post-effective written communications would no longer need to be accompanied or preceded by delivery of a final statutory prospectus.

Planning

Due to the sensitivity of public communications during the IPO process, and the risk of gun-jumping penalties in particular, companies should begin planning for the process three to six months before filing the IPO registration statement.

While the SEC proposals would liberalize and clarify some existing restrictions on public communications, advance preparation would remain critical to a successful IPO process. Even if the proposals are adopted, managing public communications will continue to involve significant judgments that can be best made with the help of well-informed company personnel. While IPO circumstances can vary significantly, companies should consider the following targets as part of the IPO planning process:

- *45 to 75 days before the filing date:* The company should hold a meeting at which company counsel reviews the legal restrictions that will apply to public communications during the IPO process. The attendees typically should include the chief executive, financial and marketing officers, as well as internal and external investor relations personnel.
- *45 to 60 days before filing:* Company counsel should meet with the chief marketing officer to review all media interviews, industry analyst meetings, industry or financial conferences and panel presentations in which company representatives are scheduled to participate, as well as any proposed marketing or publicity campaigns.
- *At least 30 days before filing:* The company should "scrub" its website by deleting or revising postings that company counsel has advised may conflict with communications restrictions during the IPO.
- *30 days before filing:* Company counsel should begin reviewing all press releases and other publications before dissemination. ■

Every public company is required to maintain "disclosure controls and procedures" that are designed to ensure that information required to be disclosed by the company in the reports that it files or submits under the Securities Exchange Act of 1934 is recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms. The reports covered by this requirement include an annual report on Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K.

The number and type of events required to be reported on Form 8-K significantly expanded in August 2004, and the general filing deadline for Form 8-K was reduced to four business days. In contrast with the periodic nature of Form 10-K and 10-Q reporting, Form 8-K reporting is ongoing, and new public companies need to immediately establish effective disclosure controls and procedures that meet the challenges generated both by the greater frequency of 8-K reportable events and the accelerated filing deadline. We offer the following suggestions:

Disclosure Committee Role

The company's Disclosure Committee should review the 22 categories of 8-K reportable events and identify the people in the company who are most likely to first become aware of each event.

The Disclosure Committee should then educate these people about the new 8-K reporting requirements and lay out a clear process for communicating information about potential 8-K events to those within the company who are responsible for preparing and filing Form 8-Ks.

Don't Forget the Board

When considering who in the organization is most likely to first become aware of various reportable events, do not forget about the board of directors.

One of the first people likely to become aware of the occurrence of certain reportable events, such as the election of new directors and entry into compensation arrangements with executive officers, is the chair of the board or the chair of the audit, compensation or nominating committee.

Since boards are increasingly meeting in executive session and key board committees no longer include members of management, the directors who set board and committee agendas need to consider how they will timely communicate matters to management and to those within the company responsible for preparing and filing Form 8-Ks.

Review Disclosure Committee Membership

Because decisions as to whether an 8-K reportable event has occurred will need to be made in real time, the company should evaluate the membership of its Disclosure Committee with the goal that its members:

- will be able to respond in a timely manner to disclosure questions that come up between meetings of the Disclosure Committee; and
- will have the knowledge and understanding of the company, and of applicable securities law, to be able to quickly analyze materiality questions.

Companies that have a large number of members on their Disclosure Committee may want to designate some members to play the primary role in analyzing Form 8-K disclosure questions.

Information Flow

In light of the short time frames for identifying and analyzing 8-K reportable events and preparing Form 8-Ks, the company should put in place processes that will result in multiple members of the Disclosure Committee being made aware of potentially reportable events.

A process that results in news only flowing to a single member of the Disclosure Committee might result in loss of critical time if that person is temporarily unavailable for any reason.

Defining Materiality

Since several of the reportable events contain a materiality standard, the Disclosure Committee should develop objective rules of thumb to be used in helping identify material events.

For example, an 8-K filing is required when a company incurs direct financial obligations that are material to the company. Accordingly, the company should establish some up-front quantitative guideposts as to what would be a material amount of debt.

Keep in mind, however, that while quantitative rules of thumb are helpful, the materiality of an event must ultimately be assessed in a qualitative manner, taking into account all relevant factors.

Contract Signatures

The company should establish a policy regarding authorized signatories for material contracts. It may also want to adopt formal policies requiring legal department review of potentially material contracts prior to signing.

Meeting Minutes

The minutes of board and committee meetings should be carefully prepared so they clearly distinguish between what is reportable on Form 8-K (such as the actual taking of definitive action committing the company to a restructuring plan) versus what is not reportable (such as mere discussions about a possible restructuring).

Reportable Events

The company's process for collecting data needed to complete Forms 10-K and 10-Q should encompass the new 8-K reportable events. In the course of preparing Forms 10-Q and 10-K, the company should:

- determine whether it failed to identify any 8-K reportable events during the past quarter; and
- retest any close materiality determinations during the quarter that served as a basis for not reporting an event on Form 8-K.

If the company discovers that reportable events did occur during the quarter but were not properly reported, it must—in addition to reporting the event as part of the next Form 10-K or 10-Q—consider whether this discovery suggests an ineffectiveness of its disclosure controls and procedures that must be redressed or reported in connection with the next Form 10-K or 10-Q.

Accurate Documentation

After implementing appropriate 8-K reporting processes, the company should make sure its documentation regarding disclosure controls and procedures accurately describes the steps it uses to comply with its Form 8-K obligations. ■

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

See our *2004 Venture Capital Report* for an in-depth analysis of the US and European venture capital markets and the outlook for 2005. The report features industry and regional breakdowns; practical advice for VC directors; an overview of trends in VC deal terms; and a look ahead to VC fund formation, governance and liquidity in 2005.

Our *2004 M&A Report* offers a detailed review of the global M&A market and discusses the outlook for 2005. Other highlights include advice on deal protection techniques, a survey of the key terms in sales of VC-backed companies, an analysis of the impact of Sarbanes-Oxley on M&A transactions, and practical guidance on Form 8-K filing requirements in M&A deals.

To request a copy of either report, please contact marketing@wilmerhale.com or call 617 526 5600.

Data Sources

Wilmer Cutler Pickering Hale and Dorr LLP compiled all data in this report unless otherwise noted. Offerings by REITs, bank conversions and closed-end investment trusts are excluded. Offering proceeds exclude proceeds from exercise of underwriters' over-allotment options, if applicable. The IPO data is collected from various sources, including IPO.com, IPOCentral.com, SEC filings and the Washington Service Bureau. For lead underwriter rankings, IPOs are included under the current name of each investment bank. For law firm rankings, IPOs are included under the current name of each law firm. PIPEs data is sourced from PrivateRaise and The PIPEs Report. Rule 144A data is sourced from PrivateRaise.

Internet Availability

An electronic version of this report, along with a searchable database of the data that appears in this report, can be found at www.ipoleader.com.

Additional Copies

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