

Message from Our Managing Partner

In this issue, Valérie Demont examines considerations companies must consider as they decide to go public, and Russ Adler notes a New York state law requiring employers to provide written notice of various aspects of employees' pay.

Sue Krembs and Jaime Daddona Brennan report on the SEC's new guidance on accounting rules affecting the oil and gas industry, and note how the Obama administration has shrunk the reach of Sarbanes-Oxley.

Merger and acquisition activity is likely to increase this year because of the high level of distressed debt, according to a study commissioned by Carl Marks Advisory Group LLC and Pepper. We're hosting a seminar on this topic.

A Pepper podcast features Amy McAndrew discussing the labor and employment pitfalls of company holiday parties. It's more than just lampshades on heads – eat, drink and be wary, she advises, in matters such as gift-giving, holiday bonuses and more.

And don't miss Pepper's latest webinar in our Indian Webinar Series. I was recently on CNBC-India discussing the decision concerning the practice of law in India by foreign law firms, ending a 14-year case and making it clear that offices of foreign law firms in India were simply not permitted under current law.

James D. Rosener, Partner

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To Be or Not to Be a Public Company

VALÉRIE DEMONT | DEMONTV@PEPPERLAW.COM

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A flurry of initial public offering activity, which had been unseen since the beginning of the credit crisis, indicates a further sign of revival of the U.S. capital markets. The new IPOs should be good news to many companies that had been effectively shut out of various financing sources — debt and equity — over the past year. This year, more than 55 companies have filed IPO registration statements with the U.S. Securities and Exchange Commission. Most are U.S. companies, joined by a few foreign companies, especially from China. Many of them are REITs and technology-based services providers, with a few in the financial services, power, retail and other sectors. About 23 companies effectively completed their IPOs this year, a far cry from 2007's 282 IPOs or even 2008's 51 IPOs, but the recent increase in the number of IPO filings over the past few weeks is cause for optimism.

An IPO is a transformational event for a company, its management, employees and promoters, and the decision to go public is one that needs to be carefully weighed.

For promoters, an IPO may allow them to monetize their investment by selling down a portion of their holdings in the company at the time of the IPO, yet at the same time retain control of the company. Once the company is public, promoters may also find it easier to sell portions of their ownership over time in additional sales into the public markets.

For companies, an IPO allows them to access, in at times significant amounts, additional capital; raise their profile in the industry

This publication may contain attorney advertising.

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and with their clients; facilitate acquisitions and other M&A activity (publicly traded stock can be an attractive alternative to cash); in certain cases, obtain better loan terms from lenders; and give them additional incentives to attract and retain top talent. Once public, the company may also regularly tap the public capital markets to raise additional funds on an ongoing basis as its business and funding needs evolve.

These considerations must be carefully weighed against the challenges and costs of going public and ongoing compliance and regulatory burdens applicable to public companies, their directors, officers and principal stockholders. Some of these challenges and requirements include:

Independent Board. Unless more than 50 percent of the voting power of the company is held by a shareholder following the IPO, a majority of the board of directors will generally need to be independent. The company will also be required to have a fully independent compensation committee and nominating/corporate governance committee (subject to phase-in periods). With the growing demands on independent directors, finding the right independent directors may be a difficult task, and the company will also need to procure director and officer liability insurance to attract new independent directors.

Audit Committees. Public companies are required to have fully independent audit committees, with audit committee members who meet certain financial literacy requirements.

Independent Auditors. The independent auditors of the company will need to be registered with the Public Company Accounting Oversight Board, or PCAOB. This may require the company to change its auditors and get new audited financials in connection with its IPO. The relationship of the independent auditor with management and the company is regulated, and audit committee preapproval of audit and nonaudit services provided by the independent auditors will be required.

Internal Control Over Financial Reporting. Public companies are required to maintain “internal control over financial reporting.” Management must carry out an annual assessment of the company’s internal control over financial reporting, which, in certain cases, will also need to be passed upon by the company’s independent auditors. Those requirements are complex, time-consuming and costly.

Disclosure Controls and Procedures. Public companies must maintain “disclosure controls and procedures” that ensure internal

procedures are in place to timely and adequately dispense information to the public. As with internal controls, these disclosure controls are also subject to effectiveness assessments.

Financial Statements. The IPO prospectus will need to contain audited and unaudited consolidated financial statements of the company for the past three years (and any interim quarterly unaudited financial statements) and selected annual consolidated financial data for the past five years (of which the oldest two years may be unaudited).

Public Scrutiny. Public companies are subject to extensive ongoing reporting, disclosure and other compliance obligations. Among other requirements, the company must make annual and quarterly disclosures as well as ongoing periodic disclosures upon the occurrence of specific events. Those requirements can be difficult when the company is experiencing financial or business difficulties, contemplating a significant transaction, or entering into strategic agreements that it may have to disclose. The company also will become subject to rules regarding shareholders’ meetings and proxy statements. In addition, it will need to file its material agreements with the SEC. The SEC standards for confidentiality of competitive and other sensitive information are difficult to meet.

Certifications. The CEO and CFO of the company will need to certify the company’s periodic filings. A knowingly false certification could lead to criminal liability.

Loans to Executive Officers and Directors. Any loan or advance extended to directors and executive officers will need to be repaid, forgiven or otherwise unwound as soon as possible prior to the filing of the IPO.

Stockholder Reporting Obligations. Executive officers and directors, as well as 10 percent stockholders, must publicly disclose their securities holdings in the company (including derivative securities). In addition, they must publicly disclose any trades that they make in the company’s securities and will be subject to liability for “short-swing” profits they make on any sales and purchases of the company’s securities occurring within a six-month period. Separately, any person beneficially owning more than 5 percent of the company’s securities must publicly file statements disclosing his or her identity and stock ownership. Violation of these obligations could result in profit disgorgement and other penalties.

Hostile Takeover and Shareholder Activism. Public companies are subject to hostile takeover activity and shareholder activism, both of which are on the rise. Anti-takeover defenses will need to be put in place to protect the continued growth of the business while balancing those needs against a successful marketing of the IPO, the requirements of investors and the positions taken by proxy advisory firms on corporate governance and takeover defenses. For example, opposition is growing against certain forms of takeover defenses, including poison pills, staggered boards and plurality voting.

Employment and Benefit Plans. Employment agreements for senior management and key employees and employee benefit plans (for example, incentive plans, stock purchase plans and director stock option plans) should be put in place at the time of the IPO for retention purposes, IPO marketing reasons and because it is more difficult to put those plans in place once the company has gone public. These arrangements should comply with the new corporate governance environment on say-on-pay and executive compensation.

Investor Relations. Public companies need to release earnings on a quarterly basis and comply with complex rules on communications. An officer in charge of investor relations and an investor relations firm will need to be hired for that purpose.

Costs. An IPO is an expensive process with underwriter commissions of about 7 percent of the IPO proceeds and legal, accounting, stock exchange and other fees and expenses on top of that. Post-IPO, ongoing compliance and reporting costs can be burdensome, especially for smaller public companies.

Although taking a company public requires much consideration, it can be a very beneficial experience when done correctly. By carefully planning and scrutinizing each step of the process, management and stockholders can ensure that the best interests of the company and its stockholders are being served.

Upcoming Capital Roundtable MasterClasses

Pepper Hamilton is the co-host of upcoming MasterClasses in 2010:

Launching a New SBIC in 2010 - The Basics & the Nuances

Special Half-Day Pre-MasterClass Workshop

March 10, 2010 | New York City

Michael B. Staebler, partner, Pepper Hamilton LLP

SBICs - A Whole Day, The Whole Story: Everything You Need to Know to Get Licensed, As Well as Launch & Manage an SBIC

March 11, 2010 | New York City

Michael B. Staebler, partner, Pepper Hamilton LLP

www.capitalroundtable.com/masterclass/mc_2010-03-11.html

PE Fundraising from Institutional Investors in 2010 - How to Be a Rainmaker During the Drought

May 13, 2010 | New York City

Julia D. Corelli, partner, Pepper Hamilton LLP

<http://capitalroundtable.com/calendar/>

PE Fundraising from Institutional Investors

October 7, 2010 | New York City

Julia D. Corelli, partner, Pepper Hamilton LLP

<http://capitalroundtable.com/calendar/>

New York Requires Employers to Provide Employees with Written Notice of their Pay Day, Rate of Pay and Overtime Rate

RUSSELL E. ADLER | ADLERR@PEPPERLAW.COM

Effective October 26, 2009, New York employers must provide employees with written notification of their rate of pay, the employer's regular pay date and, for employees who are eligible for overtime pay, their overtime rate as well. In addition, employers are required to obtain written acknowledgement from employees confirming their receipt of this information. The stated purpose of the law is to enable employees to determine whether their paychecks properly reflect the agreed upon wage rate and overtime rate. The law, which is an amendment to an existing provision of the Labor Law, is not retroactive and applies only to employees hired on or after October 26, 2009.

The law further provides that the written acknowledgement must comply with any requirements established by the Commissioner of Labor regarding content and form, but as of the date of preparation of this notice, no requirements have been established. In advance of the effective date, employers should integrate into their new hire materials a simple form containing the pertinent information to be signed by employees hired on or after October 26, 2009.

While not the stated purpose of the law, compliance will reinforce employers' obligations to ensure they are properly characterizing their employees' exempt or non-exempt status. The law reflects a continuing trend of employment-related legislation from Albany aimed at providing employees with greater protection.

SEC Releases Bulletin on Oil and Gas Industry Reporting

SUSAN J. KREMBBS | KREMBSS@PEPPERLAW.COM

JAIME DADDONA BRENNAN | BRENNANJ@PEPPERLAW.COM

On October 30, 2009, the Office of the Chief Accountant of the U.S. Securities and Exchange Commission (SEC) issued updated guidance on how the agency's staff interprets accounting rules related to the oil and gas industry. The updates correspond with rulemaking that the SEC approved in December 2008 in an effort to modernize its oil and gas company reporting requirements to help investors evaluate the value of their investments in these companies. The principal revisions of the guidance, known as Staff Accounting Bulletin No. 113, include:

- changing the price used in determining quantities of oil and gas reserves
- eliminating the option to use post-quarter-end prices to evaluate write-offs of excess capitalized costs under the full cost method of accounting
- removing the exclusion of unconventional methods used in extracting oil and gas from oil sands or shale as an oil- and gas-producing activity, and
- removing certain questions and interpretative guidance that are no longer necessary, as well as making certain non-substantive editorial changes.

The guidance updates Topic 12 of the codification of staff accounting bulletins in order to make it consistent with the SEC's Final Rule Release, *Modernization of Oil and Gas Reporting*, issued December 31, 2008.

It is important to note that the statements in a staff accounting bulletin are not rules or interpretations of the SEC, nor are they published as bearing the SEC's official approval. They represent interpretations and practices followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure requirements of the federal securities laws.

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Obama Administration Shrinks Sarbanes-Oxley Protections as Small Public Companies Win Exemption from Audits

SUSAN J. KREMBS | KREMBSS@PEPPERLAW.COM

JAIME DADDONA BRENNAN | BRENNANJ@PEPPERLAW.COM

On November 3, 2009, the House Financial Services Committee voted to exempt small public companies from having to comply with a provision of the Sarbanes-Oxley Act – the intent of which was to prevent financial fraud – that requires that companies hire auditors to examine their internal systems to ensure compliance with accounting reporting rules. The amendment would apply to public companies with a net worth of less than \$75 million, which encompasses approximately half of all public companies. The amendment is part of an omnibus investor bill the committee is working on to reform financial regulations.

Proponents of the amendment argue that the costs of compliance with that particular provision are too burdensome, and affect companies' ability to grow and hire new people.

SEC Chairman Mary L. Schapiro strongly opposed the exemption, saying the law “leads management to better understand financial reporting risks, put in place appropriate controls to address financial reporting risks, and addressing internal control deficiencies in a more timely fashion.” Former SEC Chairman Arthur Levitt was also sharply critical of any efforts to roll back Sarbanes-Oxley.

Although the provisions of the law that require companies to comply with audit requirements have not been fully implemented, the SEC recently announced that, starting next year, further delays would not be entertained.

Distressed M&A Outlook - Market Conditions to Produce Significant M&A Opportunities

Tuesday, January 19, 2010

7:30 a.m. - Registration and Breakfast

8:00 - 9:00 a.m. - Roundtable Discussion

The Harvard Club of New York City

35 West 44th Street

New York, NY 10036-6645

To gain perspective on the current distressed M&A market, Pepper Hamilton LLP and Carl Marks Advisory Group LLC commissioned mergermarket, a research and publishing company, to survey a diverse group of corporate executives, private equity practitioners, hedge fund investors and lawyers regarding the foremost issues facing distressed investors today.

Join us for breakfast as we discuss the findings of our survey on the distressed M&A market and how the landscape has changed since the survey was conducted, including the Chrysler/GM effect, the imposition of politics on the financial markets and the repercussions of CIT.

Moderator

James D. Rosener, partner, Pepper Hamilton LLP

Panelists

Todd A. Feinsmith, partner, Pepper Hamilton LLP

Warren H. Feder, partner,

Carl Marks Advisory Group, LLC

Lawrence E. Klaff, principal,

Gordon Brothers Group, LLC

Register online at

https://www.regonline.com/distressed_NewYork.

Please contact Brian Dolan at dolanb@pepperlaw.com with questions about this event.

Indian Webinar Series: National Security and Other U.S. Government Regulatory Requirements for U.S.-India Inbound or Outbound Sales, Joint Ventures, Mergers and Acquisitions

January 13, 2010 | 11:00 A.M. - 12:00 P.M. EASTERN

A number of U.S. regulatory requirements can affect business transactions involving sensitive and classified technology services and goods between U.S. and Indian companies. This webinar discusses two of these regulatory requirements and the steps that companies must take to comply with them.

Exon/Florio and CFIUS Review. The Exon/Florio Amendment to the Defense Production Act of 1950 may require review by Treasury's Committee on Foreign Investment in the United States (CFIUS) if the acquisition has national security implications. Although this process is straightforward, it is an extremely important step since CFIUS has the authority to stop a proposed acquisition if found by the committee to be detrimental to the national security of the United States.

Export Controls. Exports of technology and services to the foreign parent company may require export approvals under the International Traffic in Arms regulations (ITAR) of the Department of State and the Export Administration Regulations (EAR) of the Department of Commerce. Failures to obtain export approvals have negative consequences. License denials may keep the foreign acquiring company from receiving export-controlled technology or even discussing the technology with its U.S. employees. Failure to comply with the ITAR or EAR may also result in hefty fines and criminal penalties.

Moderator

Valérie Demont, partner, Pepper Hamilton LLP

Speakers

Michael A. Hordell, partner, Pepper Hamilton LLP

Stanley R. Soya, partner, Pepper Hamilton LLP

Register for this complimentary online webinar at <https://www.regonline.com/US-India>.

For more information about this webinar please contact Brian Dolan at dolanb@pepperlaw.com or 1.215.981.4568.



Peppercast: Holiday Parties - Eat, Drink and Be Wary!

It's that time of year again. Even with many employers cutting back during these difficult economic times, most still want to find special ways to thank their employees and acknowledge the hard work they have put in over the last year.

In this podcast, **Amy McAndrew**, of counsel in the Berwyn office of Pepper Hamilton and a member of the firm's Labor and Employment practice, discusses issues employers should be aware of during the holiday season, including holiday parties, employee gift giving and holiday bonuses.

Listen today by visiting the Labor and Employment Law section of www.pepperpodcasts.com.