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*Presenting a live 90-minute webinar with interactive Q&A*

# **IPO Readiness Strategies: Navigating the Legal Complexities**

Meeting the Challenges of Corporate Governance, D&O Liability, Confidentiality and More

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WEDNESDAY, AUGUST 3, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Warren Fixmer Vice President Equity Capital Markets, **Bank of America Merrill Lynch**, New York

Jane Storero, Vice President Corporate Governance and Corporate Secretary,  
**Pepco Holdings, Inc.**, Washington, D.C.

Yelena M. Barychev, Partner, **Blank Rome**, Philadelphia

Paul D. Broude, Partner, **Foley & Lardner**, Boston

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# Bank of America Merrill Lynch



## IPO Market Update

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August 3, 2011

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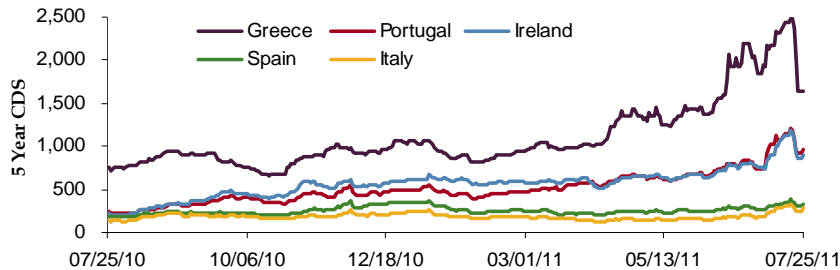
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# IPO Market Overview

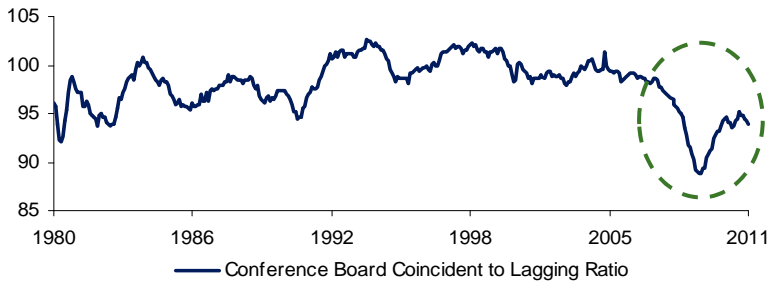
# IPO Market Overview

## Challenging Macro Backdrop...

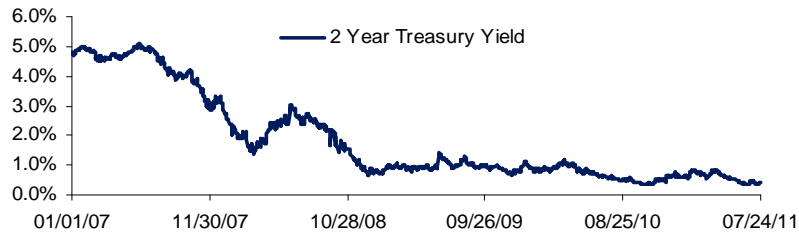
### Sovereign Issues Front and Center



### Business Cycle - Double Dip Concerns

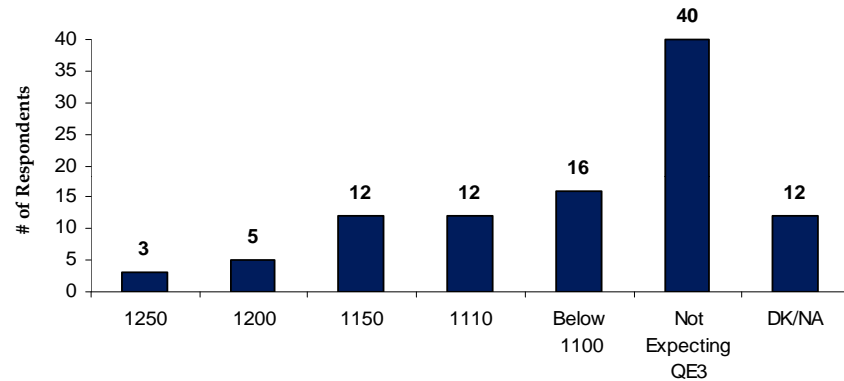


### Risk Appetites Bound to Increase, But When?

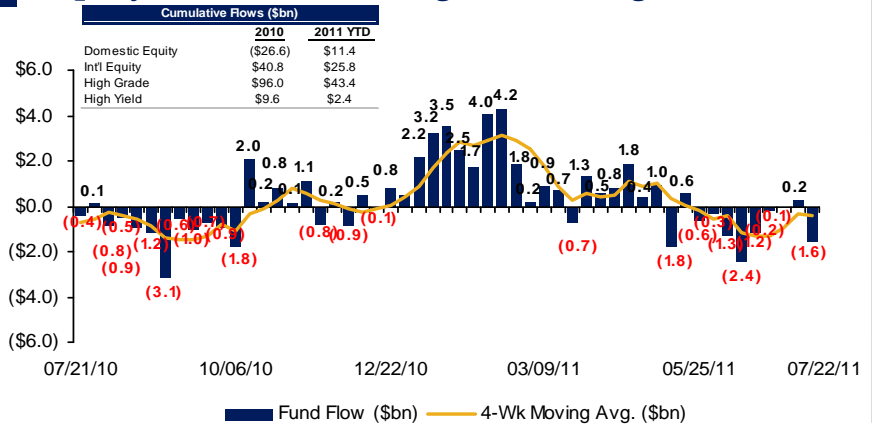


### Expectations Around QE3? (1)

At what level of the S&P 500 would you expect the Fed to announce a QE3 program?



### Equity Fund Flows - Progress Waning (2)



Source: Bloomberg as of 7/25/2011.

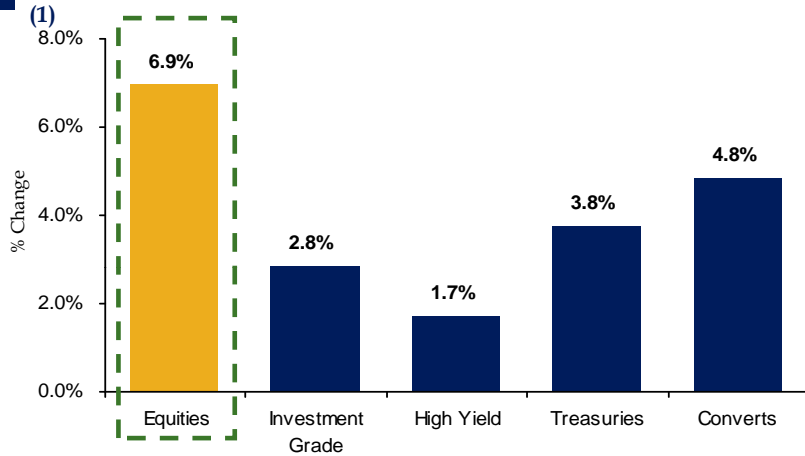
(1) BofAML Fund Manager Survey. (2) AMG Data, domestic equity fund flows excluding ETF activity.



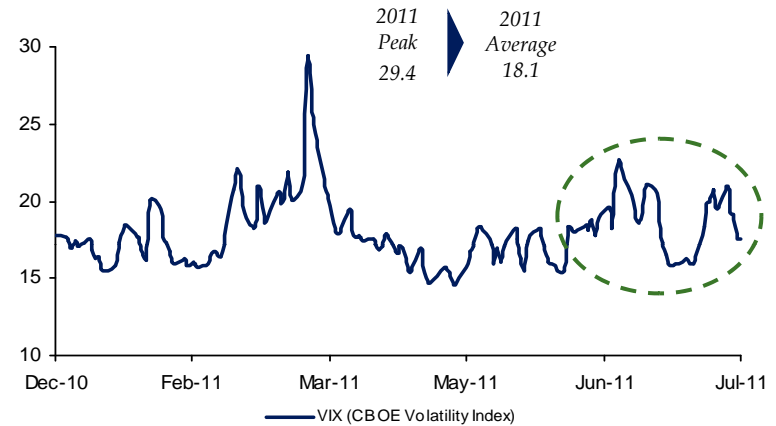
# IPO Market Overview

## ... Yet Equity Markets Remain Resilient

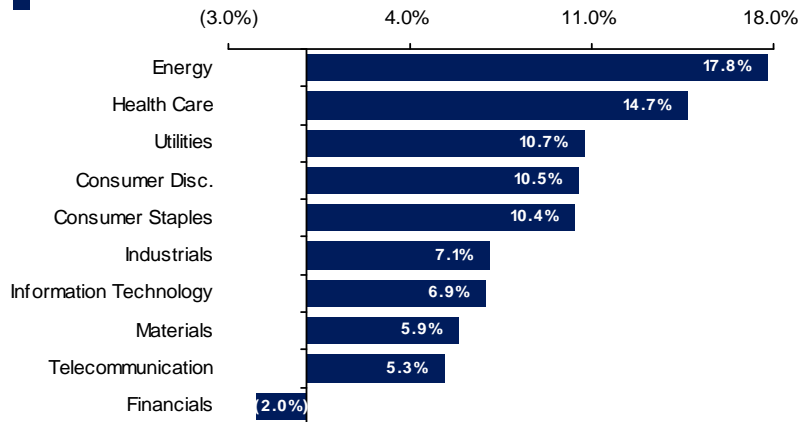
### Equities are the Best Performing Asset Class YTD



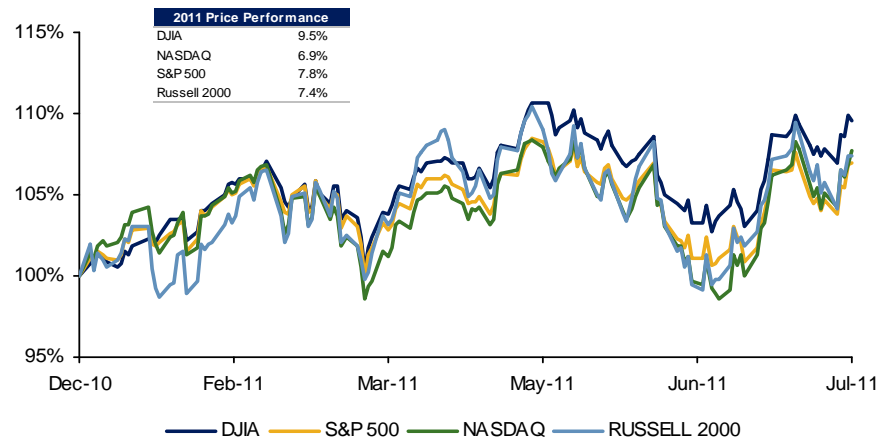
### Manageable Volatility



### Participation Across Most Sectors (2)



### Performance From All Market Cap Segments



Sources: Bloomberg and Factset as of 7/22/2011.  
(1) 2011YTD. (2) Based on S&P 1500 sectors.

# IPO Market Overview

## Market Sentiment Scorecard

|                  |                                     | 2011YTD                         |            |   | Trailing 4 Weeks                |           |   |
|------------------|-------------------------------------|---------------------------------|------------|---|---------------------------------|-----------|---|
| Secondary Market | Broad Market Performance            | Dow:                            | 9.5%       | ✓ | Dow:                            | 6.3%      | ✓ |
|                  |                                     | S&P 500:                        | 6.9%       | ✓ | S&P 500:                        | 6.0%      | ✓ |
|                  |                                     | NASDAQ:                         | 7.8%       |   | NASDAQ:                         | 7.8%      |   |
|                  | Equity Funds Flows <sup>(1)</sup>   |                                 | \$11.4bn   | ✓ |                                 | \$(1.6bn) | ✓ |
|                  | VIX Average                         |                                 | 18.1       | ✓ |                                 | 18.2      | ✓ |
| Add-On Market    | Marketed Add-On Pricing Performance | Total Proceeds (\$mm):          | \$64,647.7 | ✓ | Total Proceeds (\$mm):          | \$3,082.3 | ✓ |
|                  |                                     | # of Add-Ons:                   | 124        | ✓ | # of Add-Ons:                   | 8         | ✓ |
|                  |                                     | Median File / Offer:            | (6.6%)     |   | Median File / Offer:            | (6.9%)    |   |
|                  |                                     | Median Disc. / Last Sale:       | (2.0%)     |   | Median Disc. / Last Sale:       | (1.9%)    |   |
|                  | Marketed Add-On Trading Performance | Median % Change Offer / 1 Day:  | 1.5%       | ✓ | Median % Change Offer / 1 Day:  | 0.5%      | ✓ |
|                  |                                     | Median % Change Offer / 1 Week: | 2.5%       |   | Median % Change Offer / 1 Week: | 5.3%      |   |
| IPO Market       | BIPO Index                          |                                 | (0.7%)     | ✓ |                                 | 1.7%      | ✓ |
|                  | IPO Pricing Performance             | Total Proceeds (\$mm):          | \$29,864.0 | ✓ | Total Proceeds (\$mm):          | \$1,483.0 | ✓ |
|                  |                                     | # of IPOs:                      | 78         | ✓ | # of IPOs:                      | 8         | ✓ |
|                  |                                     | Median File / Offer:            | 3.2%       |   | Median File / Offer:            | 9.3%      |   |
|                  | IPO Trading Performance             | Median % Change Offer / 1 Day:  | 3.5%       | ✓ | Median % Change Offer / 1 Day:  | 8.2%      | ✓ |
|                  |                                     | Median % Change Offer / 1 Week: | 4.0%       |   | Median % Change Offer / 1 Week: | 12.8%     |   |

Performance: ✓ Strong   ✓ Reasonable   ✓ Weak

Source: Bloomberg and Dealogic as of 7/22/2011.

Note: Issuance data in table references SEC registered offerings greater than \$50mm, excluding SPACs and closed-end funds.

(1) Equity fund flows for domestic equities excluding ETF activity.

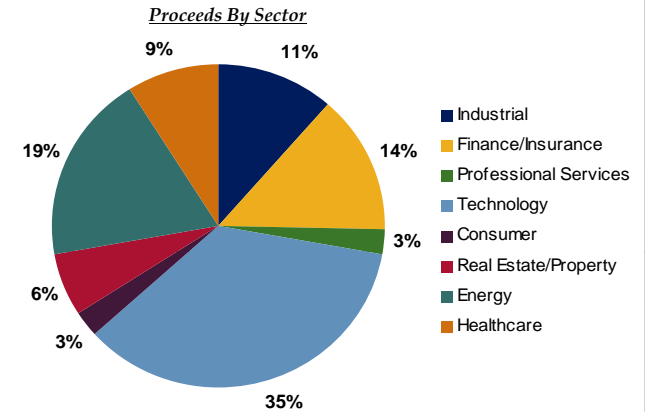
# IPO Market Overview

## Q2 was the Busiest Quarter Since 2009

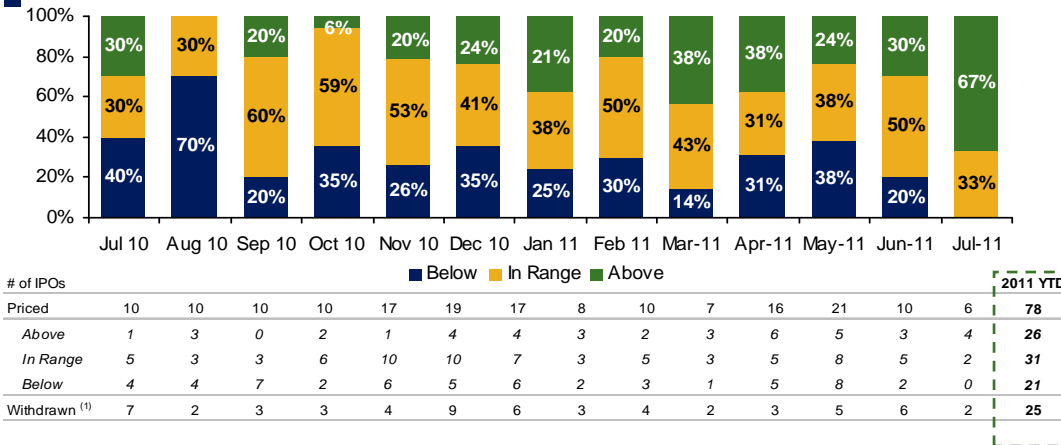
### IPO Volume Returning to Historical Levels



### 2010 - 2011 YTD IPOs by Sector



### Investors Have Shown Some Price Sensitivity



### Year-over-Year Comparison

|                        | 2010YTD | 2011YTD |
|------------------------|---------|---------|
| # of Total IPOs:       | 64      | 78      |
| Total Proceeds (\$mm): | 11,809  | 29,844  |
| % In / Above Range:    | 56.3%   | 73.1%   |
| Avg. File / Offer:     | (8.7%)  | 2.4%    |
| Avg. Offer / 1 Day:    | 5.4%    | 12.2%   |
| Avg. Offer / 1 Month:  | 3.9%    | 9.1%    |
| % Greenshoe Exercise:  | 56.3%   | 57.7%   |

Source: Dealogic as of 7/22/2011. Excludes BCC/SPACs, closed-end funds, and IPOs with base deal value less than \$50mm.  
 (1) Withdrawn due to market conditions.

# IPO Market Overview

## Top 20 Performing IPOs 2011YTD

| Pricing Date | Issuer                  | Base Deal (\$mm) | Mkt Val (\$mm) | Base Deal as % of Mkt Val | % Secondary | Pricing vs. Range | Greenshoe Exercised | Offer / |         |         | Industry                |
|--------------|-------------------------|------------------|----------------|---------------------------|-------------|-------------------|---------------------|---------|---------|---------|-------------------------|
|              |                         |                  |                |                           |             |                   |                     | 1 Day   | 1 Week  | Current |                         |
| 05/18/11     | LinkedIn                | 352.8            | 4,252.4        | 8.3%                      | 38.4%       | Above             | ✓                   | 109.4%  | 109.6%  | 128.8%  | Computers & Electronics |
| 02/04/11     | Endocyte                | 75.0             | 166.2          | 45.1%                     | --          | Below             | ✓                   | 28.8%   | 18.7%   | 90.5%   | Healthcare              |
| 03/24/11     | ServiceSource           | 119.4            | 655.1          | 18.2%                     | 33.0%       | Above             | ✓                   | 21.8%   | 21.8%   | 85.3%   | Computers & Electronics |
| 07/19/11     | Zillow.com              | 69.2             | 541.2          | 12.8%                     | --          | Above             | ✓                   | 78.9%   | -       | 71.4%   | Professional Services   |
| 06/08/11     | Taomee 淘米               | 64.7             | 325.5          | 19.9%                     | --          | In Range          |                     | (8.6%)  | 5.3%    | 63.6%   | Computers & Electronics |
| 07/21/11     | Francesca's Collections | 170.0            | 739.0          | 23.0%                     | 70.6%       | Above             | ✓                   | -       | -       | 62.6%   | Retail                  |
| 03/29/11     | 360                     | 175.6            | 1,687.4        | 10.4%                     | --          | Above             | ✓                   | 134.5%  | 101.8%  | 62.5%   | Computers & Electronics |
| 06/08/11     | Fusion-io               | 233.7            | 1,478.4        | 15.8%                     | 12.6%       | Above             | ✓                   | 18.4%   | 16.7%   | 57.9%   | Computers & Electronics |
| 05/04/11     | RPX National Patent     | 160.2            | 873.7          | 18.3%                     | --          | Above             | ✓                   | 25.7%   | 44.8%   | 55.4%   | Finance                 |
| 04/07/11     | CVR                     | 307.2            | 1,168.0        | 26.3%                     | --          | Above             | ✓                   | 9.7%    | 6.3%    | 54.1%   | Chemicals               |
| 04/14/11     | Sequans Communications  | 77.0             | 343.9          | 22.4%                     | 13.4%       | Below             |                     | (17.5%) | (18.8%) | 53.7%   | Computers & Electronics |
| 06/28/11     | HomeAway                | 216.0            | 2,155.4        | 10.0%                     | 25.9%       | In Range          | ✓                   | 48.9%   | -       | 50.7%   | Computers & Electronics |
| 04/19/11     | Sagent Pharmaceuticals  | 92.0             | 429.9          | 21.4%                     | --          | In Range          | ✓                   | 24.4%   | 19.4%   | 47.6%   | Healthcare              |
| 02/09/11     | Fluidigm                | 75.0             | 256.2          | 29.3%                     | --          | In Range          | ✓                   | 3.9%    | 5.7%    | 46.7%   | Healthcare              |
| 03/31/11     | GNC Live Well           | 360.0            | 1,656.8        | 21.7%                     | 28.9%       | In Range          | ✓                   | 4.7%    | 10.3%   | 45.3%   | Retail                  |
| 02/02/11     | Tornier                 | 166.3            | 728.0          | 22.8%                     | --          | In Range          | ✓                   | (5.0%)  | (5.0%)  | 44.5%   | Healthcare              |
| 05/23/11     | Yandex                  | 1,304.4          | 8,031.2        | 16.2%                     | 70.5%       | Above             | ✓                   | 55.4%   | 37.8%   | 42.6%   | Computers & Electronics |
| 04/13/11     | (Arcos Dorados)         | 1,249.2          | 3,562.0        | 35.1%                     | 87.0%       | Above             | ✓                   | 24.7%   | 41.4%   | 38.2%   | Dining & Lodging        |
| 05/26/11     | Solazyme                | 197.6            | 1,039.3        | 19.0%                     | 5.5%        | Above             | ✓                   | 15.1%   | 22.0%   | 35.0%   | Chemicals               |
| 01/25/11     | Nielsen                 | 1,642.9          | 7,995.5        | 20.5%                     | --          | Above             | ✓                   | 8.7%    | 12.0%   | 34.5%   | Professional Services   |
| Mean (20)    |                         | 355.4            | 1,904.2        | 20.8%                     | 19.3%       |                   |                     | 29.1%   | 22.5%   | 58.5%   |                         |
| Median (20)  |                         | 172.8            | 956.5          | 20.2%                     | 2.7%        |                   |                     | 20.1%   | 14.3%   | 53.9%   |                         |

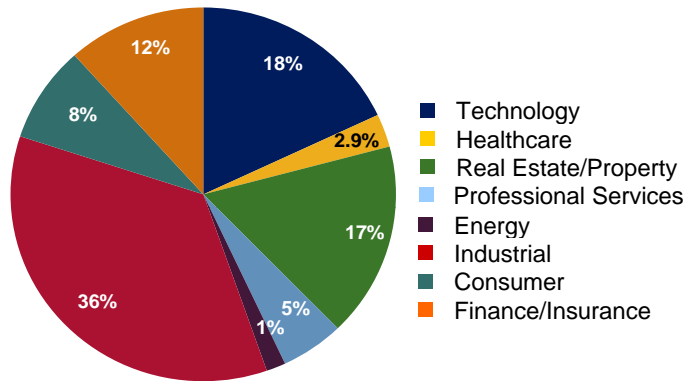
Source: Dealogic as of 7/22/2011. Excludes BCC/SPACs, closed-end funds and deals less than \$50mm.

# IPO Market Overview

## Current IPO Backlog

### Industry Breakdown by Proceeds

Total Backlog: 155 filings / \$35.1bn



### Deals on the Road

| Initial Filing Date | Expected Date | Issuer                             | Amt. Filed (\$MM) | Industry / Sector       |
|---------------------|---------------|------------------------------------|-------------------|-------------------------|
| 04/12/11            | 07/25/11      | Chefs' Warehouse Inc               | 120               | Food & Beverage         |
| 05/04/11            | 07/26/11      | Dunkin' Brands Group Inc           | 378               | Dining & Lodging        |
| 07/05/11            | 07/26/11      | Union Agriculture Group Corp       | 200               | Agribusiness            |
| 04/16/10            | 07/26/11      | Tangoe Inc                         | 88                | Computers & Electronics |
| 03/31/11            | 07/27/11      | American Midstream Partners LP     | 75                | Utility & Energy        |
| 04/08/11            | 07/27/11      | Wesco Aircraft Holdings Inc        | 347               | Aerospace               |
| 04/28/11            | 07/27/11      | Teavana Holdings Inc               | 100               | Retail                  |
| 08/03/10            | 07/27/11      | Horizon Pharma Inc                 | 61                | Healthcare              |
| 02/08/11            | 07/28/11      | ADS Tactical Inc                   | 204               | Consumer Products       |
| 03/30/11            | 07/28/11      | C&J Energy Services Inc            | 305               | Oil & Gas               |
| 04/01/11            | 08/01/11      | American Capital Mortgage Investme | 350               | Real Estate/Property    |
| 04/25/11            | 08/04/11      | WageWorks Inc                      | 75                | Professional Services   |

### Largest IPOs in Backlog

| Filing Date | Issuer                                       | (\$MM)  | Industry / Sector       |
|-------------|--|---------|-------------------------|
| 07/01/11    | Zynga Inc                                    | 1,000.0 | Technology              |
| 06/09/11    | Avaya Holdings Corp                          | 1,000.0 | Telecommunications      |
| 04/21/11    | Momentive Performance Materials Holdings LLC | 862.5   | Chemicals               |
| 05/28/10    | Toys R Us Inc                                | 800.0   | Retail                  |
| 06/02/11    | Groupon Inc                                  | 750.0   | Computers & Electronics |
| 04/29/11    | WPX Energy Inc                               | 750.0   | Oil & Gas               |
| 03/18/11    | Allison Transmission Holdings Inc            | 750.0   | Auto/Truck              |
| 05/26/11    | Rexnord Corp                                 | 700.0   | Machinery               |
| 10/06/10    | Eola Property Trust                          | 675.0   | Real Estate/Property    |
| 05/25/11    | SandRidge Permian Trust                      | 630.0   | Oil & Gas               |
| 06/21/11    | PetroLogistics LP                            | 600.0   | Oil & Gas               |
| 04/05/11    | PIMCO REIT Inc                               | 600.0   | Real Estate/Property    |
| 07/07/11    | Chesapeake Granite Wash Trust                | 583.6   | Oil & Gas               |
| 04/09/10    | Younan Properties Inc                        | 575.0   | Real Estate/Property    |
| 05/13/11    | Springleaf REIT Inc                          | 500.0   | Real Estate/Property    |

### Recent IPO Filings

| Filing Date | Issuer                             | Amt. Filed (\$MM) | Industry / Sector       |
|-------------|------------------------------------|-------------------|-------------------------|
| 07/19/11    | Cathay Industrial Biotech Ltd      | 200.0             | Chemicals               |
| 07/19/11    | AmREIT Inc                         | 86.3              | Real Estate/Property    |
| 07/18/11    | US Silica Holdings Inc             | 200.0             | Mining                  |
| 07/18/11    | Red Stone Tax Exempt Partners LP   | 115.0             | Technology              |
| 07/18/11    | Renewable Energy Group Inc         | 100.0             | Technology              |
| 07/15/11    | Norwegian Cruise Line Holdings Ltd | 250.0             | Transportation          |
| 07/15/11    | Dave & Buster's Entertainment Inc  | 150.0             | Dining & Lodging        |
| 07/15/11    | Demandware Inc                     | 100.0             | Computers & Electronics |
| 07/15/11    | Greenway Medical Technologies Inc  | 100.0             | Computers & Electronics |
| 07/13/11    | ZELTIQ Aesthetics Inc              | 115.0             | Healthcare              |
| 07/11/11    | MacDermid Group Inc                | 200.0             | Chemicals               |
| 07/11/11    | GSE Holding Inc                    | 143.8             | Chemicals               |
| 07/08/11    | Merrimack Pharmaceuticals Inc      | 172.5             | Healthcare              |
| 07/07/11    | Chesapeake Granite Wash Trust      | 583.6             | Oil & Gas               |
| 07/07/11    | Sunshine Silver Mines Corp         | 250.0             | Mining                  |

Source: Dealogic as of 7/22/2011. Includes IPOs filed since 8/01/2009, excludes BCC/SPACs and IPOs with filed proceeds of less than \$50mm.

# IPO Readiness Strategies: Navigating the Legal Complexities

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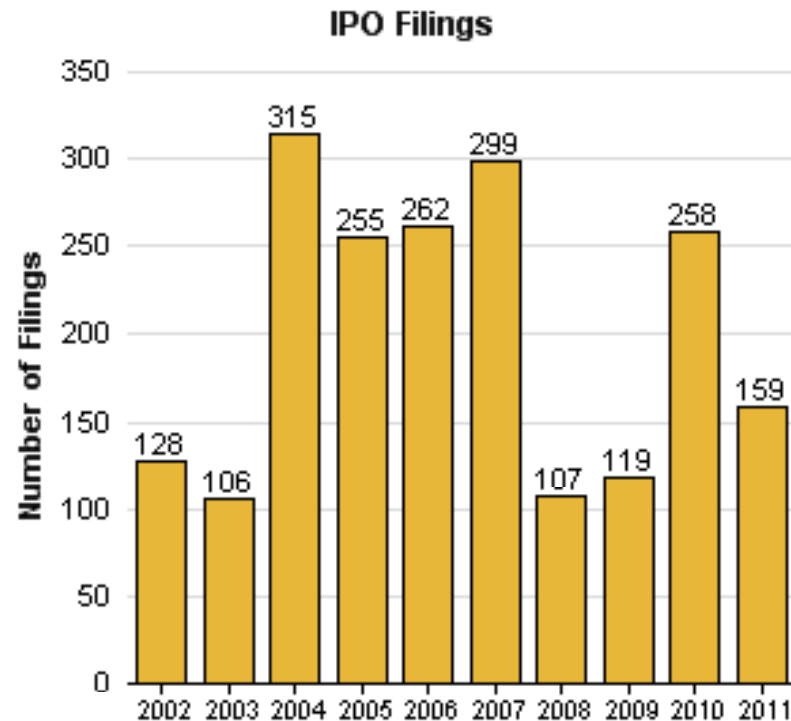
## Important Steps to Take Before Going Public

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August 3, 2011

# The IPO Environment

The Sarbanes Oxley Act of 2002 (“SOX”) has subjected public companies in the United States to unprecedented legal scrutiny. As a result of the enactment of SOX, as well as the recent economic recession, the number of IPO filings has fluctuated greatly over the past ten years.



Excludes SPACs, closed-end funds and trusts

Source: [www.RenaissanceCapital.com](http://www.RenaissanceCapital.com)

Renaissance Capital, Greenwich, CT

# Preparing for an IPO: Pre-planning is Key

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- ❖ Experienced, Professional Team
- ❖ Skilled Management Team with Public Company Experience
- ❖ D&O Liability Insurance
- ❖ Complete Corporate Records



# Assemble an Experienced Professional Team



- Legal counsel must be able to address:
  - Securities transaction and public company needs
  - Tax issues
  - Environmental concerns, if any
  - Intellectual property
  - Litigation risk
  - Benefits, including ERISA issues
  - Employment matters
  - SOX compliance
- During the pre-planning phase, engage an accounting firm registered with the Public Company Accounting Oversight Board.
- Retain legal counsel and accountants before the organizational meeting. 17

# Enhance Management Team with Public Company Experience

- Executive Team must be familiar with:
  - SEC reporting requirements
  - Accounting requirements
  - Exchange rules and requirements
- Executive Leadership must be articulate and have good public speaking capabilities in order to create a positive impression on the investment community and the public.
- Management must be able to train or retrain members of the management and finance teams to comply with public disclosure obligations.



# Enhance Management Team with Public Company Experience

## Enhanced Skill Set for Directors

- o Public company experience
- o Financial expert
- o Industry expertise
- o Community stature and expertise

## Increased pressure and responsibility for directors

- o Be informed
- o Ask critical questions of management
- o Protect the rights of stockholders/enhance shareholder value
- o Understand and monitor the IPO process
- o Risk oversight function

Underwriters are more likely to be engaged by companies with impressive management teams

- o Experience is critical
- o Credibility is important



# Evaluate Directors and Officers Liability Insurance Coverage



- Prior to the IPO, review coverage or obtain coverage.
- Counsel should review coverage to determine whether additional coverage is necessary.
  - D&O insurance obtained by private companies may exclude public companies and securities offering coverage.
- SOX has increased the cost of D&O insurance.
  - Allow time for multiple quotations and the underwriting process.
  - Use a knowledgeable broker.
  - Determine “correct” amount of coverage.

# Ensure Completeness of Corporate Records

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- Counsel for underwriters will conduct a thorough inspection of books and records.
- Corporate records must be complete, accurate and up-to-date.
  - Minutes books – reflect all required actions taken by the board, committees and stockholders since inception.
  - Stock, option and warrant ledgers – reflect the true ownership of all securities.
  - Committee charters, codes of conduct and other required corporate governance policies.
  - All material contracts must be reduced to writing.
  - Transactions with affiliates must be reduced to writing and approved or ratified by the audit committee or disinterested directors.

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# IPO READINESS STRATEGIES: NAVIGATING THE LEGAL COMPLEXITIES

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August 3, 2011

## Disclosure Controls and Procedures

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- ❖ A public company must maintain disclosure controls and procedures.
- ❖ CEO and CFO of a public company must certify that an effective process is in place ensuring that required material information about the company is included in the company's reports.
- ❖ Management should be prepared to evaluate, with the participation of the CEO and CFO, the effectiveness of the company's disclosure controls and procedures as of the end of each fiscal quarter.
- ❖ Disclosures in Form S-1 often serve as building blocks for the future disclosures in Form 10-K and Forms 10-Q.

## What are disclosure controls and procedures?

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- ❖ *Disclosure controls and procedures* → the company's controls and procedures designed to ensure that information required to be disclosed in Form 10-K, Forms 10-Q and Forms 8-K is:
  - recorded, processed, summarized and reported within the time periods specified in the SEC rules and forms; and
  - accumulated and communicated to the management, including CEO and CFO as appropriate to allow timely decisions regarding required disclosure.



## What is included in CEO and CFO certifications? (Exhibits 31.1 and 31.2 to Form 10-K and Forms 10-Q)

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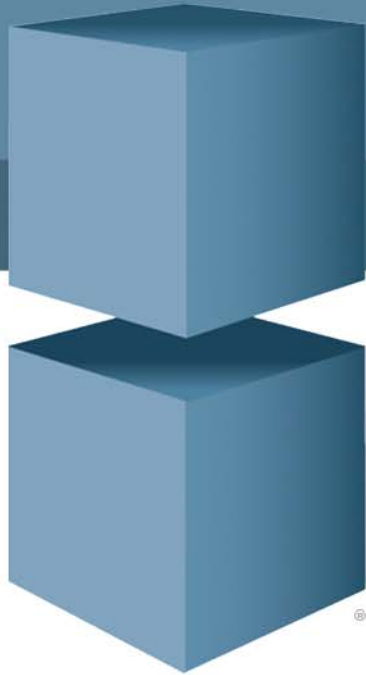
- ❖ Each CEO and CFO certification states that the officer:
  - is responsible for establishing and maintaining disclosure controls and procedures;
  - designed such disclosure controls and procedures, or caused them to be designed under the officer's supervision, to ensure that material information relating to the company is made known to the officer by others at the company; and
  - evaluated the effectiveness of the company's disclosure controls and procedures as of the end of the period covered by the Form 10-K or 10-Q and presented in such report the officer's conclusions about the effectiveness of the disclosure controls and procedures.

# Be prepared to review and evaluate disclosure controls and procedures

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- ❖ Form disclosure committee:
  - responsible for considering the materiality of information and determining disclosure obligations on a timely basis;
  - reporting to CEO and CFO who have express responsibility for designing, establishing, maintaining, reviewing and evaluating the disclosure controls and procedures; and
  - consisting of principal accounting officer (or the controller), general counsel, principal risk management officer, chief investor relations officer and heads of significant business units.
- ❖ Hold regular meetings of the disclosure committee.
- ❖ Draft subcertifications to be signed by members of the disclosure committee.

# PAUL D. BROUDE



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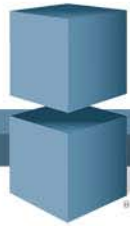


# Address IP Issues Now

## Do you own your Intellectual Property?

- Do you have assignments of inventions from all current and former employees?
- Do you have assignments of inventions from all consultants and contractors?
- Review your patent and trademark portfolio
- Review your domain name strategy
- If you have any doubt, clean up title now, as claims will come out of the woodwork once your plans to go public are known.





# Address IP Issues Now

Do you use any Open Source software?

- Conduct a Black Duck review of your code to identify any open source components
- Verify that you have any required licenses
- Revise code as necessary to avoid disclosure/licensing requirements





# Address IP Issues Now

Do you license any Intellectual Property?

- Review your license agreements to make sure they are valid.
- Consider amending/revising agreements before you lose leverage.
- Consider extending/renewing if appropriate.
- Make sure the agreements allow you to disclose them in your registration statement





# Address IP Issues Now

Can you sell or license your Intellectual Property?

- Review export control issues
- Obtain any necessary licenses
- Review technology transfer limitations related to sensitive technology for both offshore sales and offshore developers



# Address Stock Compensation Issues

## Now



## SEC comments on stock compensation issues are universal

- Be able to demonstrate that shares and options granted were at fair market value on the date of grant
- Be prepared to defend the company's valuation methodology
- Goal is to avoid restating financial statements due to revised compensation charges
- Complex analysis which has the ability to delay an IPO while issues are resolved





# Address Stock Compensation Issues Now



- Engage an independent valuation firm
- Perform contemporaneous valuations on a quarterly basis
- Establish a pattern of quarterly option grants using valuations



# Address Stock Compensation Issues Now

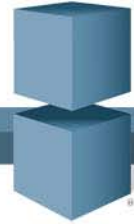


- Impact of comparable company group
- Impact of stock sales by the company
- Impact of secondary sales by shareholders
- Impact of IPO process



# Address Stock Compensation Issues

## Now



- SEC will require complete disclosure in S-1
- Be prepared to provide data for prior 18 months
- Articulate reasons for officer and director grants





# Paul D. Broude



- Paul Broude is a partner with Foley & Lardner LLP, where he is a member of the Transactional & Securities and Private Equity & Venture Capital Practices, vice chair of the firm's Emerging Technologies Industries Team, and a member of the Life Sciences Industry Team. He represents a wide range of publicly and privately held companies, entrepreneurs and private equity funds in technology and other business ventures.
- Mr. Broude's experience includes:
  - Representing issuers, investment banking firms and private equity investors in equity and debt financings, including public offerings, private placements, venture capital and other financings
  - Representing a wide variety of buyers and sellers in merger and acquisition transactions, including acquisitions of publicly held companies
  - Representing management groups and boards of directors in "going private" transactions
  - Representing private equity firms in fund formation, investing, compliance issues and day-to-day matters
  - Structuring and negotiating licensing arrangements and strategic partnerships
  - Counseling businesses on a wide range of day-to-day legal and business issues, including securities laws compliance, corporate governance issues and compensation planning for key executives
- In 2010 and 2011, the *Legal 500* recognized Mr. Broude for his work in the area of mergers & acquisitions and he has been named several times to the *Massachusetts Super Lawyers®* lists, an honor received by only 5% of Massachusetts attorneys.
- Mr. Broude also has served as a representative to the U.S. Securities and Exchange Commission's Council on Capital Formation. He is a graduate of the Harvard Law School (J.D., *cum laude*, 1982) and Brandeis University (B.A. *magna cum laude*, 1979).



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# IPO READINESS STRATEGIES: NAVIGATING THE LEGAL COMPLEXITIES

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August 3, 2011

# Compliance with Sarbanes-Oxley Act

- ❖ Corporate Governance Matters (SEC and NYSE/NASDAQ Requirements):
  - composition of the board of directors and board committees
  - NYSE/NASDAQ requirements and transition periods for IPOs
  - code of ethics
  
- ❖ Financial Reporting:
  - internal control over financial reporting
  - non-GAAP financial measures
  - off-balance sheet arrangements
  
- ❖ Management Issues:
  - forfeiture of executive's compensation in connection with a restatement
  - no personal loans to directors or executive officers
  - accelerated Section 16 reporting by directors and executive officers

# Compliance with Sarbanes-Oxley Act – Corporate Governance Matters

- ❖ Evaluate the composition of the board of directors to make sure that it complies with the SEC and NYSE/NASDAQ corporate governance requirements (use directors' and officers' questionnaires)
- ❖ Establish the audit committee, compensation committee and nominating committees of the board
- ❖ Identify the audit committee financial expert
- ❖ Identify specific experience, qualifications, attributes or skills that lead to the conclusion that the person should serve as the company's director or committee member
- ❖ Set up the schedule of board and committee meetings (including executive sessions of independent directors)
- ❖ Draft charters of the board committees
- ❖ Draft the code of ethics to meet the SEC and NYSE/NASDAQ requirements
- ❖ Draft corporate governance guidelines (NYSE requirement)

# Compliance with Sarbanes-Oxley Act – Corporate Governance Matters

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## □ Audit Committee Responsibilities – SEC Requirements:

- appoint, compensate, retain and oversee the work of any registered public accounting firm, which should report directly to the audit committee;
- establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters;
- establish procedures for the anonymous submission by employees regarding questionable accounting or auditing matters;
- have authority to engage independent counsel and other advisers; and
- the company must provide appropriate funding, as determined by the audit committee, to compensate accountants and advisers as well as to pay administrative expenses of the audit committee.



# Compliance with Sarbanes-Oxley Act – Corporate Governance Matters

## ➤ Composition of Board of Directors and Board Committees:

### □ Audit Committee Composition – SEC Requirements

At least three members, each of whom is independent:

- Audit committee member cannot accept, directly or indirectly, any consulting, advisory or other compensatory fee from the company or any subsidiary (other than as a member of the audit committee, the board or any other committee or fixed amounts of compensation under a retirement plan)
- Audit committee member cannot be an affiliated person of the company or any subsidiary (i.e., cannot be the beneficial owner of more than 10% of the company's voting securities or an executive officer of the company, an executive officer of an affiliate, a director who is also an employee of an affiliate, a general partner of an affiliate and a managing member of an affiliate)

# Compliance with Sarbanes-Oxley Act – Corporate Governance Matters

## □ Audit Committee Financial Expert – SEC Requirements

At least one audit committee member should be designated as an audit committee expert who:

- understands generally accepted accounting principles and financial statements;
  - has experience preparing, auditing, analyzing or evaluating financial statements;
  - understands internal control over financial reporting;
  - understands audit committee functions; and
  - has the foregoing skills due to education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in a position involving similar functions; experience actively supervising a person performing the foregoing functions; experience overseeing companies or accountants with respect to the preparation, auditing or evaluation of financial statements.
- NYSE/NASDAQ Requirements and Transition Periods for IPOs

# Compliance with Sarbanes-Oxley Act – Corporate Governance Matters – NYSE

## IPO Transition Period

At least a majority of independent members must serve on the board within one year of the date the company's securities first trade (i.e., listing date)

The company must have at least one member on its audit committee by the listing date, at least two members within 90 days of the listing date and at least three members within one year of the listing date.

## No IPO Transition Period

At least a majority of independent members serve on the board as of listing date

The audit committee must have at least three independent members as of the listing date

# Compliance with Sarbanes-Oxley Act – Corporate Governance Matters – NYSE

## IPO Transition Period

The company must have at least one independent member on its audit committee that satisfies the SEC and stock exchange requirements by the listing date, at least a majority of independent members within 90 days of the effective date of its registration statement and a fully independent committee within one year of the effective date of its registration statement

## No IPO Transition Period

The audit committee must have at least three independent members as of the listing date

# Compliance with Sarbanes-Oxley Act – Corporate Governance Matters – NYSE

## IPO Transition Period

The company must have at least one independent member on its nominating committee and at least one independent member on its compensation committee by the date the transaction closes, at least a majority of independent members on each committee within 90 days of the listing date and fully independent committees within one year of the listing date

## No IPO Transition Period

The company must have the nominating and compensation committees composed entirely of independent directors as of the listing date

# Compliance with Sarbanes-Oxley Act – Corporate Governance Matters – NYSE

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## IPO Transition Period

The company's nominating, compensation and audit committee charters, corporate governance guidelines and code of business conduct and ethics can be available on the company's website by the earlier of the date the IPO closes or five business days from the listing date

## No IPO Transition Period

The company's nominating, compensation and audit committee charters, corporate governance guidelines and code of business conduct and ethics must be available on the company's website as of the listing date

# Compliance with Sarbanes-Oxley Act – Corporate Governance Matters – NASDAQ

## IPO Transition Period

- a company listing in connection with its initial public offering shall have twelve months from the date of listing to comply with the majority independent board requirement

## No IPO Transition Period

- a majority of the board of directors must be comprised of independent directors as defined in Rule 5605(a)(2) at the time of listing

# Compliance with Sarbanes-Oxley Act – Corporate Governance Matters – NASDAQ

## IPO Transition Period

- a company listing in connection with its initial public offering is permitted to phase in its compliance with the independent committee requirements set forth in Rule 5605(d) and (e) as follows: (1) one independent member at the time of listing; (2) a majority of independent members within 90 days of listing; and (3) all independent members within one year of listing

## No IPO Transition Period

- a company must have a compensation committee and a nominating committee comprised solely of independent directors at the time of listing
- a company must adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available



# Compliance with Sarbanes-Oxley Act – Corporate Governance Matters – Code of Ethics

## ➤ Code of Ethics for Senior Financial Officers

- ❑ applies to the company's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions.
- ❑ should be designed to deter wrongdoing and to promote:
  - honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;
  - full, fair, accurate, timely, and understandable disclosure in reports and documents that a registrant files with, or submits to, the Commission and in other public communications made by the registrant;
  - compliance with applicable governmental laws, rules and regulations;
  - the prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and
  - accountability for adherence to the code.

# Compliance with Sarbanes-Oxley Act – Financial Reporting

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- ❖ Discuss with the auditors the company's internal control over financial reporting
- ❖ Consider engaging consultants in connection with ICFR compliance
- ❖ Review Section 302 and Section 906 certifications to be signed by CEO and CFO in connection with future filings of Form 10-K and Forms 10-Q
- ❖ Prepare Management's Discussion and Analysis of Financial Condition and Results of Operations:
  - evaluate whether the Form S-1 should include non-GAAP financial measures and, if so, prepare necessary disclosures for the Form S-1;
  - evaluate whether the company is using off-balance sheet arrangements and, if so, prepare necessary disclosures for the Form S-1; and
  - add contractual obligations disclosure table.

# Compliance with Sarbanes-Oxley Act – Financial Reporting – ICFR

## ❖ Internal Control over Financial Reporting (ICFR)

- A public company must maintain ICFR.
- CEO and CFO of a public company must certify that an effective process is in place ensuring that required material financial information about the company is accurately included in the company's reports.
- Management should be prepared to evaluate, with the participation of the CEO and CFO, (i) the effectiveness of the ICFR as of the end of each fiscal year; and (ii) any change in the ICFR that occurred during each of the company's fiscal quarters, that has materially affected, or is reasonably likely to materially affect, the company's ICFR.
- The company that is an accelerated filer or a large accelerated filer must provide in its Form 10-K the registered public accounting firm's attestation report on the company's ICFR.

# Compliance with Sarbanes-Oxley Act – Financial Reporting – ICFR

- ❖ **ICFR → a process designed** by, or under the supervision of, the company's CEO and CFO, and effected by the company's board of directors, management and other personnel, **to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements** for external purposes in accordance with GAAP **and includes those policies and procedures that:**
  - **pertain to the maintenance of records** that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the company;
  - **provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP**, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and
  - **provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the company's assets** that could have a material effect on the financial statements.

# Compliance with Sarbanes-Oxley Act – Financial Reporting – ICFR

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- ❖ Transition Period for Management’s Report and Auditors’ Attestation Report in Form 10-K
- The company need not provide management's annual report on ICFR and the auditor’s attestation report, if any, until it either has been required to file an annual report on Form 10-K for the prior fiscal year or has filed an annual report with the SEC for the prior fiscal year.
- The company should include the following statement in the first annual report that it files with the SEC:

“This annual report does not include a report of management's assessment regarding internal control over financial reporting or an attestation report of the company's registered public accounting firm due to a transition period established by rules of the Securities and Exchange Commission for newly public companies.”

# Compliance with Sarbanes-Oxley Act – Financial Reporting – CEO/CFO Certifications

- Exhibits 31.1 and 31.2 (Section 302):
  - ❑ financial information included in the report fairly presents in all material respects the financial condition, results of operations and cash flows of the company
  - ❑ CEO/CFO are responsible for establishing and maintaining ICFR and have:
    - designed such ICFR, or caused such ICFR to be designed under their supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP;
    - disclosed in the report any change in the company's ICFR that occurred during the company's most recent fiscal quarter (the fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the company's ICFR; and
    - disclosed, based on their most recent evaluation of ICFR, to the company's auditors and the audit committee:
      - (a) all significant deficiencies and material weaknesses in the design or operation of ICFR which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
      - (b) any fraud, whether or not material, that involves management or other employees who have a significant role in the company's ICFR.

# Compliance with Sarbanes-Oxley Act – Financial Reporting – CEO/CFO Certifications

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- Exhibits 32.1 and 32.2 (Section 906)
  - ❑ The report fully complies with the applicable requirements of the Securities Exchange Act of 1934; and
  - ❑ The information contained in the report fairly presents, in all material respects, the financial condition and results of operations of the company.

# Compliance with Sarbanes-Oxley Act – Financial Reporting – MD&A

- Non-GAAP Financial Measures:

add reconciliation to GAAP and a statement disclosing the reasons why the company's management believes that presentation of non-GAAP financial measures provides useful information to investors regarding the company's financial condition and results of operations

- Off-Balance Sheet Arrangements:

discuss the company's off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on the company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that is material to investors

- Contractual Obligations:

disclose contractual payments due by period: less than 1 year, 1-3 years, 3–5 years, more than 5 years for long-term debt obligations, capital lease obligations, operating lease obligations, purchase obligations, and other long-term liabilities reflected on the company's balance sheet under GAAP



# Compliance with Sarbanes-Oxley Act – Management Issues

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## ➤ Forfeiture of Bonuses and Profits

If the company is required to prepare an accounting restatement due to material noncompliance with any financial reporting requirement under the securities laws resulting from misconduct, the CEO and CFO of the company must reimburse the company for:

- any bonus or other incentive-based or equity-based compensation received by them from the company during 12 months following the earlier of the first public issuance or filing with the SEC of the document embodying such financial reporting requirement; and
- any profits realized from the sale of the company's securities during the 12-month period.

# Compliance with Sarbanes-Oxley Act – Management Issues

- No Personal Loans to Executive Officers and Directors
  - ❑ Subject to limited exceptions, the company cannot, directly or indirectly extend or maintain credit, arrange for an extension of credit or renew an extension of credit to the company's directors and officers.
  - ❑ Identify all outstanding loans to executive officers and directors.
  - ❑ If loans do not qualify for available exemptions, make arrangements to get these loans paid off.
  - ❑ Provide applicable related party transaction disclosures.
  
- Accelerated Electronic Section 16 Filings
  - ❑ Identify Section 16 officers.
  - ❑ File Form 3 and establish procedures to file Forms 4 within 2 business days after the transaction.
  - ❑ Prepare Insider Trading Policy and establish trading windows.

# Compliance with Dodd-Frank Act

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- ❖ Focus on Executive Compensation:
  - say on pay and golden parachutes
  - executive compensation v. the company's performance
  - pay ratios
  - clawback provisions
  
- ❖ Enhanced Compensation Committee Standards
  
- ❖ Incentives for Whistleblowers

# Compliance with Dodd-Frank Act

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## ❖ Focus on Executive Compensation

### ➤ Say on Pay and Golden Parachutes:

- ❑ public companies are required to conduct a separate shareholder advisory vote:
  - to approve the compensation of executives (the "say-on-pay" vote), as disclosed pursuant to Item 402 of Regulation S-K; and
  - to permit shareholders to weigh in on how often a company should conduct a shareholder advisory vote on executive compensation (the "frequency of say-on-pay" vote).
- ❑ review and update policies related to executive compensation
- ❑ draft compensation discussion and analysis and other executive compensation disclosure with say on pay votes in mind

New public companies that qualify as smaller reporting companies will not be subject to "say-on-pay" and "frequency of say-on-pay" votes until the first meeting of shareholders at which directors will be elected occurring on or after January 21, 2013.

# Compliance with Dodd-Frank Act

- Executive Compensation v. Performance; Pay Ratios
  - ❑ SEC rules to be proposed and adopted in August – December 2011
  - ❑ disclose the relationship between executive compensation actually paid and the company's financial performance
  - ❑ disclose the median of total annual compensation of all employees, except the CEO; total annual compensation of the CEO; and the ratio of the median of the employees' total annual compensation and the CEO's total annual compensation
  
- Clawback Provisions
  - ❑ SEC rules to be proposed and adopted in August – December 2011
  - ❑ If the company is required to prepare an accounting restatement due to the material noncompliance with any financial reporting requirement under the securities laws, the company will recover from any current or former executive officer who received incentive-based compensation (including stock options) during the 3-year period preceding the date on which the company is required to prepare an accounting restatement, based on the erroneous data, in excess of what would have been paid to the executive officer under the accounting restatement.
  - ❑ More stringent requirements than under the Sarbanes-Oxley Act

# Compliance with Dodd-Frank Act

## ➤ Enhanced Compensation Committee Standards

- ❑ On March 30, 2011, the SEC proposed rules directing national securities exchanges to establish listing standards that require each member of a listed issuer's compensation committee to be "independent," as defined in the listing standards of the exchanges adopted in accordance with the proposed rule.
- ❑ Proposed compensation committee standards are based on concepts used in the SEC regulation of the audit committee.
- ❑ SEC rules are scheduled to be adopted in August – December 2011

## ➤ Incentives for Whistleblowers

- ❑ SEC is required to pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the SEC with original information about a violation of the securities laws leading to the successful enforcement of a covered judicial or administrative action that results in monetary sanctions exceeding \$1,000,000.
- ❑ The amount of the award must be at least 10 percent but no more than 30 percent of the monetary sanctions that the SEC and the other authorities are able to collect.
- ❑ Draft whistleblower policies
- ❑ No retaliation against whistleblowers

## Publicity and Company Website Review

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- ❖ No Gun-Jumping
  - No offers of sales of any securities unless a registration statement has been filed with the SEC
  - Broad interpretation of an offer to sell as any attempt to dispose of the security for value → any publicity (even if the IPO is not mentioned) may be construed as such attempt and result in “gun-jumping” or unlawful publicity regarding the offering
  
- ❖ Penalties for Gun-Jumping:
  - delaying the IPO until after a specified “cooling-off” period (days, weeks, months)
  - making the company disclose gun-jumping information in the prospectus
  - Including a “rescission risk factor” in the prospectus

# Publicity and Company Website Review

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## ❖ Safe Harbors

- safe harbor for communications made by or on behalf of the company more than 30 days before the filing of the registration statement:
  - do not reference the IPO
  - take reasonable steps within the company's control to prevent further distribution or publication of information during 30 prior to filing Form S-1
- safe harbor for regularly released factual business information:
  - do not mention the IPO
  - do not use as part of the offering activities



## Publicity and Company Website Review – Recommended Action Items

- ❖ Avoid interviews, press releases or other public statements regarding the offering prior to effectiveness of Form S-1
- ❖ Engage in normal advertising, consistent with past practices; do not increase the advertising campaign or change the focus to emphasize the company and its prospects rather than the products
- ❖ Securities counsel should review all proposed press releases, sales and marketing literature and other statements about the business and operations of the company
- ❖ Public statements should only be made through a designated senior member of management (CEO or CFO)
- ❖ The company and securities counsel should review the company's website, including hyperlinks and blogs
- ❖ Prepare the website for compliance with SEC disclosure requirements for public companies

# Publicity and Company Website Review



**Investor Relations**

**IR Home**

**Corporate Governance**  
[Vision Statement](#)  
[Governance Guidelines](#)  
[Code of Ethics](#)  
[Committees & Charter](#)  
[Board of Directors](#)  
[Executive Management](#)

**Corporate Information & Investor Documents**  
[Annual Reports](#)  
[Financial Releases](#)  
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[Channel Share Slide](#)  
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[SEC Documents](#)

**Stock Information**  
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## Investor Relations

**Lowe's Vision** - We will provide customer-valued solutions with the best prices, products and services to make Lowe's the first choice for home improvement.

With fiscal year 2010 sales of \$48.8 billion, Lowe's Companies, Inc. is a FORTUNE® 50 company that serves approximately 15 million customers a week at more than 1,750 home improvement stores in the United States, Canada and Mexico. Founded in 1946 and based in Mooresville, N.C., Lowe's is the second-largest home improvement retailer in the world. For more information, visit [Lowe's.com](#).

**Electronic Delivery**

Lowe's offers shareholders electronic delivery of the Annual Report and Proxy Statement over the Internet. Enroll now and enjoy the benefits of the quickest delivery of your proxy materials while also eliminating paper documents from your files.

[ENROLL](#)

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**Recent News Headlines**

05/27/11 - Lowe's Holds Annual Meeting of Shareholders

05/26/11 - Lowe's to Webcast Presentation from the Sanford C. Bernstein & Co. Strategic Decisions Conference

05/20/11 - Lowe's to Webcast Annual Meeting of Shareholders

05/16/11 - Lowe's Reports First Quarter Sales and Earnings Results

**Stock Quote**

|             |                |
|-------------|----------------|
| Last Price: | <b>\$22.60</b> |
| Change      | - 1.48% 0.34   |
| Day High    | \$22.94        |
| Day Low     | \$22.52        |
| Volume      | 5,979,300      |

12:42 PM ET on 07/22/11  
(20 minute delay)

**Earnings Release Dates**

2Q11 Mon., Aug 15, 2011  
 3Q11 Mon., Nov 14, 2011  
 4Q11 Mon., Feb 27, 2012  
 1Q12 Mon., May 21, 2012

**Webcast Events (view archive)**

 Lowe's First Quarter 2011 Earnings Conference Call  
 05/16/11 at 9:00 AM ET

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2010 Annual Report



**Buy Stock Direct**

Lowe's has a direct stock purchase plan (DSPP) and a dividend reinvestment plan (DRIP).



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# Hot Disclosure Topics

- ❖ Support for Factual Statements
  - “We are the world’s largest professional network on the Internet”
  - Third-party statements:
    - Need to be able to cite the source of information
    - To the extent that any report was prepared for the company or for use in the prospectus – need to file a consent from that party to use such report
- ❖ Use of Proceeds (more specific disclosure regarding the use of proceeds)
- ❖ Executive Compensation (the SEC challenges failure to disclose performance metrics based on potential competitive harm)
- ❖ Director Qualifications (specific experience that led to the conclusion that each director should serve on the board of directors)
- ❖ Risk Management Disclosures (the SEC stresses the importance of reasoning behind the conclusion not to include Item 402(s) disclosure)