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Sheppard, Mullin, Richter & Hampton LLP

Q4 2012

Market Trends & Legal Developments for Dealmakers

January 31, 2013

Agenda

Market Trends

- Venture Capital
- Private Equity
- Initial Public Offerings
- Mergers & Acquisitions

Legal Updates

- Jobs Act & Capital Markets
- Mergers & Acquisitions
- General Corporate & Corporate Governance

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SMRH Market Trends & Legal Updates

Venture Capital

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Market Trends - Total Investments

Market Trends
- ***Venture Capital***
  - Private Equity
  - Initial Public Offerings
  - Mergers & Acquisitions
- Legal Updates
  - JOBS Act & Capital Markets
  - Mergers & Acquisitions
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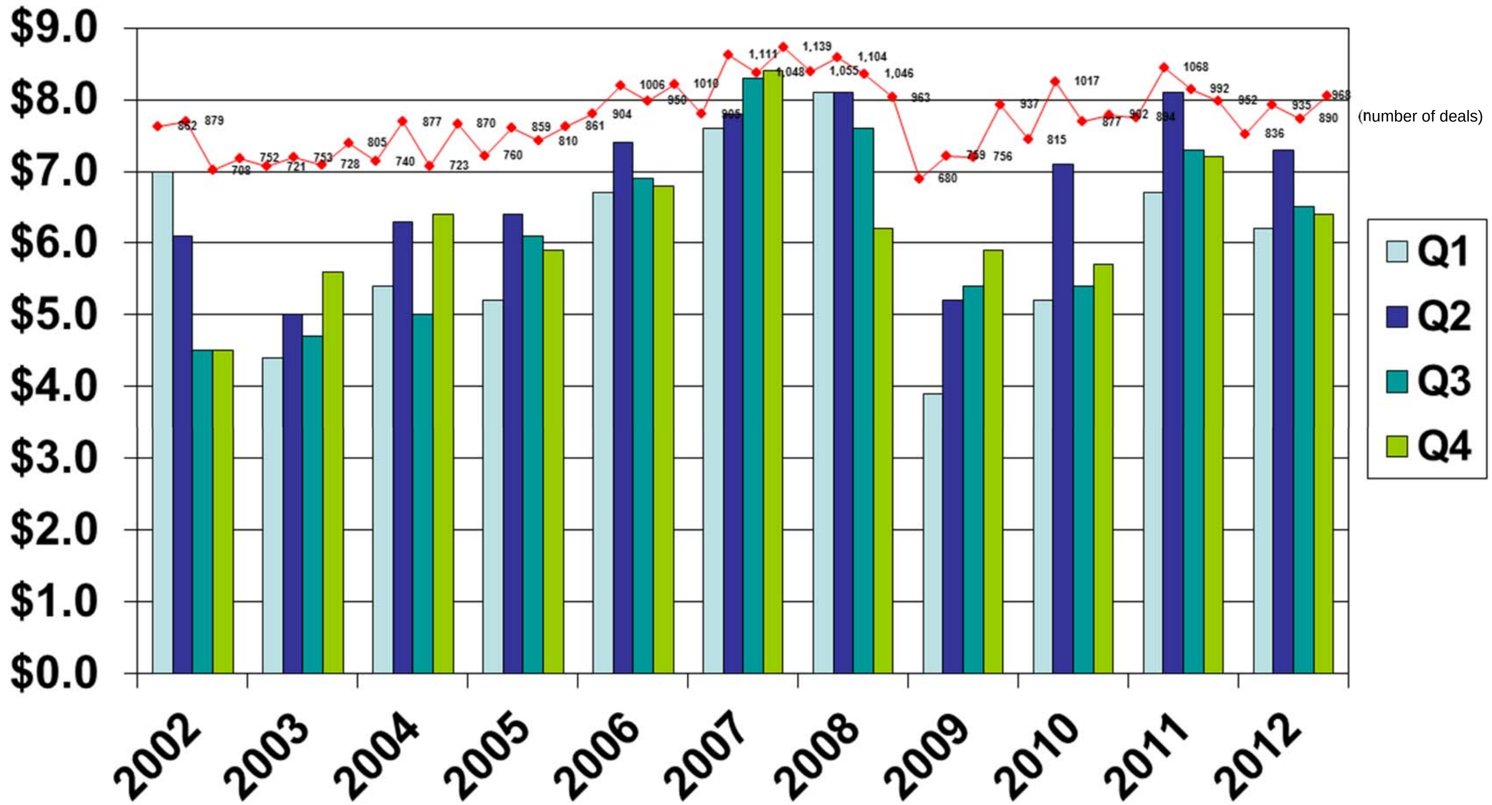
($ in billions)



Investments in Q4 2012 totaled $6.4B in 968 deals, a 3% decrease in dollars but a 5% increase in deals from Q3 2012, when $6.49B went into 890 deals

Venture capitalists invested $26.5 billion in 3,698 deals in 2012, a decrease of 10% in dollars and a 6% decline in deals over the prior year

Source: PWC/NVCA/Thomson Reuters

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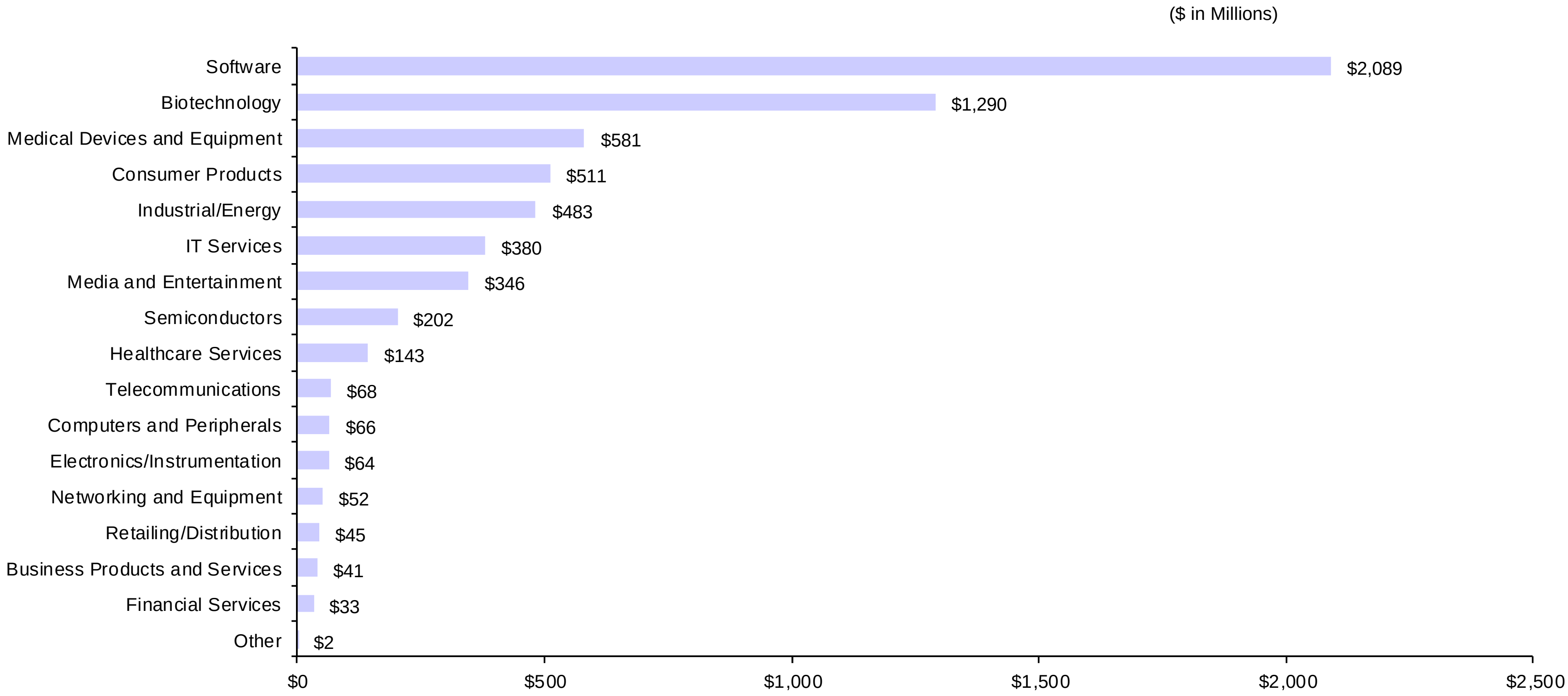
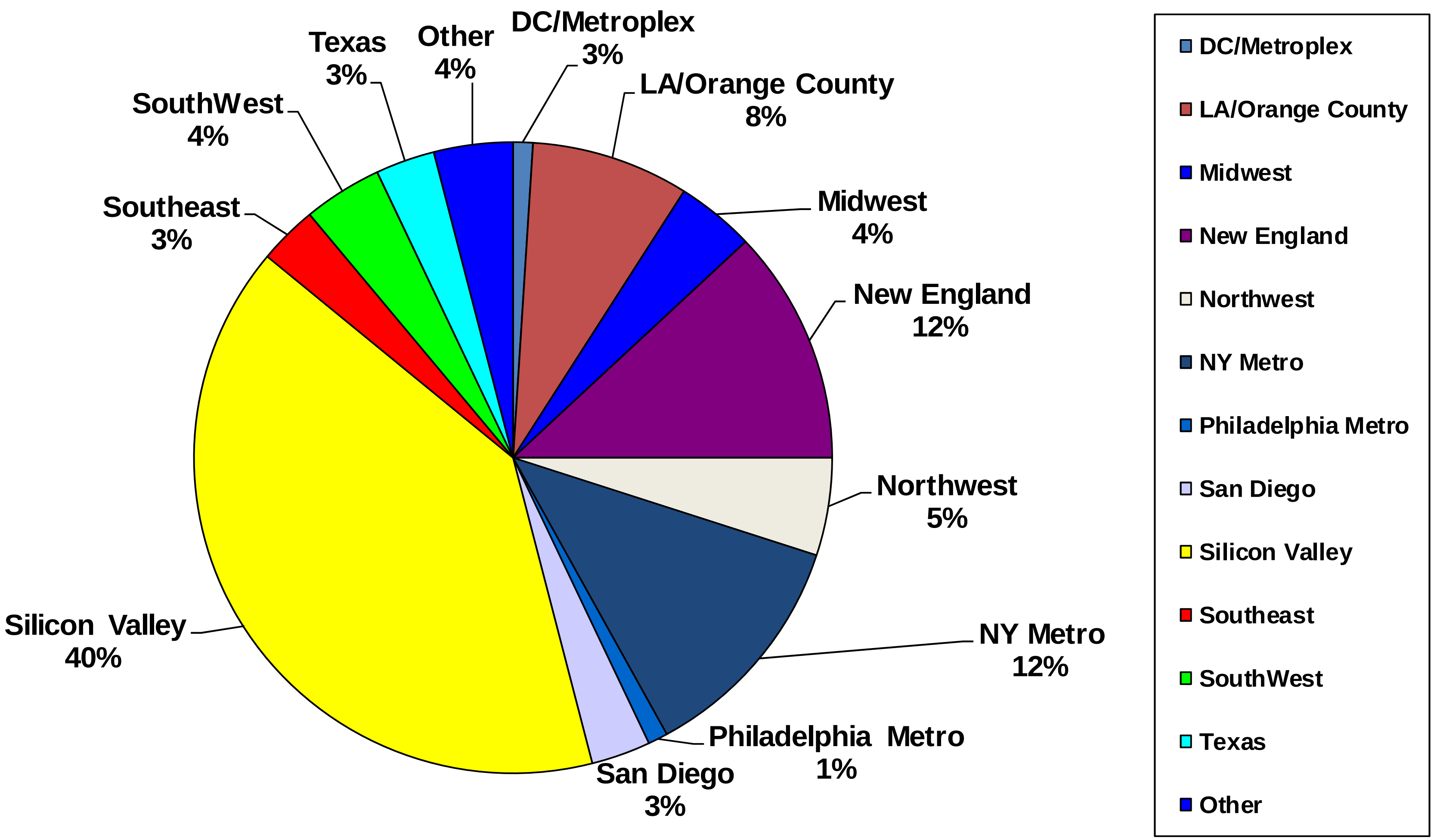
Q4 2012 Investments by Industry



Although capital investment into the software sector decreased slightly in Q4 2012 from its level in Q3 2012, it continues to lead with close to $2.1B of total investments. Consumer Products and Services enjoyed a 232% increase in funding over Q3 2012 levels

Source: PWC/NVCA/Thomson Reuters

Q4 2012 Investments by Region



Silicon Valley continues its domination of venture investing, with 40% of total venture capital investments, while NY and LA continue to heat up

Source: PWC/NVCA/Thomson Reuters

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Venture Fundraising

Year/Quarter	Number of Funds	Venture Capital ($M)
2008	215	25,577.2
2009	162	16,187.9
2010	176	13,669.8
2011	187	18,745.7
2012	182	20,569.9
4Q'10	50	3,712.2
1Q'11	49	7,699.5
2Q'11	48	2,713.3
3Q'11	66	2,116.0
4Q'11	54	6,217.0
1Q'12	54	5,987.4
2Q'12	46	6,203.7
3Q'12	56	5,088.0
4Q'12	42	3,290.8

Source: Thomson Reuters and National Venture Capital Association

- U.S. venture capital firms raised $20.6 billion from 182 funds in 2012, a 10% increase by dollar commitments compared to 2011
- During Q4 2012, 42 U.S. venture capital funds raised $3.3 billion. This level marks a 35% decrease by dollar commitments and a 25% decrease by number of funds compared to Q3 2012

The top five venture capital funds accounted for 55 percent of total fundraising for Q4 2012, on par with Q3 2012

Source: PWC/NVCA/Thomson Reuters

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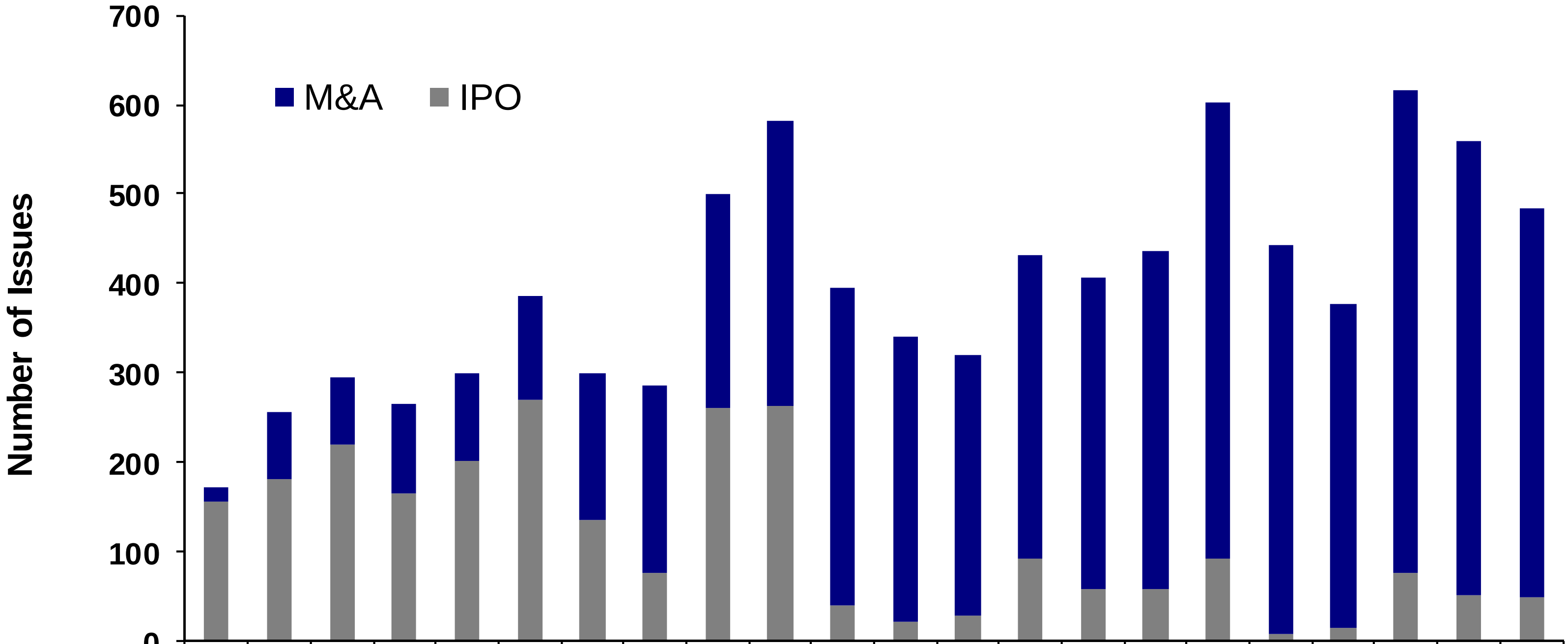
Venture-Backed Liquidity Events



	'91	'92	'93	'94	'95	'96	'97	'98	'99	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	12
M&A	17	76	74	100	97	116	164	209	240	317	353	318	290	339	350	378	510	434	363	539	506	435
IPO	156	181	220	166	202	270	136	77	260	264	41	22	29	93	57	57	93	9	15	77	52	49

While the venture capital and startup communities were optimistic about a more robust IPO market in 2012, political, economic and market conditions served as the backdrop for a series of fits and starts which hurt volume growth throughout the year for public offerings and acquisitions alike

Source: PWC/NVCA/Thomson Reuters

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Private Equity

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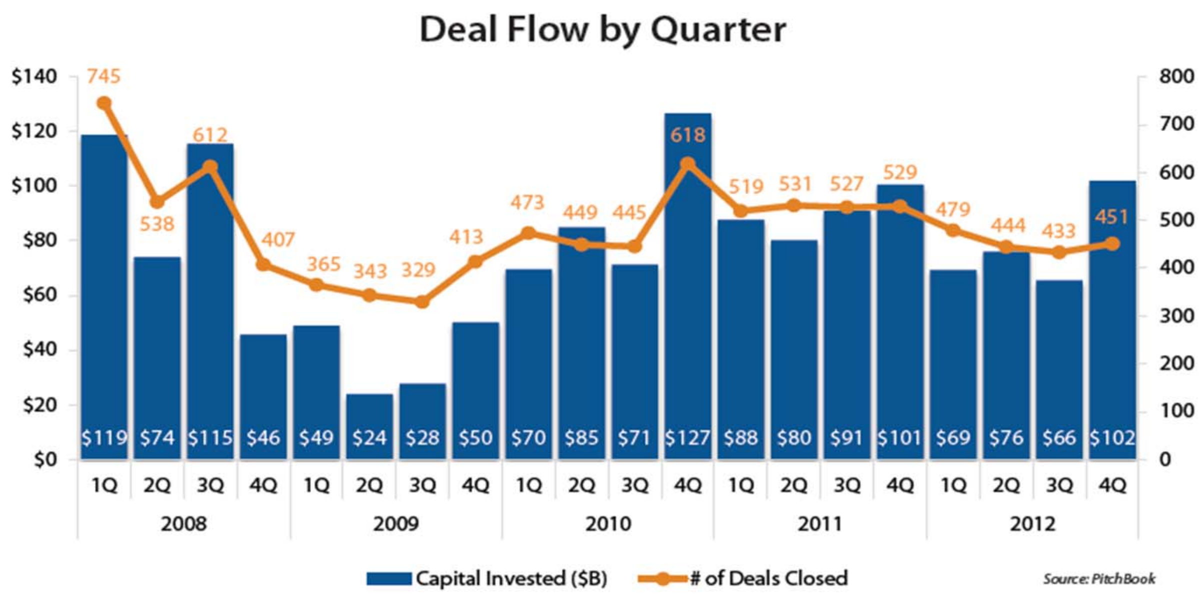
Total Private Equity Deal Flow

- Investors were particularly keen to complete large deals in Q4 2012 with the threat of increased taxes, as there were 9 transactions of $1 billion or more in the final quarter of the year
- These large deals helped push the total capital invested in Q4 2012 to $102 billion, the second highest quarterly total in the last four years
- In 2012, PE firms exited more companies via secondary buyouts than corporate acquisitions—the first time this has ever happened. Furthermore, 17% of buyouts executed in 2012 were for companies that already had PE backing, also a record



Heading into 2013, the fundraising environment may continue to pose challenges for smaller PE firms

Q4 Transactions by Industry Sector

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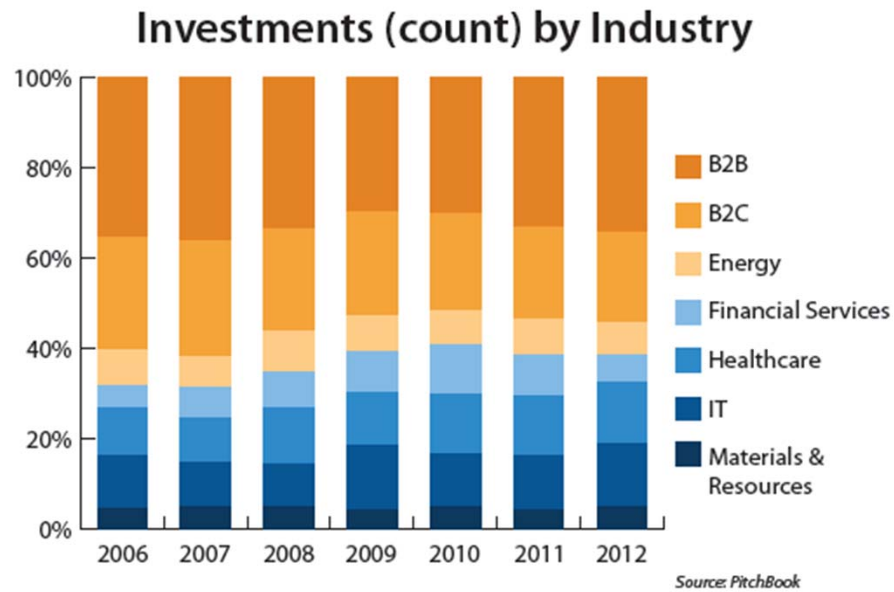
With deal volume falling 14% in 2012, many industries saw a contraction in completed deals compared to 2011. Information Technology (IT) was a stand-out as it experienced a slight uptick

- The most significant contraction was in Energy, where capital invested dropped by 46% as the industry contracted from 16% of total PE capital invested in 2011 to 10% in 2012
- BIB deal-making has expanded every year since 2009 and represented 34% of activity in 2012



Heading into 2013, many investors are optimistic about continuing opportunities in the B2B space as corporations have large cash reserves and are in need of technology upgrades

Q4 Transactions by Region

- Deal-making in the South dropped a substantial 27% in 2012 (down from 388 to 285), mainly due to significant decreases in B2B and B2C investment
- No industry was immune to the downturn in deal-making in the Mid-Atlantic as every industry saw its deal count fall by at least 20% in 2012, with deal count dropping from 441 to 296
- While the increase was modest, the Midwest was the sole region to see an uptick in deal activity in 2012, with an increase from 59 to 61

Deal Counts for Other Regions

	West Coast	Great Lakes	New England	Southeast	Mountain
2011	320	474	135	288	146
2012	**295**	**471**	**124**	**275**	**141**

Capital invested in the Midwest nearly doubled from $4.3 billion in 2011 to $8.3 billion in 2012. The main driver of the growth was the B2C industry, where deal flow expanded by 55%

Private Equity Exit Activity

- PE firms realized 172 investments during Q4 2012, the second most ever and an increase of 39% over the previous quarter
- The amount of capital exited skyrocketed 165% in Q4 2012 to a record-breaking $53 billion as investors showed a commitment to realizing their larger investments before the new year

The race to exit companies in Q4 2012 will have ramifications on exit activity in the near term and may decrease exit activity in early 2013

Initial Public Offerings

Q4 2012 Exit Trends (Venture-Backed Issuers)

Quarter/Year	Total M&A Deals	M&A Deals with Disclosed Values	*Total Disclosed M&A Value ($M)	*Average M&A Deal Size ($M)	**Number of IPO's	Total Offer Amount ($M)	Average IPO Offer Amount ($M)
2007	488	200	30,745.5	153.7	92	12,365.5	134.4
2008-1	129	43	5,201.6	121.0	6	577.5	96.3
2008-2	102	28	3,145.2	112.3	0	0	0.0
2008-3	109	40	5,248.8	131.2	1	187.5	187.5
2008-4	76	23	2,641.3	114.8	0	0	0.0
2008	416	134	16,236.9	121.2	7	765.0	109.3
2009-1	80	19	830.5	43.7	0	0	0.0
2009-2	77	14	1,982.4	141.6	7	997.6	142.5
2009-3	96	30	2,224.3	74.1	2	522.5	261.3
2009-4	98	45	7,327.7	162.8	4	459.7	114.9
2009	351	108	12,364.9	114.5	13	1,979.8	152.3
2010-1	146	36	4,945.1	137.4	8	921.9	115.2
2010-2	108	30	2,681.4	89.4	18	1,548.4	86.0
2010-3	133	36	4,140.9	115.0	17	1,996.0	117.4
2010-4	134	47	5,932.8	126.2	25	3,142.8	125.7
2010	521	149	17,700.3	118.8	68	7,609.1	111.9
2011-1	135	51	5,966.8	117.0	14	1,526.9	109.1
2011-2	92	37	6,202.3	167.6	21	5,883.5	280.2
2011-3	139	43	6,934.5	161.3	5	475.9	95.2
2011-4	122	38	4,989.6	131.3	11	2,803.2	254.8
2011	488	169	24,093.2	142.6	51	10,689.5	209.6
2012-1	112	28	3,671.0	131.1	19	1,682.8	88.6
2012-2	118	31	6,180.2	199.4	12	17,219.1	1434.9
2012-3	110	35	8,088.8	231.1	10	1,140.7	114.1
2012-4	95	26	3,523.2	135.5	8	1,408.4	176.1
2012	435	120	21,463.2	178.9	49	21,451.2	437.8

- Venture-backed initial public offering activity raised $1.4 billion from eight offerings during Q4 2012, a slight decline in volume from the Q3 2012 but a 23% increase in dollars
- For full year 2012, venture-backed initial public offerings raised $21.5 billion from 49 listings, with dollars raised driven by the Facebook offering, representing the strongest annual period for IPOs, by dollar value, since 2000
- For Q4 2012, 95 venture-backed M&A deals were reported, 26 of which had an aggregate deal value of $3.5 billion, a 57% decrease from Q3 2012

Source: Thomson Reuters & National Venture Capital Association
* Only accounts for deals with disclosed values
** Includes all companies with at least one U.S. VC Investor that trade on U.S. Exchanges, regardless of domicile.

Acquisitions of venture-backed companies totaled $21.5 billion for full year 2012, an 11% decline from full year 2011

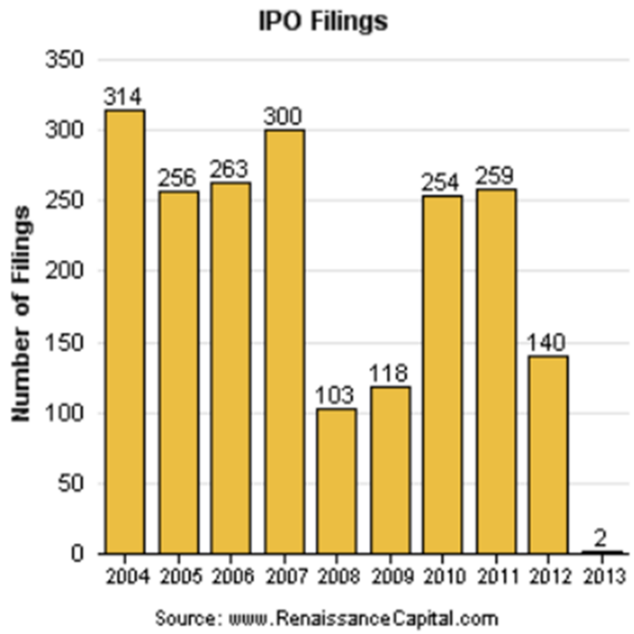
Comparison Average IPO Statistics

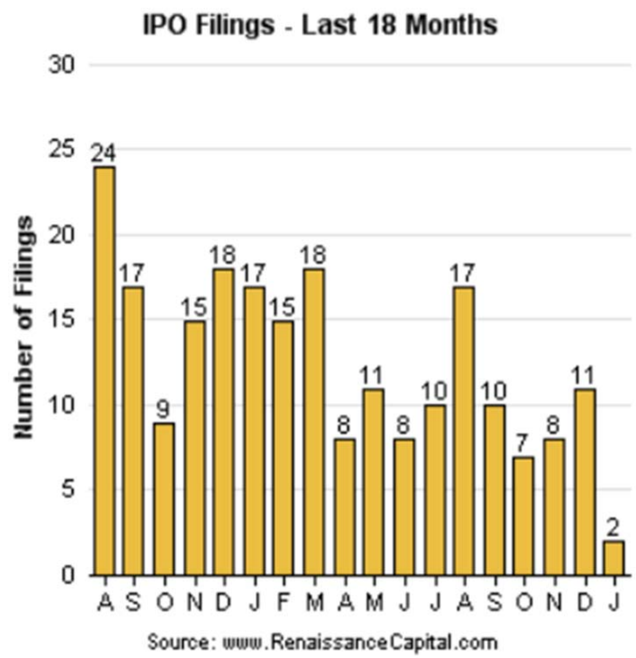
	2009	2010	2011	2012
Average Deal Size:	$479M	$159.9M	$247M	$315M
Underwriting Fees:	4.45%	6.51%	5.54%	3.89%
Issuer Counsel Fees:	$2M	$1.7M	$1.9M	$1.9M
Auditor Fees:	$1.41M	$958K	$1M	$1.1M
Printer Fees:	$400K	$316K	$342K	$372K
Transfer Agent Fees:	$23K	$19.6K	$14.2K	$13.4K
Listing Fees:	$150K	$151K	$159K	$162K
Total Fees as % of Offering Size:	8.62%	10.32%	10.30%	9.92%

Source: SEC filings

The US IPO Market for 2012

- The US IPO market was modestly more active in 2012, with 128 deals, up 2% from the previous year. Total proceeds were up 17% but fell 27% excluding Facebook
- 26 IPOs were filed in Q4 2012
- Technology was once again the most active sector in 2012, accounting for 30% of deals and 48% of proceeds. Deal flow from the financial sector jumped this year, representing 16% of deals

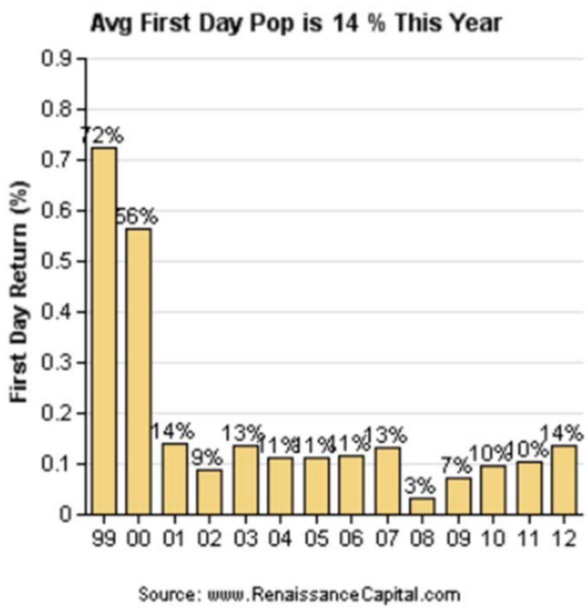




IPO activity, in terms of number of filings, experienced a significant decline over its 2011 pace, with 119 fewer filings in 2012

The US IPO Market for 2012

- 40% of IPOs priced below the range this year, up from 34% last year and near 2010's 42% record
- Only 19% of deals closed below their offer price on the first day compared to 33% in 2011
- Financial stocks led the year with a 31% return, while the health care sector posted a 27% return, driven by a handful of strong-performing biotechs. Technology stocks also performed well, with a 26% average return



The average first-day return this year was 14%, the best since 2001

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Public Market Trading Statistics by Vertical

Industry Segment	Stock Price % Change		LTM Revenue	LTM EBITDA	TEV / Revenue Multiple			TEV / EBITDA Multiple		
	1 Month	12 Month	Growth	Margin	LTM	2012P	2013P	LTM	2012P	2013P
Bellwethers	**2.1%**	**22.4%**	**9.4%**	**31.3%**	**2.2x**	**2.2x**	**2.0x**	**8.4x**	**7.4x**	**6.8x**
Data and Information Services	**2.3%**	**36.4%**	**10.2%**	**28.4%**	**2.8x**	**2.7x**	**2.5x**	**10.3x**	**9.3x**	**8.8x**
Diversified Information Services	2.2%	33.6%	9.2%	28.6%	3.0x	2.7x	2.6x	9.8x	9.7x	8.8x
Financial Data and Media	1.5%	16.8%	10.9%	38.1%	4.3x	4.2x	4.0x	10.2x	9.4x	9.0x
Lender/Mortgage/Real Estate Data and Processing	4.0%	69.2%	10.4%	19.7%	2.3x	2.3x	2.2x	10.5x	7.6x	7.3x
Market Data and Research	1.7%	37.0%	15.6%	16.8%	1.9x	1.8x	1.7x	12.4x	10.4x	9.6x
Internet & Digital Media	**(1.3%)**	**22.2%**	**21.8%**	**20.6%**	**2.3x**	**2.2x**	**2.0x**	**9.6x**	**8.4x**	**7.8x**
Advertising & Marketing	(2.9%)	16.6%	43.1%	28.1%	4.0x	3.6x	2.8x	9.7x	8.5x	8.9x
Content Delivery & Management	(0.4%)	6.8%	17.9%	20.8%	1.9x	1.9x	1.8x	9.6x	7.2x	6.8x
Content & Services	(1.4%)	22.5%	25.1%	14.1%	2.7x	2.6x	2.3x	9.8x	7.7x	8.1x
Diversified Media	0.9%	45.1%	1.7%	23.4%	1.9x	1.9x	1.8x	8.0x	7.8x	7.3x
e-Commerce	(1.7%)	12.6%	23.3%	18.4%	2.6x	2.4x	2.0x	15.5x	12.1x	11.2x
IT and Tech-Enabled Services	**3.3%**	**25.4%**	**13.0%**	**15.5%**	**1.6x**	**1.5x**	**1.1x**	**9.2x**	**9.0x**	**7.4x**
Government IT & BPO	6.5%	22.2%	3.1%	9.8%	0.5x	0.5x	0.5x	11.1x	5.3x	5.3x
IT Services	5.0%	22.8%	9.2%	10.6%	0.6x	0.6x	0.6x	5.9x	5.6x	5.0x
Offshore BPOs	0.8%	20.7%	20.2%	19.4%	2.1x	2.1x	1.8x	10.0x	9.7x	9.5x
Onshore BPOs	2.8%	41.1%	14.1%	14.2%	0.8x	1.0x	1.0x	5.4x	4.6x	4.2x
Software – Application	**(0.8%)**	**19.9%**	**14.9%**	**20.2%**	**3.5x**	**3.2x**	**2.9x**	**13.4x**	**10.7x**	**9.4x**
Customer Engagement/Call Center Management	(10.7%)	0.6%	10.9%	15.9%	2.2x	2.1x	1.9x	13.6x	8.1x	7.4x
Enterprise Software	1.5%	19.7%	9.2%	26.0%	3.2x	3.2x	3.1x	10.2x	10.0x	9.4x
Human Capital Management	(0.8%)	64.3%	47.0%	11.5%	10.5x	9.5x	7.0x	67.4x	34.5x	27.4x
Product Lifecycle Management/Technical Design	0.9%	29.9%	11.3%	20.7%	2.5x	2.5x	2.4x	12.0x	9.0x	8.1x
Vertically Focused - Financial Technology	3.4%	27.9%	14.4%	19.5%	3.5x	3.2x	2.9x	15.2x	11.0x	9.7x
Vertically Focused - Healthcare IT	1.7%	6.9%	21.4%	24.7%	3.6x	3.4x	3.0x	14.5x	12.7x	10.8x
Vertically Focused - Public Sector	(10.0%)	0.8%	16.6%	19.4%	2.9x	2.7x	2.4x	17.9x	14.7x	12.0x
Software – Infrastructure	**1.6%**	**5.2%**	**10.1%**	**22.2%**	**2.6x**	**2.6x**	**2.4x**	**9.3x**	**8.3x**	**7.9x**
Enterprise IT Management	(0.7%)	0.6%	6.7%	23.0%	2.4x	2.4x	2.3x	12.9x	10.2x	8.3x
Enterprise Storage	5.7%	11.4%	13.1%	18.3%	2.9x	2.8x	2.4x	8.8x	9.8x	8.8x
Security	1.8%	6.9%	10.1%	26.9%	4.7x	4.6x	4.0x	8.2x	7.7x	7.3x
Software – SaaS	**(2.0%)**	**32.7%**	**27.1%**	**14.1%**	**6.1x**	**5.8x**	**4.8x**	**29.7x**	**21.2x**	**16.9x**
NASDAQ	**(4.5%)**	**8.7%**								

Note: Public comparables exclude companies with market capitalization below $500 million.

- Internet and Digital Media has experienced rapid growth, with an increase of 21.8% in LTM revenue and an increase 20.6% in LTM EBITDA margin
- Internet and Digital Media stock values have also bounced back with a 22.2% increase over the last 12 months
- Software – Application, Software – Infrastructure and Software – SaaS are also strong performers, with LTM revenue growth of 14.9%, 10.1% and 27.1%, respectively

TMT revenues and market values have been experiencing robust growth in the last 12 months

Source: Harris Williams & Co.

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Mergers & Acquisitions

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Global M&A Quarterly Trend

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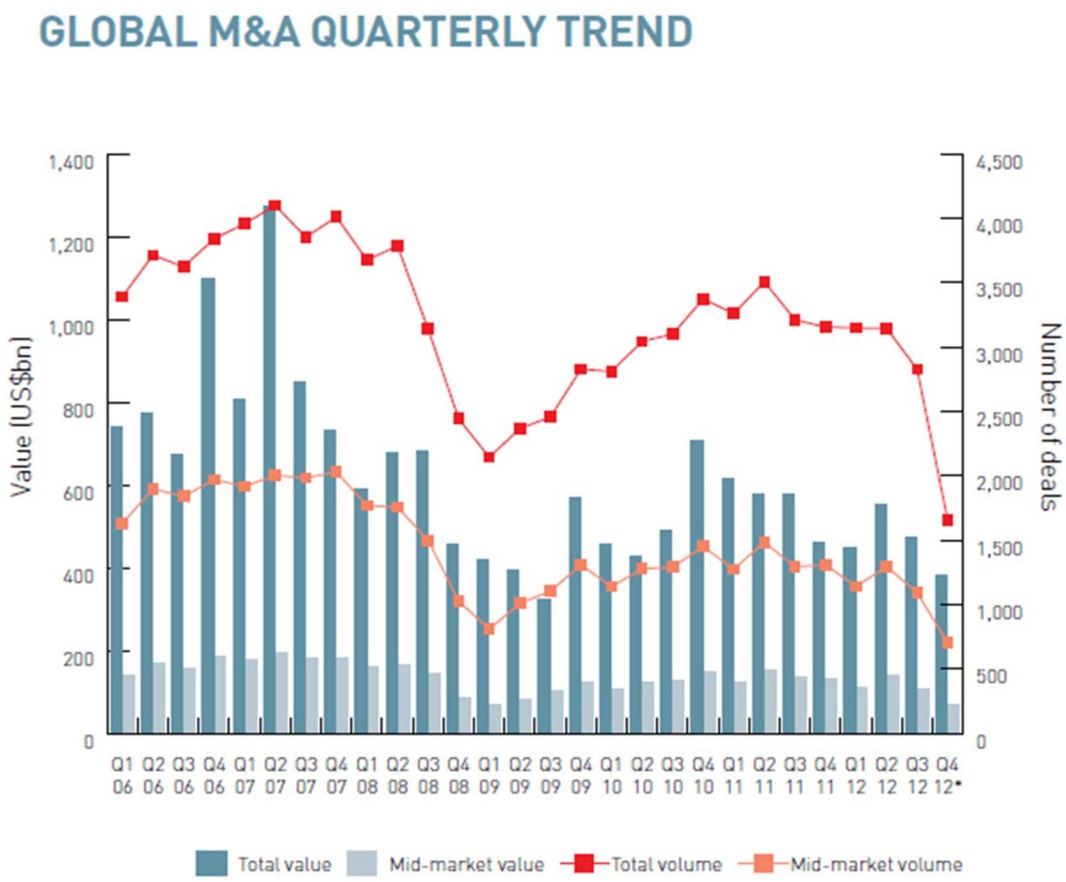
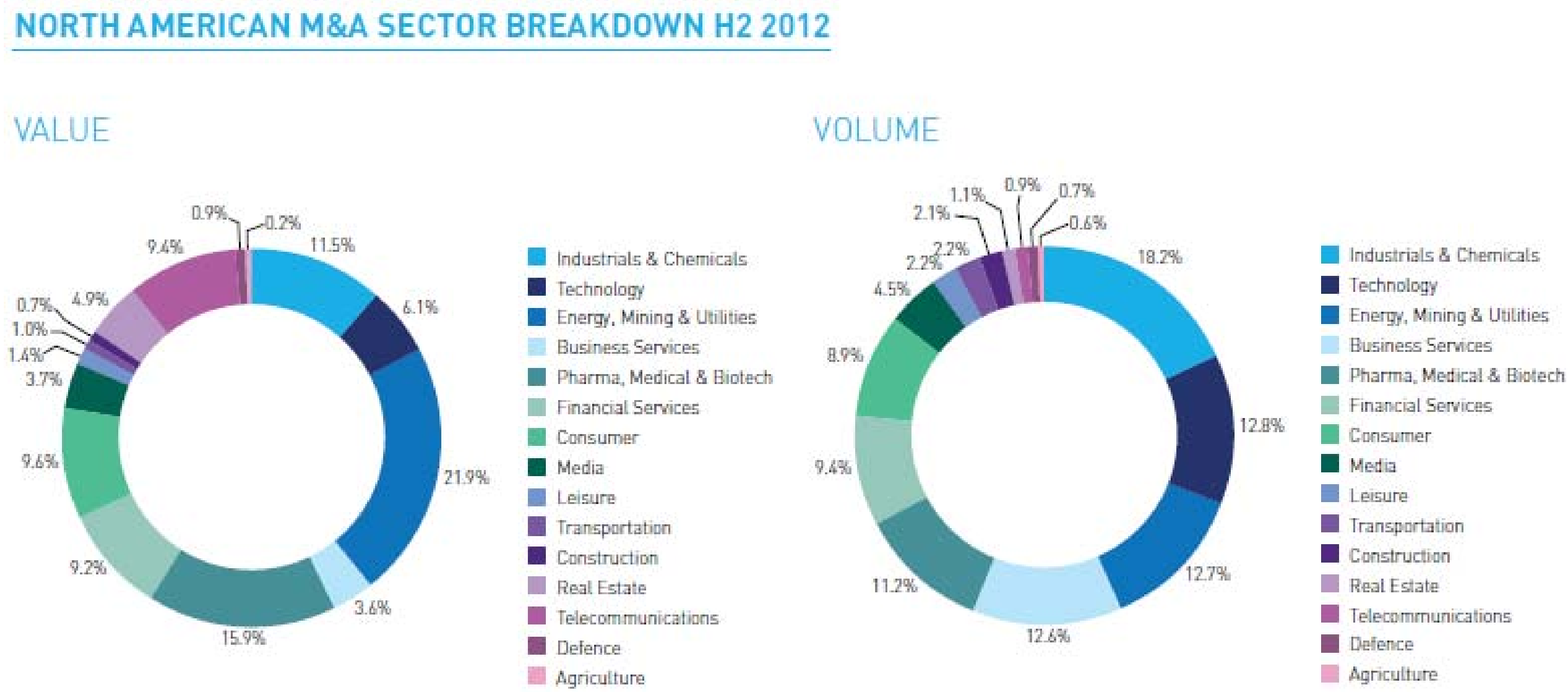


Although 2012 saw a dip in the global M&A market as compared to 2011, Q4 2012 experienced an upward trend

Source: Mergermarket/Monthly M&A Insider

North American M&A Sector Breakdown H2 2012



North American M&A deals ended strong in H2 2012 with 2,089 deals worth $576.5B. By aggregate deal value, M&A increased by 38.3% compared to H2 2011 ($416.9B)

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Global M&A Deal Size Breakdown – By Value

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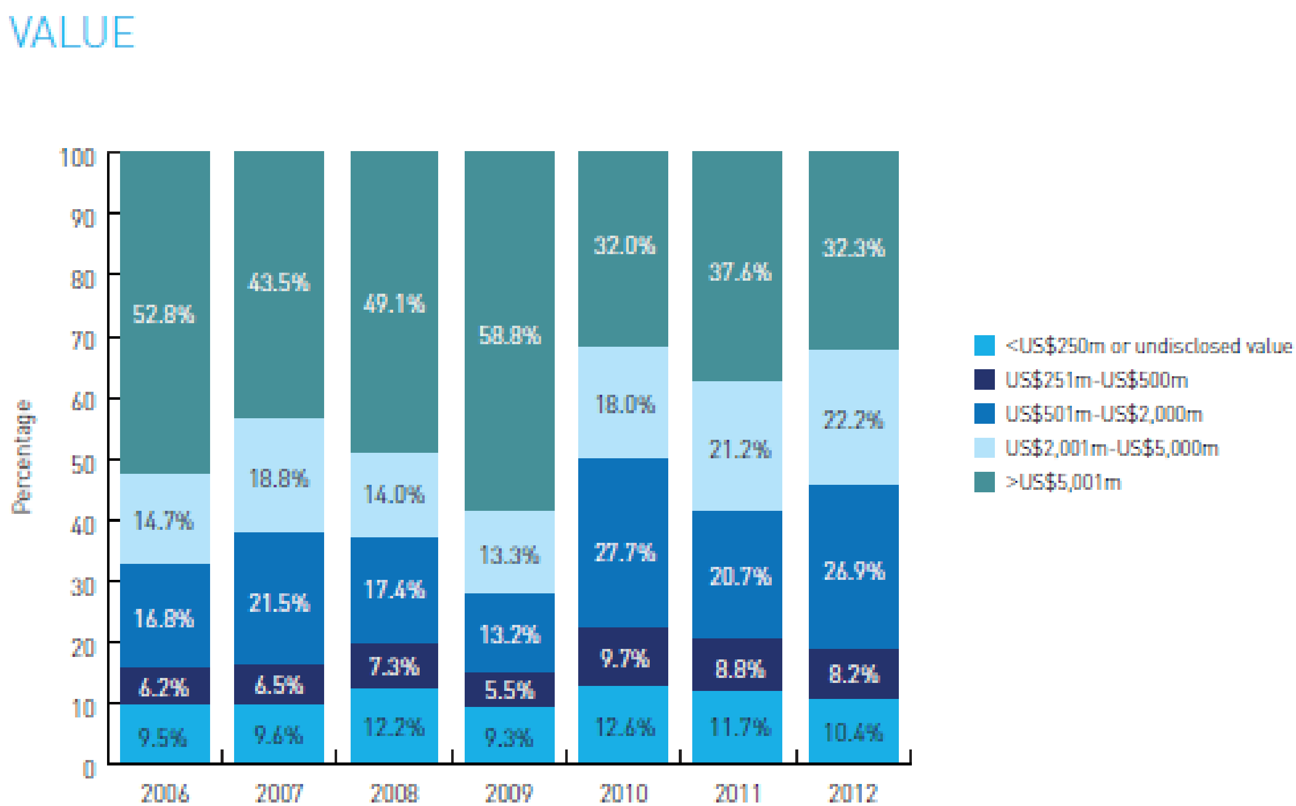

2012 M&A deal size by value has remained consistent with 2011

Source: Mergermarket/Monthly M&A Insider

Global M&A Deal Size Breakdown – By Volume

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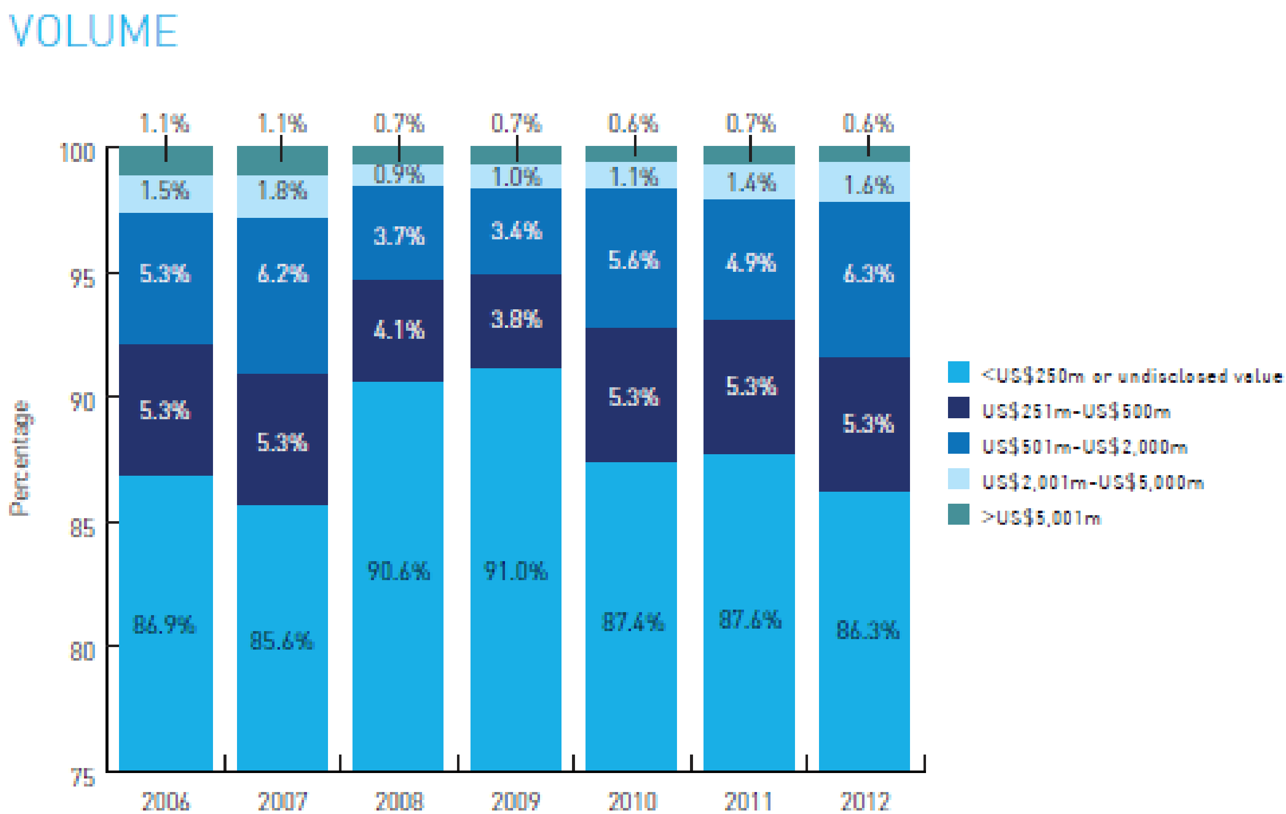

2012 M&A deals by volume continue to be concentrated in small-cap stocks

Source: Mergermarket/Monthly M&A Insider

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Recent Tech, Media & Telecom M&A

athenahealth acquires Epocrates

1/7/13

athenahealth

Ent. Value: $215 mm
Revenue Multiple: 2.0x
EBITDA Multiple: NM

- Epocrates provides subscriptions for mobile drug reference tools, electronic health records to healthcare professionals, and interactive services to the healthcare industry.
- The acquisition expands athenahealth's stronghold in the physician market and will accelerate the Company's vision to build the nation's health information backbone.

McKesson's RelayHealth acquires AHI Software

12/26/12

MCKESSON

Ent. Value: Undisclosed
Revenue Multiple: NA
EBITDA Multiple: NA

- AHI Software is a provider of on-demand patient access management solutions.
- The company's AHI QA solution is ranked number one by KLAS in the patient access category.
- The acquisition complements RelayHealth's existing patient access software, helping healthcare providers streamline processes for more effective reimbursement and better patient engagement.

Oracle acquires Eloqua

12/20/12

ORACLE

Ent. Value: $871mm
Revenue Multiple: 9.7x
EBITDA Multiple: NM

- Eloqua provides on-demand marketing automation software solutions and will become the centerpiece of Oracle's new ERP offering targeting marketing companies.
- The acquisition reinforces Oracle's momentum in SaaS, a focal point of the company's recent acquisition strategy.

Red Hat acquires ManageIQ

12/20/12

redhat

Ent. Value: $105 mm
Revenue Multiple: NA
EBITDA Multiple: NA

- ManageIQ provides enterprise cloud management and automation solutions that enable organizations to deploy, manage, and optimize private clouds, virtualized infrastructures, and virtual desktops.
- The acquisition will strengthen Red Hat's existing virtualization management console.

Dell acquires CREDANT Technologies

12/18/12

DELL

Ent. Value: Undisclosed
Revenue Multiple: NA
EBITDA Multiple: NA

- CREDANT Technologies is a provider of data protection and management technologies designed to encrypt information between mobile devices, servers, and the cloud.
- The acquisition augments Dell's growing portfolio of enterprise infrastructure solutions and highlights the momentum of the bring-your-own-device (BYOD) trend in the enterprise.

Recent proposed M&A transactions within the TMT sector suggest a robust M&A market for the sector

Source: Harris Williams & Co.

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2012: Large Buyers with Lots of Cash

- The global M&A market experienced a decline in 2012 as compared to 2011, but Q4 2012 had an upward trend
- Traditionally, after the seasonal slowdown in the summer holiday period, M&A activity picks up in Q4 with particularly strong showings in December

	Latest Cash (in $Bn)	2012 Annual Prj. Net Income (in $Bn)	Noteworthy 2009 - 2012 Deals
Microsoft	68.2	21.6	Skype, Videosuft, Yammer
Cisco	45.0	8.4	Pure Digital, Starent, Tandberg, CoreOptics, NDS Group, BNI Video, Inlet Technologies
Google	48.1	10.7	Admeld, ITA, Motorola Mobility, Zagat, DailyDeal, Meebo, Sparrow, Wildfire
	137.2	41.7	Quattro Wireless, Anobit, C3 Technologies, Chomp, AuthenTec
Oracle	33.6	9.2	Sun, GoldenGate, ATG, RightNow, Endeca, Datanomic, Fatwire, Art, Phase Forward, Taleo, Vitrue, Eloqua
intel	6.0	11.4	Wind River, McAfee, Telmap, Infineon Technologies, ASML Holding
	11.2	2.5	Perot, 3Par (failed), Compellent, Boomi, AppAssure, Quest
IBM	12.3	14.4	SPSS, Sterling Commerce, Netezza, Unica, BigFix, DemandTec, Worklight
hp	11.3	-12.7	3Com, Palm, 3Par, ArcSight, Fortify, Autonomy
EMC² where information lives	5.4	2.6	Data Domain, Greenplum, Archer, Isilon, Pivotal Labs, XtremeIO
	$378.3	$109.8	

Source: SEC filings

Large tech companies have healthy cash levels and have made numerous notable recent M&A purchases

Legal Updates
Q4 2012

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JOBS Act

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Questions

SEC Staff Releases Additional JOBS Act Title I FAQs (Questions 42-54) to Address Mergers and Exchange Offers

On September 28, 2012, the SEC's Division of Corporation Finance issued additional frequently asked questions (FAQs) relating to Title I of the JOBS Act

Title 1 sets out the IPO on-ramp, scaled disclosure and other provisions applicable to emerging growth companies (EGCs). The September 28, 2012 FAQs (questions 42-54) supplement the initial two sets of FAQs (questions 1 to 17 and questions 18 to 41) issued by the Division of Corporation Finance on April 16, 2012 and May 3, 2012, respectively

These new FAQs provide SEC staff guidance on the applicability of Title I to mergers and exchange offers. In particular, the FAQs address:

- The test-the-waters communications and confidential submission process in connection with an exchange offer or merger
- General financial disclosure requirements for EGCs in registration statements and periodic reports
- Determination of EGC status

JOBS Act

SEC Releases JOBS Act Report on Exchange Act Registration Circumvention Enforcement

On October 15, 2012, the SEC staff issued a report:

- Reviewing its authority to enforce Rule 12g5-1 under the Exchange Act. This rule defines "held of record" for purposes of determining whether a company has reached the threshold number of shareholders requiring it to register under Section 12(g) of the Exchange Act
- Determining if it needs new tools to enforce Rule 12g5-1(b)(3), an anti-evasion provision. Rule 12g5-1(b)(3) requires beneficial holders to be counted as record holders if the company knows or has reason to know that a form of ownership of securities is being used to circumvent the record holder calculation

The report concluded that the current tools available to the SEC were adequate and did not suggest any particular legislative action

Market Regulation

SEC Approves NASD Rule 2711 Amendments Conforming Rule with JOBS Act

- On October 11, 2012, the SEC granted accelerated approval to FINRA's proposed amendments to NASD Rule 2711 (Research Analysts and Research Reports). The amendments conform Rule 2711 to the requirements of the JOBS Act related to research analysts and research reports in certain offerings by emerging growth companies. The amendments make other related changes to the research quiet period rules and make conforming amendments to Incorporated NYSE Rule 472 (Communications with the Public)

- The amendments required by the JOBS Act are retroactively effective to April 5, 2012, the day the JOBS Act was enacted. The other changes are effective as of the date of accelerated approval

Draft Registration Statements for EGC's

SEC Sets Mandatory Transition Date for EDGAR-based Submission of Confidential Draft Registration Statements

- On October 11, 2012, the SEC announced that, beginning on Monday, October 15, 2012, emerging growth companies and eligible foreign private issuers submitting draft registration statements and amendments to the SEC for confidential review must submit them (and any related correspondence) via the EDGAR system

- Companies that have already submitted a draft registration statement using the SEC's earlier-introduced secure e-mail system should comply with the instructions issued by the SEC on how to transition from the secure e-mail system to the EDGAR system

FINRA

FINRA Rule 5123 Filing Requirements for Certain Private Placements Effective from December 3, 2012

Effective Monday, December 3, 2012, FINRA member firms participating in certain private placements must make electronic notice filings (including copies of the offering documents, if any) under FINRA Rule 5123 using the new FINRA Firm Gateway system. Subject to certain exemptions, new FINRA Rule 5123 requires each FINRA member that sells an issuer's securities in a private placement to either:

- File with FINRA a copy of any private placement memorandum, term sheet or other offering document the firm used within 15 days of the date of first sale
- Indicate that it did not use any offering documents in the private placement

Also effective December 3, 2012, member firms must submit their FINRA Rule 5122 filings for private placements of securities issued by member firms or their control affiliates using the new FINRA Firm Gateway system

NASDAQ Rules

NASDAQ Proposes Modified Disclosure Requirements Relating to Non-compliance with Listing Standards

- On October 3, 2012, NASDAQ issued a proposed rule change that would modify certain disclosure requirements relating to a company's non-compliance with NASDAQ's listing standards

- Current NASDAQ rules require a company to make a public announcement after receiving a notification from NASDAQ that the company is not in compliance with a NASDAQ listing standard. Among other things, the proposed rule change would require the company's public announcement not only to identify the NASDAQ rule on which the deficiency is based (as is currently required), but also to include a description of the bases and specific concerns underlying NASDAQ's determination

- The purpose of the proposed rule change is to ensure that investors receive adequate information when a company is deficient under NASDAQ's rules, so they may make more informed investment decisions about the company's securities

NASDAQ Rules

NASDAQ Increases Annual Fees for the NASDAQ Capital Market

On October 18, 2012, NASDAQ issued a proposed rule change to increase annual fees for companies listed on the NASDAQ Capital Market. The proposed rule change increases the annual fee for issuers of:

- Securities other than American Depositary Receipts (ADRs) from $27,500 to $32,000
- ADRs from $17,500 or $21,000, depending on the number of ADRs outstanding, to a flat fee of:
  - -- $25,000 effective January 1, 2013; and
  - -- $32,000 effective January 1, 2014

The rule change is effective on filing with the SEC but the increased fees will not be implemented until January 1, 2013

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NYSE Rules

NYSE Proposes Amendments to its Listed Company Manual to Increase Minimum Listing, Modification and Annual Listing Fees

On September 28, 2012, the NYSE proposed rule amendments to Section 902.03 of its Listed Company Manual increasing certain fees. The proposed rules would:

- Increase the listing fee for a subsequent listing of additional securities from $5,000 to $7,500
- Increase fees for applications for modifications to NYSE records (changes of name, par value, title of security or designation) and for applications relating to poison pills from $5,000 to $7,500
- Increase the annual fees for an issuer's primary class of common shares or preferred stock if no common shares are listed from the greater of $38,000 or $0.00093 per share to the greater of $42,000 or $0.00093 per share

The NYSE immediately reflected these proposed changes in its Listed Company Manual, and implemented the proposed changes on January 1, 2013

NYSE Rules

NYSE Proposes Uniform Method for Companies to Provide Notice of Certain Events

On October 15, 2012, the NYSE proposed amendments to its Listed Company Manual that would create a uniform method for listed companies to give the NYSE notice when required to do so under certain provisions of the Manual. Except in emergency situations, companies would be required to give the NYSE notice under these provisions using either:

- An e-mail address designated by the NYSE
- Egovdirect.com, a web portal operated by the NYSE

The proposed amendments would also:

- Reduce the number of copies of a proxy statement a listed company must submit to the NYSE from six to three
- Change the name of the item “Shareholders’ Meeting Notice” to “Shareholders’ Meeting/Notice of Record Date”
- Change the due date for the item “Shareholders’ Meeting/Notice of Record Date” to conform with the “Dividend Notification” due date

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NYSE Rules

NYSE Proposes Changes to Initial Listing Standards for Companies from Outside North America

- On October 5, 2012, the NYSE submitted a proposal to the SEC to amend Sections 102.01 and 103.00 of its Listed Company Manual. The proposed amendments would permit the NYSE to consider stockholders and trading volume in a company's home country market or primary trading market outside the US (if that market is a regulated stock exchange) when determining whether a company from outside North America qualifies for initial listing under Section 102.01

- The proposed amendments are effective on filing, subject to a 30-day operative delay period that the NYSE has asked the SEC to waive so that the amendments become operative immediately

NYSE Rules

NYSE Proposes Amendments to Notice Requirements under the 20% Rule

- On October 19, 2012, the NYSE proposed amendments to its Listed Company Manual that would modify the notice requirements under the financial viability exception to its stockholder approval rule for transactions that may result in the issuance of 20% or more of a company's outstanding stock or voting power
- The proposed amendments would enable companies that can otherwise take advantage of the financial viability exception to potentially act more quickly and efficiently in raising capital under difficult conditions

SMRH Market Trends & Legal Updates

Mergers & Acquisitions

Mergers & Acquisitions

“Don’t Ask, Don’t Waive” Standstills

- In In re Complete Genomics, Inc. Shareholder Litigation, Delaware Court of Chancery Vice Chancellor Laster enjoined a target company from enforcing a “don’t ask, don’t waive” standstill provision (a provision that prohibited the counterparty potential bidder from making a non-public request that the target company waive the terms of the standstill provision)

- Less than three weeks later, Chancellor Strine made it clear that Delaware has no *per se* rule against “don’t ask, don’t waive” standstills, but that boards using “a powerful tool like that” need to deploy it consistent with their fiduciary duties

- Vice Chancellor Laster analogized “don’t ask, don’t waive” standstills to "no-talk" provisions in merger agreements. Delaware courts have deemed the latter impermissible because by agreeing to them a board would be violating its duty to take care to be informed of all material information reasonably available -- including whether a rejected bidder is willing to offer a higher price despite its contractual commitment not to do so

- Vice Chancellor Laster found that by agreeing to the “don’t ask, don’t waive” standstill, the Complete Genomics board impermissibly limited its ability to discharge its ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information and make a meaningful merger recommendation to its stockholders

SMRH Market Trends & Legal Updates

General Corporate & Corporate Governance

Regulation FD

Potential SEC Action Against Netflix for Alleged Regulation FD Violation in Connection with Social Media

Netflix, Inc. announced in a Form 8-K filed on December 6, 2012 that the company and its chief executive officer each received a Wells Notice indicating that the SEC may bring action against them for an alleged Regulation FD violation.

According to a statement by the CEO posted on his Facebook page and filed as an exhibit to the Form 8-K, the alleged violation occurred in July, when the CEO commented on the number of viewing hours of Netflix's customers. This comment was made on the CEO's Facebook page

We recommend that companies that seek to communicate potentially material information through social media take the following steps:

- develop a plan and clear policy that is Reg FD compliant
- issue a press release or include disclosure in their next press release confirming the intention to communicate information through social media
- identify which social media channels will be used and disclose to investors the same with instructions on how to access them
- consistently communicate according to how disclosed

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General Securities Regulation

SEC's Division of Corporation Finance Updates its Financial Reporting Manual

On October 4, 2012, the SEC's Division of Corporation Finance published an updated version of its Financial Reporting Manual. The manual has been revised to address issues related to:

- Proxy statement requirements for the disposal of a business
- Auditor association with amounts from inception in development stage companies
- The application of Public Company Accounting Oversight Board auditor requirements in a reverse merger
- Reporting requirements in a reverse acquisition with a non-shell company

The revised manual also advises that it has not yet been updated to reflect the JOBS Act and should be read in conjunction with the JOBS Act and Division of Corporation Finance staff guidance related to financial reporting and other requirements for emerging growth companies. A summary of the revisions appears on page two of the revised manual

Continuous Disclosure

Business Groups Challenge Conflict Minerals Rules

On October 19, 2012, the National Association of Manufacturers and the US Chamber of Commerce filed a petition with the US Court of Appeals for the District of Columbia Circuit requesting that the court review both the SEC's final conflict minerals rules and Section 1502 of the Dodd-Frank Act, the statutory provision under which the rules were adopted

The conflict minerals rules require reporting companies to make specialized disclosure and conduct related diligence concerning specified minerals and their derivative metals contained in the companies' products. The minerals and metals covered by the rule, including, among others, gold, tin, tantalum and tungsten, are included in many common products. Plaintiffs have requested that the court modify or set aside the rules in whole or in part

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Foreign Corrupt Practices Act

New FCPA Guidance Released by the DOJ and SEC

On November 14, 2012, the SEC's Enforcement Division and the DOJ's Criminal Division released new non-binding guidance on the US Foreign Corrupt Practices Act (FCPA) in the form of a guide entitled, A Resource Guide to the U.S. Foreign Corrupt Practices Act (Guide)

Using hypotheticals, examples of enforcement actions and applicable case law, the Guide illustrates how businesses and individuals can comply with the FCPA, detect and prevent violations and implement effective compliance programs

While the Guide does not reflect a significant change in the enforcement approach of the SEC and DOJ towards FCPA violations, it represents the government's first attempt to comprehensively collect and explain the positions it has expressed in past enforcement actions

The Guide provides insight into the government's interpretation of certain aspects of the FCPA, including:

- The scope of the FCPA's anti-bribery and accounting provisions
- What constitutes a foreign official
- Proper and improper gifts and entertainment expenses
- Parent and successor liability
- The elements of an effective compliance program
- Civil and criminal resolutions available
- Procedures for obtaining DOJ opinions

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Compensation Committees

SEC Approves NASDAQ Listing Standards Relating to Independence of Compensation Committees

The SEC has approved NASDAQ's listing standards relating to the independence of compensation committees, compensation consultants and other compensation advisers. The proposed listing standards implement Rule 10C-1 under the Exchange Act, which itself implements Section 10C of the Exchange Act which was added by the Dodd-Frank Act

SEC Approves NYSE Listing Standards Relating to Independence of Compensation Committees

The SEC has approved the NYSE's listing standards relating to the independence of compensation committees, compensation consultants and other compensation advisers. The proposed listing standards implement Rule 10C-1 under the Exchange Act, which was added by the Dodd-Frank Act. The NYSE originally proposed the listing standards on September 25, 2012 and amended the proposal three times, most recently on January 8, 2013

General Corporate

Glass Lewis Releases its 2013 Proxy Guidelines

On November 20, 2012, Glass, Lewis & Co. (Glass Lewis) released its 2013 proxy guidelines update. The guidelines cover a variety of topics, including:

- Election of directors
- Declassified boards
- Auditor ratification
- Pension accounting issues
- Say-on-pay recommendations
- Poison pills
- Authorized shares
- Voting structure

The 2013 guidelines reflect a small number of changes from 2012, the most significant of which is Glass Lewis' evaluation of board responsiveness to a shareholder vote of 25% or more against the board's recommendation on a proposal

General Corporate

ISS Releases its 2013 Proxy Guidelines

Institutional Shareholder Services (ISS) released its 2013 policy updates to its proxy voting guidelines on November 16, 2012, which, among other things, address:
Board response to majority-supported shareholder proposals
Executive compensation evaluation policy

- Say-on-golden parachute proposals
- Environmental, social and governance metrics for compensation
- Pledging of company stock
- Board attendance

These policies apply to shareholder meetings held on or after February 1, 2013

On December 4, 2012, ISS released a set of Frequently Asked Questions (FAQs) setting out how it will determine a company's peer group for purposes of conducting its pay-for-performance analysis. The FAQs cover:

- Miss's new peer group methodology
- Communicating updated peer group information to ISS

ISS has also announced that will replace GRId with ISS Governance QuickScore in late February/early March 2013

Palo Alto Corporate & Securities Team

Palo Alto
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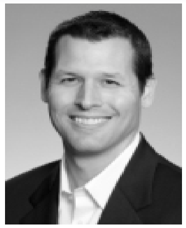

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