CALL IT WHAT YOU WILL

PRE-MARKETED OR WALL-CROSSED: THE NEW OFFERING OF CHOICE

PIPE TRANSACTIONS and registered direct offerings are examples of hybrid financings that have become increasingly more significant as market volatility has become the norm. While each transaction format has its advantages, they tend to require that the issuer offer securities to investors at a discount to the prevailing market price of the issuer's common stock. This fact, combined with the view still held by many issuers that an underwritten offering will always be the most desirable financing alternative, led us to work with clients to develop yet another hybrid financing technique—known as a "wall-crossed" or "pre-marketed" deal.

A wall-crossed or pre-marketed deal culminates in an underwritten public offering that is executed in two stages. The first stage (not visible to the market at large) involves confidential marketing by the issuer and underwriter of the potential offering to selected institutional investors. For SEC-registered transactions, it is necessary that the issuer have in place an effective shelf registration statement prior to commencing this first step. The issuer and the underwriter share with potential investors information that is not otherwise public, including the fact that the issuer is contemplating a possible financing, which will be executed as a firm commitment underwriting. Potential investors enter into confidentiality undertakings that require them to keep confidential the information conveyed to them by the issuer and refrain from effecting transactions in the issuer's securities until the information becomes public or is no longer considered current by the issuer. Once indications of interest have been obtained from these anchor investors, the issuer files appropriate disclosure and selling documents and the second stage commences. After the information is released or filed by the issuer, the underwriter may include co-managers or syndicate members in the distribution. The underwriters then commence a more widespread marketing effort. This public selling process usually is commenced and completed in a few hours (often from the market close to the following market opening) and rarely requires more than a day. Upon completion of the broader marketing, the offering is priced and proceeds to settle and close like any other underwritten follow-on offering.

Although the offering is a "public" offering, it shares many features common to "private" offerings, such as the targeted marketing approach and the sharing of information on an initially confidential basis with potential investors. Whatever bankers may call it, we call it the next leap forward in hybrid offerings.