



Private Companies Group  
*Approach*

January 2010

Dear Clients and Friends:

A new year has arrived, and with it, the usual reflections on the past and forecasts of the future in the world of business. The last decade was one of historic highs and lows; whole sectors of the economy have been altered for the foreseeable future, and the landscape now looks much different than it did three short years ago. Business owners today face structural — rather than cyclical — shifts in the economy that many have never before experienced. Often they will need to rethink entirely how their businesses fit into new economic realities in the United States and around the world. And the changes are not finished yet: major policy questions of financial regulation, climate change, health care and more remain unanswered.

Over the past year, the *Approach* has brought you stories of private companies and entrepreneurs grappling with a variety of issues — mergers, tax structures, compensation strategies among them — that times of great change can bring. We have also provided some tools for managing risk during these times, such as the Proactive Creditor Checklist. In 2010 we will continue to share insights we have accumulated over years of service to a diverse array of clients. Previous issues of the *Approach* are posted at [www.schiffhardin.com](http://www.schiffhardin.com), under “Publications.”

Whether your company is a start-up or a seasoned business organization, Schiff Hardin’s Private Companies Group brings to bear a wide range of specialties in a collaborative, “right-sized” approach to help your business succeed. Our attorneys understand our clients’ diverse businesses, their challenges and risks, and their opportunities. We understand the often intense pressure on their key resources: money, personnel and time. We help our clients thrive in this environment.

This is the Schiff Hardin *Approach*.



**Strong Advocates.**  
**Trusted Advisers.**  
*Lasting Client Relationships.*

Atlanta

Boston

Chicago

Lake Forest

New York

San Francisco

Washington

A technology company seeks counsel on agreements covering international component sourcing and subsequent marketing of its RFID-enabled products.

The Schiff Hardin corporate technology team recently assisted a private technology company with the development and commercialization of RFID-enabled products. Our team worked with the client on the international sourcing of the RFID technology components, the translation of final product into customer sales, and the integration and outsourcing of a related ticket sales call center.

The technology is now being employed in solutions ranging from pre-paid wristbands, which allow parents to provide a controlled source of funds for their children at theme parks, to “preferred customer” tokens and cards, used at entertainment venues to allow customers to charge items to their card. The RFID-enabled products allow hospitality vendors greater visibility into their customers’ spending patterns and provide insight into potential marketing opportunities.

The Schiff Hardin team worked diligently to ensure that the client was protected at every stage, whether negotiating strong warranty and intellectual property commitments for the sourced components or profit-sharing mechanisms in the customer contracts. Our team also created form master services agreements that include licensing and services provisions, as well as reasonable exclusivity terms for use with future hospitality customers.

For further information: **Brian Gannon**, Corporate and Securities  
404.437.7059, bgannon@schiffhardin.com

**Laura McGuffey**, Corporate and Securities  
404.437.7041, lmcguffey@schiffhardin.com



A foreign real estate developer seeks to obtain bankruptcy protection for a portion of its U.S. operations and, subsequently, to acquire certain assets from the bankruptcy estate.

Due to the recent downturn in the domestic real estate market, our client, a foreign-based real estate developer, sought to file for Chapter 11 bankruptcy protection for certain of its United States-based subsidiaries. Our client also desired to assist these subsidiaries financially to continue their operations during the bankruptcy process. Further, our client sought approval from the bankruptcy court to purchase certain assets from the bankruptcy estate. Schiff Hardin’s Private Companies Group helped our client reach each of these goals.

We assisted our client in all aspects of the proceeding, from the decision to file for bankruptcy protection through the closing of the asset acquisition. This included obtaining court approval for our client’s secured financing to the bankruptcy estate, and guiding our client through the conversion of the case to a Chapter 7 liquidation. Using expertise from Schiff Hardin’s Corporate, Bankruptcy, Finance and Real Estate groups, we worked with our client to draft and negotiate the secured financing, real estate transfer and asset acquisition documentation, and to argue and make all necessary filings with the court. Our client now has a new platform from which to grow its U.S. operations, created from certain of its familiar, prior operations.

For further information: **Steve Dragich**, Corporate and Securities  
312.258.5692, sdragich@schiffhardin.com

**Mark Fisher**, Restructuring, Bankruptcy and Creditors’ Rights, 312.258.5710,  
mfisher@schiffhardin.com

**Jason Zgliniec**, Corporate and Securities  
312.258.5795, jzglienic@schiffhardin.com

Schiff Hardin has assisted private companies in mergers or stock sales where a portion of company stock was held in their 401(k) plan trusts, either by the trust as a general investment or allocated to the accounts of individual participants. In the former case, plan trustees must approve of the transaction. In the latter, approval via pass-through voting by participants of allocated stock may be required by plan documents or ERISA and state law. In either case, the participants or plan trustees must be provided with current, accurate information about the transaction.

When a private company's plan trustees are company executives, the trustees should comply with ERISA conflict-of-interest guidelines and hire an independent third-party trustee to decide whether to sell the trust's shares of company stock.

If the company stock held in the trust is allocated to individual participants' accounts, the participants may have the right under the plan and trust documents to direct the investment of that stock in their accounts. They would receive a voting proxy with information on the value of their company stock and the price being offered by the purchaser. Depending on the share value, number of participants, and whether their stock will be exchanged for stock in the new company, that portion of the transaction may need to fit within an exemption from the federal securities laws.

Such transaction-related legal issues can present unexpected problems to the companies involved in the deal, but are not insurmountable with proper and timely planning by the parties and their legal counsel.

For further information: **Ed Spacapan**, Employee Benefits and Executive Compensation, 312.258.5788, [espacapan@schiffhardin.com](mailto:espacapan@schiffhardin.com)



Full disclosure is a hallmark of the bankruptcy process. Debtors and their counsel are required to disclose to creditors and the court not just financial and operational details, but the nature of their relationship to each other.

Schiff Hardin counseled a major creditor regarding a debtor's failure to disclose insider relationships (including the fact that the debtor was paying a utility owned by a debtor insider). Attorneys in our Restructuring, Bankruptcy and Creditors' Rights Group challenged the debtor's failure to disclose and ultimately revealed significant insider transactions and payments that were benefiting the debtor's insiders and not the debtor's good-faith creditors, including our client.

We moved swiftly to investigate the related-party transactions and ultimately obtained the appointment of an independent trustee to operate the debtor-in-possession, and the removal of the offending officers. With Schiff Hardin's counsel, our client was assured that it was dealing with an independent third party without any ties to the offending officers, offering the client an opportunity for a meaningful return in the underlying bankruptcy case.

For further information: **Gene Geekie**, Restructuring, Bankruptcy and Creditors' Rights, 312.258.5792, [egeekie@schiffhardin.com](mailto:egeekie@schiffhardin.com)

**Jon Viganò**, Restructuring, Bankruptcy and Creditors' Rights, 312.258.5635, [jviganò@schiffhardin.com](mailto:jviganò@schiffhardin.com)

A merger or stock sale can involve some unexpected issues if target company stock is held by its 401(k) plan.

A creditor needs to make certain that its debtor-in-possession complies with the full disclosure required in bankruptcy.



 **SCHIFFHARDIN**<sup>LLP</sup>  
Private Companies Group

Schiff Hardin is a client-focused, general practice law firm with offices in Atlanta, Boston, Chicago, Lake Forest, Illinois, New York, San Francisco, and Washington, D.C. With attorneys admitted to practice in 31 states and six countries, Schiff Hardin offers a diversified practice covering almost every legal discipline, with the broad reach to meet the needs of domestic and international clients.

Our Corporate and Securities Group, which includes the Private Companies Group, provides a full range of services for private and public companies throughout the United States and abroad, from start-up businesses to Fortune 500 corporations. Our tradition of excellence in service to our clients — many of whom we have enjoyed working with for decades — enables us to anticipate their legal needs and provide solutions to help them drive their businesses.

For comments or further information about our Private Companies Group or the services described in this issue of *The Approach*, please contact your regular Schiff Hardin attorney or any of the contact persons listed below. If you would like to receive this publication in electronic form, please visit our web site to sign up.

[www.schiffhardin.com](http://www.schiffhardin.com)

**Steve Dragich**  
**Chicago**

312.258.5692  
sdragich@schiffhardin.com

**Matt Galo**  
**Chicago**

312.258.5643  
mgalo@schiffhardin.com

**Nicole Finitzo**  
**Lake Forest**

847.295.4308  
nfinitzo@schiffhardin.com

**Brian Gannon**  
**Atlanta**

404.437.7059  
bgannon@schiffhardin.com

**Bob Mullen**  
**San Francisco**

415.901.8783  
rmullen@schiffhardin.com

**John Dadakis**  
**New York**

212.745.0860  
jdadakis@schiffhardin.com

**Todd Eskelsen**  
**Washington**

202.778.6420  
teskelsen@schiffhardin.com

