



Private Companies Group  
*Approach*

April 2010

Dear Clients and Friends:

Periods of historic flux are often periods of uncommon opportunity. While one can still find a wide array of opinions on how much the country has recovered from the recent economic turmoil (or even whether such a recovery has begun), it seems clear that now is a unique moment for businesses to press certain advantages if they can. As discussed inside, mergers and acquisitions have ticked up recently, spurred in part by potential changes in capital gains taxes on the horizon. Add to this a federal funds rate beginning to rise from historic lows, and more players willing to make deals on real estate and equipment than they were before the recession, and you have a moment in which to do some serious strategic planning and reorganizing.

As usual, you will also find here stories of private companies — perhaps similar to yours — adapting, changing and seizing opportunities. 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.*



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Whether your company is a buyer, seller or other participant in M&A deals, Schiff Hardin's Private Companies Group can help with all aspects of your transaction.

The M&A landscape in 2009 was marked by tight credit markets, low valuations and uncertainty about the future of the economy. The good news for companies considering deals in 2010 is that the pace of transactions conducted in the first quarter has increased, and most commentators in the M&A industry are predicting a continuation of that trend. Among many reasons for the increase in deal activity, companies are:

- Selling businesses to avoid potential capital gains tax increases
- Buying based on a need to grow through acquisition due to slow organic growth
- Reducing costs by divesting non-core businesses
- Moving forward with deals due to increasing confidence in the economy

Whether you are a buyer looking to take advantage of attractive valuations or a seller looking to avoid tax increases after 2010, there are a number of steps that you can take to prepare for a successful transaction in 2010.

Sellers should make sure their financial and legal documents are in good order. Depending upon their circumstances, companies may want to perform a due diligence review of their businesses similar to the review that any potential buyer will conduct. A sell-side due diligence review can help avoid delays in closing the deal and provide the seller with information for valuation discussions. Sellers should also consult with their legal and accounting advisors about how to structure potential sales of their businesses before entering discussions with potential buyers.

Sellers who remained on the sidelines in 2009 waiting for economic conditions to improve, and are now uncertain whether to sell their businesses in 2010, should determine whether a sale at a lower valuation would be offset by avoiding the tax rate increases likely to become effective in 2011. President Obama has proposed to raise the current 15% long-term capital gains rate to 20% effective January 1, 2011. Other tax increases also may take effect next year.

In 2010, buyers should also plan ahead in structuring acquisitions. Relevant considerations include:

- A realistic approach to valuation
- Using increased equity or an earnout to fill any shortfall of capital (if using an earnout, buyers should consider whether to include it in 2010 income to take advantage of current tax rates)
- Reviewing the transaction for regulatory issues that could delay the deal
- Assessing whether the buyer needs to grow through acquisition
- Forecasting whether current valuations will increase or decrease

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Schiff Hardin assisted a national equipment rental company that provides support services to the film and video production industry by updating and clarifying its customer rental and service agreements. The demanding pace of the industry frequently requires swift arrangements for equipment rental and related services. As a result, these deals are increasingly made electronically, often via smart phones.

To help our client stay ahead of its competitors and streamline its administration, our Private Companies attorneys updated the client's terms and conditions and operating protocols to permit the electronic formation of lease contracts, an approach appreciated by our client and its customers alike. The attorneys who designed these protocols and developed the client's standardized forms and procedures also trained the client's employees on-site to use the new documents and methods in their day-to-day operations.

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When our client decided to design a ship to exploit a new, highly efficient form of hull architecture, and to operate a day cruise business as a demonstration of the prototype vessel, he trusted Schiff Hardin to assist. Attorneys from our Private Companies Group were involved in all aspects of this venture, leading to the launch of a high-speed ferry between the United States and a foreign port, offering passengers on-board entertainment including gaming.

Schiff Hardin represented this entrepreneur in negotiating many diverse contracts, obtaining business licenses and permits, navigating a wide variety of regulatory requirements, and resolving disputes. Among other things, we:

- Negotiated and prepared intellectual property license agreements
- Established various foreign and domestic corporate entities
- Negotiated shipbuilding contracts and port leases
- Established intercompany financing and charter arrangements
- Gave counsel regarding federal and state gaming laws
- Assisted in compliance with the Patriot Act and other laws
- Litigated disputes with the shipbuilder
- Used expedited litigation procedures in a dispute with a marine pilots' association
- Provided state and federal tax planning advice

Our attorneys' creative and problem-solving skills resulted in a successful launch of this unique business.

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A national equipment rental company needs its customer agreements revamped for use in electronic formats to keep pace with a fast-moving industry.

A prominent industrialist embarks on a maritime business venture, requiring counsel on aspects from technology licensing to financing to port leases, and many points in between.



  
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 attorneys listed inside, or Steve Dragich (312.258.5692, sdragich@schiffhardin.com) or Matt Galo (312.258.5643, mgalo@schiffhardin.com). If you would like to receive this publication in electronic form, please visit our Web site to sign up.

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