§ 18:9 Unconventional Marketing Techniques

§ 18:9.1 Underwritten IPOs

The vast majority of underwritten IPOs are marketed through the use of preliminary prospectuses, perhaps a free writing prospectus or two, a road show directed toward institutional investors, and, in recent years, an electronic road show. Some IPO companies have strayed from convention, however, particularly when hoping to attract a substantial retail investor base, feeling the need to offer tangible evidence of the quality of their goods or services, or seeking to market stock to their own customers.

Table 18-4

Underwritten IPOs with Unusual Marketing Twists

- ❑ For its 1985 IPO (following a Vermont-only public offering the prior year), **Ben & Jerry's Ice Cream** placed stickers on its cartons proclaiming "Scoop up our Stock" and inviting customers to call a toll-free telephone number to request a prospectus. The week before the offering, the company's co-founders stood on Wall Street in blue jeans and T-shirts and handed out free ice cream cones.
- ❑ In 1995, Boston Beer Company, the purveyor of **Samuel Adams beer**, distributed coupons in its six-packs, and established a toll-free telephone line, to encourage customers to request a prospectus and submit stock orders. The customer shares were then allocated on a first-come, first-served basis out of a pool representing about 25% of the offering.
- ❑ The IPOs of the **Boston Celtics** (1986) and the **Cleveland Indians** (1998) probably benefited from widespread sports media coverage and intense fan loyalty directed at the teams, even without special marketing efforts. Neither IPO included an allocation of season tickets or any rights to game-worn gear. Similarly, fan popularity presumably boosted the IPOs of the NHL's **Florida Panthers** (1996) and **World Wrestling Federation Entertainment** (1999). Of these four sports IPOs, only the WWF remains public today—with a market cap that at times has exceeded $1 billion.

- ❑ **Google**'s epic 2004 IPO—perhaps the most unusual and successful IPO in history—employed a modified Dutch auction format that was open to the public to price and allocate the shares.
- ❑ For its IPO in 1997, **Great Plains Software** established a dedicated website containing the printed prospectus, demonstrations of the company's products, and comments from members of the company's management.
- ❑ In the 1985 IPO of **Kurzweil Music Systems**, the printed prospectus was polybagged with an audiocassette that contained a sound recording to demonstrate the ability of the company's polyphonic digital synthesizer to replicate the sound quality and dynamic range of acoustic musical instruments. (In response, one state blue sky law administrator who was reviewing the offering submitted recorded comments on an audiocassette.)

In addition to being perceived as gimmicky by institutional investors, unorthodox marketing techniques can run afoul of the securities laws if not structured carefully. Companies considering unusual IPO marketing approaches should clear them with the lead managers and counsel in advance. If the legality is uncertain, SEC concurrence should be sought, since a securities law violation could result in the delay or cancellation of the IPO. After the initial Form S-1 is filed, SEC guidance should be coordinated through the legal examiner assigned to the filing; pre-filing guidance should be sought from the Office of Chief Counsel in the SEC's Division of Corporation Finance.

§ 18:9.2 Direct IPOs

Offering gimmicks are more common in direct initial public offerings than underwritten IPOs. These deals—commonly called "DPOs"—are marketed directly to retail investors, without underwriters, and are usually conducted pursuant to SEC Regulation A. For public offerings raising less than $5 million, Regulation A requires less extensive disclosure and permits general solicitation and advertising to "test the waters" for investor interest before going through the effort and expense of filing an offering statement with the SEC.

Some companies pursuing DPOs have employed creative solicitation methods tied to distribution of their products to target their existing customers. For example, Annie's Homegrown, a maker of all-natural and organic food products, attracted 2,500 investors in its 1995 DPO by inserting offering invitations in pasta boxes, mailing letters to 40,000 customers, placing an ad in *Mother Jones* magazine, and posting the prospectus on its website.[14] In 1996, Spring Street Brewing Company conducted the first DPO over the Internet, and other online DPOs followed in droves. Without the due diligence and market support functions provided by underwriters, however, most DPO companies have proved to offer better products than investments. Perhaps to make amends, Portland Brewing Company reportedly provided "liquid dividends" to its stockholders: one free pint of ale a day at its brew pub.[15]

The Green Bay Packers conducted a unique direct public offering in 1997. The Packers, who have been publicly owned by a non-profit corporation since 1923, raised $24 million through the sale of "special stock" to fund improvements to their football stadium. This offering followed much smaller offerings in 1923, 1935, and 1950. Holders of the stock are entitled to voting rights but cannot receive dividends on the shares, transfer the shares (except to immediate family members as a gift or upon death, or to the Packers at a nominal price), or pledge the shares. No single stockholder can hold more than 200,000 shares (less than 5% of the outstanding shares). Upon the liquidation or dissolution of the Packers, stockholders are entitled to receive nothing; all net proceeds will go to a charitable foundation. Stockholders do not receive preferential access to season tickets, and the primary allure of the shares appears to be the opportunity to "become a part of the Packers' tradition and legacy" (as stated in the offering documents) and to support an ownership structure in which the absence of a controlling stockholder makes it nearly impossible for the Packers to relocate. On these facts, the SEC issued a no-action letter concluding that the special stock was not a "security" under the federal securities laws, thereby permitting the Packers to make the offering without registration under the Securities Act and not requiring the Packers to file periodic reports under the Exchange Act. Stockholders of the Packers elect the board of directors (which has forty-five members, serving staggered three-year terms), and the board appoints seven of its members to an executive committee that oversees operations and selects management. The Packers release an annual financial report, hold annual stockholder meetings at Lambeau Field, and have more than 112,000 stockholders—none of whom will ever make a nickel on their shares.

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14. Marshall Jon Fisher, *At Home with Annie*, COUNTRY J., July/Aug. 2000.
15. *Tapping into a Heady Trend*, U.S. NEWS & WORLD REP., Aug. 1, 1994.