



Private Companies Group  
*Approach*

June 2009

Dear Clients and Friends:

Welcome to the June issue of the Schiff Hardin *Approach*. The calendar will soon reflect the arrival of summer, but last winter's recession still lingers over the business landscape. Difficult credit markets and large-scale bankruptcies will continue to challenge many businesses for months to come. Yet there are signs of a possible thaw: although some companies are facing strict lending requirements, others have been able to access new capital. Retail sales and the housing market continue to slide, however some reports show increases in consumer confidence and capital expenditure orders. Businesses continue to shed employees, yet overall unemployment growth is slowing. We leave to the pundits any prediction of the end of the recession, but we are heartened by these cautious, positive signs.

In this issue of the *Approach*, you will find accounts of private companies, perhaps similar to your own, that have grappled with the challenges posed and opportunities created by the current economic environment. In each case, the attorneys of Schiff Hardin's Private Companies Group worked closely with these organizations to achieve favorable results in often uncertain circumstances.

Whether your company is a start-up or a seasoned business organization, our 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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A company seeks funding from new investors, but its existing private equity owners first need to address several million dollars of accrued but unpaid preferred returns. The client wants a second opinion about the tax effects of the investor's proposed restructuring.

The company, an online service provider organized as a limited liability company, had been through several rounds of private equity financing. It had multiple layers of preferred and common equity interests of its various investors, in addition to a series of profits interests for senior management. The company was negotiating with a new investor for another round of financing, but on the condition that the existing capital structure be streamlined by capitalizing several million dollars of unpaid preferred returns that had been accruing to the existing investors for several years.

The company's regular tax and legal advisors were of the view that if the company recapitalized these preferred returns, the investors holding preferred interests would recognize ordinary income. Schiff Hardin was brought in as special corporate and tax counsel to take a fresh look at the situation and, if possible, recommend a more tax-efficient approach. We structured the transaction to avoid recognizing income using an analysis of newly proposed regulations, which were unfamiliar to existing counsel, relating to the tax treatment of certain convertible partnership interests.

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A family-owned business uses a voluntary stock redemption to allow family shareholders to reassess their commitment to ownership, and to re-examine its own dividend distribution policy.

In a family-owned business, planning for a stock redemption should be a collaborative process for the shareholders. Working with Schiff Hardin's Private Companies and Private Clients, Trusts and Estates Groups, this company started by forming a committee of four family shareholders, some employed by the company and some not, to propose terms for the redemption. The committee interviewed appraisers to value the company stock and recommend financial terms. It also proposed policies for how a selling shareholder would otherwise be affected, including attendance at meetings or what benefits and perquisites would continue.

Our attorneys worked with the committee throughout this process. We prepared presentations for the committee and for the shareholders on the valuation principles that would determine company value, and the tax implications of selling their stock. When the final redemption proposal was accepted, all shareholders and family members were better educated about the implications.

The result was a process that had broad support among the shareholders and resulted in no shareholder selling his or her stock. Several family members said the process gave them renewed appreciation for the benefits of ownership of the business. The company also adopted a more generous dividend policy in recognition that cash flow issues were driving several shareholders' concerns, determining that the cost to the company of an increased dividend would be far less than that of multiple stock repurchases.

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An executive search firm called its attorneys at Schiff Hardin the day after discovering that one of its three shareholders (who claimed he was on vacation) entered the firm's office on a Sunday and took confidential documents and assets: client files, financial statements and records, and a firm computer filled with trade secrets, client information and firm information. The shareholder then sent harassing e-mails to the remaining shareholders and made a series of phone calls to existing clients disparaging the firm and making several defamatory statements. Prior to leaving, he had set up his own executive search firm with one of the firm's employees in direct competition with our client. After departing with the confidential information, they were ready to start their new enterprise.

A shareholder of an executive search firm steals confidential client information and uses it to launch a rival company.

The Schiff Hardin team jumped into action by bringing a lawsuit against the departing shareholder for, among other things, misappropriation of trade secrets, breach of fiduciary duties, conversion, fraud, defamation and return of the stolen files and computer. The case was settled before trial, with our client receiving its property back plus a sizeable sum.

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A private company turned to Schiff Hardin in its effort to manage its overhead costs. The company sought to gain efficiencies and streamline its operations by closing under-performing offices and reducing its administrative staff, at the same time minimizing its potential legal liability.

A mid-size, multi-state private company strives to remain competitive in the current economic climate, and seeks counsel when it decides to close offices and reduce its headcount.

To accomplish these goals, our attorneys worked hand-in-hand with the company to analyze and refine its methodology for selecting the positions and individuals chosen for the layoffs. We reviewed and suggested improvements to the company's criteria for selecting employees for their reductions. We then reviewed the applicable performance metrics for the selected individuals and compared them to the metrics for their co-workers, noting anomalies for the company's review. We also analyzed the impact of the reductions on all protected classes and suggested strategies to reduce risk where imbalances occurred. In addition, we informed the client of federal and state-specific notice requirements and prepared viable and enforceable release agreements to ensure minimal exposure. As a result, this company has achieved its staffing goals and is better positioned to endure the current economic turbulence.

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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 nearly 400 attorneys admitted to practice in 26 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 further information about our Private Companies Group or these materials, please contact any of the attorneys below. Please visit our Web site to learn more about Schiff Hardin.

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