



Panel II.

Themes and Trends in the M&A Market

Adam C. Peakes
Managing Director

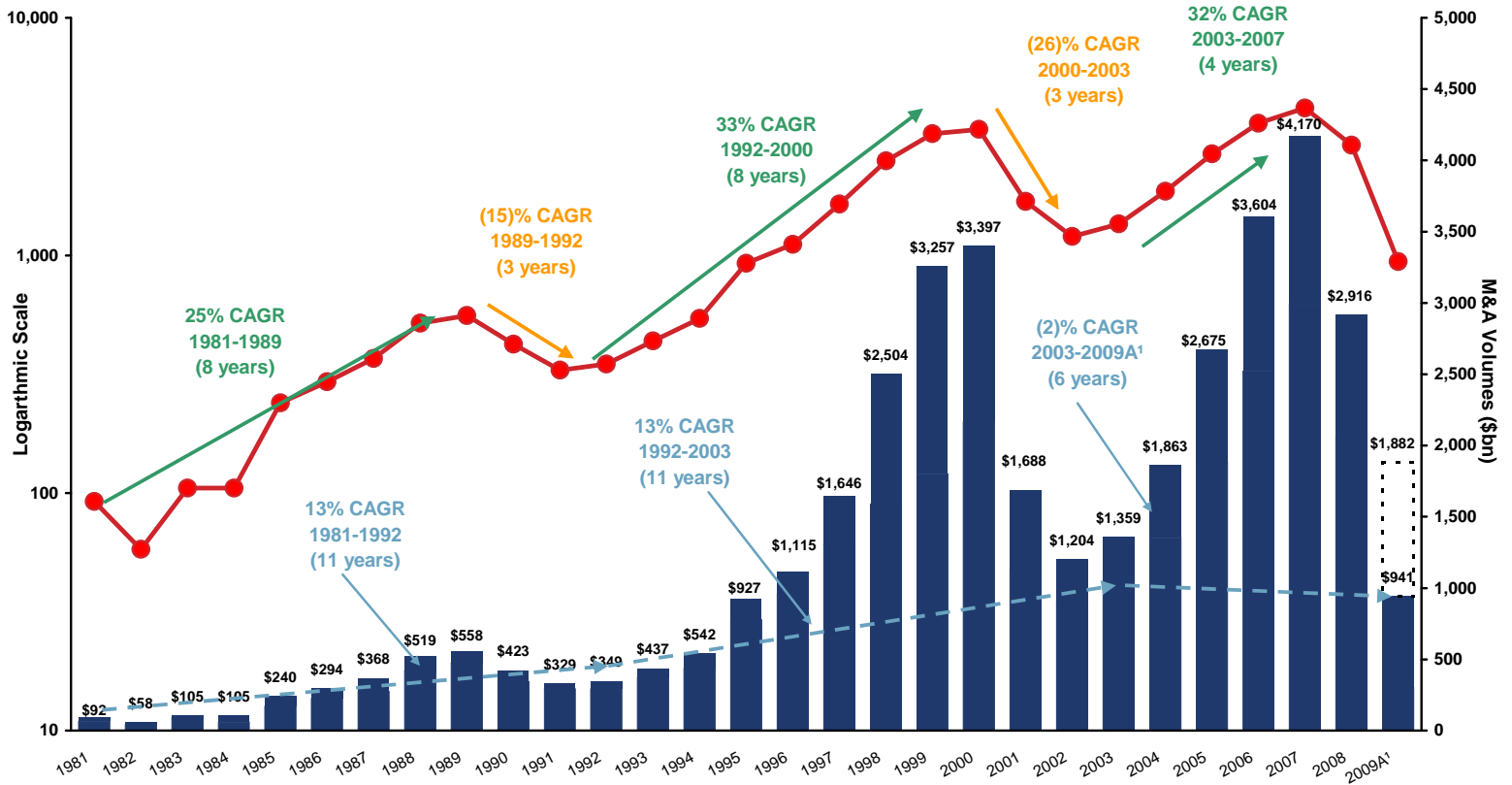
Goldman, Sachs & Co.
September 2009



M&A Environment in Context: Long Term View

Global Announced M&A Volume

(US\$ in billions)



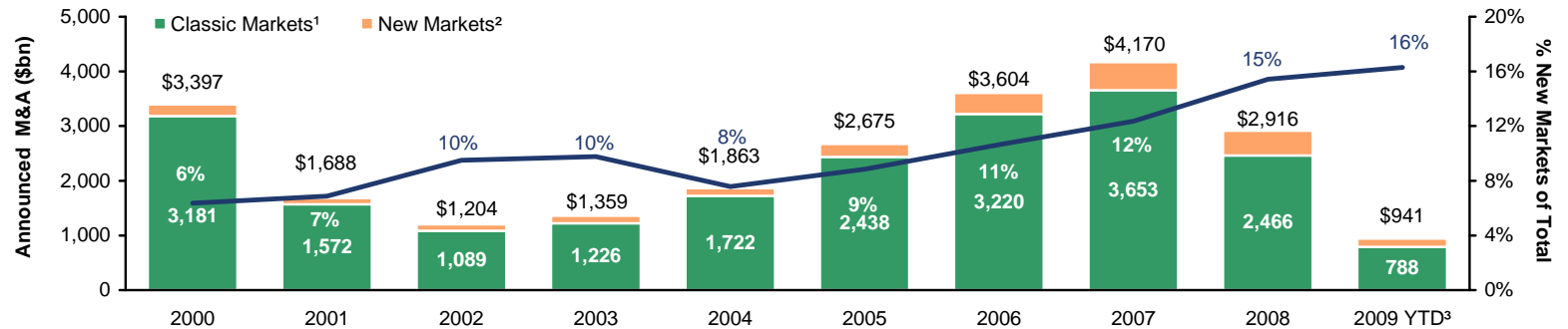
Source: SDC
¹ 2009A represents 2009 annualized volume as of Q2, June 30, 2009.

M&A Activity Snapshot: New Markets

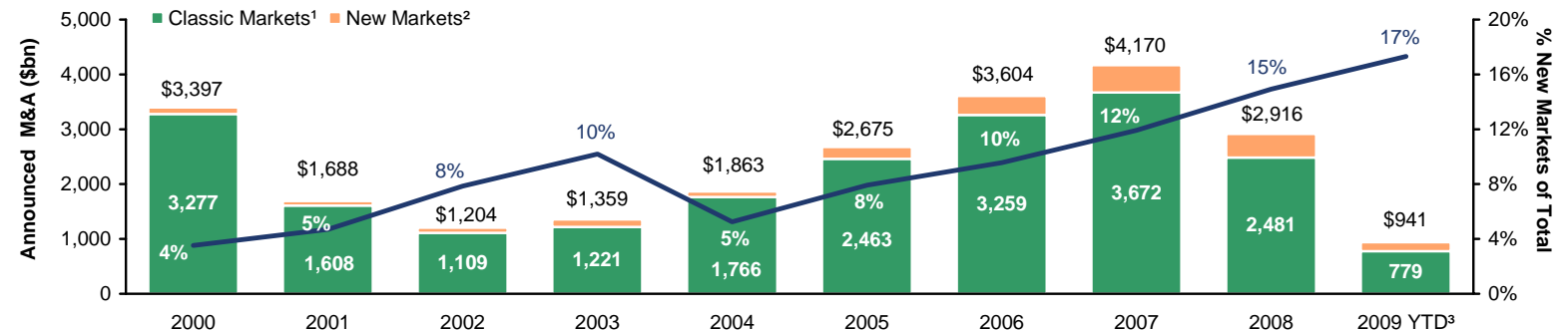
New Markets Comprised a Record Share of Global M&A in 2008

(US \$ in billions)

Increasing Trend of M&A Involving New Markets Targets (Breakdown of Volume by Geography of Target)



...with Similar Trend of Acquirors out of the New Markets (Breakdown of Volume by Geography of Acquiror)



Source: SDC

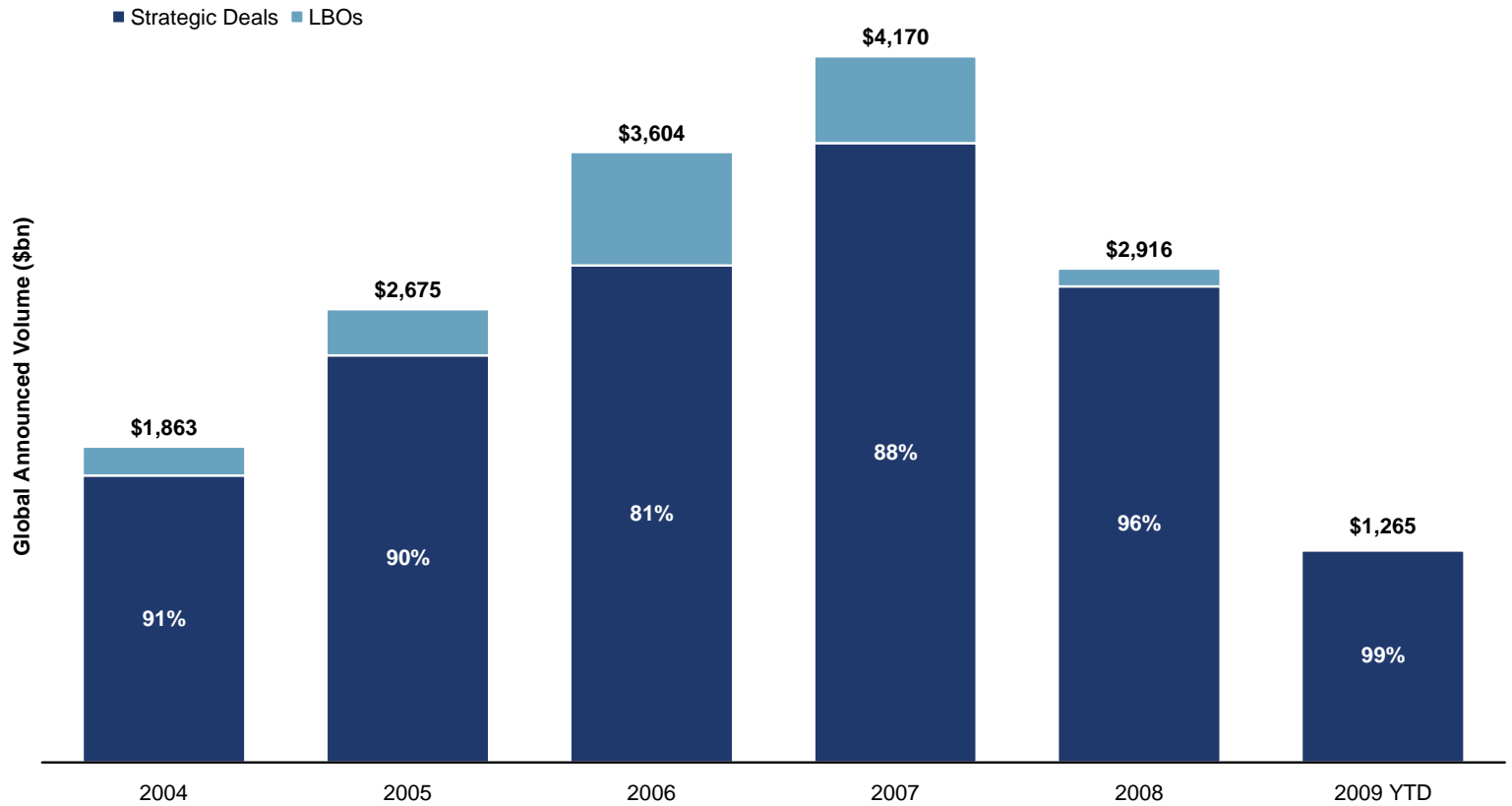
¹ Includes North America, Europe, Asia ex-China, Japan and Australia.

² Includes Middle East, China, Brazil, India, E. Europe, Russia, and Africa.

³ 2009 YTD volume as of Q2, June 30, 2009.



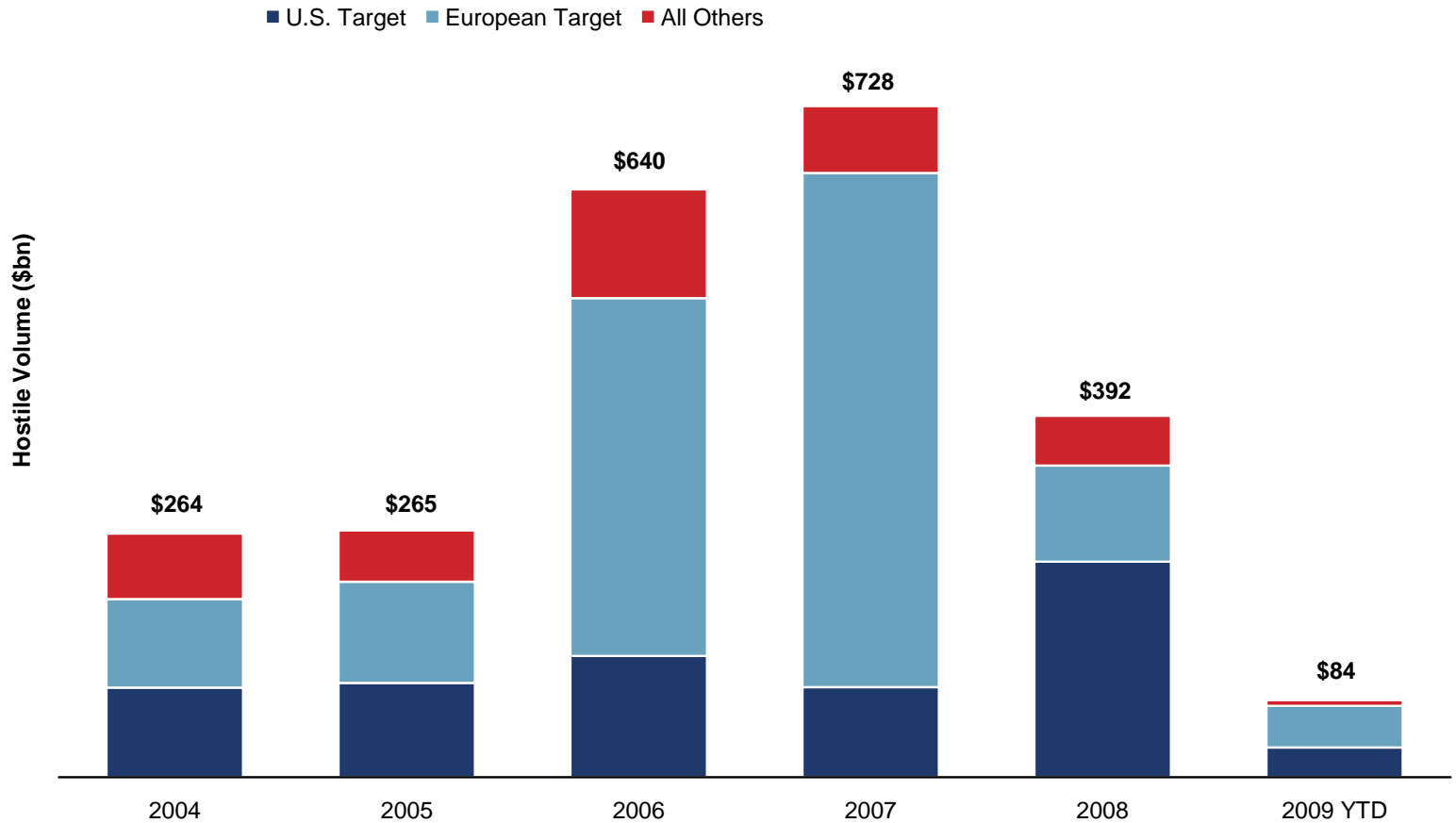
Strategic vs. Sponsor Activity



Source: Thomson Financial Securities Data



Global Hostile / Unsolicited M&A Activity^{1,2}



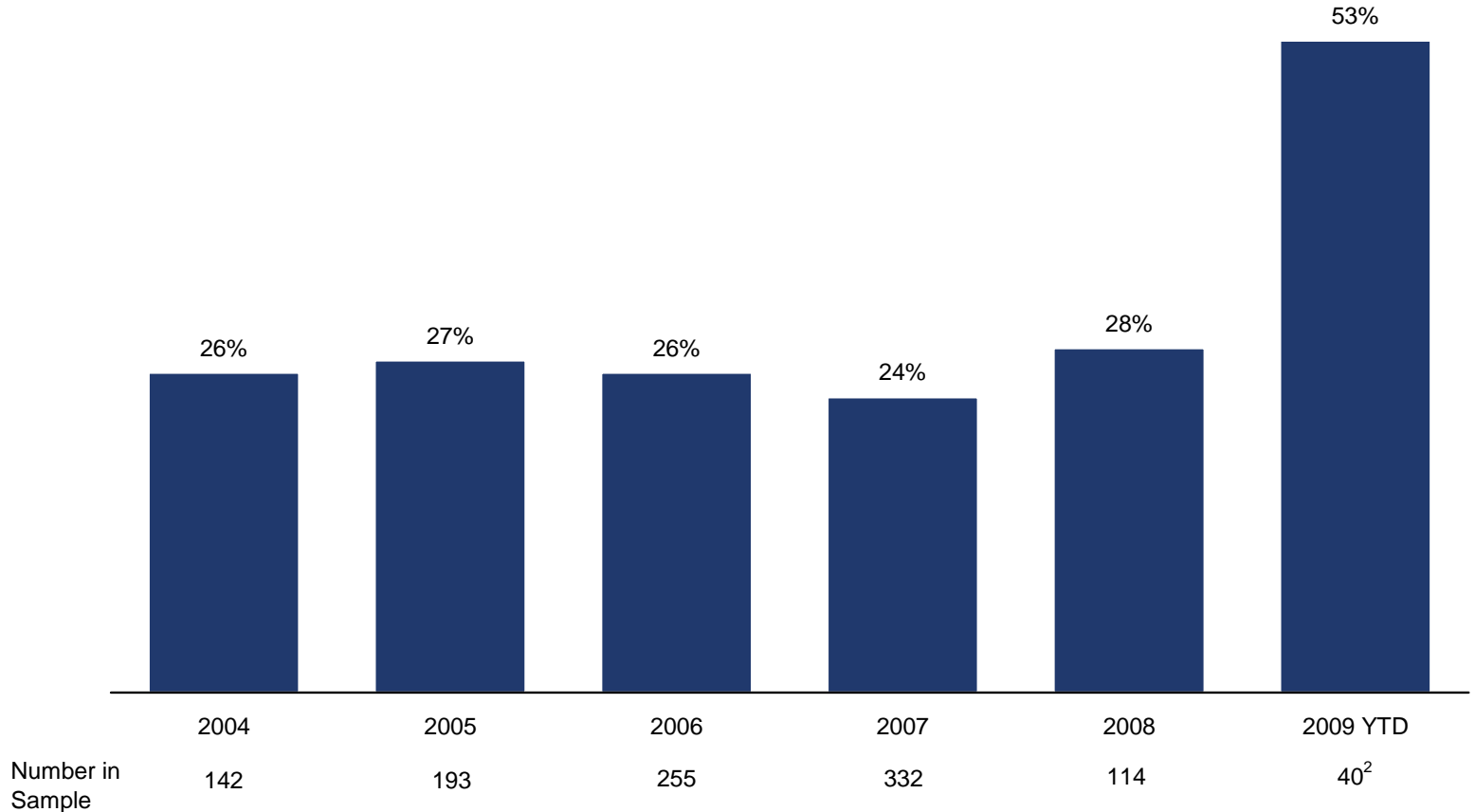
Source: Thomson Financial Securities Data

¹ Hostile / unsolicited activity includes deals that began as unsolicited.

² 2009 YTD as of July 31, 2009.



Average Acquisition Premia¹



Source: Thomson Financial Securities Data

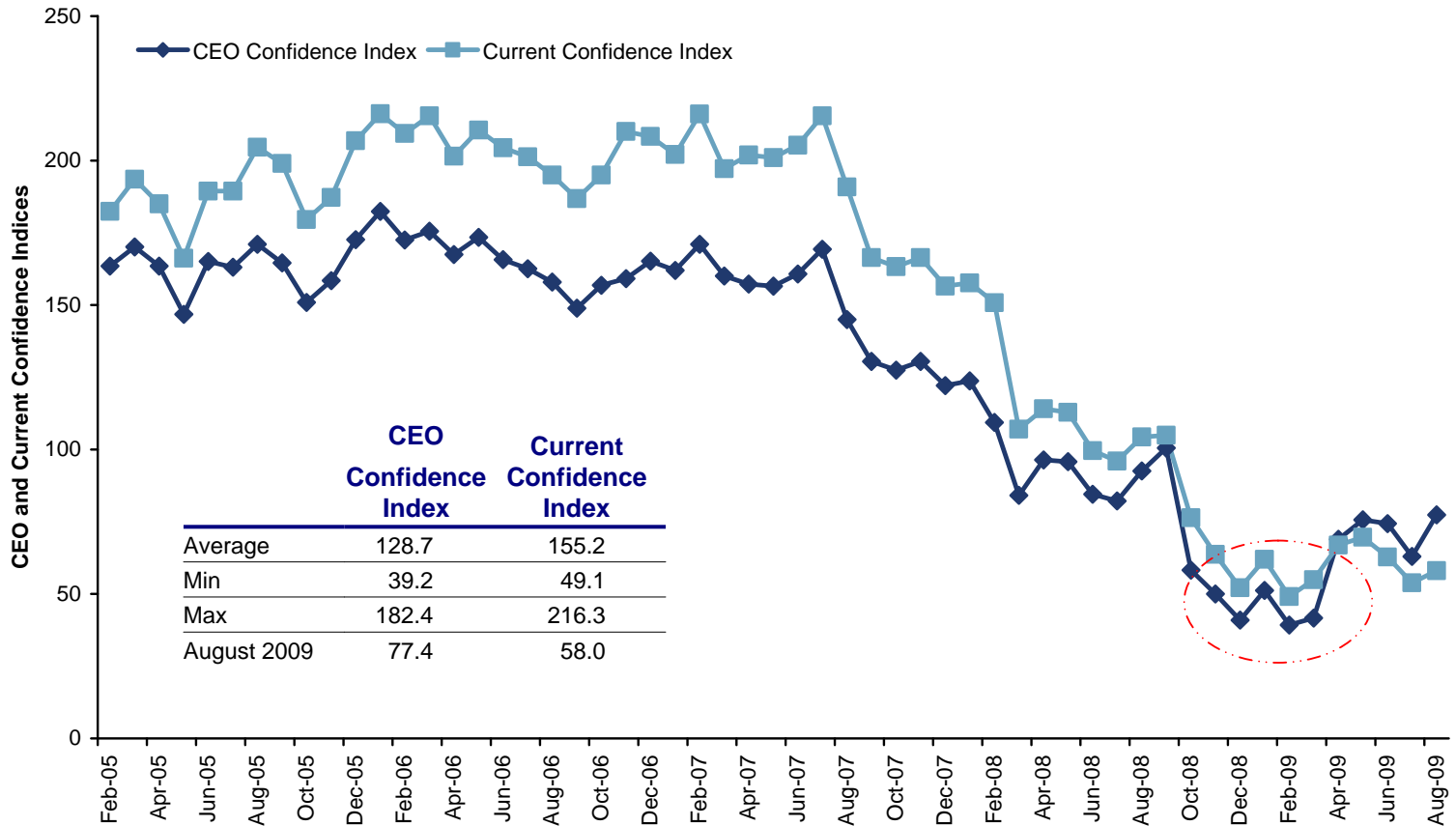
¹ Premium is relative to target share price 4 weeks prior to announcement for deals with U.S. targets valued over \$250 million.

² YTD excludes Advanced Medical Optics, which had a premium >300% relative to the share price 4 weeks prior to announcement.

Selected Themes in the Current Environment

- Increasing CEO confidence
- Lack of visibility into future operating performance
- Commodity price uncertainty
- Capital markets are open but cost and leverage levels have changed
- Larger, well capitalized companies have significant cost of capital advantage and intend to use it
- Increased use of stock consideration as a value bridge
- Increased hostile activity?

CEO Confidence – On the Rebound?



Source: CEO confidence index, Chief Executive Magazine online, as of August 30, 2009

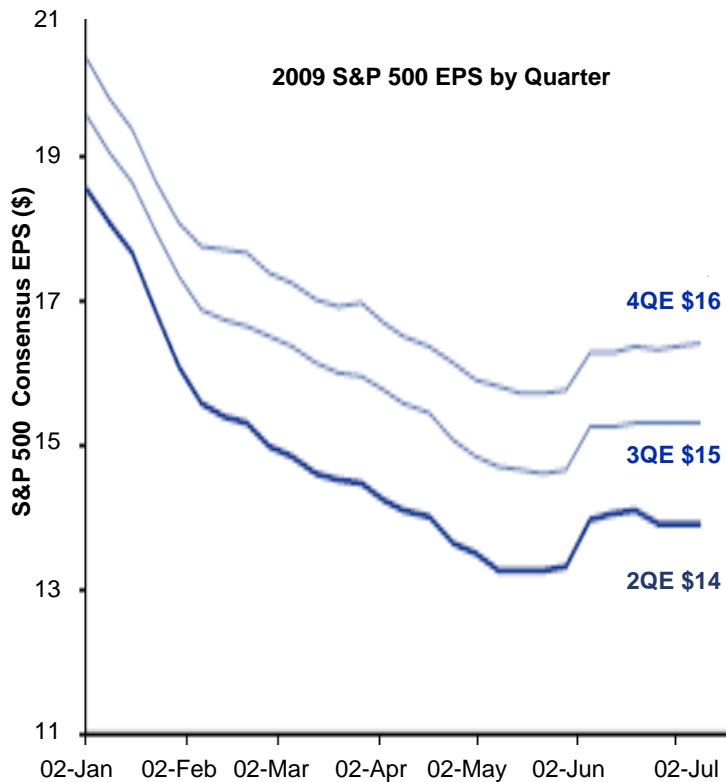
Note: CEO confidence index comprises results of: current confidence index, future confidence index, business condition index, invest confidence index and employment confidence index surveys



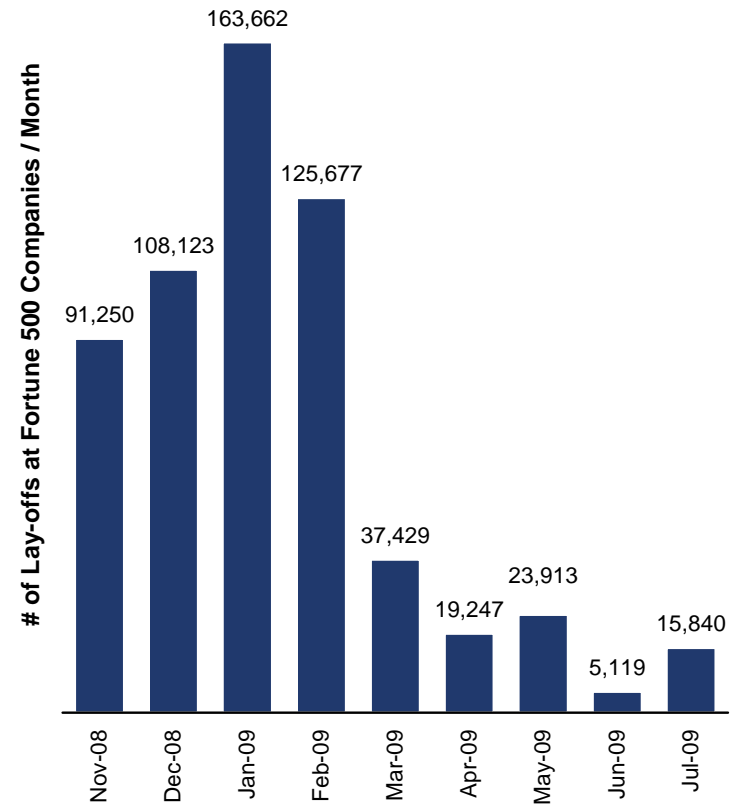
Operating Performance: Lack of Visibility

Difficulty in Projecting the Future / Inward Focus on Restructuring

S&P 500 Consensus EPS Revisions



Number of Lay-offs at Fortune 500 Companies



Source: FactSet and Goldman Sachs Global ECS Research, Forbes, Lay-off Tracker as of July 30, 2009



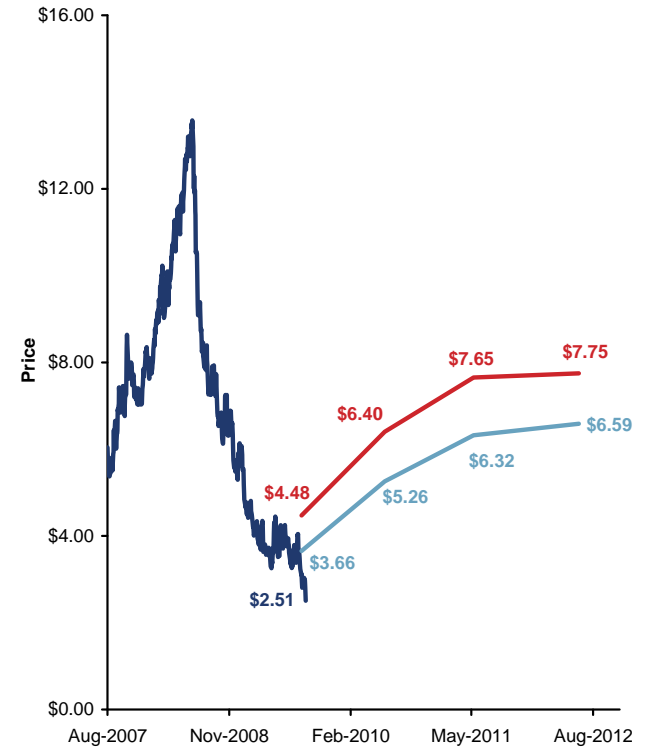
Oil and Natural Gas Pricing Environment

A Tale of Two Commodities

Oil (WTI)



Natural Gas (Henry Hub)



— Historical Spot

— Strip

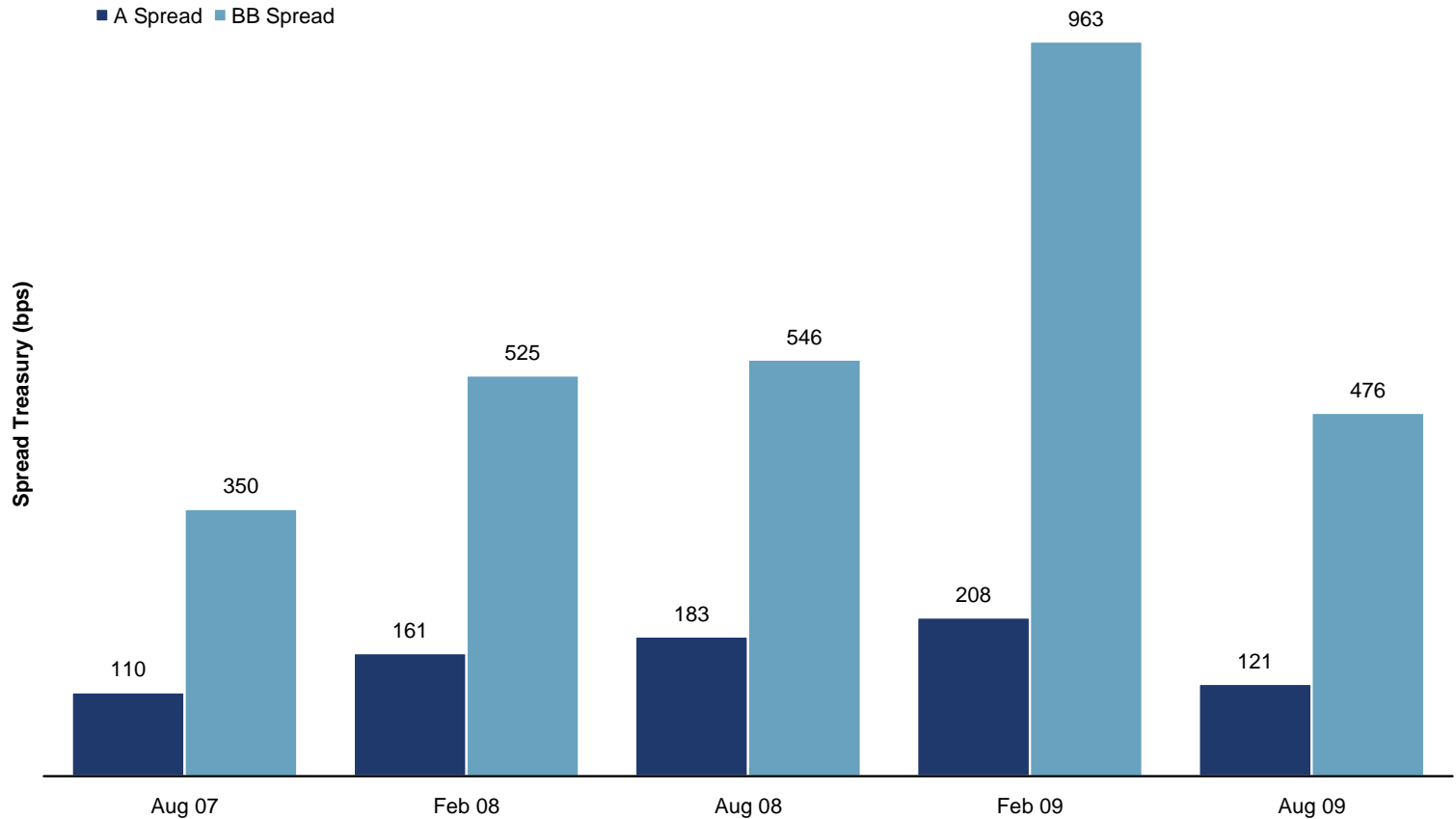
— Consensus

Source: Capital IQ, Bloomberg, GS Research



Debt Investors Require Increased Returns

A Spreads vs. BB Spreads

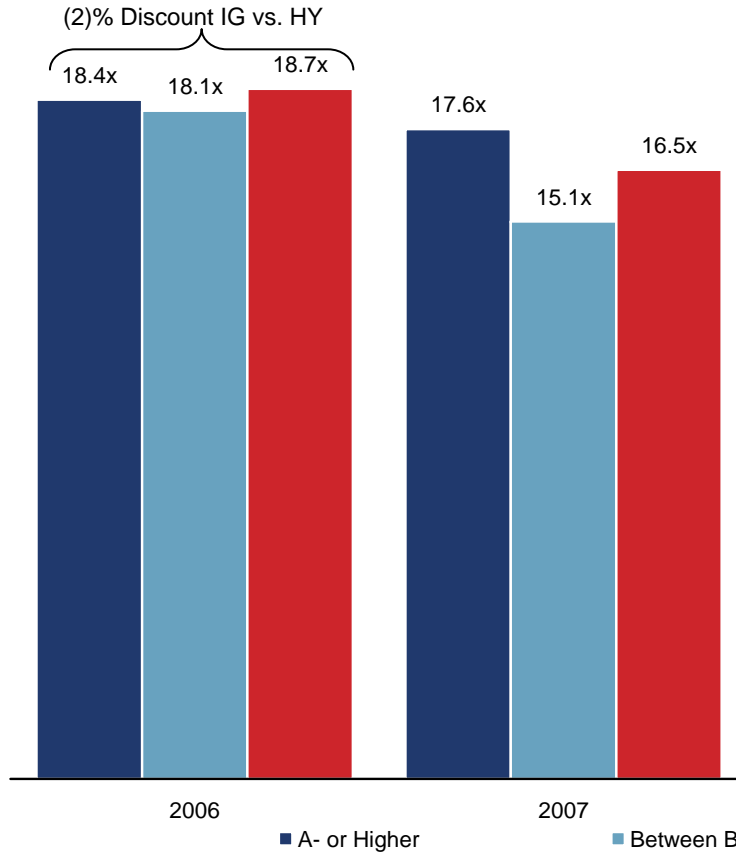


Source: Average spreads on 10 year bonds, Bloomberg Fair Market Indices as of August 31, 2009

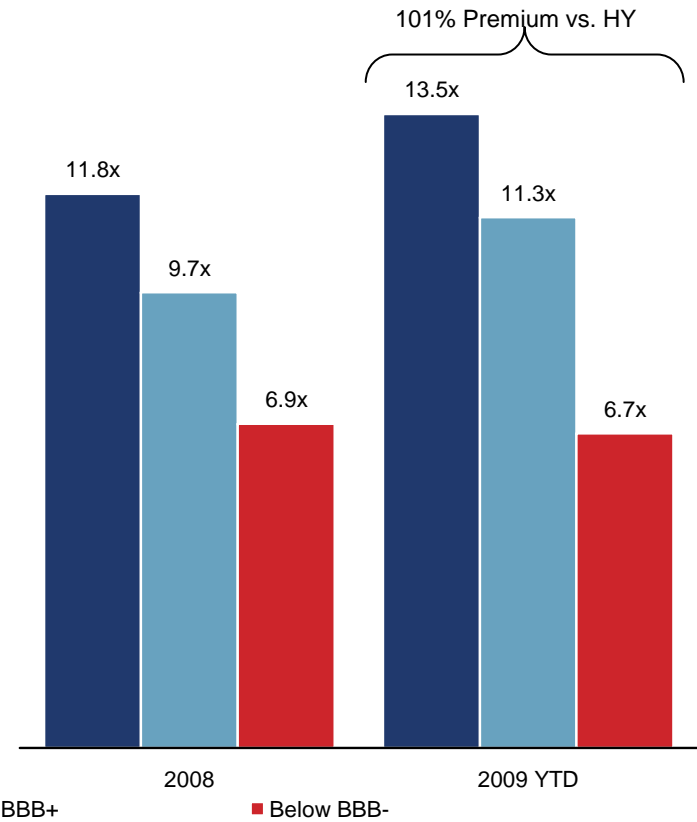


Balance Sheet Strength

Median P/E Multiples by Ratings Bucket: 2006-2007



Median P/E Multiples by Ratings Bucket: 2008-2009

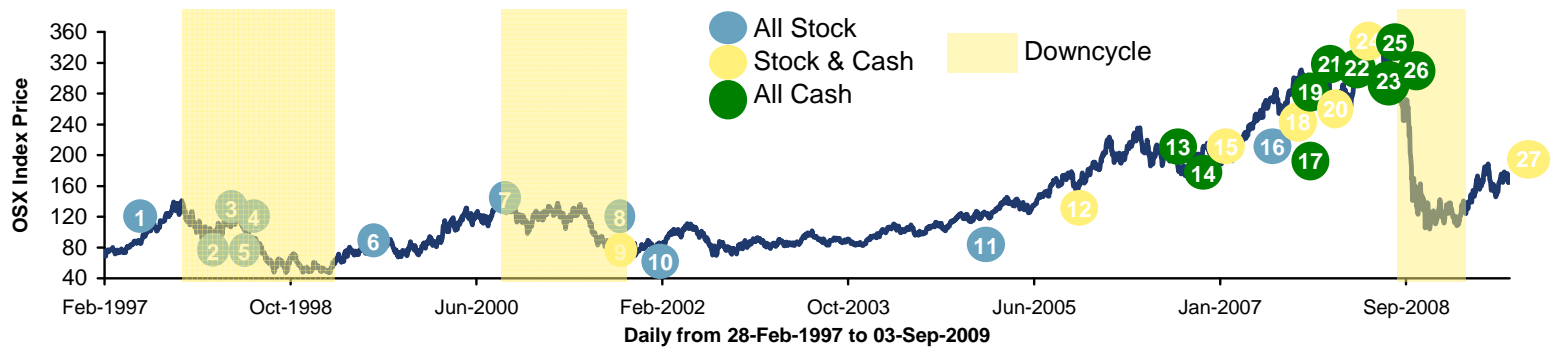


Source: CapitalIQ, Factset as of July 31, 2009
Note: Index constituents: S&P 500 Index



Oilfield Services M&A Through the Cycles

Oilfield Services Transactions (> \$2bn)

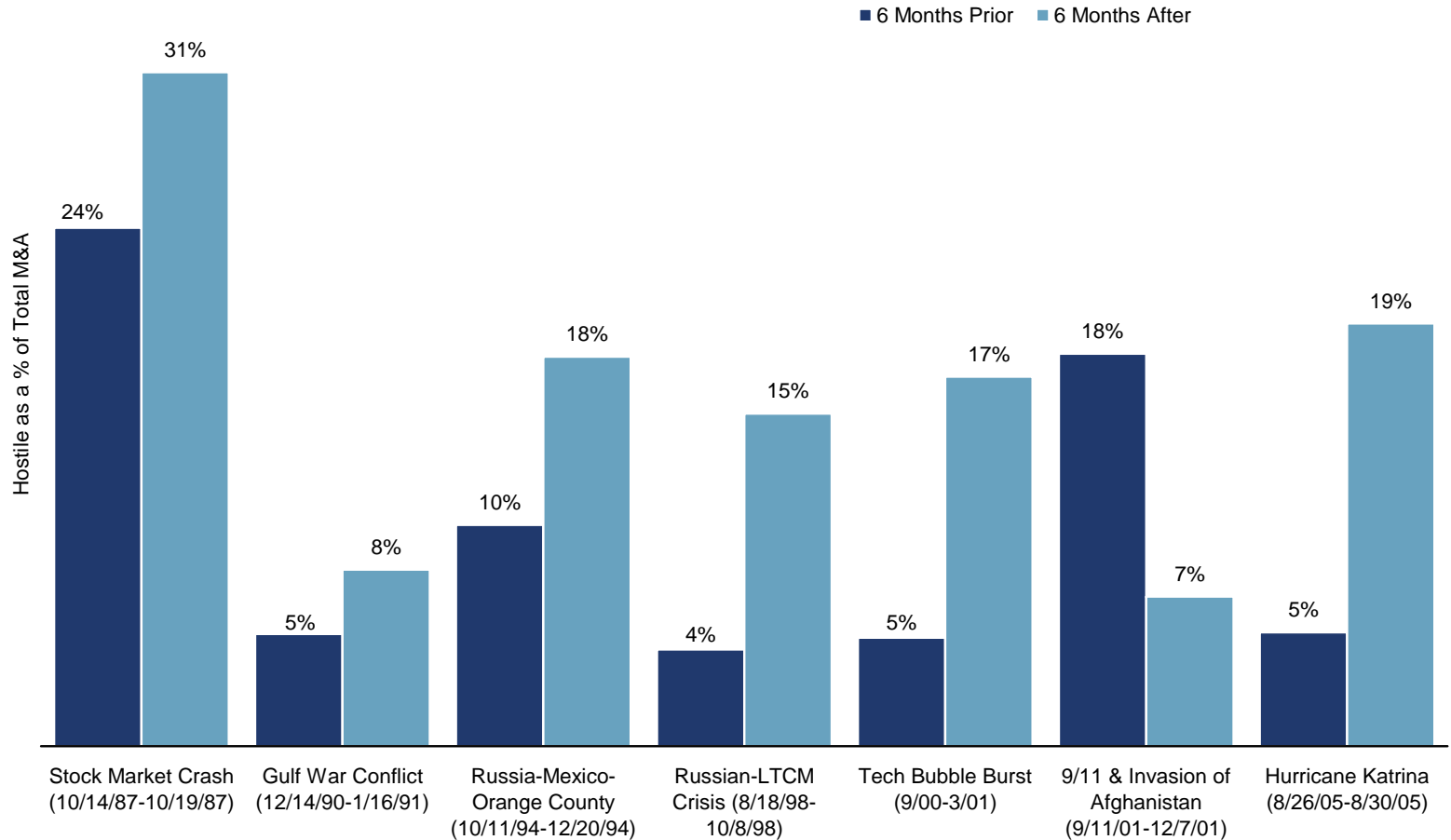


Transaction	Date Announced	Acquirer	Target	Size (\$mm)	Consideration	Premium	Transaction	Date Announced	Acquirer	Target	Size (\$mm)	Consideration	Premium
1	10-Jul-1997	Falcon	Reading & Bates	\$ 2,665	All Stock	17%	14	12-Jun-2006	Tenaris SA	Maverick Tube	2,321	All Cash	42%
2	26-Feb-1998	Halliburton	Dresser Industries	8,671	All Stock	14%	15	5-Sep-2006	CGG	Veritas	3,306	Stock & Cash	33%
3	4-Mar-1998	EVI	Weatherford Enterra	2,745	All Stock	N/A	16	5-Feb-2007	Universal Compression	Hanover Compressor	2,074	All Stock	2%
4	10-May-1998	Baker Hughes	Western Atlas	5,048	All Stock	6%	17	12-Feb-2007	Tenaris SA	Hydril	2,046	All Cash	17%
5	19-Jun-1998	Schlumberger	Camco International	3,255	All Stock	33%	18	19-Mar-2007	Hercules Offshore	TODCO	2,434	Stock & Cash	28%
6	12-Jul-1999	Schlumberger	Sedco Forex	3,621	All Stock	0%	19	29-Jun-2007	Various PE Firms	CCS Income Trust	2,625	All Cash	21%
7	21-Aug-2000	Transocean	R&B Falcon	8,969	All Stock	15%	20	23-Jul-2007	Transocean	GlobalSantaFe	17,299	Stock & Cash	0%
8	24-May-2001	Pride	Marine	2,000	All Stock	18%	21	17-Dec-2007	National Oilwell Varco	Grant Prideco	7,400	All Cash	22%
9	3-Jul-2001	Technip	Colflexip SA	2,378	Stock & Cash	10%	22	19-Dec-2007	First Reserve	Abbot Group PLC	2,889	All Cash	17%
10	4-Sep-2001	Santa Fe	Global Marine	3,658	All Stock	17%	23	22-Feb-2008	First Reserve	CHC Helicopter Corp	2,242	All Cash	49%
11	13-Aug-2004	National Oilwell	Varco International	2,670	All Stock	9%	24	3-Jun-2008	Smith International	W-H Energy Services	2,808	Stock & Cash	9%
12	6-Jun-2005	Weatherford	Precision Drilling	2,391	Stock & Cash	N/A	25	13-Jun-2008	Various PE Firms	Expro International	3,698	All Cash	22%
13	21-Apr-2006	Schlumberger	WesternGeco	2,400	All Cash	N/A	26	7-Jul-2008	COSL	Awilco	3,791	All Cash	19%
							27	31-Aug-2009	Baker Hughes	BJ Services	5,537	Stock & Cash	16%

Source: FactSet, JS Herold



Opportunistic Hostile Activity Spikes Post-“Crisis”



Source: Thomson Financial Securities Data



Lyondell Chemical Company v Ryan

Panel II.

Factual Background

- May 11, 2007 — Basell affiliate files a Schedule 13D announcing rights to acquire 8% of Lyondell at \$32.11 per share; 13D stated that Basell affiliate “might . . . acquire additional shares”. Lyondell Board meets in response, and determines no particular action is necessary.
- May 14, 2007 — Apollo Management calls Dan Smith, CEO of Lyondell, to suggest a possible MBO of Lyondell financed by Apollo. Mr. Smith rejects proposal.
- June 26, 2007 — Basell announces definitive agreement to buy Huntsman for \$9.6 billion.
- July 4 - 9, 2007 — Huntsman announces receipt of potentially superior proposal by Apollo/Hexion.
— Huntsman board determines Apollo/Hexion bid is superior; triggering Basell's matching right.

Factual Background

- July 9, 2007
 - Smith, on his way to Rotterdam board meeting for Lyondell, meets with Leonard Blavatnik in New York - \$40 per share proposed for Lyondell, later increased to \$48 that same day:
 - Definitive documents by July 12
 - Sign by Monday, July 16
 - \$400 million break-up fee (just over 3%)
 - No shop
- July 10, 2007
 - Lyondell Board meets in Rotterdam; Smith asks for additional information about Basell financing.
- July 11, 2007
 - Lyondell Board authorizes Smith to continue discussion; retains financial advisor
- July 12, 2007
 - Huntsman announces definitive agreement with Apollo/Hexion. Lyondell Board meets again in Rotterdam.
- July 13 – 15, 2007
 - Agreements negotiated; diligence process.

Factual Background

- July 14, 2007
 - Smith talks by phone with Blavatnik and requests:
 - increased price,
 - go-shop for 45 days with 1% break-up fee,
 - break-up fee thereafter reduced from \$400 million,Blavatnik is “incredulous,” but agrees to reduce break-up fee to \$385 million (3% of equity value).
- July 16, 2007
 - Definitive agreement signed.
- July 17, 2007
 - Transaction announced before market opens.

Chancery Court Proceeding

- Claim against directors that they breached duty of loyalty
- Procedural status:
 - summary judgment motion to dismiss claim against directors
 - not a preliminary injunction to enjoin the merger
 - preliminary injunction hearing had been held in Texas
 - preliminary injunction denied
 - in Delaware, but using Texas preliminary record
 - benefit of all reasonable inferences to non-moving party

Court of Chancery - Plaintiff Claims

- Primary claim: Lyondell directors breached Revlon duty
- Since transaction closed, injunctive relief no longer available
- Lyondell has DGCL § 102(b)(7) charter provision; directors exculpated for monetary damages for breach of duty of care
- Plaintiff can only prevail on claim for monetary damages if Board
 - received an improper personal benefit
 - failed to act in good faith, or
 - acted disloyally
- Duty of care not challenged

Issues in Chancery Court Proceeding

- Structural loyalty claim
 - plaintiff argued that the financial benefits to outside directors from their stock options was an improper personal financial benefit
 - options were awarded in an established plan
 - options were paid out at the \$48.00 per share price for all shareholders (less the strike price)
 - Chancery Court dismissed the structural loyalty claim
 - accelerated vesting upon a merger not an improper personal benefit

Court of Chancery - Holding and Discussion

- Well established Revlon duties under Delaware law
 - does not require perfect process
 - "no single blueprint" to follow

Court of Chancery - Holding and Discussion

- Court second guesses the Board actions
- Despite knowledge that the Board was independent and not conflicted, the Court found that fact questions existed on whether Board complied with its Revlon duties
- The Chancery Court determined that the Revlon duties were triggered by the filing of Basell's 13D which put Lyondell "in play"

Court of Chancery - Holding and Discussion

- The Chancery Court was critical of:
 - The Board's inaction between the filing of the 13D and the actual offer from Blavatnik
 - The fact that Smith, the CEO, led the discussions for Lyondell
 - The absence of a formal market check before signing
 - How quickly the deal was negotiated and documented
 - Deal protection measures that are widely viewed as routine (no shop with a fiduciary out; 3% break-up fee)

Court of Chancery - Holding and Discussion

- Possibly "bad faith" by directors
 - possibly "a knowing disregard of directors' known fiduciary duties in a sale scenario"
 - Revlon mandates "impeccable" knowledge of the market
 - "slothful indifference" despite knowing that the company was in play

Court of Chancery - Result

- Uncertainty as to:
 - Revlon duties
 - "good faith" of independent and non-conflicted Board members
 - effect of "take it or leave it" offer

Motion for Interlocutory Appeal

- Denied by Chancery Court
- Upon motion directly to Delaware Supreme Court, interlocutory appeal accepted

Delaware Supreme Court

- Delaware Supreme Court reverses and renders judgment for defendant Lyondell directors
- Directors "did not breach their duty of loyalty by failing to act in good faith."

Delaware Supreme Court - Revlon

- Revlon duties do not arise simply because company is "in play"
 - 13D filing did not trigger Revlon duty
- Directors began negotiating sale on July 10, 2007
 - at that time Revlon duties triggered
- Only one Revlon duty: "get the best price for the stockholders at a sale of the company"
- Board has wide latitude

Delaware Supreme Court - Bad Faith

- Bad faith
 - if a "fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."
 - if a showing that "knowingly and completely failed to undertake their responsibilities."
- Even an inadequate or flawed effort is not a "conscious disregard"
- Noted the "blowout" price that even some Basell directors believed was too high

Subsequent Delaware Cases

- *Wayne County Employees Ret. Sys. v. Corti*
 - Will not "second guess business judgment" of board in sale of control context
 - to survive a motion to dismiss, allegation must suggest that director defendants "knowingly and completely failed to undertake their responsibilities" to obtain the best sale price

Lyondell - Practical Takeaways

- Structural duty of loyalty issue of directors addressed
 - stock option acceleration and cash out at merger price does not breach duty of loyalty of independent directors
- End run around DCGL § 102(b)(7) charter provision probably halted
 - pure duty of care claims (for which directors have no personal liability under charter provision) cannot be recharacterized as duty of loyalty "bad faith" claims
- "Bad faith" defined as far more than just gross negligence
 - only where "directors utterly failed to attempt to obtain the best sale price"

Lyondell - Practical Takeaways

- Revlon duties clarified
 - not triggered simply because company "in play"
 - Board must make conscious decision to sell before Revlon triggered
 - only one Revlon duty - "to get the best price"
 - no single set of requirements; wide latitude

**Panel II.
Hexion Chemical Company v Huntsman Corp.**

Presenter: Jeffrey Burton Floyd

Hexion Chemical v Huntsman Corp.

- **Factual Background of *Hexion Chemical Company v Huntsman Corp.***

Key Issues in the Decision

- **Material Adverse Effect**
- **Knowing and Intentional**
- **Reasonable Best Efforts**
- **Burden of Proof**

Chancery Court's Analysis

- **Bounds of Material Adverse Effect**
 - **Appropriate Benchmarks to Measure**
 - **Proving the Event or Circumstance**
 - **Carve-outs do not define the Test**
 - **Effect of Projections and Disclaimers**
- **To Know and Intend does is not applied to the result, just the act**
- **Reasonable Best Efforts allows for commercial evaluation of required action**

Some Lessons Learned

- **MAE is for the unknown; you must contract specifically for the known**
- **Forum selection clause must be properly scoped**
- **Measure of damages remains unresolved**
- **Exceptions or toggle provisions may swallow the benefits of an exclusive remedy provision**
- **Disclaimers can form the basis for an MAE carve-out**
- **Burden of proof is not just for litigators**
- **Review key conditions provisions bilaterally**

M N A T

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

Unconditional Control Issues

Presenter: Frederick H. Alexander

In re Loral Space & Commc'ns Inc.

- **36% stockholder**
- **Equity raise**
- **Fairness or *Revlon*?**
- **Unconventional remedy**

Wayne County Employees' Retirement Sys. v. Corti

- **Asset acquisition**
- **New majority stockholder**
- **Adequate market test?**
- **Management involvement in discussions**
- ***Lyondell* applied**

Louisiana Mun. Police Employees' Retirement Sys. v. Fertitta

- **39% stockholder**
- **Going private**
- **Open market purchases**
- **Failed transaction**
- ***Lyondell* not applied**

In re Trados Inc. S'holder Litig.

- **Private company**
- **Third party acquisition**
- **Preferred Directors**
- **Common underwater**
- **Standard of review**