

ExecutiveMemo

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A newsletter of the Illinois Manufacturers' Association



May 26, 2010

BRIEFLY

Nuclear Manufacturing Outreach Workshop, June 7-8, 2010, Chicago Marriott O'Hare

Join industry leaders in new reactor design, engineering, construction and procurement to learn how your company can become part of this growing market.

Presented by the Nuclear Energy Institute, the Nuclear Manufacturing Outreach Workshop is an excellent opportunity for companies interested in entering the nuclear sector to gain insights into the current market for components, commodities and services, as well as industry requirements to enter the market. In addition, participants will have the opportunity to interact directly with procurement personnel from some of the leading firms in the nuclear industry. Executives and business development, sales and marketing personnel will find the workshop very informative.

This workshop is co-sponsored by the American Society of Mechanical Engineers, National Association of Manufacturing, the U.S. Department of Energy, the Electric Power Research Institute and the National Institute of Standards and Technology Manufacturing Extension Partnership.

Visit <http://www.nei.org/newsandevents/conferencesandmeetings/mowil> for more information and to register, or contact Kate Gerlach at kq@nei.org, telephone 202-739-8000.

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A prospective viewpoint: Six factors that will drive an increase in M&A

M&A is on the rise. Why?

Certainly an improved economic outlook, better performing equity markets and banks' increasing propensity to lend have contributed significantly to the recent M&A market recovery. However, the more important question asks . . . is the recovery merely a temporary respite, or will it continue?

We believe the recent recovery is not just a temporary phenomenon, but rather a longer term trend that will continue through 2010 and into 2011, largely due to the following six factors.

1. Companies need to put their cash to work

To weather the recent recession and survive what was an uncertain outlook, companies shifted their focus to conservative cash management policies in order to strengthen their balance sheets. Through cost cutting and reduced cash outlays, companies stockpiled cash and/or used cash to pay down debt.

- Cash balances of the 421 non-financial firms in the S&P 500 increased 31 percent to \$964 billion in 4Q '09 when compared to 4Q '08.
- As conditions have improved and the outlook has become more clear, companies are putting their cash to work in three main ways:
 - Acquisitions – after its cash balance increased almost 500 percent, Walgreens acquired Duane Reade for \$1.1 billion in cash;
 - Share buybacks – after its cash balance increased more than 80 percent, Pepsi announced a plan to buy back \$15 billion of stock (global share buybacks through 1Q '10 represented nearly half of total '09 buybacks); and
 - Dividends – after its cash balance more than doubled, Starbucks recently

announced its first dividend (in addition to a share buyback program).

2. Private equity groups hold record amounts of capital

In '07 and '08, Private Equity Groups raised record amounts of capital: \$301 billion and \$264 billion, respectively. However, the recent economic upheaval and tight credit markets kept most financial buyers from deploying their capital.

- The amount of committed (and undeployed) capital, commonly referred to as the "PE overhang," swelled nearly 70 percent to more than \$400 billion by the end of '09, far exceeding the \$292 billion record set prior to the downturn.
- The recent declines in deal activity have strengthened the resolve of many PE firms to invest their committed capital before they face demands from investors to reduce management fees and/or extinguish commitments.
- Nearly 30 percent of the PE firms that have announced an acquisition in '10 did not complete an acquisition in '09.
- 304 PE investments were completed in the U.S. in 1Q '10 with a combined value of more than \$14 billion, representing the best quarter in over a year in terms of deal volume (the middle market accounted for 80 percent of these deals).
- The exit market also has experienced an increase in activity, with 65 completed exits in 1Q '10, more than double that of 1Q '09.

3. Credit markets thawing and interest rates attractive

Credit markets have eased, albeit slightly, as banks begin to regain comfort in extending loans to strong credits.

See **INCREASE IN M&A**, page 2

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- 4Q '09 saw an increase in lending activity, with volume topping \$25 billion, an increase of more than 37 percent from the same period in '08.
- Average debt multiples of LBO loans increased 1x EBITDA to 4.3x in 1Q '10 when compared to the '09 average of 3.3x.
- On a historical basis, interest rates remain at record lows since the Federal Reserve lowered the Federal Funds Rate target to nearly zero in December '08. Additionally, both the Fed and the European Central Bank have indicated rates will remain low for an "extended period."
- In '10, deals of various sizes have been financed by debt as weaker credits once again are able to attain financing and stronger credits now benefit from better financing terms and conditions.
- Examples of deals announced in '10 financed partly or completely by debt are API Technologies Corp.'s \$29 million acquisition of Kuchera Industries, Inc. and Kuchera Defense Systems, Inc.; Thoma Bravo's announced \$142 million acquisition of Plato Learning, Inc.; Madison Dearborn Partners' announced \$915 million acquisition of BWAY Holding Company; and Phillips-Van Heusen Corp.'s announced \$3.2 billion acquisition of Tommy Hilfiger Corporation.

4. Growth opportunities lie abroad

- Opportunities to diversify abroad are gaining momentum. While much of this is driven by improving global economic conditions, companies also are finding attractive opportunities to deploy capital outside the U.S.
- In the first three months of '10, nearly 350 transactions were announced involving a U.S.-based buyer and a non U.S.-based seller, representing a 45 percent increase from the 1Q '09. While the increase is partly driven by improved economic conditions and the increase in overall M&A, developed and emerging markets in Europe, Asia and Africa are seen by many to offer significant growth opportunities across many industries.
 - In one of the most high-profile transactions of the year, Kraft Foods, Inc. acquired Cadbury plc for \$22.3 billion, in a long fought battle that ended when the deal closed in March of '10. According to the *New York Times*, "Analysts had long supported Kraft's rationale for the merger, which would . . . help the American food company expand into faster-growing countries like India, South Africa and Mexico."
 - Earlier this month, Thomas & Betts Corporation announced that it had com-

pleted its \$115 million acquisition of PMA AG, a Switzerland-based manufacturer of technologically advanced cable protection systems, that will, according to T&B, "expand access for the T&B family to growing industrial markets outside of North America."

5. Remaining competitive

Given both the difficulties encountered in generating organic growth and the opportunistic behavior of their well-capitalized counterparts, many companies have engaged in and will continue to make acquisitions so as not to be left behind.

- Companies that can neither grow organically nor obtain financing to pursue their own acquisitions may have no choice but to find a buyer/partner in order to compete. This reality, coupled with the improvement in general market conditions and increased clarity on future results, has increased the openness of many would-be targets to acquisitions.
- In the two largest deals of '09, Merck announced its acquisition of Schering-Plough for \$46.0 billion in March of '09, after Pfizer announced its acquisition of Wyeth for \$64.5 billion in January of '09.
- Apollo Global Management announced its offer, which was terminated earlier this month, to acquire Cedar Fair for approximately \$2.2 billion in December of '09, after its rival, The Blackstone Group, announced its acquisition of Anheuser-Busch Inbev's American theme parks for approximately \$2.7 billion in October of '09.
- Apple Inc. acquired Quattro Wireless, Inc. in January of '10, entering the mobile advertising industry already occupied by Google Inc., Microsoft Corporation, Yahoo! Inc. and AOL, Inc.

6. The need to diversify due to an uncertain or negative industry outlook

Many large companies that find themselves in mature industries are using M&A to combat market uncertainty, low projected growth or negative industry outlooks.

- Some healthy companies, especially those in stable (or shrinking) lines of business, are using their available cash and debt capacity to acquire new platforms and diversify their product/service offerings
- In April of '10, Hillenbrand, Inc. acquired K-Tron International, Inc. for \$435 million in a diversification strategy aimed at reducing its dependence on the low-growth death care market. K-Tron manufactures material handling equipment and systems.
- Other companies are using "tuck-in" or "bolt-on" acquisitions to supplement their product/service offerings either as

part of a defined strategy or because they may not be in a position to acquire a large target.

- 110 of the companies that comprise the S&P 500 made an acquisition in 1Q '10, more than in each of the past three quarters.
- In the past six months, nearly 40 percent of the S&P 500 have made an acquisition, while over 50 percent have made an acquisition in the past 12 months.
- In the past 12 months, nearly 30 percent of the S&P 500 have made more than one acquisition, while nearly 15 percent have made more than two acquisitions.

While hindsight may be 20/20, forecasting the future certainly is not. Nonetheless, we believe the factors identified above will be key contributors to a sustained recovery.

Author Scott P. George is Managing Director, P&M Corporate Finance. He can be reached at Scott.George@pmcf.com.

Sources: Capital IQ, The Economist, The New York Times, Pitchbook, Standard & Poor's, Thomson Reuters, The Wall Street Journal

Do you think about hiring unpaid interns this summer? Think again . . .

With the summer right around the corner, a barely recovering economy and an unemployment rate still at staggering levels, young workers seem more inclined to accept unpaid internships as an alternative to unemployment. However, employers should think twice before utilizing unpaid interns as a substitute for their regular workers or to supplement their existing workforce during specific time periods. While the benefit of using "free" labor can be very appealing, for-profit private sector employers can avail themselves of this benefit only under very limited circumstances. Indeed, according to the acting director of the Department of Labor's ("DOL") Wage and Hour Division, there are only limited circumstances in the for-profit sector "where you can have an internship and not be paid and still be in compliance with the law."

Recently, the DOL has issued a fact sheet to help employers determine when individuals working in the for-profit sector can be categorized as unpaid interns, i.e. "trainees," rather than "employees," and properly excluded from being paid minimum wage and overtime compensation. The DOL's guidelines include the following six-factor test which, if met, enables an employer to lawfully not pay its interns any compensation:

See **UNPAID INTERNS**, page 3

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

As indicated by these factors, the internship must be structured as an educational experience for the individual working for a for-profit employer, rather than as productive work for the benefit of the employer's business and operations. The more the internship provides the individual with skills specific to one employer's operations and business, the more likely the intern must be treated as an "employee" and paid the minimum wage and overtime pay. As a practical matter, however, while a for-profit employer can use the benefit of an intern's unpaid work when all six factors are met, it might not be that easy to draw a line between work beneficial to an employer and work activity that could be viewed solely as a bona fide educational experience.

In addition, at both federal and state levels, the DOL is cracking down on firms that fail to pay their interns properly and has stepped up its efforts to educate companies

and students about the legal requirements regarding internship pay. For example, last year, the New York State DOL investigated a number of companies' internship programs to determine proper compliance with the wage and hour laws. Similarly, California officials have issued guidance letters advising employers about the application of the law, while Oregon regulators have been busy investigating and settling some cases where young workers did not receive compensation for jobs employers claimed were unpaid internships.

As a result, employers are well advised to consult with legal counsel before hiring summer interns. Especially in this economic downturn, while the opportunity to cut employment costs is very tempting, employers could find themselves dealing with the hassle and expense associated with misclassifying their interns as unpaid trainees, which could cost a lot more than the required minimum wage and overtime compensation.

Author Casandra Rdzak is a member of the Labor & Employment Practice Group of Chicago-based law firm Neal, Gerber & Eisenberg LLP. Casandra can be reached at 312-827-1482 or crdzak@ngelaw.com.

Don't break the law on employee breaks and on call time

Wage and hour claims continue to rise, including class actions and collective actions that can create substantial exposure for manufacturers. One way manufacturers can avoid liability is to ensure that they are paying employees for compensable breaks and on call time.

Not all employees are entitled to break time, and not all break time is compensable. Under the Fair Labor Standards Act

See **THE LAW**, page 4

DATES OF NOTE

More information/events may be found at <http://www.ima-net.org/calendar.cfm> and <http://www.ima-net.org/MIT/open.cfm>
Email: jstanley@ima-net.org

June 10, 2010

IMA-MIT Event: Leading and Managing Through Change, DePaul University O'Hare Campus, 3166 S. River Rd., Des Plaines

This one-day interactive workshop combines proven leadership behaviors with practical skills for helping leaders respond to the changes they face in today's rapidly changing and highly competitive environment. This program is designed to provide leaders with the strategic and tactical skills not only to lead change, but also to identify at what stage their followers are emotionally in a change process. During the program, participants are encouraged to examine their own reactions to change, recognize where their followers are in the change process and develop ideas on how to skillfully lead them through this change.

June 16, 2010 — Rockford

June 24, 2010 — Peoria

IMA Breakfast Briefing: Health Care Reform and How it Affects You

Presented by attorneys from Michael Best & Friedrich LLP — 8:00-11:00 am. See ad, lower left, this page.

June 25, 2010

IMA-MIT Event: Strategic Planning and Goal Setting, DePaul University O'Hare Campus, 3166 S. River Rd., Des Plaines

The Strategic Planning and Goal Setting Workshop aims to assist managers and team leaders to plan strategically, set goals and objectives for their functional team, and align them with actions, as well as to demonstrate strategic thinking during everyday operations.

July 14, 2010

IMA-MIT Event: Consultative Selling Skills for Sales Professionals, DePaul University O'Hare Campus, 3166 S. River Rd., Des Plaines

The goal of any selling process is to earn and sustain a loyal and partnership-minded client base that will keep coming back. Be ready to turn your "lean and mean" sales team into 'customer friendly' advisors your clients will trust to help them make complex buying decisions. Get a better grasp of the needs and vision of your customers, and leave with tools you need to develop great working relationships with key decision makers. Participants will be able to determine how their company's product can provide meaningful value to a client, even in a competitive or saturated market.

July 21, 2010

IMA-MIT Event: Essential Internal Training Skills and Techniques, DePaul University O'Hare Campus, 3166 S. River Rd., Des Plaines

Essential Internal Training Skills and Techniques is a one day workshop that will introduce the new internal trainer or subject matter expert to the skills necessary for them to be a successful trainer or facilitator. Essential Internal Training Skills and Techniques will cover core skills such as how to create rapport with your learner, how to communicate learning objectives, how to introduce a learning activity, how to ask the right question, and how to engage and reengage the adult learner. Know how to lead an effective class discussion. Learn how to ask the right question – each time, every time.



Breakfast Briefings 2010 . . .

Health Care Reform and How it Affects You

**JUNE 16 - CLOCK TOWER RESORT
ROCKFORD**

<https://www.ima-net.org/breakfast0616.cfm>

**JUNE 24 - PERE MARQUETTE HOTEL
PEORIA**

<https://www.ima-net.org/breakfast0624.cfm>

Presented by attorneys from Michael Best & Friedrich LLP — 8:00-11:00 am

Health care reform has arrived! President Obama signed into law The Patient Protection and Affordable Care Act on March 23, 2010 and a package of amendments to this legislation, the Health Care and Education Affordability Reconciliation Act of 2010 (the "Reconciliation Bill") was approved on March 30th. Join us for a presentation and discussion about the short and long-term impact of this legislation. Key topics of discussion include provisions that become effective immediately; employers' responsibilities and potential penalties; impact on employee benefit plans; impact on employees' responsibilities; and exchanges and tax provisions impacting employers and benefit plans.

Cost per session: \$60 IMA member ♦ \$85 non-members

Questions? Contact Kimberly McNamara at kmcnamara@ima-net.org or 630-368-5300, Ext. 2109

(the "FLSA"), employers are not required to provide meal periods or other breaks to their employees. The FLSA does provide, however, that if an employer chooses to offer a meal break, any meal break of thirty minutes or more generally is not considered "hours worked" for which compensation is required, provided that the employee is completely relieved from duties during the meal break. Meal or other breaks of fewer than thirty minutes are considered compensable "hours worked."

Illinois law, on the other hand, requires meal breaks under certain circumstances. Any employee who works for seven and one-half hours is entitled to an unpaid meal period of at least twenty minutes. As under the FLSA, whether the meal period is to be treated as "hours worked" depends upon whether the employee is performing work during a break. The meal period must be given to the employee no later than five hours after beginning work. A meal break is not required when an employee is in a position that requires him to be on call. In that case, the employee must be allowed to eat on the job. Aside from the meal period, there is no law in Illinois requiring employee breaks.

A recent addition to the FLSA also mandates reasonable break periods for nursing mothers. The Patient Protection and Affordable Care Act, signed by President Obama on March 23, 2010, includes a provision requiring that all employers provide: (1) a reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth; and, (2) a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, that an employee may use to express breast milk. Illinois has a similar law called the Nursing Mothers in the Workplace Act. Under the federal and state laws, non-exempt employees need not be paid for such breaks.

Wage and hours laws also apply to time worked while on call. Under the FLSA, if a non-exempt employee is allowed to go home, but must answer work-related phone calls or otherwise be on call to work on short notice, the employee might be entitled to pay depending upon the amount of freedom given the employee. If an employee is free to engage in normal activities and work-related phone calls are infrequent, then the employee is not entitled to pay for the on call time when the employee is not actually working. An exception to this rule exists when being on call, even for

infrequent phone calls or work, greatly restricts an employee's personal life. In that case, the employer likely must pay the employee for the entire time he is on call, including time that the employee is waiting to be called.

It is important for manufacturers to adhere to the FLSA and state laws regarding break periods and on call time to help prevent costly wage and hour lawsuits. Employers can help avoid significant exposure by conducting internal wage and hour audits to determine their level of compliance with the applicable laws. Aside from assessing whether any changes need to be made to comply with the law, conducting such an audit can be beneficial in developing defenses in the event a wage and hour lawsuit does arise.

If you have any questions about break periods and on call time, or any other wage and hour or other employment law issue, please contact Dan Kaufman at dakaufman@michaelbest.com or Charmaine Butler at cmbutler@michaelbest.com. They also can be reached at 312-222-0800.

Energy Market Update from Constellation Energy

For week ending May 21, 2010 . . .

Natural Gas: Natural gas declined over 35 cents last week to \$4.03/mmbtu as the DJIA moved lower, a correlation which has not typically been that strong, especially as domestic gas supply has helped disconnect U.S. gas from global energy and economic trends. Natural gas inventories remain at a record for this time of year but for a second-straight week the storage report was below most expectations, largely due to higher-than-expected power and some heating demand.

Crude Oil: Prompt-month crude oil fell less than 50 cents from where it closed on Monday, ending the week just above \$70/bbl, following equity market movements and gains in the U.S. dollar. On Thursday, the June '10 crude contract rolled off the board at \$68.01/bbl, the lowest level in the prompt month contract

since September 2009. EIA oil data showed a small build in crude inventories amid another dip in refinery utilization. Current inventories stand at 362.69mm bbls.

Weather:

- Likely surge in cooling load expected as seasonably warm temperatures anticipated for the East at the end of this week.
- Intensity of heat in Midwest should weaken, but above normal temps will remain during 6-10 day period.
- East expected to cool to near normal for first 10 days of June in the East.

Visit Constellation NewEnergy online at www.newenergy.com to sign up to receive the complete Energy Market Update weekly. Or call CNE directly at 866-237-POWER.

Source: Energy Information Administration (EIA), NYMEX, NOAA, Reuters & Constellation NewEnergy (CNE)

First quarter manufacturing technology consumption up 33.7 percent

March U.S. manufacturing technology consumption totaled \$258 million, according to AMTDA, the American Machine Tool Distributors' Association, and AMT, the Association for Manufacturing Technology. This total, as reported by companies participating in the USMTC program, was up 58.1 percent from February and up 49.5 percent from the total of \$172.59 million reported for March 2009. With a year-to-date total of \$548.53 million, 2010 is up 33.7 percent compared with 2009.

March manufacturing technology consumption in the Midwest Region totaled \$77.40 million, up 82.1 percent when compared with the \$42.49 million total for February and up 43.2 percent when compared with March a year ago. The \$155.85 million year-to-date total was 28.2 percent more than the total for the same period in 2009.

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