

PIPE Transactions

Basics and Current Developments

Anna Pinedo

Partner, New York

+1 212 506 2275

apinedo@mayerbrown.com

Jennifer Carlson

Partner, Palo Alto

+1 650 331 2065

jennifer.carlson@mayerbrown.com

April 2020

Agenda

- Market trends
- PIPE basics
- PIPE documentation
- PIPE considerations for placement agents
- Venture, private equity and change of control PIPE transactions
- PIPEs with existing stockholders as investors
- Securities exchange and securities law considerations
- Handling material non-public information (“MNPI”) as a result of Coronavirus-related issues

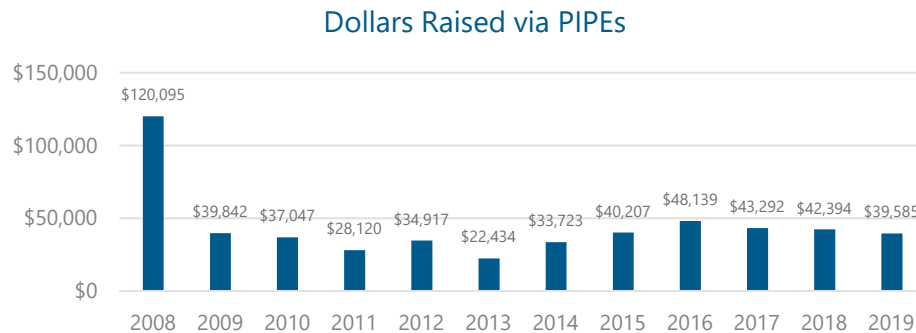
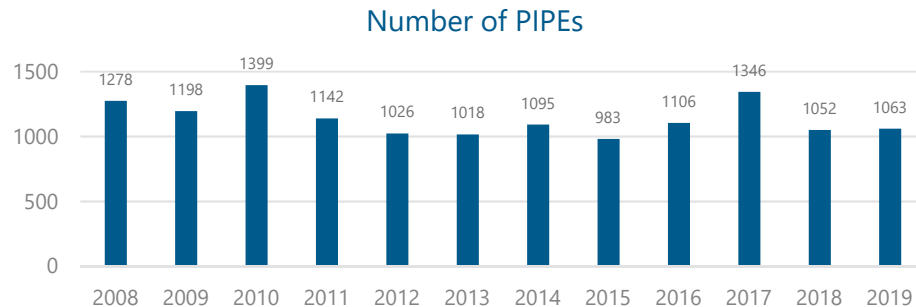
Market trends

Market trends

- During periods of relative market stability, issuers have a broader range of capital-raising alternatives in addition to PIPE transactions:
 - Many more issuers now are eligible to use a shelf registration statement on a primary basis. As a result, more follow-on offerings are completed as shelf takedowns
 - Many shelf takedowns employ the wall-crossing and confidential marketing approach that began with PIPE transactions
- However, in periods of heightened market volatility and in special situations, PIPE transactions remain a capital-raising alternative of choice

PIPE market trends

Year	Number of PIPEs	Dollars Raised
2020*	281	\$14.0 billion
2019	1063	\$39.6 billion
2018	1052	\$42.4 billion
2017	1346	\$43.3 billion
2016	1106	\$48.1 billion
2015	983	\$40.2 billion
2014	1095	\$33.7 billion
2013	1018	\$22.4 billion
2012	1026	\$34.9 billion
2011	1142	\$28.1 billion
2010	1399	\$37.1 billion
2009	1198	\$39.8 billion
2008	1278	\$120.1 billion



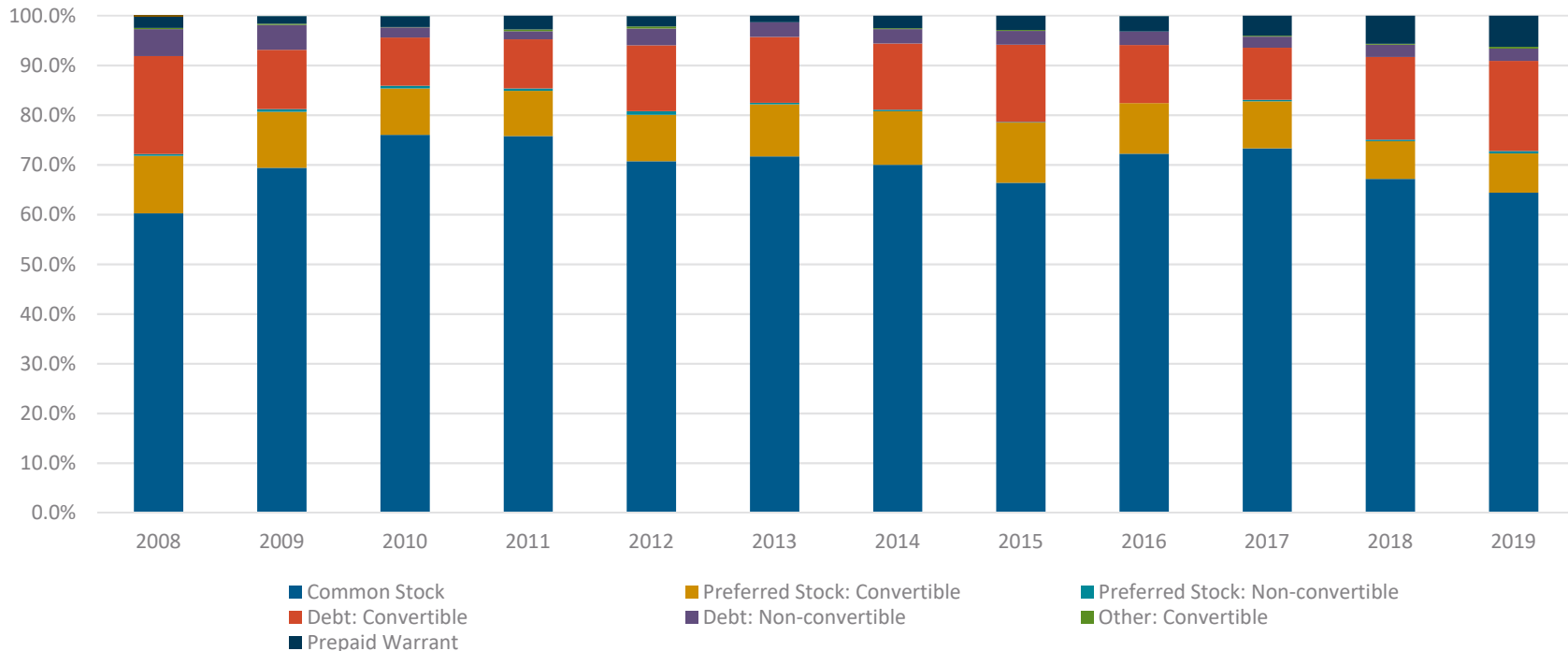
Data: PrivateRaise.com; *2020 YTD (1/1/2020- 3/29/2020)

PIPEs by the numbers

Security Type	2019		2020*	
	(# of placements)	(\$ millions raised)	(# of placements)	(\$ millions raised)
Common stock	685	\$17,110	181	\$10,001
Preferred stock: Convertible	84	\$6,001	24	\$396
Preferred stock: Non-Convertible	5	\$10,665	0	\$0
Debt: Convertible	193	\$4,432	55	\$3,332
Debt: Non- Convertible	26	\$543	6	\$75
Other: Convertible	4	\$265	1	\$1
Prepaid warrant	66	\$569	14	\$171
Total	1063	\$39,585	281	\$13,976

Data: PrivateRaise.com; *2020 YTD (1/1/2020 - 3/29/2020)

PIPEs: structure breakdown



Most active sectors 2019 (by number of deals)



PIPE basics

What is a PIPE transaction?

- A PIPE (private investment in public equity) is the privately negotiated sale (i.e., a private placement) of a public issuer's equity or equity-linked securities to selected accredited investors, where the PIPE investors will have available to them a resale registration statement covering the resale from time to time of the securities purchased in the PIPE transaction
- Investors enter into a purchase agreement to buy securities. The purchase agreement, or a separate registration rights agreement, provides that the issuer is required to file a resale registration statement covering the resale of the purchased securities (or the shares of common stock underlying the purchased securities)
- Usually consists of "primary shares," but may also be in the form of a "secondary offering," or a "primary/secondary" offering

PIPEs: changing terminology

- The term “PIPE” has come to mean any private investment in a public company, including:
 - A traditional PIPE
 - A private placement with delayed (or trailing) resale registration rights
 - A private convertible preferred (fixed or floater) or structured PIPE and
 - A venture-style, or change-of-control, private placement
- Of course, each of these may be better suited to a particular situation, and each raises different considerations

Who invests in PIPEs?

- “Accredited investors”
- Funds, including hedge funds, mutual funds, pension funds, etc.
- Sector and institutional buyers
- Venture funds and private equity firms have expanded their participation in PIPE transactions
 - In the case of private equity firms, this is largely a response to the lack of availability of credit for effecting the leveraged transactions that are core to their business
 - Venture capital funds have increased their participation in PIPEs because valuations have dropped and issuers have become willing to agree to the terms that are found in venture capital transactions

What types of securities are sold in PIPE offerings?

- Common stock
- Convertible preferred stock
- Convertible debt
- Warrants
- Other equity or equity-like securities of an already-public company
- A combination of these securities

Advantages of PIPE offerings to the issuer

- Lower transaction expenses compared to a registered offering
- Allows the issuer to increase its institutional holder base
- Usually requires disclosure of the transaction to the public only after definitive purchase commitments are received from investors
 - Issuer seeks to improve the pricing of the transaction by preventing shorting and other speculative trading activity before the announcement
 - The transaction form generally doesn't work in non-U.S. jurisdictions in which investors have pre-emptive rights over the issuance of new securities
- Requires preparation by the issuer of relatively limited offering documentation

Disadvantages of PIPE offerings to the issuer

- Investors almost always require a discount to the market price, due to limited liquidity
- Often, investors may require warrant coverage
- Limited to accredited investors
- Securities exchange “20% Rule,” which may limit the amount that the issuer can raise without a stockholder vote
- Limit on the number of “blackout periods” under the registration statement

Two types of PIPEs

- Traditional PIPEs
 - Investors commit to purchase a fixed amount of securities at a fixed price, with the closing conditioned mainly upon the SEC's readiness to declare effective a resale registration statement registering the underlying common stock sold
- Private placement with trailing registration rights
 - Private placement of securities were the effects the registration **after** the closing of the private placement

Private placement with trailing resale rights

- Structured as a private placement with follow-on (or “trailing”) registration rights
- Once investors enter into a definitive purchase agreement, closing can occur
- Post-closing, the issuer is obligated to file a resale registration statement and to use its best efforts, commercially reasonable efforts, or some other negotiated standard, to have it declared effective by the SEC
- Typically, the purchase agreement, or a separate registration rights agreement, outlines specific deadlines for the issuer to file, and then to seek effectiveness of, the resale registration statement
 - Many transactions include a requirement that the issuer make penalty payments if it fails to meet the deadlines set for filing or effectiveness, or both

Private placement with trailing resale rights

(cont'd)

- The purchase agreement/registration rights agreement generally contains a limitation on black-out or suspension periods
- The purchasers are named in the resale registration statement as “Selling Stockholders”
- The resale registration statement is usually kept effective until all of the shares may be sold without limitation under Rule 144
 - As mentioned above, many agreements require that the registration statement be kept effective for a maximum period of one or two years. If affiliates participate as investors, they often reject the maximum period

PIPE documentation

Key documents in a PIPE offering

- Engagement letter between issuer and placement agent
- Offering materials or reliance on SEC filings depending on the circumstances
- Purchase agreement/registration rights agreement
- Legal opinions
- Closing documents
- Press release/Form 8-K
- Resale registration statement

Engagement letter

- This is often the only binding agreement between the issuer and the placement agent
- Placement agent's fees
- Exclusivity period — “tail”
 - Frequent subject of negotiation: As to which investors does the issuer pay the placement agent a fee? What is the duration of the tail period?
- Depending on whether the transaction is structured as a Section 4(a)(2) and/or a Rule 506(b) transaction, the engagement letter may contain representations regarding bad actor status
- Indemnification provisions
- Conditions precedent — will placement agent receive a comfort letter? Is a Legal opinion regarding no registration required?

Purchase agreement

- Agreement is between the issuer and the investors
 - Placement agent is not usually a party, unless it is also investing
- Issuer representations and warranties
 - Investor will not have material non-public information once the transaction is announced
- Issuer covenants to promptly make the transaction public
- Investor representations (generally limited):
 - Private placement reps; “accredited investor”
 - Confidentiality, no violation of the securities laws
 - Conditions to closing

Purchase agreement *(cont'd)*

- The purchase agreement may, depending on the nature of the investors, contain ongoing covenants relating to corporate governance (board representation or observer rights, blocking rights, etc.) or information requirements (regular deliveries of public filings or other information to investors)
- The investors typically receive only legal opinions
- Closing conditions are limited to no occurrence of any material adverse change between signing and closing and the delivery of the required legal opinions and closing documents

Negotiating the registration rights

- Limitation on the length or number of black-out periods?
- Usually no “piggy-back” registration rights.
- Will there be a time limit for filing of the resale registration statement following execution of the purchase agreements?
- Length of time given for the issuer to have the resale registration declared effective?
- Penalty payments for failure to file registration statement or to go effective?
Cap on the amount of payments?
- Can any other registration statement be declared effective before the registration statement relating to the PIPE?

PIPE offering materials: disclosure

- At times, a private placement memorandum is prepared containing, or incorporating by reference, the issuer's Exchange Act documents
- Investors rarely receive projections or other information that has not been disclosed publicly
 - Having MNPI would limit their ability to deal in the shares after the closing
- If there is a reason to provide investors with MNPI, the purchase agreement will often contain a covenant requiring the issuer to disclose such information to the public when the offering is announced or at some other relevant time
- Sometimes, PIPEs are marketed without a disclosure document, such as when the investors are familiar with companies in the issuer's sector. A term sheet with the proposed terms of the offered securities may be the only document circulated

Resale shelf registration statements

- An issuer generally does not need to be S-3 eligible on a **primary basis** to complete a PIPE transaction. An issuer may use a Form S-1 or a Form S-3 registration statement as a resale shelf registration statement in connection with a PIPE transaction
 - But...see below re the SEC's analysis
- However, using a Form S-3 for the resale registration statement is less costly and less time-consuming, since the Form S-3 is less burdensome and may be updated by the periodic filing of Exchange Act reports, without the need to file post-effective amendments. An issuer must be eligible to use Form S-3 on a resale basis
- Key due diligence point for investors and placement agents (as well as a representation in the purchase agreement, and a legal opinion): is the issuer S-3 eligible?

Use of an existing registration statement

- Generally, if an issuer has a shelf registration statement on file, it is a primary shelf registration statement for the sale of newly issued securities and therefore, of no use for an issuer looking to effect a PIPE transaction
- For a PIPE, the issuer is required to file, and have declared effective, a resale registration statement covering the resale by the PIPE purchasers (a selling stockholder shelf registration) from time to time of the securities that were purchased in the PIPE transaction
 - Exception: WKSIs — may add securities issued in a PIPE to an existing shelf

Issues re S-3 eligibility

- Problem: issuers that attempt to use an S-3 as a resale shelf but are not eligible to use the S-3 on a primary basis. PIPE transaction results in a “disproportionate” increase in total shares outstanding.
- Question: is the transaction properly characterized as a “resale”?
- If issuer cannot use Form S-3, it must use Form S-1, and must file post-effective amendments to keep the information current (no forward incorporation by reference).
- SEC’s “rule of thumb”: 33% of the public float:
 - Amount of time the shares have been held.
 - How did the investors receive the shares?
 - Relationship to the issuer.
 - Number of shares involved.
 - Are shareholders underwriters or broker-dealers?
 - Are the investors acting as a “conduit” for the issuer?

Issues re S-3 eligibility *(cont'd)*

- Recent reports suggest that the SEC will allow registration of more than 33% of the public float if the securities issued are common stock or have fixed conversion or exercise prices (i.e., no death spirals or toxic converts). Also, the SEC will be more flexible if the investors are long-term investors, such as venture capital funds.
- Many issuers that face this issue register the maximum amount of shares the SEC allows (on a secondary basis) and then, after six months, register more (SEC guidance requires that the original tranche be sold before more shares are registered); more often the sellers rely on Rule 144 as six months have passed.

PIPE considerations for placement agents

PIPEs and Regulation FD (Fair Disclosure)

- An issuer is owed a duty of confidence from its agents, such as its placement agent, accountants, and other similar participants in the PIPE process. In contrast, an issuer does not share with potential investors any information that has not already been included in the issuer's Exchange Act reports.
- A private placement memorandum for a PIPE transaction usually contains the issuer's Exchange Act reports, together with legal disclaimers. It is prudent to limit the information contained in the private placement memorandum unless the issuer will be receiving signed confidentiality agreements. Although the issuer is not sharing material nonpublic information about the issuer's business with potential PIPE investors, the issuer is sharing its plans concerning a potential financing transaction.
- **The fact that the issuer is contemplating a PIPE transaction may itself constitute material nonpublic information.**

PIPEs and Regulation FD (Fair Disclosure) *(cont'd)*

- The issuer should ensure that, before the placement agent reveals the issuer's identity, the placement agent obtains an oral agreement from each potential purchaser it contacts that information shared will be kept confidential. This oral agreement may be documented subsequently through an email acknowledgement and a covenant in the purchase agreement

Best practices and areas of risk

- Unannounced financings in a Regulation FD world raise issues that need careful consideration
 - Confidentiality agreements versus scripts with confirmatory emails
 - Information walls—confirming that fund clients have information walls and information handling procedures for MNPI
- Marketing practices also need to address areas of risk:
 - Who markets PIPEs?
 - What training and supervision do the groups marketing these deals receive?
 - What materials are sent to potential purchasers and by whom?

Best practices and areas of risk *(cont'd)*

- Within their organizations, investment banks will want to implement special compliance and other procedures for all unannounced offerings. For example:
 - In order to contain the flow of information, a financial intermediary will likely limit the number of sales people involved in making investor calls
 - The financial intermediary will want to ensure that each person placing calls is adequately trained regarding the screening process, the use of the script, the email confirmation, etc.
 - For compliance purposes, the financial intermediary will want to keep a written record regarding the investors that it contacted and confirmation of receipt of the confidentiality undertaking

Material non-public information

- Issuers and placement agents must consider (among other things):
 - The information that is being shared with potential purchasers
 - The anticipated duration of the marketing period
 - Whether any MNPI will be shared with potential purchasers, and when that information will become stale
 - Is the fact that the issuer is contemplating a potential offering MNPI? What if the company is undergoing financial distress?
 - Will potential purchasers contacted about the offering be cleansed?
 - Will issuer disseminate a cleansing release?

Material non-public information *(cont'd)*

- Non-disclosure Agreements (“NDA”): an NDA need not be a formal written agreement; however, it may be prudent to create an “audit trail” showing the formation of a binding contractual confidentiality agreement between the offeror and the offeree, which must include an express agreement not to trade

Venture, private equity and change of control PIPEs

VC/Private equity PIPE

- Venture capital (VC) or private equity (PE) funds will often invest in public companies, either to increase their position or as a new investment if valuations make it attractive
- Often a VC or a PE fund will invest in a public company as part of a recapitalization or other strategic transaction
- Why should these transactions be structured as PIPE transactions?
 - The structure allows the company to issue a highly customized security
 - Usually the investor will want to do its own diligence and is likely to acquire material non-public information that will not be capable of being disclosed by the issuer after the transaction is completed (so the VC/PE firm will continue to be restricted from trading for some period of time)

VC/Private equity PIPE *(cont'd)*

- The investors will likely want other contractual protections (affirmative/negative covenants, information rights)
- The investors may want board representation
- The investors will not be as focused on their resale opportunities, or if they are insiders/control persons, will face other limitations to resales

VC/Private equity PIPE *(cont'd)*

- These deals raise issues that usually do not arise in other PIPE transactions:
 - A change of control may:
 - Trigger acceleration or payment provisions in company agreements (such as its lending agreements and employment and option agreements)
 - Trigger a poison pill/rights plan
 - Require waivers of charter change of control provisions
 - Trigger change of control provisions in other instruments, such as warrants or debt securities that have change of control triggers
 - Raise concerns with securities exchange's change of control provisions

VC/Private equity PIPE *(cont'd)*

- Dilution for other shareholders
 - Depending on the circumstances of the financing, the transaction may be very dilutive to existing shareholders, which may heighten concerns for the issuer's board of directors as it considers the transaction terms and other alternatives
- Change of control premium issues
 - Is the issuer effectively conveying "control" through the transaction to the VC/PE investor?
 - If so, is it getting paid for the control premium?
- Fiduciary duty and other governance issues
 - A board of directors will want to document its process and consideration of alternatives

VC/Private equity PIPE *(cont'd)*

- Fairness opinion: when should a board of directors consider obtaining a fairness opinion in the context of a change-of-control transaction?
- Litigation risk may be heightened depending on the structure of the transaction
- There may be approvals required for such a transaction, including:
 - Shareholder approval, depending upon the requirements of the securities exchange and the terms of the transaction
 - Antitrust filings, depending on the transaction size
 - CFIUS, again, depending on the specifics of the transaction

PIPEs with existing stockholders
as investors or with strategic
investors

Existing stockholders and/or strategic investors

- Often, especially during periods of heightened market volatility, an issuer may consider raising capital from its existing stockholders, including directors, officers, as well as significant stockholders
- Sales to insiders may be made on a standalone basis or as part of a larger private placement
- In any case, this may raise a number of considerations for boards of directors. For example:
 - Do the insiders have different information available to them that is not to be shared with third parties? Are the insiders subject to any insider trading blackout period?

Existing stockholders and/or strategic investors

(cont'd)

- If there are third parties that are willing to purchase the securities on different or better terms, has the issuer considered whether it is prudent to enter into a related party transaction?
- Has the related party transaction been approved pursuant to the issuer's related transaction policy?
- The securities exchanges may limit the ability of insiders to participate in a private (or in the case of the NYSE, a public) offering under certain circumstances.
- If the sale involves a sale to an existing stockholder that is not an officer or director, will the transaction result in a change of control?

Existing stockholders and/or strategic investors

(cont'd)

- Negotiating a transaction with a strategic investor may raise many of the same types of issues that we noted in the context of a private placement to a VC or PE investor, including:
 - Change of control issues
 - Highly structured securities
 - Affirmative and negative covenants
 - Board rights or observer rights
- While some VC/PE firms may choose to remain passive investors, and may not want the right to appoint a director (in order to avoid or disclaim affiliate status), a strategic investor may want the board seat

Existing stockholders and/or strategic investors

(cont'd)

- The issuer may need to consider carefully whether to grant the strategic investor a board seat or any information rights (which would make the strategic investor an insider)
- In addition, the issuer may want to consider:
 - Negotiating limitations on the strategic investor's ability to invest in close competitors
 - Negotiating a standstill limiting the ability of the strategic investor to acquire more than a specified percentage of the voting stock of the issuer, often 19.9%
 - Negotiating certain prohibitions on recruiting personnel of the issuer

Terms and covenants

- Many VC/PE PIPE transactions and strategic investor PIPE transactions are structured as transactions involving convertible preferred stock, preferred stock, or structured debt with warrants (for distressed company secured debt with an equity kicker also is commonplace)
- For VC/PE investors, the transaction may be intended to result in a certain rate of return over the investment period

Terms and covenants *(cont'd)*

- Preferred stock will bear a dividend
- There may be optional or mandatory redemption provisions
- Change of control put provisions
- Voting rights generally will be series voting rights, as well as blocking or consent rights
- To the extent that there are two or more missed dividend payments, the preferred holders will have the right to elect a director

Terms and covenants *(cont'd)*

- The investors may negotiate for themselves affirmative covenants, including debt-related covenants
- Typical negative covenants may include limitations on:
 - Incurrence of indebtedness and liens
 - Issuance of more senior or parity securities
 - Asset sales
 - Transactions with affiliates
 - Change in business
 - Mergers, consolidations or sales

Related Securities Exchange Rules

Transactions completed at a discount

- A PIPE transaction may require prior approval from the exchange on which the issuer's common stock is quoted if the transaction will be completed at a discount and may result in the issuance of 20% or more of the issuer's total pre-transaction shares outstanding
- The issuer should consider not only the effect of completing the proposed PIPE transaction, but also, if the issuer has completed other private transactions within the same six-month period, the effect of such transactions, all of which may be aggregated by the exchange
- Each of the New York Stock Exchange, the NYSE American, and Nasdaq has a similar requirement

Disproportionate voting rights

- The securities exchanges also consider whether the proposed issuance will result in the issuance of securities that will result in disproportionate voting rights
- For example, the issuance of preferred stock that may convert at a discount to the market price of the common stock at the date of issuance and votes on a one for one basis with the common stock would be considered a violation of the Nasdaq Voting Rights rule
- This can be addressed by limiting the voting rights of the preferred stock — for example: a preferred share that is convertible into common stock at a 20% discount to market will be deemed compliant if its voting rights are limited to 8/10ths of a vote
- Contractual board designation/nomination rights also must be in line with the capital contribution made by the investor and must include a “step down” in those rights as the investor liquidates the position or as the investor’s percentage ownership stake is reduced on a relative basis by new company issuances

“Change of control” shareholder vote requirement

- For Nasdaq purposes, if a transaction results in an investor or group of affiliated investors obtaining a 20% interest, or the right to acquire such interest, in the issuer on a post-transaction basis, the transaction will constitute a change of control for Nasdaq purposes (*regardless of whether the shares are priced above or below market price*)
 - Nasdaq’s determination may also be impacted by factors such as overly restrictive covenants or board designation rights
 - Notwithstanding, an exception exists for pre-existing control positions that are not displaced by the transaction
- Company counsel should consult Nasdaq and may be able to refute the rebuttal presumption regarding a change of control to the extent that there are other larger holders
- The new holder might agree to a standstill provision and/or to cap its voting rights at 19.9% or 24.9% (setting aside its economic interest) in order to refute the change of control presumption

NYSE change of control rule

- The NYSE has a shareholder approval requirement prior to an issuance that will result in a “change of control”
- No definition of change of control
- The exchange applies a subjective test on a case-by-case basis
- Generally, purchases of more than 30% of the outstanding voting stock are presumed to be a change of control
- Purchases of between 20% and 30% of the outstanding voting stock may be presumed to be a change of control, but depend on other factors, such as the issuer’s corporate governance structure, such as board seats, management rights and other control rights of the acquirer of the securities

Sales to related parties

- For Nasdaq purposes, shareholder approval is required prior to the issuance of securities when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants
- Any discounted issuance to officers, directors, employees, or consultants is considered an "equity compensation arrangement"
- As a result, a director, employee, or consultant would have to purchase securities at or above the minimum price for Nasdaq purposes

Sales to related parties *(cont'd)*

- For the NYSE, transactions involving issuances to directors, officers or substantial security holders (“Related Parties”) require shareholder approval if:
 - in the case of directors and officers or substantial security holders that have director representatives or similar control rights, the number of shares of common stock (or common stock equivalents) to be issued exceeds 1% of the number or voting power of outstanding shares before the issuance, or
 - in the case of a substantial security holder that is not a director or officer, the number of securities or the voting power exceeds 5% of the pre-transaction shares or voting power outstanding and the securities are issued at a price that is lower than the minimum price.
- The NYSE applied to the SEC for an amendment that would provide relief in certain circumstances

Sales to related parties—temporary relief

- Through June 30, an NYSE-list company may qualify for a waiver from restrictions on sales to related parties:
 - If the proposed transaction is reviewed and approved by the issuer’s audit committee,
 - The sale is for cash, and
 - The sale meets the NYSE’s minimum price requirement
- Similarly, for purposes of the bona fide financing exception to the NYSE’s 20% requirement, the SEC approved the NYSE’s proposal to temporarily waive the 5% limitation for any sale to an individual investor in a bona fide private financing, which is the exception generally relied upon for Rule 144A offerings, subject to similar conditions

Securities Law Considerations

Prepaid warrants

- Prepaid warrants are a type of warrant that allows its holder to purchase a specified number of a company's securities at a nominal exercise price
 - The nominal exercise price is typically as low as \$0.01 per share
- This structure allows the company to receive the exercise price that would be due for a traditional warrant at the time of the warrant's issuance instead of at the time of the warrant's eventual exercise
- A prepaid warrant is exercisable at the holder's option immediately following its issuance and generally over a lengthy exercise period (as long as ten years) in order to provide the holder with desired ownership flexibility
- Prepaid warrants are generally issued as part of a larger financing transaction, such as a venture capital investment, minority equity investment or mezzanine financing
 - Prepaid warrants that are included with common stock as part of a concurrent common stock or unit offering will also impact the total market value analysis for purposes of the 20% rule if the total purchase price is below the company's market value

Prepaid warrants *(cont'd)*

- The purpose of using prepaid warrants is to provide investors that have restrictions on their ability to own a company's securities above a designated ownership threshold (typically, 9.99% or 19.99%) with the opportunity to invest additional capital without violating the investor's ownership restrictions
 - The ability to delay ownership of a company's common stock is particularly important to holders that already hold a significant percentage of a company's common stock
 - An investor with a significant ownership interest in voting securities of a company is likely to be considered an affiliate of the company
- Prepaid warrants are typically structured to include anti-dilution protection
 - With only a nominal exercise price, prepaid warrants instead proportionally adjust the number of shares underlying the warrant following a specified change to the company's capitalization (instead of the exercise price)
 - The "weighted average" or "full ratchet" anti-dilution provisions that are commonly found in traditional warrants are not used
- Typically include a fundamental change provision

Prepaid warrants *(cont'd)*

- The securities exchange rules also must be taken into account when a PIPE transaction includes prepaid warrants

Ownership reporting—Section 16 filing requirements

Persons Required to File

- Under Section 16(a) of the Exchange Act, reports on SEC Form 3, Form 4 and Form 5 regarding beneficial ownership in the Company are required to be filed with the SEC by:
 - every person and entity that is directly or indirectly the beneficial owner of more than 10% of a class of an equity security of the Company, and/or
 - directors and Section 16 executive officers of the Company (an “**Insider**” and collectively, “**Insiders**”)
- In addition to the Section 16 filing requirements, such a holder will be subject to the short-swing profits rule

Section 13(d) reporting for 5% stockholders

- Section 13(d) under the Exchange Act will requires disclosure of certain information to the Company, and to the SEC, and thus the public, within ten calendar days from the date on which any person or group of “related persons” becomes the direct or indirect beneficial owner of 5% (or more) of the Company’s common stock.
- Section 13(d) rules provide for two types of filings for greater than 5% stockholders:
 - Long-form Schedule 13D, and
 - Short-form Schedule 13G (if stockholder meets “passive investor” criteria).
- However, if a 5% stockholder’s holdings exceed 10% of the company’s common stock, the stockholder must amend its original 13G filing “promptly” after its holdings exceed the 10% threshold or if it increases or decreases its ownership by more than 5%.
 - With respect to filing “promptly,” Rule 13d-2(d) does not provide a specific time period and instead depends on the facts and circumstances, but it is generally understood to be 2-5 business days.

Resale restrictions

- A PIPE purchaser that becomes an affiliate will in addition to holding “restricted securities” (securities purchased in a private placement), hold securities that are considered “control securities”
- This may impact the PIPE purchaser’s approach to reselling its securities or transferring its securities in the absence of a resale registration statement
- The holder may be subject to:
 - Blackout trading policies if the holder has a board seat or observer seat
 - The affiliate conditions under Rule 144
 - Limitations for transferees on the ability to tack holding periods if they acquire from a control person or aggregation issues for Rule 144 sales for funds

PIPE to finance an acquisition

PIPE to finance an acquisition

- Why a PIPE?
 - Marketing reasons:
 - It may be important to share with potential purchasers a fair bit of information about the acquisition (all material non-public information) and restrict their ability to trade for an extended period of time
 - Important to assess when this information will be shared broadly and/or when the information will become stale
 - Lack of “current information:”
 - Is the acquisition material?
 - Is pro forma information required to be filed?
 - Pro forma information may not be available
 - A comfort letter may not be available that could cover the financial information
 - **These considerations may make it impossible to undertake a registered offering**

PIPE to finance an acquisition *(cont'd)*

- Company would like to raise capital in advance of knowing whether its bid has been accepted
- Private placement option
 - Company will conduct a private placement to institutional investors
 - Placement Agent will wall cross institutional investors and institutional investors will agree not to trade in issuer's stock (and, if public, in the target stock)
 - Placement Agent and Company will share with investors that are wall-crossed a PPM (or other offering materials)
 - Use of proceeds will describe potential acquisition — at least two alternatives:
 - Possible for proceeds to be escrowed and released only if Company is winning bidder or
 - Proceeds would be released to Company regardless of whether Company prevails and wins the bid. Company would use proceeds for future acquisitions

PIPE to finance an acquisition *(cont'd)*

- There are a number of special considerations if Company will pursue a private placement
 - Discount: will investors insist on a discounted price?
 - “Lock up”: will investors agree to be prevented from trading for a sufficiently long period of time? When will Company put out a release after definitive purchase agreements are executed? What will it say? What if the acquisition falls through? How will investors be cleansed?
- Liquidity: Investors will be focused on how quickly they can obtain liquidity
 - Company will need to agree to prepare and file a resale registration statement that covers the resale from time to time of the securities sold to investors in the private placement
 - Company and counsel will need to consider carefully the significance of the acquisition and, if significant, how long it will take to prepare the required historical financials and pro forma financials

PIPE to finance an acquisition *(cont'd)*

- Investors may exact a more significant discount if the periods to file a resale registration statement and/or to have the resale registration statement declared effective are longer than they would expect (typically period is usually 30 to 60 days)
- Securities Exchange rules: Nasdaq imposes shareholder vote requirements in various instances
- Big boy letters:
 - The investors should acknowledge receipt of information on target or the fact that they have not received combined financials

PIPE to finance an acquisition *(cont'd)*

- Smaller issuers are subject to the 1/3 cap for primaries
- Unfortunately, the cap may not provide sufficient flexibility for the issuer to raise much needed capital
- An alternative for the issuer is to structure a PIPE or a 144A or other exempt offering alongside a take down off of a shelf (subject to the 1/3 cap):
- Things to consider:
 - General solicitation issues: an issuer contemplating a PIPE or other exempt offering in close proximity to a public offering should consider whether the public offering may have been a “general solicitation” that renders the offering exemption unavailable for the PIPE

Handling MNPI as a result of Coronavirus-related issues

MNPI and Coronavirus-related issues

- Disclosure in Exchange Act documents vs PPM
 - Confidentiality agreements
 - Information walls
- Uncertainty of COVID-19 impact on issuer
- Regulation FD (Fair Disclosure) and insider trading
 - Heightened risk during current environment
 - CF Disclosure Guidance Topic No. 9, 3/25/2020
 - Division of Enforcement Market Integrity Statement, 3/23/2020



PIPE Transaction Resource Page

Visit our PIPE transactions resource page on our blog, *Free Writings & Perspectives*, where you will find presentations, podcasts, charts and articles relating to PIPEs.

www.freewritings.law/PIPEs

The logo consists of a stylized quill pen on the left, pointing downwards and to the right. To its right, the text "FREE WRITINGS +" is written in a bold, uppercase, sans-serif font. Below this, the word "Perspectives" is written in a large, elegant, black cursive script. A thin horizontal line is positioned below the cursive text.

FREE WRITINGS +
Perspectives

Our blog, *Free Writings & Perspectives*, provides up to the minute news regarding securities law developments, particularly related to capital formation, as well as commentary regarding developments affecting private placements, late stage or mezzanine private placements, PIPE transactions, IPOs and the IPO market, and new financial products.

Visit ***freewritings.law*** to subscribe.

[Americas](#) | [Asia](#) | [Europe](#) | [Middle East](#)

mayerbrown.com

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the "Mayer Brown Practices") and non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. "Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown. © Mayer Brown. All rights reserved.