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Capital Raising in the Current Environment I: PIPEs

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June 18, 2020

PIPEs: Panelists



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Special appreciation to Gibson Dunn associates Harrison Tucker and Jonathan Lee for their assistance with this presentation.

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Overview of PIPE Transactions

Overview – Background

PIPE: Private Investment in Public Equity

- *Definition.* A private placement by a public company of equity or equity-linked securities to selected accredited investors.
- *Typical Characteristics.* Generally less than 20% of issuer's equity, with restrictions on trading issued securities for a certain period of time. Transactions are private and often highly negotiated.
- *Typical Context.* Higher cost of capital than debt, so issuers traditionally utilize PIPEs when credit market is inaccessible or impractical. Tightening of credit market can also push financial sponsors to invest in PIPEs because of potential for high returns and difficulty of engaging in leveraged buyouts.

Overview – Current State of PIPEs

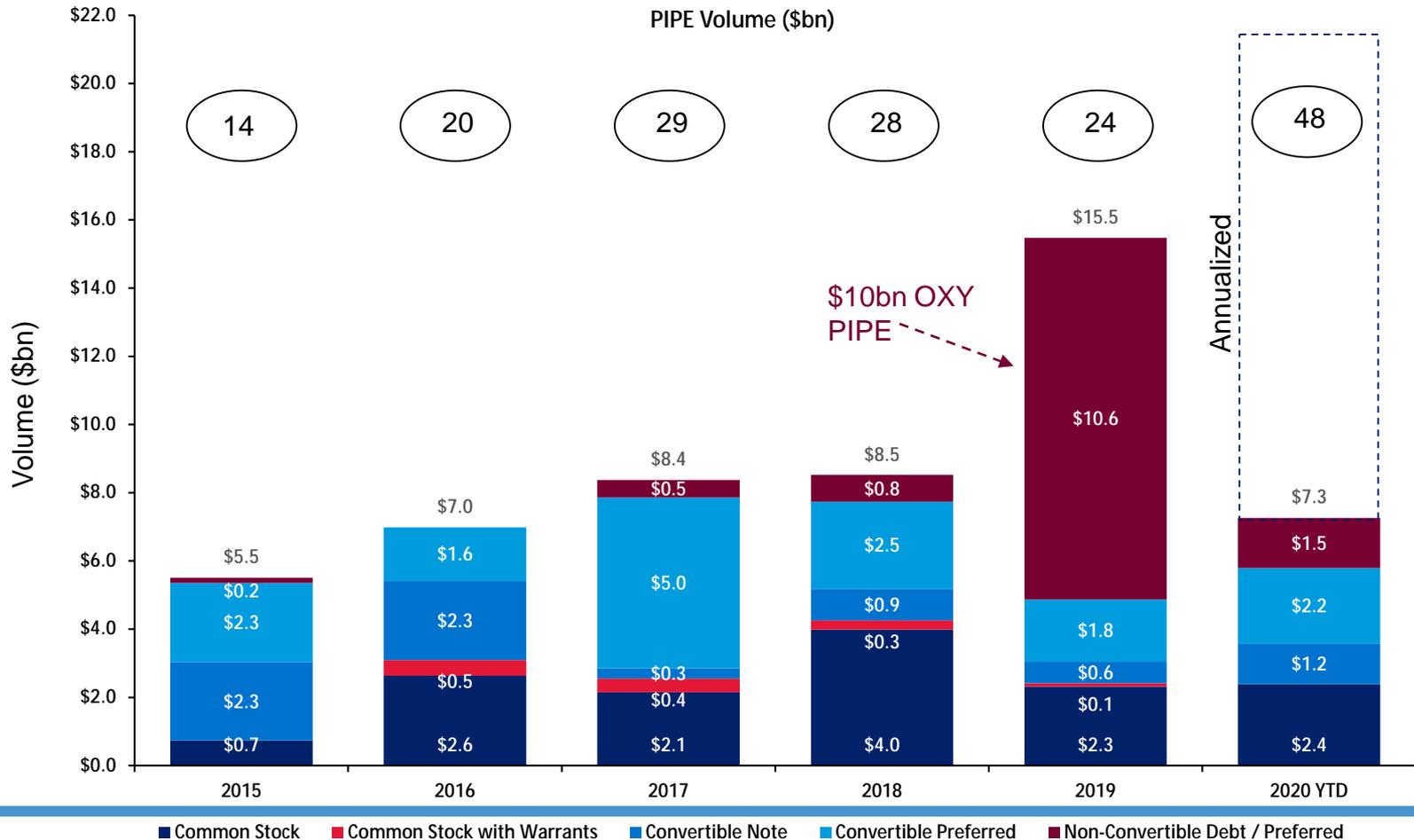
PIPEs are on the rise, particularly among larger public companies and private equity sponsors.

- *Larger Deals.* Since February 2020:
 - More than 50 proposed or closed PIPE transactions of over \$300 million.
 - 14 companies have raised at least \$1 billion, including Twitter Inc., Carnival Corp. and Dick's Sporting Goods.
- *New Participants.* Since February 2020, 44% of large PIPE transactions were completed by companies that have never previously accessed the PIPE market, including Coty Inc., Under Armour Inc. and Lyft Inc.
- *Other Recent Notable Transactions.*
 - Norwegian Cruise Lines Holdings Ltd.'s issuance of \$400 million in convertible debt to L Catterton.
 - Expedia's \$1.1 billion preferred nonconvertible issuance to Apollo Management and Silver Lake Partners.
- *Refer to Annex A (Selected Case Studies) and Annex B (Additional Precedent on PIPE Transactions)*

Parallels to Great Recession

- Ø *Similarities:* Rise in PIPE activity given tightening of credit markets.
- Ø *Differences:* Influx of larger companies doing larger deals and some enhanced interest from institutional investors.

Overview – Sponsor PIPE Issuances



Overview – Advantages of PIPEs

PIPEs are highly customizable, fast and available when other financing sources may not be.

Availability

- *Issuer.* Can be executed when debt financing or public equity offering may not be possible.
- *Financial Sponsor as Investor.* Attractive alternative to LBOs.

Execution

- *Speedy and Confidential Transaction.* Reduces burden on management and transactions costs and can be executed quickly and quietly without advance public disclosure.
- *Diligence.* May be limited due to investor sophistication and investors' desire not to receive MNPI, although many investors do require significant due diligence.
- *Securities Registration.* Registration not required and not subject to "baby shelf" restrictions.

Investment

- *Customization.* Securities can be specifically tailored to objectives of investor and issuer.
- *Investor Base.* Issuer can target specific investors and expand base of institutional investors.
- *Strong Platform.* Investor can quickly gain significant position in promising public company.

Overview – Disadvantages of PIPEs

The market for PIPEs may be opaque, and PIPEs may create post-investment obligations.



	Availability	Execution	Investment
Issuer	<ul style="list-style-type: none"> <i>Network Required.</i> Knowledge of investors required, given significant participation in market by hedge funds and distressed investors. 	<ul style="list-style-type: none"> <i>Price Discount and Dilution.</i> Purchase price often heavily discounted and may be significantly dilutive. <i>Approvals, Compliance and Registration.</i> May require shareholder approval under NASDAQ or NYSE rules (<i>refer to Annex C</i>), HSR or other filings (<i>refer to Annex D</i>) or approvals or SEC registration on back end. 	<ul style="list-style-type: none"> <i>Compromises.</i> May signal desperation, require giving up some control and have chilling effect on subsequent acquisition of issuer or future financing activity.
Investor	<ul style="list-style-type: none"> <i>Limited Market.</i> Limited and opaque market for PIPE issuers. 	<ul style="list-style-type: none"> <i>Limited Diligence.</i> Diligence and transactional timeline may be accelerated. 	<ul style="list-style-type: none"> <i>Ownership Hurdle.</i> Significant NASDAQ and NYSE hurdles for investments over 20% (<i>refer to Annex C</i>)

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Deal Structure

Deal Structure – Key Terms

PIPE terms generally revolve around the following:

The Security

Governance and Rights

The Transaction

Deal Structure – The Security

PIPE terms generally revolve around the following:

The Security



Governance
and Rights

The
Transaction

Economic

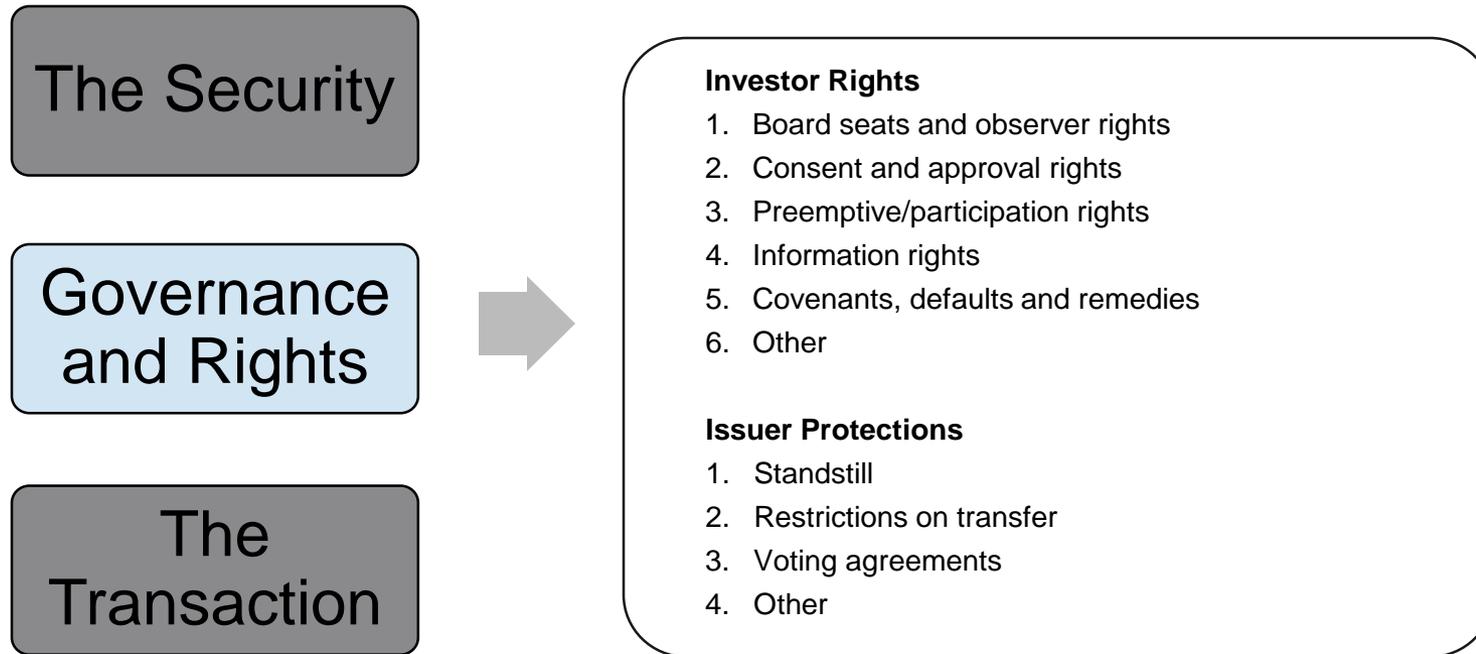
1. Size of investment
2. Type of security
3. Coupon/dividends
4. Priority
5. Maturity
6. Liquidation preference

Non-Economic

1. Redemption/repurchase rights
2. Conversion rights
3. Anti-dilution protections
4. Voting rights
5. Registration rights
6. Change of control/fundamental change protections

Deal Structure – Governance and Rights

PIPE terms generally revolve around the following:



Deal Structure – The Transaction

PIPE terms generally revolve around the following:

The Security

Governance
and Rights

The
Transaction



1. Fee and expense reimbursements
2. Closing conditions
3. Documentation

Deal Structure – Issuer Considerations

Select Issuer considerations also include:

State Law

- Board fiduciary duties, including conflicts of interest
- Adequacy of authorized capital
- Poison pill triggers
- DGCL § 203 and similar anti-takeover statutes

Contractual

- Existing preemptive, anti-dilution, registration and similar rights
- Debt covenants
- Standstill and voting agreements
- Restrictions on transfer/lock-up

Governmental and Securities

- HSR, CFIUS and other regulatory filing or approval requirements (*refer to Annex D*)
- Stock exchange shareholder approval rules (*refer to Annex C*)
- Confidentiality, Reg FD and disclosure issues
- SEC private placement and resale registration rules

Other

- Accounting and tax considerations (*refer to Annex E*)

Deal Structure – Investor Considerations

Select Investor considerations also include:

Economic

- Investment return objectives
- Liquidity and trading issues

Transaction

- Diligence
- Change of control triggers, poison pill and DGCL § 203 and similar anti-takeover statutes
- Closing conditions, termination and other fees
- Expense reimbursement and indemnification

Protections

- Position in capital structure
- Board, governance and information rights
- Use of proceeds, covenant protections and remedies for default events

Fund/Compliance

- Investment restrictions and mandates
- Implications of potential “affiliate” and “insider” status
- Section 13d and Section 16 issues (*refer to Annex F*)
- HSR, CFIUS and other regulatory filing or approval requirements (*refer to Annex D*)

Conclusion

Gibson Dunn is here to shed light on capital raising in the current environment:

Upcoming webcasts include:

- June 23, 2020: Securities Laws Issues in Restructuring and Bankruptcy
 - Presented by Alan Bannister and Michael A. Rosenthal
 - Compliance with securities laws is a crucial element of any restructuring. This webcast will address a range of potential securities laws issues arising in a variety of restructuring and bankruptcy scenarios (whether out of court or in a free-fall, pre-negotiated or pre-packaged case under chapter 11 of the Bankruptcy Code), including the registration requirements of the Securities Act of 1933 (and potential exemptions therefrom); the potential application of the tender offer regulations under the Securities Exchange Act of 1934; the role of Regulation FD for public company debtors and other concerns about material non-public information that may be obtained in creditor diligence of debtor-provided information and negotiations with the debtor; issues arising under the Trust Indenture Act of 1939; and more.
 - [Registration](#)
- June 30, 2020: Raising Capital in the Current Environment II: Bond Exchanges and Debt Tender Offers
- July 8, 2020: Raising Capital in the Current Environment III: Debt Offerings
- July 15, 2020: Considerations for Second Quarter 2020 Reports and Board Meetings

Additional Resources:

- [Considerations for PIPE Transactions](#)
- [Drafting Preferred Stock Provisions and Expected Developments in the New Environment](#)
- [Gibson Dunn – Securities Regulation and Corporate Governance Monitor](#)
 - [NYSE Provides Temporary Waiver of Certain Shareholder Approval Requirements for Private Placements](#)
 - [Nasdaq Provides Temporary Exemption from Certain Shareholder Approval Requirements in Response to COVID-19](#)

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Annexes

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Annex A

Selected Case Studies

Selected Case Studies

	Norwegian Cruise Line Holdings Ltd.	DermTech, Inc.	Dick's Sporting Goods, Inc.
Date of execution	May 5, 2020.	February 28, 2020.	April 17, 2020 Option (as defined below) exercised on April 20, 2020
Securities offered	Up to \$400,000,000 in aggregate principal amount of Exchangeable Senior Notes due 2026 (the "Notes").	2,467,724 shares of Common Stock; 3,198,9419 shares of Series B-1 Convertible Preferred Stock; and 523.8094 shares of Series B-2 Convertible Preferred Stock.	\$550 million in aggregate principal of 3.25% Convertible Senior Notes due 2025 (the "Notes"). 13-day option to purchase up to an additional \$75 million aggregate principal amount of the Notes (the "Option")
(Estimated) Market price per share	\$11.00 (Ordinary Shares)	\$12.18 (Common Stock).	\$26.50 (Common Stock)
Purchase price per share / Total dollar amount of offering	Conversion price of \$12.10 (equal to 110% of the offering price to the public in the concurrent public offering). Up to \$400,000,000.	\$10.50 (Common Stock); \$10,500.00 (Preferred Stock) / \$64,999,990.65.	Conversion price of \$35.38 per share initial conversion rate of 8.2618 shares of Company's common stock per \$1,000 principal amount of Notes).
(Estimated) Percentage of outstanding securities	~15% (not to exceed 19.9%) on an as converted basis.	~20%.	~18%
Stockholder approval necessary	No.	Yes.	No.
Underlying documentation	8-K; Indenture; Investment Agreement; Fifth Amended and Restated Credit Agreement (May 11, 2020)	8-K; Certificates of Designations; Securities Purchase Agreement; Registration Rights Agreement (March 2, 2020)	8-K; Indenture; Form of Notes; Form of Transaction Confirmations (April 23, 2020)

Selected Case Studies (continued)

	Norwegian Cruise Line Holdings Ltd.	DermTech, Inc.	Dick's Sporting Goods, Inc.
Investors	L Catterton	28 Investors	BofA Securities, Inc., Wells Fargo Securities LLC and PNC Capital Markets LLC
Issuer's stock exchange / symbol	NYSE / NCLH	NASDAQ / DMTK	NYSE / DKS
Characteristics of security	<p><u>Interest.</u> The Notes will accrue interest at a rate of 7.0% per annum for the first year post-issuance (which will accrete to the principal amount), 4.5% per annum interest (which will accrete to the principal amount) plus 3.0% per annum cash interest for the following four years post issuance and 7.5% per annum in cash interest for the final year prior to maturity.</p> <p><u>Conversion.</u> Notes are redeemable for preference shares of NCL Corporation Ltd.. Upon exchange, the preference shares will be immediately and automatically exchanged, for each \$1,000 principal amount of exchanged Notes, into a number of the Company's ordinary shares equal to the exchange rate. The exchange rate will initially be approximately 82.6446 ordinary shares per \$1,000 principal amount of Notes (equivalent to an initial exchange price of \$12.10 per ordinary share, which represents a 10% premium to the price per ordinary share being issued in the concurrent equity offering), subject to future adjustment.</p>	<p><u>Dividends.</u> Received on an as-converted basis with shares of Common Stock. See Certificates of Designations § 3.</p> <p><u>Liquidation.</u> Pari passu with shares of Common Stock. See Certificates of Designations § 5.</p> <p><u>Conversion.</u></p> <ul style="list-style-type: none"> • Shares of Series B-1 Convertible Preferred Stock automatically convert into 1,000 shares of Common Stock upon receipt of stockholder approval. See Series B-1 Convertible Preferred Stock Certificate of Designation, § 6. • Investors may elect to convert shares of Series B-2 Convertible Preferred Stock into 1,000 shares of Common Stock upon receipt of stockholder approval. See Series B-2 Convertible Preferred Stock Certificate of Designation, § 6. 	<p><u>Interest.</u> The Notes will accrue interest at a rate of 3.25% per annum.</p> <p><u>Conversion.</u></p> <ul style="list-style-type: none"> • Prior to December 2, 2024, Notes may be converted only upon (i) certain market conditions, (ii) specified corporate events, including making significant distributions or fundamental changes, or (iii) upon a redemption. See Indenture § 5.01(c). • The exchange rate is initially 8.2618 shares of Company's common stock per \$1,000 principal amount of Notes (equivalent to a per share price of \$35.38). The conversion rate and price is subject to customary adjustments upon the occurrence of certain events. In addition, if a "Make-Whole Fundamental Change" occurs, then the conversion rate will, in certain circumstances, be increased. See Indenture § 5.01(c).

Selected Case Studies (continued)

	Norwegian Cruise Line Holdings Ltd.	DermTech, Inc.	Dick's Sporting Goods, Inc.
Redemption	<ul style="list-style-type: none"> Company must repurchase the Notes upon the occurrence of a "fundamental change," which includes certain change of control transactions. See Investor Rights Agreement Schedule I. Company may redeem all or a portion of the Notes after the third anniversary of the issuance upon the occurrence of certain market conditions.. See Investor Rights Agreement Schedule I. 	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> Upon the occurrence of a "Fundamental Change," which includes certain change of control transactions or de-listing of the Company's common stock, each holder will have the right to require the Company to repurchase such holder's Notes. See Indenture § 4.02. Company may redeem all or a portion of the Notes after the third anniversary of the issuance upon the occurrence of certain market conditions.. See Indenture § 4.03.
Registration rights	<ul style="list-style-type: none"> Company to file resale registration statement at or prior to 6 months following the closing. See Investor Rights Agreement § 2(a). Subject to limited exceptions, Company to cause such statement to go effective by the 1 year anniversary of the closing. See Investor Rights Agreement § 2(a). Investor is entitled to customary piggyback registration rights. See Investor Rights Agreement § 2(b). 	<ul style="list-style-type: none"> Company to file resale registration statement no later than 60 days after closing. See Registration Rights Agreement § 2. Subject to limited exceptions, Company to cause such registration statement to go effective no later than 90 days thereafter. See Registration Rights Agreement § 2. 	<ul style="list-style-type: none"> N/A.

Selected Case Studies (continued)

	Norwegian Cruise Line Holdings Ltd.	DermTech, Inc.	Dick's Sporting Goods, Inc.
Liquidated damages	N/A.	<ul style="list-style-type: none"> Company to pay Investors 1% of the aggregate purchase price if fails to file registration statement(s) by applicable deadline(s) and/or keep effective such registration statement(s). See Registration Rights Agreement § 2(c). Company to pay Investors an additional 1% of the aggregate purchase price if such failure relates to keeping effective such registration statement(s) and is continuing as of each succeeding 30-day period thereafter. See Registration Rights Agreement § 2(c). Company's liquidated damages obligations with respect to any such Investor capped at 5% of the aggregate purchase price. See Registration Rights Agreement § 2(c). 	N/A.
Board representations	<ul style="list-style-type: none"> 1 director and 1 observer for so long as Investor holds 50% of the number of Conversion Shares owned by Investor as of the closing. See Investor Rights Agreement § 1(a). The Investor director shall sit on the audit committee of the board or, if the board determines that the Investor director does not qualify as "independent" for purposes of the audit committee, then on such other committee as the Investor may elect. See Investor Rights Agreement § 1(d). 	<ul style="list-style-type: none"> N/A. 	<ul style="list-style-type: none"> N/A.
Anti-shorting/hedging restrictions.	Yes. See Investor Rights Agreement § 3.	Yes. See Securities Purchase Agreement § 4.13.	No.

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Annex B

Additional Precedent PIPE Transactions

Select Structured PIPEs During COVID

						
Date Announced	4/23/2020	4/21/2020	4/20/2020	4/16/2020	4/6/2020	3/29/2020
Size (\$mm)	\$1,176	\$500	\$200	\$400	\$535	\$152 (includes OID; \$150 gross proceeds)
Structure	Perpetual Preferred + Warrants	Convertible Preferred	Convertible Preferred	Convertible Preferred	Convertible Bond	Convertible Preferred
Maturity / Investor Redemption	Perpetual; Upon CoC @105, 103, 102, 101, par thereafter	Perpetual; Upon CoC @105 prior to year 5, par thereafter	7.5 years; Upon CoC, greater of 101 and as-converted value	Perpetual	5 years; Upon CoC, @ par	Perpetual; Upon CoC @150 if prior to year 3, par thereafter
Issuer Redemption	Callable at any time; 105, 103, 102, 101, par thereafter	NC5, 105, 103, par thereafter	NC5, 120, par thereafter	NC7, par thereafter	NC3, 100 if CS >= 276% of the then Conv. Price	After 10 years @100
Yield	Years 1-5: 9.50% Years 6-8: + 1.00% p.a. Years 9-10: + 1.50% p.a.	7.00%	9.50%	7.00%; increases 0.75% p.a. at the end of year 8 and thereafter	2.50%	6.00%; 7.00% if no Shareholder approval; 8.00% after 10 years
Payments	Cash or In-Kind; Cash after year 6	1 st year In-Kind; Cash or In-Kind thereafter	Cash or In-Kind	Cash or In-Kind; Cash after year 8	In Kind (semi-annually)	In Kind (semi-annually)
Conversion Price / Premium ⁽¹⁾	Warrants: \$72.00; 13.6%	\$21.50; 23.6%	\$22.23; 17.4%	\$16.00; 30.4%	\$72.50; 1.4% (43.2% to previous day)	\$15.80; 13.3%
Forced Conversion	n/a	After 3 years, FC@200%	After 3 years, FC@200%	After 3 years, FC@150	n/a	NC0, 180, 170, 160, 150
% of PF Market Cap	Warrants: 6.2%	9.6%	16.7%	17.3%	7.8%	11.7%
Investor(s)	Apollo, Silver Lake	KKR	Roark Capital	Providence, Ares	Great Hill, Charlesbank, Spruce House	Madison Dearborn
Board	2 Seats (1 per investor); as long as 50% of position retained	1 Seat	1 Seat; as long as 25% of position retained	1 Seat	2 Seats (1 per investor); as long as 50% of position retained	2 Seats (1 new); as long as hold 15% of shares outstanding
Use of Proceeds	Enhance liquidity	Enhance liquidity	Enhance liquidity	Enhance liquidity	Enhance liquidity	Repay debt on RCF, GCP

Source: PrivateRaise

(1) Premium to Closing Price at Announcement.

Precedent Sponsor PIPE Transactions

Convertible Note

Announ. Date	Company	Industry	Security Type	Market Cap (\$mm)	Deal Size (\$mm)	Deal Size as a % of Mkt Cap	Dividend / Coupon	Conversion on Premium (Discount) %	Investors	Use of Proceeds
5/5/2020	Norwegian Cruise Line Holdings Ltd.	Consumer/Retail	Exchangeable Senior Notes	\$3,098	\$400	12.9%	7.0%	N/A	L Catterton	Working capital and other general corporate purposes
4/6/2020	Wayfair Inc.	Technology	Accreting Convertible Senior Notes	4,778	535	11.2%	2.5%	43.2%	Great Hill Partners LLC; Charlesbank Capital Partners LLC; Spruce House Investment Management	Working capital and other general corporate purposes
1/30/2020	Farfetch Limited	Technology	Convertible Senior Notes	3,628	250	6.9%	5.0%	8.1%	Dragoneer Investment Group	Working capital and other general corporate purposes
12/16/2019	Equinox Gold Corp.	Basic Materials	Secured Convertible Debenture	876	130	14.8%	4.8%	25.8%	Mubadala Investment Company	Working capital and other general corporate purposes
11/13/2019	KLDiscovery Inc.	Technology	Convertible Debentures	403	200	49.7%	8.0%	81.5%	MGG Investment Group; OTPP; Manulife Financial	Working capital and other general corporate purposes
9/11/2019	LexinFintech Holdings Ltd.	Financial Institutions	Convertible Notes	2,026	300	14.8%	2.0%	22.1%	PAG	Working capital and other general corporate purposes
10/2/2018	ExlService Holdings, Inc.	Technology	Convertible Senior Notes	2,220	150	6.8%	3.5%	13.3%	Orogen Group	Repay a portion of Issuer's outstanding Revolving Credit Facility and for general corporate purposes
9/14/2018	AMC Entertainment Holdings, Inc.	Media	Senior Unsecured Convertible Notes	2,564	600	23.4%	3.0%	2.0%	Silver Lake Partners	Repurchase a portion of Issuer's outstanding Class B Common Stock held by Dalian Wanda Group Co., Ltd. and pay a special cash dividend on Issuer's outstanding Class A and Class B Common Stock, as well as for transaction expenses and general corporate purposes
7/9/2018	Secoo Holding Limited	Technology	Convertible Notes and Warrants	677	175	25.8%	4.0%	44.9%	L Catterton	Working capital and other general corporate purposes
11/8/2017	Comerstone OnDemand, Inc.	Technology	Convertible Notes	2,048	300	14.7%	5.8%	12.6%	Silver Lake Partners	Repay existing convertible debt and repurchase Common Stock as well as for working capital and other general corporate purposes

Average	\$2,232	\$304	18.1%	4.5%	28.2%
Median	\$2,134	\$275	14.8%	4.4%	22.1%

Source: Private Raise as of 5/8/2020.

Includes Unregistered Sponsor PIPEs, closed or in definitive agreement, of at least \$100mm in size and at least 5% of market cap since 2017.

Precedent Sponsor PIPE Transactions

Convertible Preferred Stock (1 of 2)

Announ. Date	Company	Industry	Security Type	Market Cap (\$mm)	Deal Size (\$mm)	Deal Size as a % of Mkt Cap	Dividend / Coupon	Conversion on Premium (Discount) %	Investors	Use of Proceeds
5/7/2020	CenterPoint Energy, Inc.	Energy	Series C Mandatory Convertible Preferred Stock	\$8,239	\$725	8.8%	0.0%	(6.6%)	Elliott Management Corporation; Bluescape Group	Deleverage Issuer's balance sheet and provide working capital
4/30/2020	Covetrus, Inc.	Healthcare	Series A Convertible Preferred Stock	1,296	250	19.3%	7.5%	(4.2%)	Clayton, Dubilier & Rice, Inc.	Repay a portion of Issuer's borrowings under its Revolving Credit Facility and for working capital and other general corporate purposes
4/21/2020	US Foods Holding Corp.	Consumer/Retail	Convertible Preferred Stock	4,147	500	12.1%	7.0%	24.0%	KKR & Co. L.P.	Working capital and other general corporate purposes
4/20/2020	Cheesecake Factory Incorporated	Consumer/Retail	Series A Convertible Preferred Stock	851	200	23.5%	9.5%	18.8%	Roark Capital Group	Working capital and other general corporate purposes
4/16/2020	OUTFRONT Media Inc.	Real Estate	Series A Convertible Perpetual Preferred Stock	1,920	400	20.8%	7.0%	38.8%	Ares Management Corp.; Providence Equity Partners LLC	Working capital and other general corporate purposes
3/29/2020	EVO Payments, Inc.	Industrial	Series A Convertible Preferred Stock	1,193	150	12.6%	6.0%	11.7%	Madison Dearborn Partners, LLC	Working capital and other general corporate purposes
12/5/2019	NN, Inc.	Industrial	Series B Convertible Preferred Stock and Warrants	332	100	30.1%	10.6%	0.0%	Corre Partners Management, LLC; Legion Partners Asset Management, LLC	Working capital and other general corporate purposes
12/4/2019	Verint Systems Inc.	Technology	Series A Convertible Perpetual Preferred Stock	2,820	200	7.1%	5.2%	12.5%	Apax Partners LLP	Working capital and other general corporate purposes
12/4/2019	Verint Systems Inc.	Technology	Series B Convertible Perpetual Preferred Stock	3,178	200	6.3%	5.2%	12.5%	Apax Partners LLP	Working capital and other general corporate purposes
10/18/2019	Kennedy-Wilson Holdings, Inc.	Financial Institutions	Series A Cumulative Convertible Perpetual Preferred Stock	3,291	300	9.1%	5.8%	14.3%	Eldridge Industries, LLC	Fund the repayment of unsecured indebtedness and for working capital and other general corporate purposes
6/10/2019	Comstock Resources, Inc.	Energy	Series B Convertible Preferred Stock	614	175	28.5%	10.0%	(9.9%)	Arkoma Drilling, L.P.	Provide partial consideration for the acquisition of Covey Park Energy LLC
4/15/2019	Catalent, Inc.	Healthcare	Convertible Preferred Stock and Warrants	6,620	650	9.8%	5.0%	26.2%	Leonard Green & Partners, L.P.	Provide partial funding for Issuer's acquisition of Paragon Bioservices, Inc.
2/4/2019	Papa John's International, Inc.	Consumer/Retail	Series B Convertible Preferred Stock	1,215	200	16.5%	3.6%	30.0%	Starboard Value LP	Repay outstanding indebtedness and for working capital and other general corporate purposes
11/8/2018	CommScope Holding Company, Inc.	Telecommunications	Series A Convertible Preferred Stock	4,588	1,000	21.8%	5.5%	12.3%	Carlyle Group, LP	Provide partial funding for Issuer's planned acquisition of ARRIS International plc and for working capital and other general corporate purposes
6/26/2018	NuStar Energy L.P.	Energy	Series D Cumulative Convertible Preferred Units	2,143	590	27.5%	9.8%	3.5%	FS Investment Solutions, LLC; EIG Management Company, LLC	Working capital and other general corporate purposes
5/29/2018	Kimbell Royalty Partners, LP	Energy	Series A Cumulative Convertible Preferred Units	391	110	28.2%	7.0%	(4.6%)	Apollo Management, L.P.	Provide partial funding for Issuer's acquisition of the mineral and royalty interests held by Haymaker Minerals & Royalties, LLC and Haymaker Resources, L.P.
1/16/2018	USA Compression Partners, LP	Industrial	Series A Convertible Perpetual Preferred Units and Warrants	1,050	500	47.6%	9.8%	15.3%	EIG Management Company, LLC; FS Investment Solutions, LLC; Triloma Energy Advisors	Provide partial funding for Issuer's acquisition of CDM Resource Management LLC and CDM Environmental & Technical Services LLC from Energy Transfer Partners, L.P.
1/16/2018	SemGroup Corporation	Energy	Series A Convertible Preferred Stock	2,274	350	15.4%	7.0%	12.8%	Tortoise Capital Advisors, LLC; Canadian Imperial Bank of Commerce; Warburg Pincus LLC	Repay amounts outstanding under Issuer's Revolving Credit Facility and for general corporate purposes
12/4/2017	Carvana Co.	Technology	Class A Convertible Preferred Stock	322	100	31.1%	5.5%	10.0%	Dundon Capital Partners LLC	Working capital and other general corporate purposes

Source: Private Raise as of 5/8/2020.

Includes Unregistered Sponsor PIPEs, closed or in definitive agreement, of at least \$100mm in size and at least 5% of market cap since 2017.

Precedent Sponsor PIPE Transactions

Convertible Preferred Stock (cont'd 2 of 2)

Announ. Date	Company	Industry	Security Type	Market Cap (\$mm)	Deal Size (\$mm)	Deal Size as a % of Mkt Cap	Dividend / Coupon	Conversion Premium (Discount) %	Investors	Use of Proceeds
11/27/2017	Black Stone Minerals, L.P.	Energy	Series B Cumulative Convertible Preferred Units	3,509	300	8.5%	7.0%	20.0%	Carlyle Group, LP	Provide partial funding for Issuer's acquisition of certain mineral and royalty assets from Noble Energy, Inc.
11/26/2017	Meredith Corporation	Media	Series A Convertible Preferred Stock and Warrants	2,966	650	21.9%	8.5%	0.0%	Koch Industries Inc.	Provide partial funding for Issuer's acquisition of Time Inc. (NYSE: TIME)
9/22/2017	Phillips 66 Partners LP	Energy	Series A Perpetual Convertible Preferred Units	5,852	750	12.8%	5.0%	12.7%	Stonepeak Partners L.P.; First Reserve Corporation; Tortoise Capital Advisors, LLC	Provide partial funding for Issuer's planned acquisition of a 25% interest in each of Dakota Access, LLC and Energy Transfer Crude Oil Company, LLC and a 100.0% interest in Merer Sweeny, L.P. as well as for general corporate purposes
8/24/2017	Beacon Roofing Supply, Inc.	Industrial	Series A Cumulative Convertible Participating Preferred Stock	3,849	400	10.4%	6.0%	4.1%	Clayton, Dubilier & Rice, Inc.	Working capital and other general corporate purposes
8/2/2017	Genesis Energy, L.P.	Energy	Class A Convertible Preferred Units	3,273	750	22.9%	8.8%	12.0%	Blackstone Group Inc.; KKR & Co. L.P.	Working capital and other general corporate purposes
6/22/2017	NextEra Energy Partners, LP	Energy	Series A Convertible Preferred Units	2,130	550	25.8%	4.5%	11.6%	BlackRock, Inc.; KKR & Co. L.P.	Provide funding to allow Issuer's operating subsidiary, NextEra Energy Operating Partners, LP, to acquire assets and for general operating subsidia
5/24/2017	FGL Holdings	Financial Institutions	Series A Cumulative Convertible Preferred Stock and Ordinary Shares (see Investor Warrants)	1,565	270	17.2%	7.5%	(6.9%)	Blackstone Group Inc.	Provide partial funding for Issuer's initial Business Combination with Fidelity & Guaranty Life (NYSE: FGL) and the related acquisition of certain reinsurance companies from HRG Group, Inc.
5/11/2017	Surgery Partners, Inc.	Healthcare	Series A Convertible Perpetual Participating Preferred Stock	434	310	71.4%	10.0%	6.4%	Bain Capital Inc.	Provide partial funding for Issuer's planned acquisition of National Surgical Healthcare
5/11/2017	WildHorse Resource Development Corporation	Energy	Series A Perpetual Convertible Preferred Stock	1,141	435	38.1%	6.0%	23.4%	Carlyle Group, LP	Working capital and other general corporate purposes
5/3/2017	Virtusa Corporation	Technology	Series A Voting and Series A-1 Non-Voting Convertible Preferred Stock	924	108	11.7%	3.9%	16.7%	Orogen Group	Repay approximately \$81 million under Issuer's Senior Term Loan, fund a Common Stock repurchase program and for general corporate purposes
3/23/2017	Superior Industries International, Inc.	Industrial	Series A Perpetual Convertible Preferred Stock	465	140	30.2%	9.0%	12.4%	TPG Capital	Provide partial funding for Issuer's planned acquisition of UNIWHEELS AG
2/23/2017	Natural Resource Partners L.P.	Energy	Class A Convertible Preferred Units and Warrants	533	250	46.9%	12.0%	(10.0%)	Blackstone Group Inc.; Goldentree Asset Management LP; Louisiana State Employees' Retirement System	Provide partial funding for the redemption of \$90.0 million of 9.125% Senior Notes due 2018 and repay amounts under Issuer's Revolving Credit Facility

Average	\$2,359	\$375	22.4%	6.9%	10.3%
Median	\$1,920	\$300	20.8%	7.0%	12.3%

Source: Private Raise as of 5/8/2020.

Includes Unregistered Sponsor PIPEs, closed or in definitive agreement, of at least \$100mm in size and at least 5% of market cap since 2017.

Precedent Sponsor PIPE Transactions

Non-Convertible Preferred / Debt

Announ. Date	Company	Industry	Security Type	Market Cap (\$mm)	Deal Size (\$mm)	Deal Size as a % of Mkt Cap	Dividend / Coupon	Warrant Coverage	Investors	Use of Proceeds
4/29/2020	Cimpress plc	Industrial	Non-Convertible Senior Secured Second Lien Notes and Warrants	\$1,908	\$294	15.4%	12.0%	22.5%	Apollo Management, L.P.	Working capital and other general corporate purposes
4/23/2020	Expedia Group, Inc.	Technology	Series A Non-Convertible Perpetual Preferred Stock and Warrants	9,382	1,176	12.5%	9.5%	43.9%	Apollo Management, L.P.; Silver Lake Partners	Working capital and other general corporate purposes
9/26/2019	NGL Energy Partners LP	Energy	Class D Non-Convertible Preferred Units and Warrants	1,400	200	14.3%	9.0%	60.2%	Grosvenor Capital Management, L.P.; EIG Management Company, LLC; FS Investment Solutions, LLC	Provide partial funding for Issuer's planned acquisition of Hillstone Environmental Partners, LLC and related entities
7/2/2019	NGL Energy Partners LP	Energy	Class D Non-Convertible Preferred Units and Warrants	1,869	400	21.4%	9.0%	63.1%	Grosvenor Capital; EIG Management, LLC; FS Investment	Provide partial funding for Issuer's planned acquisition of certain assets from Mesquite Disposals Unlimited, LLC and Mesquite SWD Inc.
4/30/2019	Occidental Petroleum Corporation	Energy	Series A Non-Convertible Cumulative Perpetual Preferred Stock and Warrants	34,402	10,000	29.1%	8.0%	48.1%	Berkshire Hathaway Inc.	Provide partial funding for Issuer's planned acquisition of Anadarko Petroleum Corporation
10/30/2018	McDermott International, Inc.	Energy	Non-Convertible Redeemable Preferred Stock and Warrants	1,495	290	19.4%	12.0%	19.4%	Goldman Sachs Group, Inc.	Working capital and other general corporate purposes
3/14/2018	Seaspan Corporation	Industrial	Non-Convertible Senior Notes and Warrants	1,576	250	15.9%	5.5%	87.1%	Fairfax Financial Holdings Limited	Working capital and other general corporate purposes
1/3/2018	Seaspan Corporation	Industrial	Non-Convertible Senior Notes and Warrants	870	250	28.7%	5.5%	109.2%	Fairfax Financial Holdings Limited	Working capital and other general corporate purposes
11/29/2017	Melinta Therapeutics, Inc.	Healthcare	Senior Secured Non-Convertible Loan Facility and Warrants	418	148	35.4%	11.8%	38.5%	Deerfield Management Company, L.P.	Provide funding for Issuer's acquisition of the infectious disease business of The Medicines Company (NASDAQ-GS: MDCCO) and the retirement existing indebtedness
6/28/2017	Carrizo Oil & Gas, Inc.	Energy	Non-Convertible Redeemable Preferred Stock and Warrants	886	243	27.4%	8.9%	18.2%	Blackstone Group Inc.	Provide partial funding for Issuer's planned acquisition of properties in the Delaware Basin from ExL Petroleum Management, LLC
4/4/2017	Endologix, Inc.	Healthcare	Non-Convertible Secured Term Loan and Warrants	600	120	20.0%	6.9%	39.0%	Deerfield Management Company, L.P.	Repurchase \$53.1 million in aggregate principal amount of Issuer's outstanding 2.25% Convertible Senior Notes due 2018 and for working capital and general corporate purposes

Average	\$4,982	\$1,215	21.8%	8.9%	49.9%
Median	\$1,495	\$250	20.0%	9.0%	43.9%

Source: Private Raise as of 5/8/2020.

Includes Unregistered Sponsor PIPEs, closed or in definitive agreement, of at least \$100mm in size and at least 5% of market cap since 2017.

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Annex C

Stock Exchange Shareholder Approval
Requirements

NYSE Requirements for Shareholder Approval

The following is a summary of the NYSE shareholder approval rules that may apply to a PIPE*:

20% Test	Related Party Rules	Change of Control ⁴	Equity Compensation
Shareholder approval required if issuer issues common stock (or securities exercisable for or convertible into common stock) representing 20% or more of its outstanding shares or voting power, <u>unless</u> , (a) the cash price per share (for issuances of common shares) or the conversion or exercise price (for convertible debt, convertible preferred stock and warrants) is equal to or greater than the Minimum Price ¹ of its shares and (b) the private placement qualifies as a bona fide private financing. ² Rule 312.03(c).	Shareholder approval required if any director, officer or substantial security holder ³ of the issuer (aggregated with such person's affiliates, subsidiaries and persons closely-related to such person) receives common stock (or securities exercisable for or convertible into common stock) representing 1% or more of the issuer's shares or voting power outstanding prior to the issuance, <u>except</u> that substantial security holders (who are not officers or directors) can receive up to 5% of the issuer's shares or voting power outstanding prior to the issuance if the cash price per share is equal to or greater than the Minimum Price of its shares. An exception may be available for an "early stage company" (a company that has not reported two consecutive years with \$20 million of revenue). Rule 312.03(b).	Shareholder approval will be required if the issuance of the shares results in a change of control of the issuer. Rule 312.03(d).	Shareholder approval is required for all equity compensation plans and material revisions thereto. Rule 312.03

Financial Viability Exception: Shareholder approval may not be required if the time required to secure approval would seriously jeopardize the financial viability of the issuer and certain procedural requirements are complied with. Rule 312.05.

Mixed Financing Sources: The NYSE generally treats a series of related transactions as a single, aggregated transaction when applying the shareholder approval tests.

Adjustment Provisions in Convertible Securities and Warrants: Certain adjustment provisions of convertible securities and warrants, such as anti-dilution protections and resets, can result in a conversion or exercise price that is less than market price at the time of issuance and increase the number of shares issuable upon conversion or exercise. As a result, these provisions should be carefully analyzed for implications under the shareholder approval rules.

*Note: In addition to potential shareholder approval issues, a PIPE can also implicate NYSE's voting rights rule, such as where an investor gets board seats and/or consent or approval rights.

- Minimum Price. The lower of (i) the official closing price on the NYSE as reported immediately preceding the signing of a binding agreement to issue securities, and (ii) the average of the official closing price for the five trading days immediately preceding the signing of a binding agreement to issue securities.
- Bona Fide Private Financing. A sale in which either (a) a registered broker-dealer purchases from the issuer with a view to the private sale of such securities to one or more purchasers, or (b) the issuer sells the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquires, or has the right to acquire upon exercise or conversion of the securities, more than 5% of the shares of the issuer's common stock or voting power before the sale.
- Substantial Security Holder. The term "substantial security holder" is not defined in the rules. There is a safe harbor, however, that says any person who owns less than 5% of the stock and voting power is not a substantial security holder. Rule 312.04(e).
- Change of Control. The NYSE does not define the term "change of control." The analysis is facts and circumstances. Among factors to consider are percentage ownership, board rights, consent/veto rights over corporate action and other relationships. A change of control can potentially be implicated in situations where an investor beneficially owns as little as 20% of the issuer's common stock or voting power after the transaction or in other situations (including where ownership is less than 20%) where an investor is deemed to "control" the issuer following completion of the transaction.

NASDAQ Requirements for Shareholder Approval

The following is a summary of the NASDAQ shareholder approval rules that may apply to a PIPE*:

20% Test	Issuance in connection with acquisition of another company's stock or assets	Change of Control ²	Equity Compensation
<p>Shareholder approval required if:</p> <ul style="list-style-type: none"> • Issuer issues stock at a price less than the Minimum Price¹, which together with sales by directors, officers, or substantial shareholders¹, equals 20% or more of the issuer's outstanding shares or voting power. Rule 5635(d)(1). • Issuer issues stock equaling 20% or more of its outstanding shares or voting power for less than the Minimum Price of the stock. Rule 5635(d)(2). 	<p>Shareholder approval required if:</p> <ul style="list-style-type: none"> • Issuer issues stock representing 20% or more of its outstanding shares or voting power. Rule 5635(a)(1). • Any director, officer, or substantial shareholder¹ has a 5% or greater interest (or such persons collectively have a 10% or greater interest) in the company or assets to be acquired and the issuance of stock could result in an increase in outstanding common shares or voting power of 5% or more. Rule 5635(a)(2). 	<p>Shareholder approval required if the issuance of the shares results in a change of control of the issuer. Rule 5635(b).</p>	<p>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. Rule 5635(c).</p>

Financial Viability Exception: Shareholder approval may not be required if the time required to secure approval would seriously jeopardize the financial viability of the enterprise and certain procedural requirements are complied with. Rule 5635(f).

Mixed Financing Sources: NASDAQ generally treats a series of related transactions as a single, aggregated transaction when applying the shareholder approval tests.

Adjustment Provisions in Convertible Securities and Warrants: Certain adjustment provisions of convertible securities and warrants, such as anti-dilution protections and resets, can result in a conversion or exercise price that is less than market price at the time of issuance and increase the number of shares issuable upon conversion or exercise. As a result, these provisions should be carefully analyzed for implications under the shareholder approval rules.

* Note: In addition to potential shareholder approval issues, a PIPE can also implicate NASDAQ's voting rights rule, such as where an investor gets board seats and/or consent or approval rights.

1. **Minimum Price.** A price that is the lower of: (i) the closing price (as reflected on Nasdaq.com) immediately preceding the signing of the binding agreement; or (ii) the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement. Rule 5625(d)(1)(A)
2. **Substantial Shareholder.** An interest consisting of less than either 5% of the number of shares of common stock or 5% of the voting power outstanding of a Company or party shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a "substantial shareholder." Rule 5635(e)(3).
3. **Change of Control.** NASDAQ does not define the term "change of control." The analysis is facts and circumstances. Among factors to consider are percentage ownership, board rights, consent/veto rights over corporate action and other relationships. A change of control can potentially be implicated in situations where an investor beneficially owns as little as 20% of the issuer's common stock or voting power after the transaction or in other situations (including where ownership is less than 20%) where an investor is deemed to "control" the issuer following completion of the transaction.

Potential Solutions When Stock Exchange Shareholder Approval Rights are Implicated

- Seek shareholder approval prior to and as a condition of issuance
- Provide for closing in tranches
- Implement caps and/or blockers
- Limit or prohibit conversion/exercise and voting prior to shareholder approval
- Issue non-voting/non-convertible instrument mandatorily exchangeable for voting and/or convertible instrument upon receipt of shareholder approval
- Implement structure that incentivizes shareholder approval and that does not violate stock exchange policies against alternative outcomes and use of penalties and/or sweeteners (e.g., NASDAQ)
- Defer warrant exercisability (NASDAQ only)
- Financial viability exception
- Obtain ruling letter from stock exchange

Temporary Waivers of NYSE Shareholder Approval Requirements

On April 6, 2020, the SEC approved the NYSE's rule changes to temporarily waive through June 30, 2020 certain shareholder approval requirements relating to PIPEs:

- Section 312.03(b) – Issuance to a Related Party
 - *General Requirements:* Shareholder approval required for any issuance of voting stock to a Related Party¹ in which shares of common stock issued (or shares of common stock into which securities can be converted) exceeds (i) 1% of the number of shares of common stock outstanding or (ii) 1% of the voting power outstanding before the issuance. Limited exception for cash sales of up to 5% of the company's outstanding stock to a substantial security holder at a price equal to the Minimum Price².
 - *Effect of Temporary Waiver:* Subject to certain conditions, shareholder approval requirements for cash transactions with Related Parties that exceed the applicable 1% and 5% limits are waived, so long as the cash price meets the Minimum Price definition and the transaction is "reviewed and approved by the company's audit committee or a comparable committee comprised solely of independent directors."
- Section 312.03(c) – Transactions of 20% or More
 - *General Requirement:* Shareholder approval required for transactions (other than public offerings for cash) involving (i) 20% or more of the company's outstanding common stock or (ii) 20% or more of the voting power outstanding before the issuance. Exception for transactions involving a cash sale that comply with the Minimum Price test and constitute a bona fide private financing¹.
 - *Effect of Temporary Waiver:* 5% limitation waived for any sale to an individual investor in a bona fide private financing pursuant to Section 312.03(c). In addition, waiver permits "companies to undertake a bona fide private financing ... in which there is only a single purchaser." Finally, if such transaction involves a Related Party, it must be "reviewed and approved by the company's audit committee or a comparable committee comprised solely of independent directors." Note that the equity must still be sold at a price no less than the Minimum Price.

1. Related Party. A director, officer or substantial security holder of the company.

2. Minimum Price. The lower of (i) the official closing price on the NYSE as reported immediately preceding the signing of a binding agreement to issue securities, and (ii) the average of the official closing price for the five trading days immediately preceding the signing of a binding agreement to issue securities.

3. Bona Fide Private Financing. A sale in which either (a) a registered broker-dealer purchases from the issuer with a view to the private sale of such securities to one or more purchasers, or (b) the issuer sells the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquires, or has the right to acquire upon exercise or conversion of the securities, more than 5% of the shares of the issuer's common stock or voting power before the sale.

Temporary Waivers of Nasdaq Shareholder Approval Requirements

On May 4, 2020, the SEC approved Nasdaq's Listing Rule 5636T, which temporarily waives through June 30, 2020 certain shareholder approval requirements relating to PIPEs:

- Listing Rule 5636(c) – Issuance to a Related Party
 - *General Requirements:* Shareholder approval required for certain issuances of securities when an equity compensation plan or arrangement pursuant to which stock may be acquired by officers, directors, employees or consultants is to be established or materially amended.
 - *Effect of Listing Rule 5636T:* Shareholder approval not required so long as (i) the participation of any affiliate is less than 5% of the transaction, (ii) the participation of all affiliates are collectively less than 10% of the transaction, (iii) the participation of any affiliate was specifically required by unaffiliated investors; and (iv) the affiliates did not participate in negotiating the economic terms of the transaction.
- Listing Rule 5636(d) – Transactions of 20% or More
 - *General Requirement:* Shareholder approval required for transactions involving (i) 20% or more of the company's outstanding common stock or (ii) 20% or more of the voting power outstanding before the issuance at a price less than the Minimum Price¹.
 - *Effect of Listing Rule 5636T:* If the company (i) executes a binding agreement governing the issuance of securities, (ii) submits the Listing of Additional Shares notification form and related supplement to the Nasdaq Listing Qualifications Department² and (iii) obtains approval from the Nasdaq Listing Qualification Department, if applicable, no later than June 30, 2020, the company can issue securities in excess of 20% so long as the maximum amount of common stock, or securities convertible into common stock, issuable in the transaction is less than 25% of the total shares outstanding and 25% of the voting power outstanding before the transaction and (2) the maximum discount to the Minimum Price is 15%.

1. Minimum Price. The lower of: 1) the Nasdaq official closing price immediately preceding the signing of the binding agreement; or 2) the average Nasdaq official closing price of the common stock for the five trading days immediately preceding the signing of the binding agreement.

2. The supplement to the Nasdaq Listing Qualification Department must certify that the company complies with the following requirements and describing how it complies: (1) the need for the transaction is due to circumstances related to COVID-19, (2) the delay in securing shareholder approval would (A) have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan; (B) result in workforce reductions; (C) adversely impact the company's ability to undertake new initiatives in response to COVID-10; or (D) seriously jeopardize the financial viability of the enterprise, (3) the company undertook a process designed to ensure the proposed transaction represents the best terms available to the Company; and (4) the Company's audit committee or a comparable body of the board of directors comprised of independent, disinterested directors has: (A) expressly approved reliance on the exception and (B) determined that the transaction is in the best interest of shareholders.

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Annex D

Hart-Scott-Rodino and Other

Filing and Approval Requirements

HSR and Other Filing and Approval Requirements

- A PIPE transaction may require a filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR), if the resulting holdings of the issuer's voting securities exceeds \$94 million in value.
- Closing and funding may be delayed to accommodate HSR filings and waiting period (up to 30 days from the date of signing the purchase agreement, subject to early termination).
- Applicability of similar filings required in other jurisdictions should also be reviewed.
- Foreign investors also need to consider CFIUS requirements. Issuers in regulated industries need to consider other potentially applicable regulatory filings and approvals as well.

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Annex E

Select Accounting Considerations

Selected Accounting and Tax Considerations

- Accounting
 - Debt versus equity classifications and allocations under GAAP
 - Embedded derivatives
 - Beneficial conversion features
 - Implications of transaction structure on future reported earnings and financial condition
- Tax
 - Debt versus equity classification
 - Phantom income / OID considerations
 - Capital gain versus ordinary income
 - Impact on net operating losses, or NOLs

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Annex F

Section 13d and Section 16 Issues

Section 13d and Section 16 Issues

- Section 13d reporting
 - Becoming a 13d reporting person
 - "Group" issues
 - Potential need to convert existing 13G to 13D
 - 10-day limitation on voting and additional acquisitions in certain circumstances
- Section 16 "short swing" profits liability
 - Becoming a Section 16 reporting person
 - "Group" issues
 - Short swing profit disgorgement
- Use of conversion blockers