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Capital Raising in a Challenging Environment: PIPEs

Presented by:

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Today's Panelists

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Eric Scarazzo is a partner in Gibson Dunn's New York office. He is a member of the firm's Capital Markets, Securities Regulation and Corporate Governance, Energy, M&A and Global Finance Practice Groups. As a key member of the capital markets practice, Mr. Scarazzo is involved in some of the firm's most complicated and high-profile securities transactions. Additionally, he has been a certified public accountant for over 20 years. His deep familiarity with both securities and accounting matters permits Mr. Scarazzo to play an indispensable role supporting practice groups and offices throughout the firm. He provides critical guidance to clients navigating the intersection of legal and accounting matters, principally as they relate to capital markets financings and M&A disclosure obligations.

Agenda

I. Overview of PIPE Transactions

II. Deal Structure

III. Select Considerations

IV. Annexes: Case Studies and Other Resources

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I. 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.
- *Refer to Annex A for Selected Case Studies.*

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 Leveraged Buyouts.

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	• ***Network Required***. Knowledge of investors required, given significant participation in market by hedge funds and distressed investors.	• ***Price Discount and Dilution***. Purchase price often heavily discounted and may be significantly dilutive. • ***Approvals, Compliance and Registration***. May require shareholder approval under Nasdaq or NYSE rules *(Refer to Annex B)*, HSR (*Refer to Annex* C) or other filings or approvals or SEC registration on back end.	• ***Compromises***. May signal desperation, require giving up some control and have chilling effect on subsequent acquisition of issuer or future financing activity.
Investor	• ***Limited Market***. Limited and opaque market for PIPE issuers.	• ***Limited Diligence***. Diligence and transactional timeline may be accelerated.	• ***Ownership Hurdle***. Significant Nasdaq and NYSE hurdles for investments over 20% (*Refer to Annex B*).

II. Deal Structure

Deal Structure – The Security

- Securities commonly issued in PIPE transactions:
  - Common Stock
  - Convertible Preferred Stock
  - Convertible Senior Notes
  - Warrants
- Terms of securities that may be negotiated in transaction include:

Economic

- Size of investment
- Type of security
- Coupon/dividends
- Priority
- Maturity
- Liquidation preference

Non-Economic

- Redemption/repurchase rights
- Conversion rights
- Anti-dilution protections
- Voting rights
- Registration rights
- Change of control/fundamental change protections

Deal Structure – Governance and Rights

- Investor rights that may be negotiated in PIPE transactions:
  - Board seats and observer rights
  - Consent and approval rights
  - Preemptive/participation rights
  - Information rights
  - Covenants, defaults and remedies
- Issuers may negotiate certain protections:
  - Standstill
  - Restrictions on transfer
  - Voting agreements

Deal Structure – The Transaction

- Illustrative Transaction Process

- Common transaction documents:
  - NDA and/or Wall Cross Script
  - Term Sheet
  - Placement Agent Agreement
  - Purchase Agreement
  - Registration Rights Agreement
  - Form 8-K and press release
  - Warrant Agreement, Certificate of Designations (for Preferred Stock) or Indenture (for Convertible Debt)
  - Closing Certificates, Exchange Notifications and Transfer Agent Documents
  - Legal Opinions (may not be required in every PIPE transaction)

Deal Structure – Issuer Considerations

- Select Issuer considerations 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

Government and Securities

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

Accounting and Tax

- *Refer to Annex D*

Deal Structure – Investor Considerations

- Select Investor considerations 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 E*)
- HSR, CFIUS and other regulatory filing or approval requirements (*Refer to Annex C*)

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III. Select Considerations for PIPE Transactions

Stock Exchange Listing Rules

- **The 20% Rule**
  - Both Nasdaq and the NYSE require shareholder approval for the issuance of 20% or more of a company's outstanding common stock or voting power, subject to certain exceptions (e.g., public offering or private placement where price is above a minimum threshold tied to market price)
    - These exemptions are not typically available for PIPE transactions
  - One common workaround allowed by both stock exchanges is to issue less than 20% of shares immediately, combined with the issuance of preferred stock or another security that remains non-convertible and non-voting until shareholder approval is obtained
  - The exchanges may permit certain penalties and sweeteners to encourage shareholder approval, but such mechanisms must be navigated carefully after consulting with the applicable exchange

Stock Exchange Listing Rules (Cont.)

- **Related Party Transactions**
  - The NYSE requires shareholder approval for certain issuances to:
    i. directors, officers and 5% shareholders,
    ii. affiliates thereof, and
    iii. entities in which the foregoing have a substantial direct or indirect interest if the issuance exceeds 1% of the number or voting power of outstanding shares before the issuance
  - The NYSE makes a limited exception for issuances of up to 5% of a company's shares to a shareholder that is a related party only because it is a substantial shareholder
  - Although Nasdaq does not have a related party rule comparable to the NYSE's rule, it views issuances to directors and officers at below market value, similar to the NYSE, as equity compensation, which requires shareholder approval
    - These rules can affect PIPEs in which insiders participate

Stock Exchange Listing Rules (Cont.)

- **Change of Control**
  - Both Nasdaq and the NYSE require shareholder approval prior to transactions deemed to be a change of control.
  - Nasdaq presumes that a change of control has occurred if an investor will cross the 20% ownership threshold as a result of the transaction.
  - The NYSE presumes that a change of control has occurred where:

    i. the transaction results in an investor crossing the 20% threshold,

    ii. the investor would obtain disproportionate board representation, or

    iii. the investor would have significant veto rights over corporate actions

Registration Rights and Resale Restrictions

- PIPE investors typically receive registration rights for the shares purchased in a private placement to allow them to sell without restrictions.
- The registration rights agreement negotiated between the parties often provides the investors with
  i. demand registration rights requiring the company to register the sale of acquired shares pursuant to a resale registration statement and
  ii. piggy back registration rights that allow investors to join in a registered primary offering of the company or a secondary offering of other company shareholders.
- Once the resale registration statement is effective, holders will still need to coordinate with the transfer agent to remove restrictive legends
  - Gibson Dunn (as issuer counsel) will need to provide legal opinion to transfer agent.
  - Holders commonly required to sign (and have broker sign) representation letter and, depending on how shares are transferred in subsequent sales, medallion guaranteed stock power.
  - Confirm with transfer agent well in advance what documents are needed for legend removal.
- Following a one-year holding period, holders may request the restrictive legends be removed under Rule 144 without a sale, subject to certain conditions.

Company Charter Confirmations

- A company should confirm it has sufficient unissued but authorized stock under its charter or, if the company is considering issuing a new type of equity security, such as preferred stock, that its charter authorizes such security
- In calculating the number of shares available for issuance in the PIPE, a company should take into account shares reserved for issuance under equity compensation plans or convertible securities
- If sufficient shares are not available or the type of security being considered is not already authorized, then a company may have to seek shareholder approval to amend its charter

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IV. Annexes

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Annex A
Selected Case Studies

Selected Case Studies

	Heron Therapeutics, Inc.	Upland Software, Inc.	Norwegian Cruise Line Holdings Ltd.	Dick's Sporting Goods, Inc.
Date of execution	August 8, 2022	July 14, 2022	May 5, 2020	April 17, 2020 Option (as defined below) exercised on April 20, 2020
Securities offered	16.2 million shares of Common Stock; and Pre-Funded Warrants to purchase up to 8.5 million shares of Common Stock	115,000 shares of Series A Preferred Stock	Up to $400 million in aggregate principal amount of Exchangeable Senior Notes due 2026 (the "Notes").	$550 million in aggregate principal of 3.25% Convertible Senior Notes due 2025. 13-day option to purchase up to an additional $75 million aggregate principal amount of the Notes (the "Option")
Purchase price per share / Total dollar amount of offering	Purchase Price of $3.10 per share of Common Stock; and Purchase Price of $3.0999 per Pre-Funded Warrant Total: $76.5 million	Purchase Price of $1,000 per share of Preferred Stock Total: $115 million	$400 million aggregate principal amount	$625 million aggregate principal amount
Conversion or exercise price per share	Exercise Price of $0.0001 per share (Pre-Funded Warrants). May exercise on cashless basis	Conversion Price of $17.50 per share	Conversion price of $12.10 (equal to 110% of the offering price to the public in the concurrent public offering).	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	~16%	~21%	~15% (not to exceed 19.9%) on an as converted basis.	~18%
Stockholder approval necessary	No	Yes (Conversion capped at 19.9% until shareholder approval obtained)	No	No

Selected Case Studies (Cont.)

	Heron Therapeutics, Inc.	Upland Software, Inc.	Norwegian Cruise Line Holdings Ltd.	Dick's Sporting Goods, Inc.
Underlying documentation	Form 8-K Filing of Purchase Agreement	Form 8-K Filing of Certificate of Designations and Registration Rights Agreement	Form 8-K Filing of Indenture and Investment Agreement	Form 8-K Filing of Indenture, Form of Notes and Form of Transaction Confirmations
Investors	New and existing Institutional Investors	Affiliate of HGGC, LLC	*L* Catterton	BofA Securities, Inc., Wells Fargo Securities LLC and PNC Capital Markets LLC
Issuer's stock exchange / symbol	Nasdaq / HRTX	Nasdaq / UPLD	NYSE / NCLH	NYSE / DKS
Dividends / Interest	N/A	Dividends of 4.5% per annum until seven year anniversary of issuance and 7% per annum thereafter. Any dividends paid to holders of Common Stock on an as-converted basis.	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.	The Notes will accrue interest at a rate of 3.25% per annum.
Liquidation	N/A	Senior to Common Stock. Initial Liquidation Price is $1,000 per share.	N/A	N/A

Selected Case Studies (Cont.)

	Heron Therapeutics, Inc.	Upland Software, Inc.	Norwegian Cruise Line Holdings Ltd.	Dick's Sporting Goods, Inc.
Conversion	N/A	• Holder has option to convert, in whole or in part, at a conversion price of $17.50 per share, subject to certain adjustments. • Until shareholder approval is obtained, the aggregate number of shares of Common Stock issuable upon conversion is capped at 19.9% of shares of Common Stock outstanding as of the closing date of PIPE.	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.	• 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. • 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.

Selected Case Studies (Cont.)

	Heron Therapeutics, Inc.	Upland Software, Inc.	Norwegian Cruise Line Holdings Ltd.	Dick's Sporting Goods, Inc.
Redemption	N/A	• Company may redeem Preferred Stock for cash at any time after seven years from PIPE closing date at a price equal to 105% of the Liquidation Preference. • Upon a "Fundamental Change," holders have the right to require the Company to redeem Preferred Stock for an amount equal to the greater of (i) the sum of 105% of the Liquidation Preference and customary make-whole amount, and (ii) the amount that such holder would have received had such holder, immediately prior to such "Fundamental Change," converted Preferred Stock into Common Stock.	• Company must repurchase the Notes upon the occurrence of a "fundamental change," which includes certain change of control transactions. • Company may redeem all or a portion of the Notes after the third anniversary of the issuance upon the occurrence of certain market conditions.	• 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. • Company may redeem all or a portion of the Notes after the third anniversary of the issuance upon the occurrence of certain market conditions.
Registration Rights	• Company to file resale registration statement no later than 60 days after closing. • Company to cause such registration statement to go effective no later than 90 days (120 days if SEC review) after filing. • Investor is entitled to customary piggyback registration rights.	• Company to file resale registration statement no later than 60 days after closing. • Company to cause such registration statement to go effective as promptly as practicable after filing. • Investor is entitled to customary piggyback registration rights.	• Company to file resale registration statement at or prior to 6 months following the closing. • Company to cause such statement to go effective by the 1 year anniversary of the closing. • Investor is entitled to customary piggyback registration rights.	N/A

Selected Case Studies (Cont.)

	Heron Therapeutics, Inc.	Upland Software, Inc.	Norwegian Cruise Line Holdings Ltd.	Dick's Sporting Goods, Inc.
Liquidated Damages	• 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). • 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. • Company's liquidated damages obligations with respect to any such Investor capped at 6% of the aggregate purchase price.	N/A	N/A	N/A
Board Representations	N/A	• (i) For so long as Investor and its affiliates own at least 5% of the Company's stock (including shares issuable upon conversion of Preferred Stock), one member of the board, and (ii) for so long as Purchaser and its affiliates own at least 10% ,one non-voting observer. • Board member is entitled to search on each committee.	• One director and one observer for so long as Investor holds 50% of the number of Conversion Shares owned by Investor as of closing. • Director shall sit on the audit committee or, if the board determines that the director does not qualify as "independent," then on such other committee as the Investor may elect.	N/A

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Annex B
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, unless, (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 at least as great as the Minimum Price[1] of its shares[2] or (b) the issuance involves a public offering for cash. 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) in excess of either 1% of the issuers outstanding shares or voting power. Shareholder approval not required if such transaction is a cash sale for a price that is at least the Minimum Price. Rule 312.03(b)(i). Shareholder approval also required prior to issuances where the securities are issued as consideration in a transaction in which a related party has a 5% or greater interest in the company or assets to be acquired or in the consideration to be paid, and the issuance of securities exceeds 5% of the issuers outstanding shares or voting power. Rule 312.03(b)(ii).	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(a)

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.

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*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.

1. 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, or (ii) the average of the official closing price for the five trading days immediately preceding the signing of a binding agreement to issue securities.
2. If the securities are issued in connection with an acquisition of the stock or assets of another company, shareholder approval will be required if the issuance alone (or when combined with any other present or potential issuance in connection with such acquisition, is equal to or exceeds either 20% or more of the issuer's outstanding shares or voting power.
3. 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).
4. 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
Shareholder approval required if: • Issuer issues stock at a price less than the Minimum Price[1], which together with sales by directors, officers, or substantial shareholders[1], 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).	Shareholder approval required if: • Issuer issues stock representing 20% or more of its outstanding shares or voting power. Rule 5635(a)(1). • Any director, officer, or substantial shareholder[1] 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).	Shareholder approval required if the issuance of the shares results in a change of control of the issuer. Rule 5635(b).	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).

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.

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* 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

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Annex C
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).
  - **TRIGGER ->** If the resulting holdings of the issuer's voting securities exceeds $101 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 D
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 E

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

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