

Survey of 2009 Life Sciences Private Investment in Public Equity (PIPE) Transactions

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Introduction

Private investments in public equity (“PIPEs”) are a permanent fixture in the U.S. capital raising landscape. Once considered a financing alternative used only by public issuers unable to raise capital through more traditional means, including through registered public offerings, PIPEs are now seen by many public issuers as the preferred form of financing. According to PlacementTracker, a research company that tracks private placements, in 1998, there were 428 reported PIPE transactions in which issuers raised approximately \$3 billion. By comparison, the number of reported PIPE transactions completed in 2008 was more than 1,000 representing over \$110 billion in gross proceeds. Even in 2009, despite a meltdown in the U.S. financial markets, issuers completed over 800 PIPE transactions. Biotechnology and pharmaceuticals continue to be two of the most active sectors in the PIPE arena.

As the number of PIPE transactions has increased, the class of PIPE investors has expanded significantly. Earlier this decade, hedge funds, pension funds and corporate insiders represented the largest group of investors in PIPE transactions, particularly by life sciences companies. Today, private equity funds, sovereign wealth funds and venture capitalists—groups that historically avoided making private investments in public issuers—have become major participants in the PIPE market. Investments by these groups, along with a large influx of capital from foreign investors and the announcement of large PIPE transactions completed by blue chip companies, have given the U.S. PIPE market added legitimacy and spurred significant changes in the terms of PIPE transactions.

PIPE Components

PIPE transactions have two principal components. The first component involves the initial issuance of the securities—i.e., the private placement of securities by a public company to one or more accredited investors in reliance on the statutory private placement exemption provided by Section 4(2) of the Securities Act of 1933 (the “Securities Act”) and/or the private offering exemption provided by Regulation D under the Securities Act. The securities sold in PIPEs may include common stock, straight or convertible preferred stock, straight or convertible debt or a combination of these securities. Warrants are frequently issued to investors as an extra incentive for them to enter into the PIPE transaction. Since they are privately placed to the investors, securities issued in PIPE transactions are considered “restricted securities” within the meaning of the rules under the Securities Act.

Because PIPE investors require resale liquidity, the second component involves the filing of a registration statement by the issuer to register with the Securities and Exchange Commission (the “SEC”) the reoffer and resale of the common shares issued (or issuable) in the PIPE by the investors on a delayed or continuous basis in one or more transactions at varying prices (i.e., variable priced). Although PIPEs can be structured so that an effective registration statement is a condition to closing the transaction, most PIPEs today provide for the filing of a registration statement with the SEC within some number of days after the transaction is closed. Once the SEC declares the registration statement effective, PIPE investors are then generally able to resell freely their common shares in the trading market. However, in the event an issuer is unable to register some or all of the underlying PIPE shares for resale on a timely basis, it may incur significant penalties in favor of the investors.

Benefits of PIPEs

PIPEs offer a number of advantages over other financing options for public companies. In particular, these transactions allow issuers to raise capital much more quickly than a public offering by the issuer registered with the SEC. As opposed to traditional follow-on registered offerings that typically involve a management “road show” and other time-consuming marketing efforts, PIPEs can be completed with limited marketing by targeting a specific list of potential investors. Moreover, PIPEs may be completed on a confidential basis. With registered public offerings, issuers are often forced to publicly announce their intent to sell shares by filing a registration statement with the SEC in advance of pricing and confirming purchase orders from investors. The filing of a registration statement or a “red herring” prospectus under a shelf registration statement for a marketed offering has a tendency to create “overhang,” where the market perceives the pending issue as potentially dilutive, which can exert downward pressure on an issuer’s stock price and ultimately reduce the price at which shares may be sold by the issuer in the offering. On the other hand, most PIPEs do not require any public disclosure by issuers

until their purchase agreement with investors has been executed and the price at which the securities are sold has been determined. Finally, PIPEs can provide issuers with a greater degree of certainty to close. Whereas general market volatility, lack of sufficient public demand for the offered securities, and a difficult pricing environment can obstruct companies’ public offering efforts, which may force them to postpone or withdraw their offerings as they wait for a more favorable market window, PIPEs generally can be completed with a small number of investors in any type of market. This is substantiated by the large number of PIPE transactions completed in 2009, in which we witnessed the worst economic downturn in recent history.

Purpose

With the rapid development of the PIPE market, the dramatic changes to the composition of investors participating in these transactions and the continual adoption of new and revised positions related to PIPE transactions by regulatory authorities, we believe life sciences companies will benefit from a survey showing the very latest trends among PIPE transactions in their industry. This is particularly important in light of recent market events that have essentially closed the public offering market to many issuers.

Methodology

We reviewed the publicly-available transaction documents and related public disclosures for 20 PIPE transactions (excluding structured equity lines and prepaid warrant transactions) completed by life sciences companies between January 1, 2009 and October 31, 2009. Each of the issuers filed a Current Report on Form 8-K with the SEC to report the PIPE transaction.

Because the results included in this survey are based on a review of the transaction data and documentation made publicly available by PIPE issuers through filings submitted to the SEC, the information contained in this survey may not reflect all material terms, or the final results, of these transactions. In some instances, issuers disclosed estimates or maximum amounts, which were used to compile the information contained herein. Because these transactions accounted for only a portion of the PIPE transactions completed by life sciences companies during the survey period, they may not be representative of the broader PIPE market.

Our Practice

The Paul Hastings Securities and Capital Markets Practice is focused on meeting the growing needs of life sciences companies conducting business both nationally and internationally. Our lawyers have substantial experience assisting life sciences issuers and investors in every

type of corporate financing, including PIPEs, registered direct offerings, at-the-market equity offerings, rights offerings, Rule 144A transactions and underwritten registered offerings.

In the past six years, we have represented issuers and investors in over 60 PIPE and other public company private or direct offerings raising over \$3.4 billion in capital. We are among the most active law firms in the country in representing issuers and investors in PIPE transactions. With our PIPE financing expertise and life sciences industry insight, we are able to provide life sciences issuers and investors with proactive solutions to the often complex securities, regulatory and accounting challenges raised by PIPE transactions. Moreover, our Securities and Capital Markets Practice Group has strong relationships and is in regular communication with staff members of the SEC and the national securities exchanges, which gives us tremendous opportunity to both anticipate and quickly address changes in the PIPE regulatory environment. To access a recent client alert by our practice that reviews a number of methods of capital raising available to public issuers, follow this link: "**Capital Raising Alternatives for Public Companies in the Current Environment.**"

If you have any questions regarding this survey, please contact any of the members of the Paul Hastings Securities and Capital Markets Practice Group or the Paul Hastings lawyer with whom you normally work.

2009 Key Highlights and Developments

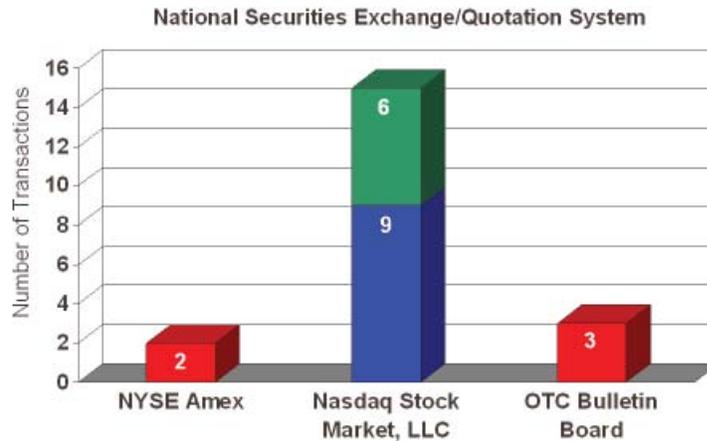
- Life science issuers continued to be avid users of PIPEs, completing more than 30% of announced transactions.
- Compared to 2008, there was a decline in the number of PIPE transactions completed and a considerable drop in the amount raised, largely due to the economic downturn. In addition, registered direct transactions, commonly referred to as "registered PIPEs," were used for the first time by a number of issuers who previously only used PIPEs and other unregistered transactions to raise financing. Like PIPE transactions, registered direct offerings are marketed confidentially. However, whereas PIPEs entail registering securities for resale by PIPE investors after they have been privately placed, in a registered direct offering the issuer's initial sale of securities is registered. This gives registered direct investors immediate resale liquidity.
- Private equity and venture capital funds led a large number of transactions in 2009, particularly in the first two quarters. Participation by hedge funds declined substantially as a number of these funds faced redemptions and were forced to focus on restructuring prior PIPE transactions rather than making new investments.
- A significant number of PIPE transactions were sold at a premium to the issuer's closing price. We attribute the dramatic rise in the number of PIPE transactions sold at a premium to the increased participation of private equity and venture capital funds in PIPE transactions. These groups generally have a longer-term investment horizon and therefore, compared to hedge funds and other technical investors, place less emphasis on receiving a positive spread on their investment at the time of closing.
- Mandatory registration rights remained prevalent. Despite the 2008 amendments to Rule 144 under the Securities Act that reduced the applicable holding periods for the resale of restricted securities, investors continued to demand the prompt resale registration of their PIPE securities.
- We observed a significant increase in the use of redemption rights – threshold-based and time-based. Somewhat surprisingly, a substantial number of these redemption rights were held in favor of both issuers and investors. Threshold-based redemption rights in life sciences PIPEs are often tied to the achievement of regulatory milestones, including completion of certain clinical trials or filings with the U.S. Food & Drug Administration (the "FDA").

- A number of notable SEC enforcement actions involving PIPE transactions were settled or adjudicated, including the SEC’s case against billionaire Mark Cuban. In a number of these cases the courts ruled against the SEC, which has left the PIPE community with some uncertainty regarding insider trading and short sale issues surrounding PIPEs.
- As a number of public issuers were unable to locate financing, they sought to rely on the exercise of warrants issued in previous PIPE transactions to meet their near-term liquidity needs. Often these issuers were forced to reduce the exercise prices of outstanding warrants and/or grant additional warrants to prior PIPE warrant holders in order to induce these holders to exercise.
- In September, the Staff of the SEC issued new compliance and disclosure interpretations (“C&DIs”) regarding Section 13 of the Securities Exchange Act of 1934 (the “Exchange Act”). A number of the new C&DIs directly impact PIPEs, including those related to short sales and the effectiveness of beneficial ownership caps. Specifically, the interpretations note that although short sales normally will not change a reporting person’s beneficial ownership, they may trigger a requirement to amend a previously filed Schedule 13D if the short sale reflects a material change in facts or circumstances contained in the reporting person’s prior Schedule 13D. In addition, the interpretations state that a convertible security containing a “conversion cap” may relieve the security holder of a beneficial ownership report filing obligation if the conversion cap is both “binding and valid.” The following factors may indicate that a conversion cap is not valid and binding: the cap “is easily waivable by the parties (particularly the holder of the convertible securities); lacks an enforcement mechanism; has not been adhered to in practice; or can be avoided by transferring the securities to an affiliate of the holder.” One factor indicating that a conversion cap is valid and binding is that the cap “is the product of bona fide negotiations between the parties.”

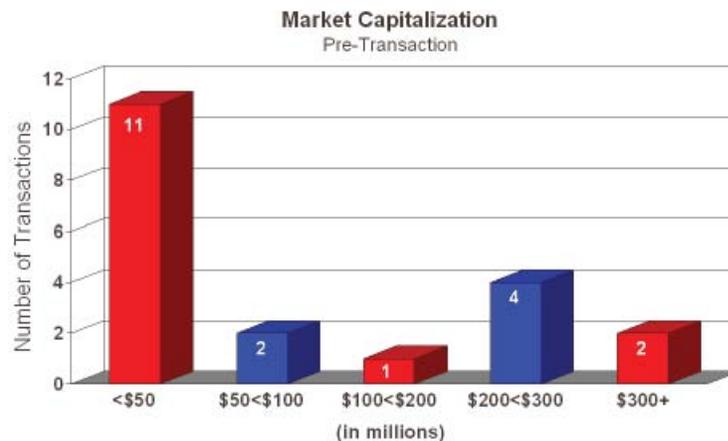
The Issuers

- **A.P. Pharma, Inc.**
- **Affymax, Inc.**
- **Antigenics Inc.**
- **Biomimetic Therapeutics, Inc.**
- **Cadence Pharmaceuticals, Inc.**
- **Cardima, Inc.**
- **EnteroMedics Inc.**
- **Exact Sciences Corporation**
- **GTC Biotherapeutics, Inc.**
- **Jazz Pharmaceuticals, Inc.**
- **NeoStem, Inc.**
- **Neurometrix, Inc.**
- **Nile Therapeutics, Inc.**
- **Novelos Therapeutics, Inc.**
- **PharmAthene, Inc.**
- **PhotoMedex, Inc.**
- **ReGen Biologics, Inc.**
- **Somaxon Pharmaceuticals, Inc.**
- **Sunesis Pharmaceuticals, Inc.**
- **ZIOPHARM Oncology, Inc.**

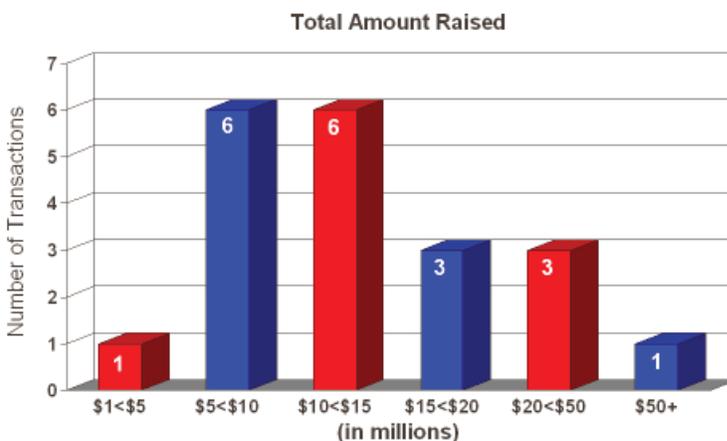
The Results



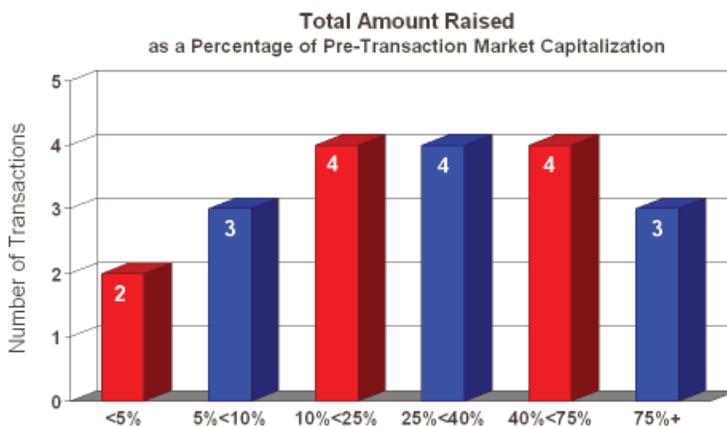
In 2009, across all industries, issuers trading on the Nasdaq Stock Market, LLC (“Nasdaq”) completed the largest number of PIPE transactions. Among the life sciences issuers included in the survey with securities traded on Nasdaq, six were listed on the Nasdaq Capital Market and nine on the Nasdaq Global Market. We believe this allocation is a reflection of the number of life sciences companies listed on Nasdaq rather than other factors that may make PIPEs a more favorable capital-raising alternative for Nasdaq issuers. The percentage of PIPEs completed by OTC Bulletin Board (the “OTCBB”) life sciences companies, which tend to be companies with smaller market capitalizations than companies traded on national securities exchanges, dropped significantly from prior years. We believe the constriction of the capital markets in 2009 hurt smaller public issuers, including a number of those quoted on the OTCBB, at disproportionately higher rates than their larger peers.



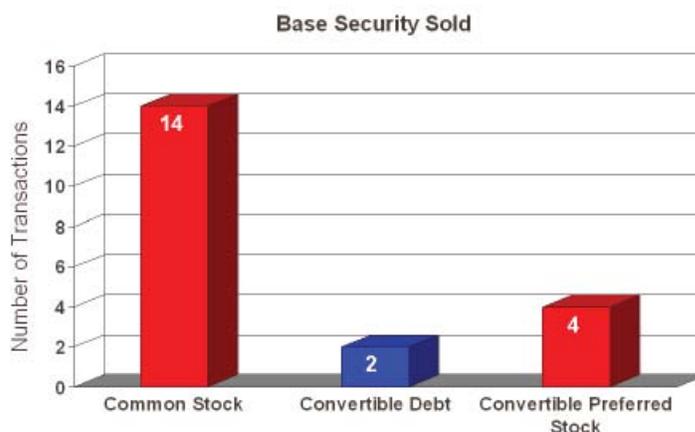
Although a number of large issuers completed highly publicized PIPE transactions in 2009, the surveyed data suggests that a substantial majority of PIPE transactions continue to be completed by “small cap” and “micro cap” issuers. Many of these issuers are ineligible to use the shelf registration process for a primary public offering or cannot generate sufficient investor interest for a registered public offering, which limits their capital-raising alternatives. The surveyed issuers had a median market capitalization of \$38.2 million as of immediately prior to their PIPE transactions.



The surveyed issuers raised an average of \$16.6 million per transaction, just \$0.3 million less than the life sciences companies included in our 2008 survey. In addition to capital requirements and investor interest, regulatory considerations often play a critical role in determining the amount raised in PIPE transactions. In our experience, micro, small and mid cap PIPE issuers seek to raise sufficient capital in a PIPE transaction to allow them to achieve a critical milestone – often submission of an Investigational New Drug Application (IND) to the FDA, enrollment or completion of clinical trials or submission of a New Drug Application (“NDA”) to the FDA. A number of life sciences issuers included in our survey also completed independent PIPE transactions in 2006, 2007 or 2008.

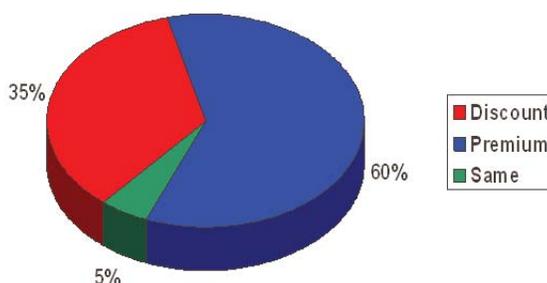


On average, the amount raised in the surveyed transactions constituted approximately 38% of the issuer’s pre-transaction market capitalization, measured as the number of outstanding common shares multiplied by the issuer’s closing price on the last trading prior to the execution of the PIPE purchase agreement. This was 18% higher than reported in our 2008 results. We believe the percentage increase is a result of the decline in many issuers’ trading prices, and therefore market capitalizations, in 2009, based on the economic downturn. The Nasdaq, NYSE and NYSE Amex generally require shareholder approval of PIPE transactions in which the issuer sells 20% or more of its pre-transaction common shares outstanding at a discount to its market price. In our experience, these rules have been significant factors in regulating the size of PIPE transactions by issuers traded on national securities exchanges.



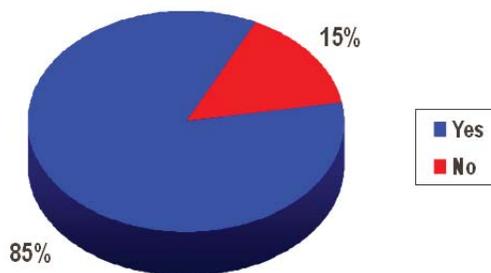
The base (i.e., primary) security sold in a PIPE transaction may include common stock, straight or convertible preferred stock, straight or convertible debt, or a combination of these securities. Common stock transactions were the most prevalent form of PIPE transaction among surveyed life sciences companies in 2009, as well as in 2008. Because the terms of convertible securities (e.g., the amount and form of dividend and interest payments, restrictive covenants and conversion price adjustments) generally require more negotiation and more extensive documentation than common stock provisions, common stock transactions can often be completed more quickly than PIPE transactions with convertible securities. In addition, the negative publicity associated with a number of PIPEs in which issuers sold variable-priced convertible securities without a conversion pricing floor (known as “death spiral” or “toxic” convertibles) have further solidified issuers’ preference for the common stock structure. In our experience, hedge funds, pension funds and other investors that do not intend to hold their PIPE securities as a long-term investment also prefer common stock transactions for their speed and simplicity.

Sale/Conversion Price Versus Pre-Transaction Closing Price



Because the securities issued in PIPE transactions are deemed “restricted securities” under the Securities Act and therefore lack immediate resale liquidity, they are typically sold at a discount to the issuer’s recent trading price. Measured against the closing price of the issuer’s stock on the date immediately preceding the execution of the PIPE purchase agreement, in 2009 we observed a greater percentage of PIPE transactions priced at a premium than in prior years. Approximately 67% of the surveyed convertible preferred stock and convertible debt PIPEs, which provide investors with an “embedded option” (i.e., conversion feature) and typically include mandatory interest or dividend payments, were sold at a premium. Among the eight common stock PIPEs sold at a premium, the average warrant coverage was 87%, compared to 37% for common stock PIPEs priced at a discount. We believe investors may have been more willing to pay a premium for these shares in exchange for greater warrant coverage, as well as other preferential rights.

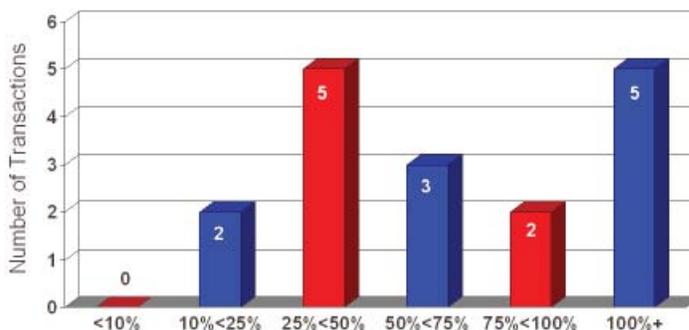
Warrant Coverage



PIPE investors often receive warrants to purchase the issuer’s common stock as a “sweetener.” Warrants provide investors with an enhanced return on their investment in the event the issuer’s stock price improves after the PIPE is completed, without subjecting them to any investment risk if the issuer’s stock price stays flat or declines. Each warrant issued in the surveyed transactions was exercisable for the issuer’s common stock regardless of the type of base security sold. Investors who do not receive warrants in PIPE transactions are often “compensated” with a greater discount to the purchase price of the base PIPE shares, a higher interest or dividend rate on their convertible securities or other preferential rights. The percentage of transactions with warrant coverage among surveyed life sciences companies was virtually identical in 2008 and 2009.

Warrant Coverage

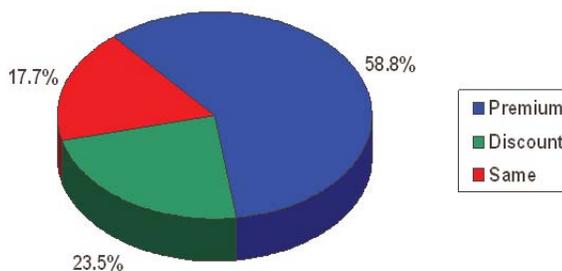
as a Percentage of the Number of (Underlying) Base Shares Sold



The number of warrants issued to PIPE investors is typically based on the (underlying) number of common shares sold in the transaction or a percentage of the aggregate proceeds raised in the transaction. The average and median number of warrant shares issued in the surveyed transactions, as a percentage of the number of (underlying) common shares sold, were 61.8% (56.8% in 2008) and 50.0% (same in 2008), respectively. In the five surveyed transactions in which investors received 100% warrant coverage, which was the largest percentage among surveyed transactions, investors paid a premium to the issuers’ closing prices for the base securities sold in the transactions.

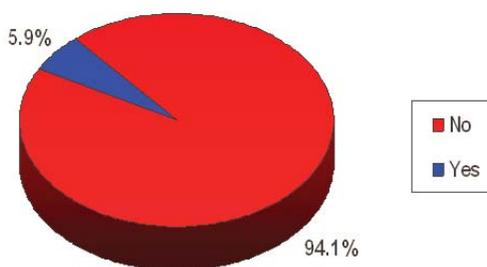
Warrant Exercise Price

as Compared to Base Security Sale/Conversion Price



The initial exercise price of the PIPE warrants is usually set as a percentage of the sale or initial conversion price of the base security sold in the transaction. Pricing the warrants at a premium ensures that the issuer’s shareholders will not experience further dilution of their equity position unless the issuer’s stock price increases after the PIPE and also allows the issuer to avoid the negative accounting treatment associated with pricing warrants at or below its market price. In the four instances in which the warrant exercise price was less than the base security sale/conversion price, the exercise price was still at a premium to the issuer’s market price. Among the surveyed transactions, the average premium of the warrant exercise prices over the base security sale prices was 26.4% (25.2% in 2008).

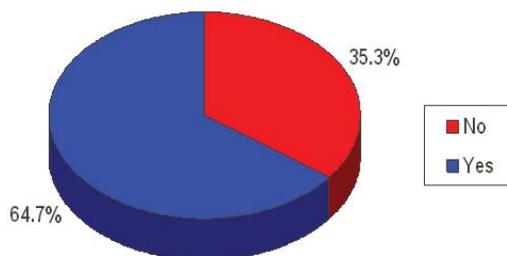
Warrant Exercise Price Adjustment Feature



Pricing adjustment mechanisms are designed to eliminate the economic dilution that would be incurred by PIPE investors in the event the issuer engages in one or more additional capital-raising equity or equity-linked offerings after the PIPE is completed. In some cases, however, these provisions are intended to protect investors against a decline in the value of their PIPE investment if the issuer fails to meet operational or financial milestones, or experiences a significant and/or persistent drop in its trading price, after the PIPE.

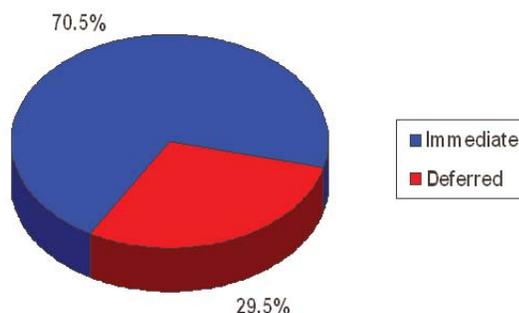
In the case of warrants, full ratchet adjustment provisions lower the exercise price to equal the price of a subsequent issuance deemed to be dilutive to the holders of the warrants. Weighted average protection lowers the exercise price based upon a weighted average calculation of the dilutive price of a subsequent issuance. One of the surveyed transactions with warrant coverage included a pricing reset feature to either lower or increase the warrant exercise price depending on whether the issuer met a clinical trial milestone by year-end.

Warrant Cashless Exercise Feature

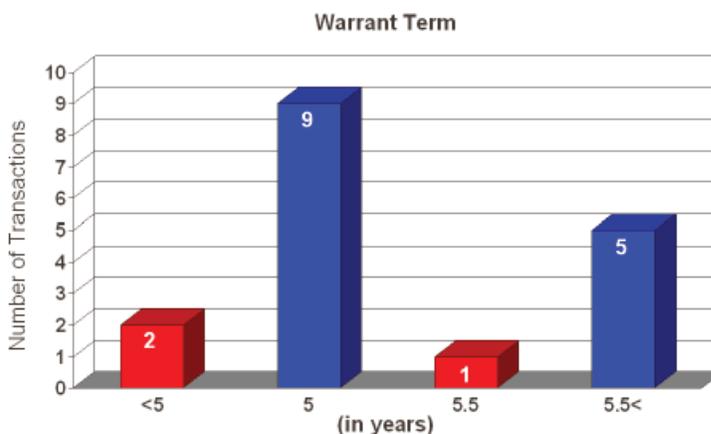


A “net share settlement” feature (often called a “cashless” exercise feature) allows the warrant holder to receive the “in-the-money” value of the warrant—measured as the difference between the contractually agreed-upon value of the issuer’s common shares on the date of exercise less the warrant exercise price—in the form of the issuer’s common stock without paying the exercise price of the warrant. Exercise by net share settlement allows investors to “tack” their holding period of the underlying common shares back to the date the warrant was issued for purposes of Rule 144 under the Securities Act. In addition, it reduces the potential dilution to an issuer’s shareholders because fewer shares are actually issued under the warrant. Because the exercise of warrants for cash can be a significant source of capital for issuers, however, many companies prefer to avoid issuing warrants with a net share settlement feature.

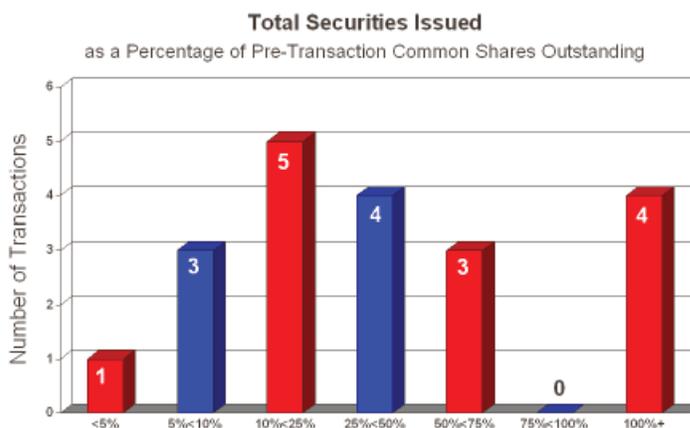
Warrant Exercisability



In each instance where warrant exercisability was deferred, the warrants became exercisable six months after issuance. In certain circumstances, deferring the exercisability of a warrant for at least six months allows the PIPE issuer to exclude the warrant shares from the number of shares deemed issued in the PIPE for purposes of determining whether shareholder approval of the PIPE transaction is required under national securities exchange rules.

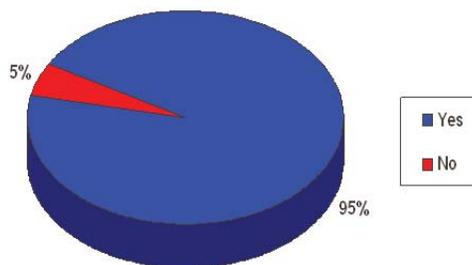


Warrants issued in PIPE transactions typically have an exercise period of five years. In 2009, we observed an increase in the term of warrants issued by life sciences issuers. Fewer than 11% of warrants included in our 2008 survey of life sciences PIPEs had a term greater than 5.5-years. The shortest and longest terms among warrants issued in the surveyed transactions were three and seven years, respectively.



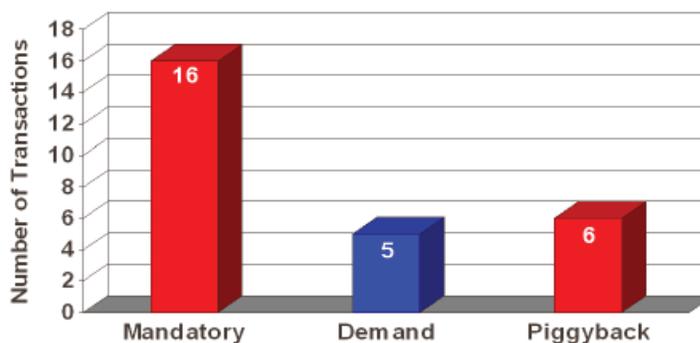
Including warrant coverage, the securities issued in a majority of the surveyed transactions represented 25% or more of the issuers' pre-transaction common shares outstanding (same in 2008). Among the surveyed transactions, on average the total number of securities sold (or saleable) constituted 51.6% of the issuer's pre-transaction shares outstanding (compared to 31.7% in 2008). The size of PIPE transactions has been subject to increased pressure in recent years. Beginning in late 2006, the SEC revealed that if the value of shares proposed to be registered for resale on behalf of PIPE investors constitutes more than one-third of the issuer's pre-transaction public float, the SEC would presumptively view the proposed registration as an indirect primary offering made on behalf of the issuer, in which case the PIPE investors (identified as selling the securityholders in the registration statement) would be viewed as underwriters with respect to the resale of their shares to the public (and therefore become subject to the attendant liabilities under Section 11 of the Securities Act). Shareholder approval requirements under national securities exchange regulations also have served to limit the number of shares sold in discounted PIPE transactions. However, we believe this factor may have played a lesser role in 2009 as more PIPE transactions were priced at a premium to the issuer's market price compared to prior years.

Registration Rights



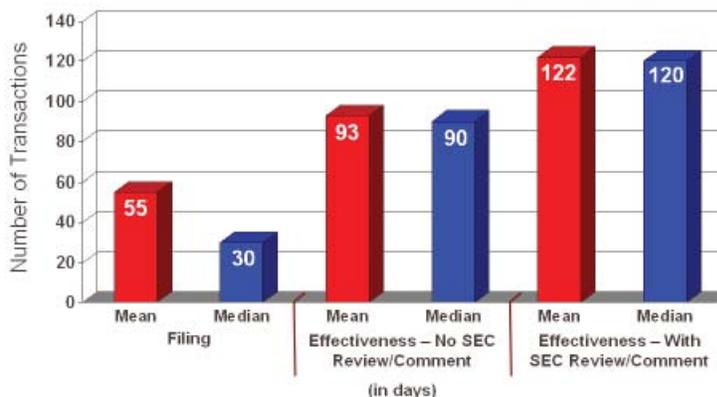
Registration rights are a primary component of PIPE transactions. Although the 2008 amendments to Rule 144 under the Securities Act reduced the applicable holding periods for the resale of restricted securities by the issuer’s non-affiliates (to six months) and affiliates (to one year), and therefore may have diminished some of the value historically provided by registration rights, the majority of PIPE transactions continue to include some form of registration rights. Nearly all of the surveyed transactions containing registration rights required the issuer to register for resale all of the (underlying) common shares issued in the PIPE transaction, including warrant shares.

Form of Registration Rights



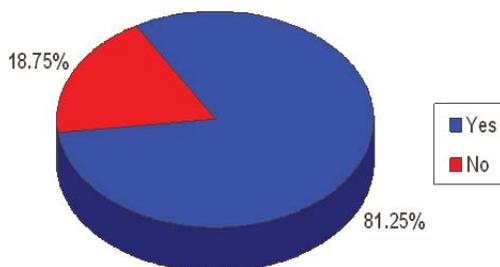
Mandatory registration rights require an issuer to file a registration statement covering the resale of the (underlying) common stock issued in the PIPE within a certain period of time following the closing. Demand registration rights allow investors to require that the issuer file a resale registration statement covering some or all of the (underlying) common stock issued in the PIPE at some time, or from time to time, after the closing. Investors’ demand registration rights may be subject to postponement in the event the filing of a resale registration statement would be deemed detrimental to the issuer and its shareholders. Piggyback rights generally allow investors to include their PIPE shares in any registration statement filed by the issuer to register shares in a primary offering for capital-raising purposes and/or a secondary offering on behalf of other selling securityholders. Some of the surveyed PIPE transactions included two or all three forms of registration rights.

Registration Rights Filing and Effectiveness Deadlines



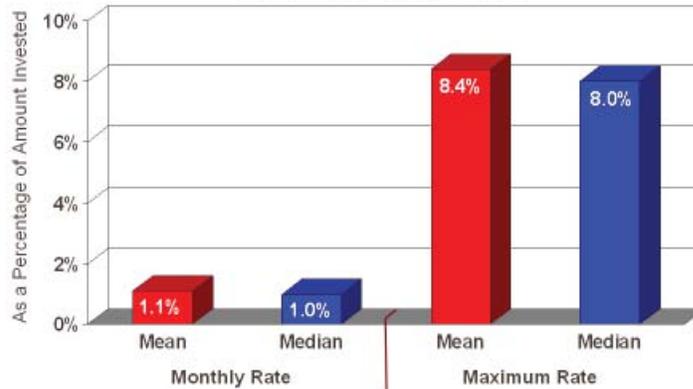
Mandatory registration rights provisions typically require the issuer to file the registration statement with the SEC within a certain time after the PIPE transaction closes and to obtain effectiveness of the registration statement within a certain period after either the closing or the date the registration statement is filed. Some PIPE issuers are provided additional time to obtain effectiveness in the event the SEC selects the resale registration statement for review and/or provides the issuer with comments following its review. Among the 16 surveyed transactions with mandatory registration rights, ten provided the issuer additional time to obtain effectiveness following the SEC’s review and/or comment.

Registration Rights Liquidated Damages Penalties



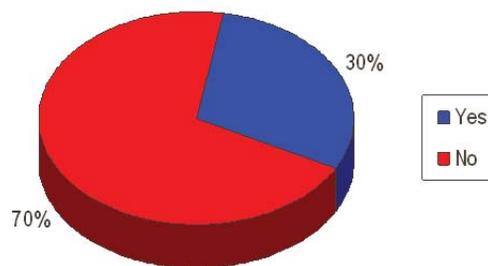
In the event (i) the issuer fails to file the registration statement by the deadline set forth in the PIPE agreements, (ii) the SEC fails to declare the registration statement effective by the applicable deadline and/or (iii) the issuer fails to keep the registration statement continuously effective during a minimum period after initial effectiveness, the issuer is frequently required to pay the investors a cash penalty (commonly referred to as “liquidated damages”). Liquidated damages are designed to compensate investors for a loss of their bargained-for resale liquidity. Among the 16 surveyed transactions in which investors had mandatory registration rights, 13 included a liquidated damages provision. Over the past few years, the Chief Accountant’s Office of the SEC’s Division of Corporation Finance has focused on PIPE issuers’ accounting treatment of warrants and other securities that carry potential liquidated damages penalties for issuers in the event the securities are not registered for resale. In certain cases, the PIPE issuer is required to classify the securities as a liability and “mark-to-market” the liability each quarter until the registration statement is declared effective by the SEC.

Registration Rights
Liquidated Damages Rates



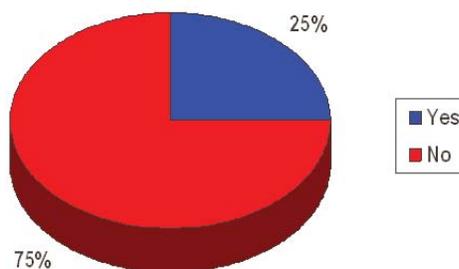
The amount of liquidated damages payable by an issuer for failing to meet its mandatory registration rights obligations is usually a percentage of the total amount raised in the PIPE or a percentage of the purchase price corresponding to the unsold shares that are not covered by an effective resale registration statement or otherwise eligible to be resold freely pursuant to Rule 144 under the Securities Act. These damages typically are assessed on a monthly basis and subject to a maximum. Approximately two-thirds of the surveyed transactions with liquidated damages penalties included a cap on the amount of damages payable (80% in 2008).

Preemptive Rights/Rights of First Refusal



These rights allow PIPE investors to participate in one or more of the issuer’s capital-raising transactions after the PIPE is completed. Preemptive rights generally give an investor the right to purchase the number of securities in a future financing that is necessary for the investor to maintain its proportionate equity interest in the issuer, measured as of either immediately following the completion of the PIPE or immediately prior to the subsequent financing. Rights of first refusal generally allow an investor to purchase up to the full amount or a fixed percentage of the securities offered in a subsequent financing regardless of the investor’s equity position.

Board Nomination Rights



PIPE investors may negotiate the right to nominate one or more of their representatives for election to the issuer’s board of directors. In our experience, hedge funds typically do not seek nomination rights for two primary reasons. First, many hedge funds expect to resell their PIPE shares promptly after they become freely tradable (e.g., under an effective resale registration statement or pursuant to Rule 144 under the Securities Act) and therefore are less concerned with overseeing the issuer’s operations or being involved in its decision-making processes at the board level. Second, true to their name, many hedge funds wish to continually hedge their investments in PIPE issuers, which may require them to continuously acquire and sell positions in the issuers’ stock. If a fund had a representative on an issuer’s board of directors, it may be precluded from engaging in these trades in light of insider trading considerations and pursuant to the short-swing trading restrictions under Section 16(b) of the Exchange Act .

On the other hand, in our experience, private equity, sovereign wealth and venture capital funds—groups that generally make larger PIPE investments and have a longer investment horizon and greater experience with board functions than hedge funds—are more likely to seek board nomination rights in connection with their PIPE investments.

Conclusion

Although in many respects the PIPE market is becoming more standardized, we continue to see significant variation among the terms of these transactions across industries. Life sciences companies continue to be one of the primary users of the PIPE structure because they are typically large consumers of capital with fewer and smaller revenue sources than issuers in other sectors that may be able to generate income at earlier stages in their development. We anticipate seeing a significant number of PIPes completed by life sciences companies in 2010.

About Paul Hastings

With 18 offices throughout Asia, Europe and the United States, Paul Hastings has the global reach and extensive capabilities to provide personalized service wherever our clients' needs take us. Through a collaborative approach, entrepreneurial spirit, and firm commitment to client service, the professionals of Paul Hastings deliver innovative solutions to many of the world's top companies and financial institutions.

Our Securities and Capital Markets Practice

Paul Hastings has developed a broad-based and sophisticated Securities and Capital Markets Practice focused on the needs of companies and financial institutions conducting business both nationally and internationally. We assist companies at all points of the business cycle, from corporate formation and capital creation to the preparation of their SEC disclosure documents and compliance matters.

Our lawyers have substantial experience in virtually all areas of the capital markets corporate finance arena, including public and private equity and debt financings, secured financings, formation of investment funds, workouts and corporate restructurings and distressed debt trading. In addition, our leveraged finance team integrates our bank finance practice with our capital markets and structured finance experience to offer clients seamless execution in bridge and bank/bond structures, whether within a single jurisdiction or in cross-border transactions. Although we have significant experience in nearly all industries and markets, we have a distinguished practice in the life sciences, technology, telecommunications, Internet, media and cable television areas.

Our Life Sciences Practice

Paul Hastings has significant experience in representing clients in the life sciences industry on a global basis. "Life sciences" encompasses a broad range of companies, including pharmaceutical, biotechnology, medical device, medical technology, bioinformatics, e-health, bio-agriculture and environmental biotechnology companies. We also represent sources and finders of capital for companies engaged in the life sciences industry.

Our Life Sciences Practice Group brings together the firm's years of experience in the industry by combining the skills of lawyers from all of our practice areas, including corporate finance, securities compliance, and mergers and acquisitions. Our lawyers routinely handle complex affiliations, formation of joint ventures, divestitures, restructurings and strategic alliances. We have assisted with complex affiliations and strategic transactions involving non-profit and for-profit entities, religious and secular organizations, governmental and private associations, academic and non-academic institutions.

We draw upon our legal experience along with our practical understanding of our clients' business needs based upon our collective experience in working closely with leading companies and firms in the industry. We apply a multi-disciplinary approach to provide cost-effective service to our clients.

Our Team

Paul Hastings handles matters on a global scale and consistently fields teams of lawyers with relevant legal experience, capabilities and knowledge that are appropriate for our clients' needs. For more information on our corporate practices, please contact one of the following lawyers listed below.

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