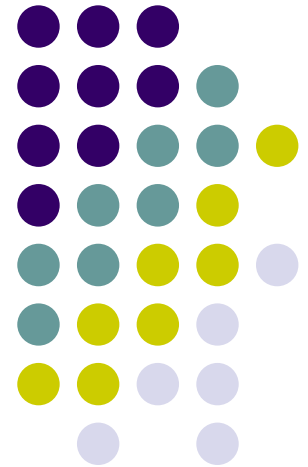




Overview of Registered Direct and PIPE Offerings



About

Ellenoff Grossman & Schole LLP



Ellenoff Grossman & Schole LLP is a New York-based law firm with over 50 professionals offering its clients legal services in a broad range of business related matters. The Firm specializes in many areas of commercial law: Corporate, Securities, Broker-Dealer Regulation, Hedge Funds, Real Estate, Litigation, Tax and Estate Planning. The philosophy of the Firm is to provide the highest quality legal advice and counsel, dedicating consistent, personalized attention to each client at a reasonable price.

The Firm has over 25 securities professionals specializing in a range of activities, including:

- Registered Directs (RDs)
- PIPEs (Private Investment in Public Equity)
- Public Offerings (IPOs and Secondaries) – including SPACs
- Mergers and Acquisitions (public and private)
- Exchange Act reporting (Form 10-Ks, 10-Qs and Proxies)
- FINRA (formerly NASD), AMEX, NASDAQ and OTC compliance
- Broker-dealer regulation
- Rule 144 and 144A transactions
- Sarbanes-Oxley and Section 16 compliance

Barry I. Grossman
Ying Li
Douglas S. Ellenoff
Kathleen Cerveny
C. David Selengut
Lawrence A. Rosenbloom
Stuart Neuhauser
Chris Seamster

Adam Mimeles
Ben Reichel
Martin R. Bring
Tamar Donikyan
Michael Midura
Sarah E. Williams
Annie Y. Wong
Joan Wu

Joan Adler
David Kutcher
Asim Shaikh-Grabowski
Svetlana Dvoskin
Phi H. D. Nguyen
Brian Lee
Joshua Englard
Marc Mandel

Registered Directs and PIPE Practice



Over the last few years, **Ellenoff Grossman & Schole LLP** has been involved at various stages in over 125 PIPEs, representing over **\$375,000,000** of financings. Recently completed PIPEs and RDs that we have been involved with include:

Selected PIPEs (2006-2009)

Boulder Specialty (\$246,000,000)
Design Within Reach, Inc. (\$15,000,000)
A.C. Moore Arts & Crafts, Inc. (\$10,000,000)
Elephant Talk Communications, Inc. (\$5,111,000)
Hudson Holding Corp. (\$4,000,000)
CNS Response, Inc. (\$2,043,000)
Velocity Asset Management (\$855,000)
Counter Point Group, Inc. (\$561,000)
Hybrid Dynamics Inc. (\$300,000)
Enhance Skin Products, Inc. (amount undisclosed)

Selected Registered Directs (2009 only)

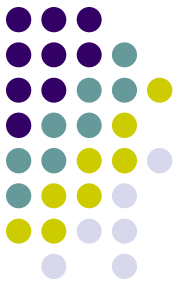
Genorex Biotechnology (\$12,250,000)
New Generation Biofuels (\$3,200,000)
NovaBay Pharmaceuticals (\$2,045,000)

What is a PIPE (Private Investment in Public Equity)?



- A PIPE (or Private Investment in Public Equity) is a private investment, either common stock or a convertible instrument, in a public company, typically priced at a discount to the current market value per share.
- Within a short period following the investment in the public company, usually 30-60 days, the public company is required to file a registration statement with the SEC to register the shares that were sold in the PIPE. The public company is usually required to have the registration statement declared effective within 90-150 days.
- The failure to file the registration statement or have the registration statement declared effective within the time periods set forth above can cause the company to incur a significant penalty.

What is an RD (Registered Direct Offering)?



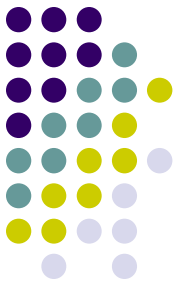
- A Registered Direct offering (or RD) is very similar to PIPE, except investors receive *registered shares* of the issuer.
- As a result, no subsequent registration of the securities issued in the offering is required.
- The securities issued in an RD are registered pursuant to an issuer's *universal shelf registration statement*, which allows an issuer to file for an unspecified offering and then subsequently “pull down” and issue registered shares when market conditions allow.
- RDs have increased in 2008 and 2009 because the SEC changed its rules to allow exchange-listed (not OTCBB), sub \$75M market cap companies that are current in their SEC filings to utilize universal shelf registrations.

Overview of Typical PIPE Structure



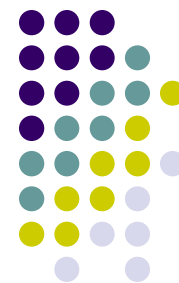
- A PIPE is a type of financing transaction undertaken by a public company, normally with a small number of sophisticated investors. In a typical PIPE, the company relies on an exemption from SEC registration requirements to issue investors common stock or securities convertible into common stock for cash. The company then registers with the SEC the resale of the common stock issued in the private placement, or issued upon conversion of the convertible securities issued in the private placement.
- Investors are typically “institutional” rather than “retail”.
- Careful consideration of private placement exemptions and other regulatory issues is required.

Overview of Typical RD Structure



- Since 2008, SEC rules allow exchanged-listed, sub \$75M market cap companies to issue securities off of a universal shelf in an amount equal to no more than 33% of the value of the issuer's public float in any 12 month period. Larger issuers do not have this limitation.
- Unlike a PIPE, RDs can be marketed and sold in various ways:
 - Privately, to a select group of institutions or "accredited" individuals (like a PIPE); or
 - Publicly, to a wider audience (including retail investors), as in a fully underwritten offering.

Marketplace Statistics (PIPEs)



The following table sets forth the annual number of PIPE transactions and aggregate dollar amount raised from 1995 to 2008. The data excludes PIPE transactions by Canadian issuers.

| Year | No. of Transactions | Total Raised |
|--------------|----------------------------|--------------------------|
| 2008 | 1,323 | \$123,000,000,000 |
| 2007 | 1,425 | \$83,847,077,012 |
| 2006 | 1,388 | \$29,347,575,708 |
| 2005 | 1,353 | \$20,725,019,324 |
| 2004 | 1,315 | \$17,155,256,776 |
| 2003 | 947 | \$14,421,416,510 |
| 2002 | 730 | \$12,405,738,521 |
| 2001 | 912 | \$14,825,967,151 |
| 2000 | 1,112 | \$24,388,204,218 |
| 1999 | 678 | \$10,265,089,616 |
| 1998 | 428 | \$2,998,805,923 |
| 1997 | 448 | \$4,747,221,485 |
| 1996 | 306 | \$4,101,292,110 |
| 1995 | 114 | \$1,334,025,502 |
| Total | 12,479 | \$363,562,689,856 |

* Source: Sagient Research Systems, Inc., PlacementTracker – Private Placement Resources

Marketplace Statistics (RDs)



The following table sets forth the annual number of Registered Direct transactions and aggregate dollar amount raised from 2001 to 2008. The data excludes transactions by Canadian issuers.

| Year | No. of Transactions | Total Raised |
|--------------|----------------------------|-------------------------|
| 2008 | 110 | \$4,808,000,000 |
| 2007 | 123 | \$5,307,000,000 |
| 2006 | 119 | \$4,048,000,000 |
| 2005 | 92 | \$3,587,000,000 |
| 2004 | 85 | \$2,257,000,000 |
| 2003 | 93 | \$2,041,000,000 |
| 2002 | 76 | \$1,446,000,000 |
| 2001 | 70 | \$1,230,000,000 |
| Total | 768 | \$24,724,000,000 |

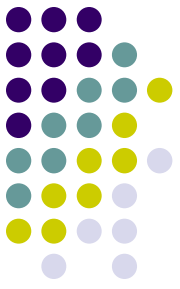
* Source: Private Raise

Overview of the Typical PIPE Registration Process



- Following the private placement, the issuer will file to register the issued securities on Form S-3 or S-1. PIPE terms usually require filing a registration within 30 to 60 days of the closing of the PIPE securities and having it declared effective within 90-120 days. Issuer registers for resale by the PIPE investors any common stock and any common stock underlying convertible securities issued in the PIPE.
- Exchange registered small cap companies (not including BB or Pink Sheets) – with less than \$75 million public float can use Form S-3 for secondary resale registrations with no limit. Issuer will not be S-3 eligible if it defaults on debt since its last fiscal year end and must have timely filed all their SEC reports and not been a shell company for at least 12 months.
- If the Issuer is allowed to use Form S-3 for resales then the registration statement will be “evergreen”. As the Issuer files its Exchange Act reports, the S-3 is automatically updated.

Overview of the Typical PIPE Registration Process (continued)



- If the Issuer is not eligible to use Form S-3, Form S-3 will be unavailable for the PIPE registration. This is important for investors because the likelihood of a black out period or a registration statement going stale is reduced or eliminated with a Form S-3.
- If the Issuer has to use an S-1 Registration format, it still would normally rely upon Rule 415 to allow continuous resales by selling shareholders. The S-1 format does not stay “evergreen” – will have to be amended or supplemented when the information including financial statements are no longer current.

What are the Advantages of PIPEs?



- PIPEs allow public companies to raise money without initially filing a registration statement. As such, the company gets access to the cash sooner than they otherwise would if they were required to file a registration statement and wait for SEC to clear the registration statement.
- Simultaneous PIPEs have been used by companies, including SPACs, in order to finance various transactions such as acquisitions and mergers.
- Investors in a PIPE traditionally get a discount to the market price of the stock which could be as high as 20%. The discount is based on the fact that the investor is receiving a security at a fixed price that is not freely tradeable. Investors also often receive warrants in connection with the PIPE. The failure to file the registration statement associated with the shares received in the PIPE or have such registration statement declared effective on a timely basis allows the investor to receive additional securities under various penalty formulas.

What are the Advantages of RDs?

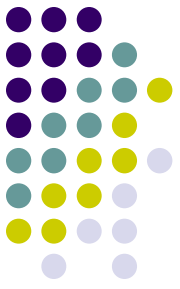


- RDs have come into favor as (once the universal shelf registration is cleared by the SEC), the issuer can quickly issue *registered* shares to investors. Because there is no subsequent registration risk for investors, RDs typically are priced more favorably for issuers than PIPEs.
- RDs can accommodate many different features and can be marketed more broadly than a PIPE.

Issues in Implementing a PIPE



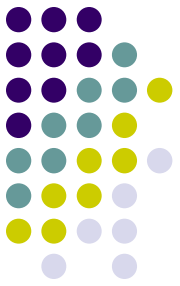
- **Shareholder approval issue.** Shareholder approval is required for listed companies (NASDAQ, AMEX and NYSE) prior to the issuance of the PIPE securities if the amount of common stock issued (or the amount issuable as a result of the conversion) exceeds 20% of the issuers outstanding stock (not fully diluted), unless the stock is issued at a price that equals or exceeds the market value of the stock.
- **SEC Rule 415 Issue.** Since 2007, the SEC has been issuing comments on a selective basis to issuers during the resale registration process challenging the ability of the issuer to rely on Rule 415 for the proposed resale of the PIPE securities if the proposed resale represents a large percentage of the issuer's outstanding stock (over 33%). In essence, the SEC is questioning whether the proposed resale registration statement is not a secondary offering but actually a primary offering. Further, the SEC has requested that the PIPE investor(s) be named an underwriter and that a fixed offering price and a set offering period be set in the registration statement. (Discussed in more detail below)



Issues in Implementing a PIPE (continued)

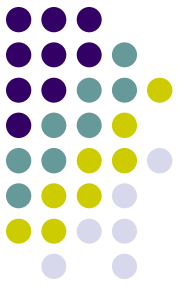
- **Integration.** In a PIPE, particular sensitivity must be paid to the “integration doctrine.” The integration doctrine provides an analytical framework for determining whether multiple securities transactions should be considered the same offering, resulting in the issuer violating the private placement rules. One of the biggest hindrances to pursuing a Retail PIPE is whether there is an “Open Registration” on file with the SEC. There are SEC No-Action Letters (See “Black-Box” and “Squadron Ellenoff”) permitting some forms of Institutional PIPEs notwithstanding that there may be an Open Registration.
- **Reg FD.** Under Regulation FD, a public company that intentionally discloses material non-public information must do so in a fashion designed to effect public dissemination of the information. In many situations, particularly small and micro cap companies undertaking a PIPE, the terms of the PIPE may well constitute material non-public information. As a result, companies engaging in such transactions should obtain either non-disclosure agreements or refrain from providing any material non-public information to the investors.
- **FINRA Approval.** Subsequent resale registration statement needs to be approved by FINRA (formerly the NASD) for broker-dealer compensation issues.

Issues in Implementing an RD



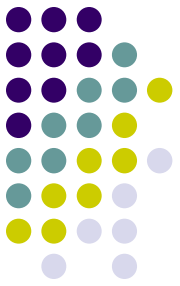
- Even though an RD is a *registered* offering, the stock exchanges may still not view it as a *public* offering (especially if the marketing is limited). As such, the 20% Rule (discussed above) could still be implicated.
- Because an RD is a registered offering, placement agents/underwriters and investors may request additional diligence items in the form of auditors comfort letters and legal opinions (including “10b-5” opinions). This adds cost to the transaction, so small RDs may not be worth it.
- If the RD is marketed like a PIPE (privately, with no public announcement of the offering), Reg FD issues are still in play.
- Care must be given to make sure offering materials (including subscription agreements) are not deemed “free writing prospectuses”.
- FINRA approval of broker-dealer compensation issues in the both universal shelf registration and actual deal terms must be obtained.

2008 Modifications to Rule 144 May Change the PIPE World



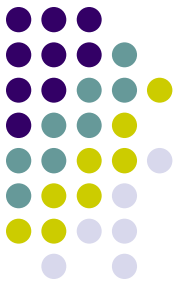
- Rule 144 allows public resale of restricted securities if a number of conditions are met. Restricted securities are securities acquired in unregistered private sales from the issuer such as a PIPE. Before restricted securities can be sold by non-affiliates in the marketplace without restrictions, the issuer must be current in its '34 Act reporting obligations and the shares must be held for at least six months. Non-affiliates who have held their shares for at least one year, may sell without restrictions, and without regard to the timeliness of the Issuer's reporting obligations. The holding period begins when the securities (common stock or a convertible instrument that is subsequently converted into common stock without additional payment) were bought and fully paid for.
- Shares in former shell companies are now eligible for public resale under Rule 144, one year after certain "Form 10 information" is filed in an 8-K by the Issuer.
- The historical SEC process to register sales acquired in a PIPE on the average takes between 90 to 150 days. The six month Rule 144 waiting period (which took effect in 2008), may make issuers and broker dealers more inclined to offer securities in private placements without the need to agree to register the shares (but only file the registration statement for the warrants). The shortened holding period may also reduce the discount that issuers traditionally offer on PIPEs.

Rule 415 Issues in PIPEs



- Rule 415 is one of the rules under which resale registration statements are filed by issuers on behalf of investors following PIPEs. In recent months the SEC has raised an issue in certain resale registration statements whether the resale should be viewed and treated as a primary offering by the issuer and not a resale by the selling shareholder.
- The determination whether a person is an underwriter with respect to a large amount of securities acquired in one or a series of offerings under the rule depends on the particular facts and circumstances.

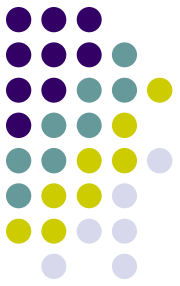
Rule 415 Issues in PIPES (continued)



Things to consider in determining if PIPE resale registration will be compromised:

- What is the relationship of the holder of the securities to the Issuer? *“other than the registrant” or any subsidiary*
- Is the holder an affiliate of the Issuer? (SEC has stated this is not a controlling factor in the analysis). Look at *ownership level, control of issuer, director seats, covenants in PIPE documents (4.99% conversion prohibitions)*
- What is the percentage of shares being registered and held by the holder's compared to the capitalization of the Issuer?
- How long has the PIPE Investor held the securities?
- Is the holder of the securities in the business of underwriting? Is the seller acting as a conduit for the issuer?
- Has the Issuer previously conducted a public offering?
- Is this a post “shell company” registration?

Are PIPE Selling Shareholders “Underwriters”?



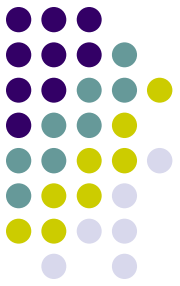
Liability, Liability, Liability!!!

- Responsible for the registration statement contents
- Potential liability for all purchasers, including subsequent purchasers in the chain, not just the first sale into the market
- Increase due diligence requirements
- Affects ability to resell
- The SEC may require a defined offering period; may require set pricing

Possible Solutions:

- Limitations on size of the PIPE to avoid large blocks being registered (private contractual limitation on conversion (i.e. 4.99%) or ownership level have not been accepted by the SEC to avoid underwriter status).
- Limit the amount of shares to be registered in any given registration.
- Issuer or PIPE Investors retain an Underwriter for the resale registration.

Notices and Disclaimers



- This information may answer some questions, but is not intended as a comprehensive analysis of the topic. In addition, this information should not be relied upon as the only source of information.
- This information is supplied from sources we believe to be reliable but we cannot guarantee its accuracy.
- This document and the information contained herein is confidential. This document has been furnished to you solely for your information and neither this document nor the information contained herein may be reproduced, disclosed or redistributed, in whole or in part, by mail, facsimile, electronic or computer transmission or by any other means to any other person, except with the prior written consent of the Ellenoff Grossman & Schole LLP.
- The material has been prepared or is distributed solely for information purposes and is not a solicitation or an offer to buy any security or instrument or to participate in any trading strategy.
- This presentation is made solely for the interest of friends and clients of Ellenoff Grossman & Schole LLP and should in no way be relied upon or construed as legal advice. For specific information on particular factual situations, an opinion of legal counsel should be sought. Prior results do not guarantee a similar outcome.