

Financing Solutions & Strategies for Life Sciences
Post-Conference Workshop

Executing and Documenting the Deal

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Structured and Strategic Investments

Executing and Documenting the Deal

Documentation

- Non-Disclosure Agreement
- Term Sheet
- Subscription Agreement
- Certificate of Designations, Note, Indenture, or other Governing Documentation Providing for Terms of Purchased Security
- Warrants
- Investor Rights Agreement and/or Governance Agreement
- Registration Rights Agreement

Documentation

(continued)

- Standstill Agreement
- Voting Agreement
- Press Release
- Form 8-K
- Engagement Letter
- Placement Agency Agreement
- Legal Opinions
- Poison Pill Amendment

Selected Legal Issues for Issuer

- Regulation FD
 - Disclosure generally
 - Heightened disclosure obligations when the Issuer is otherwise selling securities
- Sufficient authorized capital

Selected Legal Issues for Issuer

(continued)

- Non-contravention of existing contracts
 - Debt agreements, contractual preemptive and anti-dilution provisions, change of control provisions, poison pill, etc.
- Nasdaq or NYSE stockholder approval requirements
 - Public vs. Private Deal
 - 20% test for discounted deal
 - Change of control
 - “At-the-market”
 - Alternative outcomes

Selected Legal Issues for Issuer

(continued)

- HSR
- Issues relating to resale registration
 - Indirect primary offerings/Rule 415 cutback
 - Whether the Selling Stockholder may be deemed to be an Underwriter
- Fiduciary duties and possible *Revlon* and zone of insolvency issues

Selected Other Issues for Issuer

- Scope of confidential information provided to Investor and related implications
- Dilutive impact of transaction
- Accounting consequences
- Tax consequences
- Ability of Investor to sell securities of Issuer, engage in short sale and hedging transactions, etc.
- Due diligence
- SEC and exchange rules for control corporations

Selected Investor Issues

- Section 13d reporting
 - 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
 - Group issues
- Conversion blockers to deal with Section 13 and Section 16 limitations

Selected Investor Issues

(continued)

- Consequences of potential “affiliate” status
- Issues associated with receipt of material non-public information
- Need for board seats, observer rights and other investor rights
- Potential HSR applicability
- Liquidity
- Due diligence requirements
- Legal issues relating to hedging and resale strategies

Selected Investor Issues

(continued)

- Permissibility of investment under fund documents
- Delaware Section 203
- Poison pill, poison put and change of control triggers
- Tax and accounting implications of investment

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Diving Into the Documents

NDA-Related Issues

- Term
- Definition of “confidential information”
- Agreement to keep information confidential
- Agreement not to trade while in possession of material non-public information
 - Mark Cuban case

NDA-Related Issues

(continued)

- “Free to trade” provisions and agreements by Issuer to disclose material non-public information provided to Investor
- Standstill provisions
- Non-solicitation provisions

Term Sheet

- Follow the “KISS” principle (Keep It Simple Stupid!)

Term Sheet

(continued)

- Primary securities to be purchased
 - Convertible Preferred
 - Convertible Debt
 - Exchangeable Preferred
 - Exchangeable Debt
 - Straight Preferred
 - Straight Debt
 - Common Stock

Term Sheet

(continued)

- Key terms
 - Title of security
 - Price
 - Use of proceeds
 - Maturity, if applicable
 - Dividend, interest rate, etc. and payment dates
 - Liquidation preference, principal amount, etc.
 - Ranking

Term Sheet

(continued)

- Key terms (continued)
 - Ranking
 - Conversion or exchange rights and related matters
 - Ability to convert or exchange
 - Conversion rate, conversion price, exchange rate, etc.
 - Forced conversions
 - Anti-dilution protections

Term Sheet

(continued)

- Key terms (continued)
 - Redemption at option of Issuer
 - Put rights of Investor
 - Change of control protections
 - Covenants
 - Events of default
 - Guarantees, collateral and similar matters

Term Sheet

(continued)

- Warrant terms
 - Scope of warrant coverage
 - Exercise price
 - Exercise period and expiration
 - Anti-dilution provisions
 - Standard adjustments
 - Full and weighted average ratchets
 - Net share or other non-cash settlement provisions
 - Black-Scholes payment upon change of control

Term Sheet

(continued)

- Investor Rights
 - Board seats, observer rights, committee rights
 - Preemptive rights, rights of first offer and similar rights
 - Voting rights and consent or veto rights over corporate transactions
 - Covenants
 - Information rights
 - VCOC and similar rights

Term Sheet

(continued)

- Investor Rights (continued)
 - Indemnification rights
 - Transfer, hedging and similar restrictions, if applicable
 - Standstill provisions, if applicable

Term Sheet

(continued)

- Registration Rights
- Documentation
- Closing Conditions
- Other Terms
 - Expense reimbursement
 - Structuring or similar fees

Subscription Agreement

- Provisions relating to purchase and sale of the securities
- Representations and warranties of the Issuer
- Representations and warranties of the Investor
- Covenants/agreements of the parties
- Closing conditions
- Investor rights (if applicable and not provided for in a separate investor rights agreement)
- Registration rights (if not provided for in a separate registration rights agreement)

Subscription Agreement

(continued)

- Miscellaneous provisions
 - Termination
 - Survival of representations and warranties
 - Indemnification
 - Choice of law and related provisions
 - Notices
 - Assignment
 - No third party beneficiaries

Investor Rights Agreement

- If investor rights are not provided for in Subscription Agreement
- Covenants
 - Negative covenant not to undergo additional financing for a certain period of time
 - Negative covenant not to file a registration statement for a certain period of time
 - Negative covenant governing certain material business matters
 - Affirmative covenant to appoint board members

Registration Rights Agreement

- Resale shelf filed within specified period after close versus demand and piggyback rights
- Blackout periods
- Penalties for registration defaults
- Ability to effect underwritten offerings
- Indemnification
- Rule 415 cutbacks

Documentation Relating to Terms of Securities

- Certificate of Designations
- Note
- Indenture
- Warrant Agreement
- Other documentation

Other Documents

- Standstill Agreement (if applicable and not reflected in NDA or Subscription Agreement)
- Voting agreement, including possible bylaw and charter amendments
- Amendment to poison pill (if necessary)
- Documentation relating to collateral, guarantees, and similar matters (if applicable)

Disclosing the Deal

- Press Release(s)
- 8-K(s)
- Content and timing for each

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Q&A

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