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A Registered PIPE?

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We are accustomed to getting unusual questions concerning PIPEs, since just about every form of financing is now described as a PIPE. Most of the questions we receive are thought provoking and a few of them are actually bizarre. Last month, a client called asking if we might assist in structuring a publicly offered PIPE. We took a deep breath and pointed out that a PIPE is understood to be a private investment in public equity. Undaunted, our client explained that its goal was to offer securities publicly in a way that replicated as closely as possible the marketing dynamics and procedures of a traditional PIPE. Happily, we were able to advise that we did not need to create such a structure, since one already exists. It's called a registered direct financing. We designed this approach about a decade ago, have used it widely, and it remains a very useful offering methodology.

A registered direct offering is a targeted agency transaction. An investment bank is engaged to act as a placement agent and commits to introduce a company to potential investors. The offering may be completed using a single-purpose registration statement if a company does not have a universal shelf registration statement on file with the SEC. Alternatively, a registered direct offering may be a means of structuring a shelf takedown if the company already has a universal or equity shelf registration statement on file with the SEC. In either case, the prospectus (or prospectus supplement, for a shelf take-down) describes on the cover page and in the Plan of Distribution section an offering made on an agency basis principally to institutional investors. The Plan of Distribution describes that the closing process involves settling through DTC on a regular T + 3 or T + 4 basis through an escrow account.

If a company does not have a universal shelf registration statement on file, it may file a registration statement with the SEC on the appropriate form. The registration statement describes the offering process. Since the offering process involves a more limited distribution methodology when compared to an underwritten follow-on offering, the company's stock generally is subject to a reduced risk of shorting upon filing of the registration statement. Hedge funds are not encouraged to short stock in anticipation of receiving deal stock since the distribution is limited and there is no assurance that they actually will be allocated any deal stock. Since registered direct offerings are targeted to institutional investors, these offerings may be less like-

ly to be subject to SEC review. A closing can occur as soon as the single-purpose registration statement is declared effective.

A company with an effective universal or equity shelf registration is even better situated to benefit from this type of offering. A placement agent may conduct a shelf take-down as a registered direct offering overnight or over the course of a few days. Depending on marketing needs, the placement agent and the company may choose to produce a preliminary prospectus supplement. Alternatively, given the availability of an effective shelf registration statement, the placement agent may choose to market the transaction without a preliminary prospectus supplement. These conditions bear a striking similarity to a fixed price traditional PIPE transaction. Investors participating in a registered direct offering may receive a preliminary prospectus (or preliminary prospectus supplement, in the case of a shelf take-down) if one is used. Otherwise, investors will receive a final prospectus (or a final prospectus supplement, in the case of a shelf take-down) together with a confirmation after pricing. Like an underwritten follow-on offering, investors are not required to negotiate or sign any purchase agreement; consequently, there is no documentation to be negotiated with purchasers. This reduces legal and administrative expenses and shortens the marketing period. Investors have immediate liquidity. In fact, the securities will be freely transferable securities that will trade on a "when issued" basis. Since there is no illiquidity risk being borne by investors, a registered direct offering will price at a lower discount-to-market than a conventional private transaction or a PIPE.

In addition to all of these important advantages, a registered direct that is completed as a shelf take-down offers an issuer the ability to test the waters without committing publicly to a transaction. A placement agent retained by a company with an already effective shelf registration statement may engage in a non-deal road show, or, alternatively, simply assess market appetite for a financing transaction. Based on the indications received by the placement agent, the placement agent and the company can make an informed decision about whether to proceed with a take-down. Even if the placement agent and the issuer decide that it's prudent or necessary for marketing or other reasons to use a preliminary prospectus supplement in connection with a transaction, the filing of the preliminary prospectus supplement describing the registered direct won't subject the company's stock to the beating often associated with the announcement of an underwritten follow-on transaction. The registered direct truly is a hybrid transaction, possessing all of the targeted marketing appeal and the cost and time efficiencies usually associated with private transactions. This methodology also is a particularly useful way to respond to reverse inquiry opportunities, or to accommodate institutional investors that would like to accumulate a significant position in a stock.

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Since a registered direct is a "public offering" under the securities laws, it is possible to allocate shares to retail investors. In most instances, the exchanges and the NASD view registered directs as "public offerings" not subject to the limitations on issuance or requirement for shareholder approval associated with private placements completed at a discount to book or market.

The increased popularity of universal shelf registration statements makes this offering methodology even more attractive at a time when the public markets open and close with little predictability or warning.

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