

SULLIVAN & CROMWELL LLP

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Why S&C?

S&C's success is the result of the quality of its lawyers, the most broadly and deeply trained collection of attorneys in the world. Our integrated teams reflect S&C's hallmark multidisciplinary approach. We have advised accredited investors, issuers and placement agents on numerous private investment in public equity (PIPE) transactions. Our expertise spans the entire range of financial products, including common stock, convertible preferred stock, convertible debt and warrants.

COMMERCIAL AND BUSINESS SENSE

S&C brings a commercial approach to the Firm's work that results in efficient handling of legal matters and an ability to distill key business issues with technical and creative excellence. Clients value the careful, creative and practical approach the Firm's lawyers bring to complex work.

DEEP REGULATORY ROOTS

S&C has a long-standing history of advising on important regulatory matters. Our lawyers are proactive in developing strategies on behalf of our clients and successfully represent them before federal and state regulatory bodies.

EXCEPTIONAL TEAM

Effective teamwork with clients and colleagues is a hallmark of S&C. We emphasize strong partner leadership throughout the Firm – our partners proactively manage clients' work with unsurpassed expertise and work with our associates through high-powered, lean teams to ensure the highest level of professional service in a timely and cost-effective manner.

INTEGRATED GLOBAL FIRM

S&C comprises over 875 lawyers who serve clients around the world through a network of 13 offices on four continents. We act as one firm on a global scale, taking an integrated approach to all client matters worldwide.

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Ranked among the **top 5** investor legal advisors by number of deals

Power Rankings, *The Deal*, Q1 2020

Ranked among the **top 5** investor legal advisors by total amount placed

The U.S. PIPE and Private Placement Markets, *PlacementTracker*, Q3 2019

PIPEs: Key Issues to Consider

As public companies look to access sources of additional liquidity, some companies are exploring the possibility of issuing equity or convertible debt on a private placement basis in a so-called “PIPE”, or a private investment in public equity, transaction. Here we discuss select issues that issuers should consider as they explore this type of financing. View on our [website](#).

Stock Exchange Shareholder Approval: Both Nasdaq and the NYSE require listed companies to obtain shareholder approval for certain issuances of common stock or securities convertible into common stock, including certain issuances of 20% or more of the issuer’s outstanding common stock. Several of the requirements particularly as they relate to convertible securities are complex and may appear counterintuitive. Both exchanges also have exceptions from the shareholder approval requirement for issuers that face financial hardships requiring prompt access to capital, although this exception is limited in scope and requires prior approval from Nasdaq or the NYSE, as applicable. Whether Nasdaq and NYSE expand their interpretation of this exception in light of COVID-19 has not yet been tested. Issuers considering a private placement (as well as certain registered offerings) will want to consult with counsel early in the process to confirm whether shareholder approval is required and whether an exemption may be available.

Charter Documents: Issuers should review their organizational documents to ensure that they have sufficient authorized shares, whether preferred or common stock, to complete the transaction. Even if an issuer is not required to obtain shareholder approval under stock exchange rules, amendments of a company’s charter to increase the authorized shares would typically require shareholder approval. Preferred equity or convertible debt also may provide issuers with greater flexibility than issuing straight common stock, given the ability to vary conversion rates, liquidation preferences, interest and dividend rates, and other terms.

Credit Agreements/Indentures: Issuers should review their credit agreements and indentures to understand the implications of an equity or convertible debt issuance and ensure that they comply with the terms of those agreements and indentures, including with respect to any requirements relating to the use of proceeds of the issuance. Key provisions typically will include change of control, mandatory prepayment, debt and liens.

Antitrust: Depending on, among other things, the size and purpose of the investment by investors, antitrust approval (or other regulatory approval in regulated industries) may be needed in connection with the transaction. For example, the current HSR filing threshold is \$94 million, and depending on the terms of the investment, such as Board seats or other rights, the passive investor exemption from filing may not be available. Companies and investors also need to be mindful of any potential required or recommended CFIUS or similar filings. As the COVID-19 situation remains rapidly evolving and disruptive, any potential need for approval should be identified as soon as possible in order to understand how long the approval process will take in relevant jurisdictions, taking into account any potential governmental delays.

Change of Control Issues: Depending on the amount and type of equity being issued and the extent that it is being issued to a small number of investors and the nature of any related change in the composition of the Board of Directors, counsel should evaluate whether the transaction may result in a change of control under a company’s equity incentive plans, credit documents or other contracts.



PIPEs: Key Issues to Consider, continued

Fiduciary Duties and Other Board Matters: General counsel should be prepared to discuss the directors' fiduciary duties in connection with approving a significantly dilutive transaction. Particularly where a single investor is acquiring a sizable equity position or the potential investor has a relationship with a member of the Board or management, these issues will require careful attention in order to adequately advise and protect the Board. Counsel should also ensure that the Board is fully informed of the terms of the securities, particularly the terms of any warrants or convertible instruments that may result in additional equity being issued in the future.

IR: The IR department should be prepared with a comprehensive communications plan around any PIPE transaction, particularly to the extent that investors may be alarmed by the need for perceived "rescue financing". Although investors may view an investment as positive news, if they are surprised at the issuer's need or desire to raise funds in this environment or the terms of a capital raise, the market could react negatively.

Confidentiality Agreements: Potential investors may not want to be subject to extended restrictions on their ability to buy or sell the issuer's shares in the public market due to the receipt of material nonpublic information in connection with the exploration of a transaction. As issuers consider the terms of the confidentiality agreement with potential investors, they should be prepared to address investors' requests to be "cleansed" of any material nonpublic information promptly following completion or abandonment of a transaction. Issuers, counsel and any financial advisors should work through these issues as they develop any wall-cross or other investor outreach procedures.

Registration Rights: For those PIPE transactions that require registration of the shares, issuers may want to consider seeking a longer period in which to register the resale of the securities in light of current circumstances affecting companies, advisers, auditors and regulators (including the SEC) that may impact the ability to prepare a registration statement and clear any related SEC review.

Disclosure Issues: Even though the securities issued in a PIPE are issued on an unregistered basis, issuers remain subject to 10b-5 liability for material misstatements or omissions in connection with the sale of those securities and in connection with public disclosures to existing investors regarding the status of financing efforts.



PIPE Experience (2010 – present)

S&C has advised accredited investors, issuers and placement agents on numerous PIPE transactions. Our expertise spans the entire range of financial products, including common stock, convertible preferred stock, convertible debt and warrants. A selection of our PIPE transactions is below:



Ally Financial, Inc. (U.S.) in the private placement of its common stock for an aggregate purchase price of \$1 billion to various sophisticated institutional buyers (2013)



Amalgamated Bank (U.S.) in connection with the 40.7% stake purchase of Amalgamated by WL Ross & Co. (U.S.) and The Yucaipa Companies (U.S.) for approximately \$100 million (2012)



Aquiline Capital Partners (U.S.) in connection with its investments of \$27 million (2010) and \$25 million (2012) in BNC Bancorp (U.S.) through purchases of newly issued shares



California Resources Corporation (U.S.) in connection with:

- the \$50 million investment by Ares Management, L.P. (U.S.) by way of private placement (2018)
- the \$825 million infrastructure joint venture and equity investment with Development Capital Resources (U.S.) (2018)



Canada Pension Plan Investment Board (Canada) in its \$750 million investment in Aqua America Inc. (U.S.) in connection with its acquisition of Peoples in Canada (Canada) (2019)



Canyon Partners, LLC (U.S.) in connection with New Residential Investment Corp.'s (U.S.) \$600 million PIPE capital raise through entry into a private senior secured loan agreement and warrants structured and led by Canyon Partners, with participation from credit funds managed by affiliates of Fortress Investment Group LLC (U.S.) (2020)



Capital Product Partners (Greece) in connection with:

- its \$130 million private placement of convertible preferred units to a group of investors (2013)
- its \$140 million private placement of convertible preferred units to a group of investors (2012)



Central Pacific Financial (U.S.) in connection with investments by The Carlyle Group (U.S.) and Anchorage Capital Group (U.S.) (2011)



Cheniere Energy, Inc. (U.S.) in connection with its \$1 billion issuance of convertible PIK notes for purchase by Baytree Investments (Mauritius), Seatown Lionfish (Singapore) and RRJ Capital (Cayman) (2014)



Cronos Group Inc. (Canada) in connection with Altria Group's (U.S.) \$1.8 billion acquisition of a minority stake in Cronos (2018)



CVC Capital Partners (U.K.) in the \$4.2 billion sale of a 42.5% ownership interest in Univar (Netherlands) to Clayton, Dubilier & Rice (U.S.) (2010)



Eastman Kodak Company (U.S.) in connection with:

- the \$100 million convertible debt investment by Southeastern Asset Management Inc. (U.S.) (2019)
- its agreement to issue \$200 million of newly created convertible preferred stock to funds managed by Southeastern Asset Management (U.S.) (2016)

PIPE Experience (2010 – present), continued



Goldman Sachs (U.S.) in connection with:

- its convertible note deed with REVA Medical, Inc. (U.S.) (2014)
- its RMB 312 million investment in China Huarong Asset Management Co. (China) (2014)



GSO Capital Partners (U.S.), the credit division of Blackstone, as part of an investor group providing equity financing in connection with CF Corporation's (Cayman) \$1.84 billion acquisition of Fidelity & Guaranty Life (U.S.) (2017)



Justice Holdings (U.K.) and **Pershing Square Capital Management** (U.S.), co-founder of Justice, in connection with Justice's \$1.4 billion business combination with Burger King Worldwide Holdings (U.S.) (2012)



LATAM Airlines Group (Chile) in its subscription agreement providing for Qatar Airways' (Qatar) acquisition of up to 10% of LATAM's total shares, which were acquired in connection with a capital increase (2016)



Oaktree Capital Management (U.S.) in connection with:

- its warrants to purchase shares of common stock of Sorrento Therapeutics, Inc. (U.S.) (2018-2019)
- a private placement with Resource Capital Corp.'s (U.S.) registered offering of senior notes (2017)



Navistar International Corporation (U.S.) in connection with the \$256 million minority stake issuance of its common stock to Volkswagen Truck & Bus GmbH (Germany) (2016)



Optimer Pharmaceuticals, Inc. (U.S.) in the purchase of \$25 million of its senior non-voting preferred stock by Cubist Pharmaceuticals, Inc. (U.S.) in connection with the acquisition of Optimer by Cubist (2013)



Paion AG (Germany) in connection with the \$10.7 million investment by Granell Strategic Investment Fund Limited (Ireland), a subsidiary of Cosmo Pharmaceuticals N.V. (Ireland) (2016)



Related Companies (U.S.) in its strategic \$80 million investment in Ladder Capital (U.S.) (2017)



Rhône Capital (U.S.) in its acquisition of 7.5% of the common stock of Coty Inc. (U.S.) for an undisclosed amount (2011)



Pepco Holdings, Inc. (U.S.) in its issuance of \$90 million of non-voting preferred stock for purchase by Exelon Corporation (U.S.) in connection with the \$6.8 billion acquisition of Pepco by Exelon (2014)



Pershing Square Capital Management (U.S.) in its purchase of \$500 million of common stock of the Howard Hughes Corporation (U.S.) (2020)



Sompo Japan Nipponkoa Holdings (Japan) in its equity method investment in SCOR (France), including the acquisition of Patinex AG's (Switzerland) entire holding in SCOR (2015)



SPO Advisory Corp. (U.S.) in its agreement with Liberty Media (U.S.), which is part of commitments by SPO Advisory and other third party investors, of an aggregate of \$1.55 billion in subscriptions for newly issued shares of Series C Liberty Media common stock in connection with Liberty's acquisition of Formula 1 (2016)

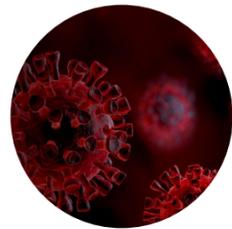


Tinicum FET, LLC (U.S.), subsidiary of Tinicum Capital Partners, in its purchase of \$50 million of common stock of Forum Energy Technologies (U.S.) in a private placement that closed concurrently with Forum's IPO (2012)

S&C Online Resources



Lexis Practice Advisor Practice Note: [Ari Blaut](#) and [Krishna Veeraraghavan](#) co-author an article on [PIPEs](#).



[COVID-19 Resources](#): To help our clients and the public navigate this challenging time, we have prepared alerts outlining and explaining legal and legislative developments. We will continue to provide updates as events unfold.



[S&C Client Alerts](#): Receive our analysis and alerts on breaking legal developments in your selected practice areas and industries.



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