

**OUTLINE OF ISSUES TO CONSIDER IN PREPARING FOR AN IPO**

**Steven M. Cohen  
Morgan, Lewis & Bockius LLP**

**Prepared for NJTC Capital Conference**

**January 23, 2004**

**A. Form Working Group**

1. Management
2. Company counsel
3. Managing underwriters
4. Underwriters' counsel
5. Auditors
6. Transfer agent
7. Financial printer

**B. Specific Issues to Which Underwriters Should be Asked to Respond in Initial Meeting**

1. Firm's expertise in life sciences industry
  - (a) Recent transactions
  - (b) Aftermarket performance
2. Resource commitment (during and after the transaction)
  - (a) Investment banking team
  - (b) Research analyst (note, new independence requirements)
  - (c) Market making activities
3. Research positioning in life sciences industry
  - (a) Current coverage universe
  - (b) Firm's ability to articulate the Company's opportunity
4. Valuation, structure and timing
  - (a) Approach to valuation
  - (b) Transaction terms (see "Structure of Offering" below)
  - (c) Filing strategy/pricing strategy
  - (d) Recommendation on timing
5. Proposed spread and other underwriters' compensation matters
6. Recommend selling strategy

- (a) Institutional vs. retail
- (b) Domestic vs. international
- (c) Road show recommendations
- 7. Specific qualifications as a manager
  - (a) Differentiation from other investment banking firms
  - (b) Value-added capabilities
- 8. Lead-managers
  - (a) Number of lead managers
  - (b) Fee split arrangement
- 9. Any recommended changes in Company's management team or corporate strategy?
- 10. Ask to speak with CEOs of other clients
- 11. Underwriter's compensation issue if affiliate of underwriter is an investor

**C. Time and Responsibilities for Offering**

- 1. Internal preparation meetings before kick-off meeting
- 2. Kick-off Meeting – Week 1
- 3. Drafting meetings – Weeks 1 – 4
- 4. Due diligence – Weeks 1 – 4
- 5. Filing target date – End of Week 4
- 6. SEC review period
  - 30-35 days to first comments – End of Week 9
  - 15 days to complete response – End of Week 11
- 7. Road show schedule/presentation – Weeks 12-15
- 8. Possible Shareholders' meeting (see "Corporate Structure Issues" below)
- 9. Other lead time issues (art work for prospectus, requests for confidential treatment, etc.)

**D. Structure of Offering**

- 1. Offering entity
- 2. Offering size
  - (a) Primary
  - (b) Selling shareholders, if any
  - (c) Over-allotment option (size and split between company and any selling shareholders)
- 3. Use of proceeds
- 4. Syndicate strategy
- 5. Shares to be reserved for specific investors or syndicate members
- 6. Underwriter compensation – anticipated discount from price to public
- 7. Road show
- 8. Nasdaq NMS/New York Stock Exchange listing
- 9. Ticker Symbol preference (reserve in advance)

## E. Corporate Structure Issues

1. Board of directors; management; employees
  - (a) Directors
    - (i) Composition of board after offering – as a result of Nasdaq and stock exchange rules relating to audit committees, at least 3 independent directors are required
    - (ii) Committees, including an audit committee with at least 3 independent directors (NASD and NYSE requirements)
    - (iii) Director compensation arrangements
      - cash compensation
      - stock option compensation
      - committee compensation
  - (b) Officers
    - (i) Titles
    - (ii) “Executive” officers vs. “Senior” officers
    - (iii) Section 16 insiders - reporting and compliance issues
    - (iv) Employment arrangements
    - (v) Incentive arrangements
  - (c) Employees
    - (i) Non-compete arrangements, non-solicitation and confidentiality arrangements
    - (ii) Incentive arrangements and plans
  - (d) Option and benefit plans
    - (i) Compliance with ERISA, tax and securities laws - Rule 701
    - (ii) Consider plans or plan amendments
      - new equity compensation/stock option plans
      - 401(k) plan (match feature with or without company stock feature)
      - employee stock purchase plan.
    - (iii) SEC registration of shares issuable upon exercise of options (Form S-8)
  - (e) Directors and officers liability insurance
    - (i) coverage amount
    - (ii) cost
    - (iii) breadth of coverage
    - (iv) deductibles
2. Corporate structure
  - (a) Charter and bylaws - review and make any necessary changes
    - (i) Review capital structure (make sure that there will be sufficient common stock and blank check preferred)
    - (ii) Antitakeover provisions
    - (iii) Remove any unnecessary provisions
    - (iv) Review indemnification provisions

- (b) Review corporate structure
  - (i) Consider merging subsidiaries into parent prior to offering
  - (ii) Tax issues, including the use of a Delaware or foreign “technology” subsidiary for state tax planning
- (c) Corporate records
  - (i) Review minute books for completeness and accuracy
- 3. Share capital
  - (a) Review existing shareholder list
    - (i) Registration rights/waivers
    - (ii) Lock-ups
      - existing lock-ups required by contract
      - requests for new lock-ups
    - (iii) Preemptive rights; antidilution provisions
    - (iv) Accuracy and completeness of stock book
  - (b) Identify all issuances of shares since formation
  - (c) Shares authorized and outstanding - amend charter as necessary
  - (d) Transition stock recordkeeping to transfer agent
  - (e) Stock options outstanding and to be granted

#### **F. Review Legal Issues**

1. Outstanding claims – resolve if practical to do so
2. Third-party consents
3. Disclosure issues
  - (a) Confidentiality agreement restrictions
  - (b) Material contracts
    - (i) Identify
    - (ii) Disclosure issues
    - (iii) Exhibits to registration statement
    - (iv) Confidential treatment
  - (c) Related party transactions
    - (i) Identify
    - (ii) Consider if advantageous to continue
    - (iii) Review documentation
    - (iv) Ratification by independent directors
  - (d) Employment agreements
  - (e) Management compensation
  - (f) Option grants to executive officers
  - (g) Pending acquisitions or other material transactions
  - (h) Restrictions on future activity contained in development agreements, co-promotion agreements and other business agreements
    - (i) Antitakeover provisions
    - (j) D&O questionnaires - Identify any issues raised by responses
4. Make sure that there is appropriate trademark protection for the Company’s name and that there are no other intellectual property conflicts
5. Review web page for “gun jumping” issues
6. Blue sky matters – most likely not an issue as a result of NSMIA

#### **G. Accounting and Financial Issues**

1. Preparation and audit of financial statements – 3 years or from inception
2. Need for unaudited interim financial statements - SAS 71 review
3. Historical option pricing or other cheap stock issues
4. Historical review recognition policy
5. Management's Discussion and Analysis of Financial Condition and Results of Operation
6. Comfort letter from auditors to underwriters
7. Management letters
8. Availability and discussion of forecast information
9. Tax issues - NOLs (Section 382 analysis)
10. Goodwill/intangibles
11. SEC requirements for separate financials in connection with acquisitions
12. Pro forma presentations

#### **H. Interaction with Public During Offering Process; Publicity**

1. Prior to filing
2. Registration period
3. Post effectiveness
4. Filing press release - Rules 135, 134
5. Employee communications
6. Web page communications
7. Analyst and investor meetings
8. Public relations firm
9. Communications with existing investors

#### **I. Post-Offering Issues for Underwriters**

1. Continuing market making
2. Provision of research reports
3. Follow-on offering
4. M&A Services

#### **J. Ten Issues to Consider One Year in Advance of Introductory Meeting**

1. Estate planning for Executives
2. Add independent directors to Board of Directors
3. Hire experienced IPO counsel and Big 4 or reputable regional accounting firm
4. Establish Web site and public communications policy
  - (a) Set up web site sufficiently in advance of IPO so as to establish a history of ordinary course business and financial communications
  - (b) Limit web site and other public communications to ordinary course business and financial matters
5. Establish rational fair market value exercise price for option grants to avoid "cheap stock" issues resulting in compensation expense
6. Repay officer loans
7. Assess sufficiency of minute books and other corporate records
8. Obtain or upgrade directors and officers insurance

9. Consider impact of product development and launch schedules on IPO timing to avoid negative surprise
10. Upgrade internal controls, including Sarbanes-Oxley compliance to ensure integrity of financial statements and sound corporate governance

