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WEBINAR

Maturing Markets: Opportunities and Risks in Life Sciences Refinancings & Restructurings

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Presenters: Joe Conahan, Chalyse Robinson, George Shuster, Brandt Tierney

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Webinar Guidelines

- Participants are in listen-only mode
- Submit questions via the Q&A feature
- Questions will be answered as time permits
- Offering 1.0 CLE credit in California and New York*

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WEBINAR

Speakers

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Introduction

As life sciences companies proliferate and mature, increased opportunities and risks arise in respect of companies in urgent need of reinvestment. In this webinar, WilmerHale panelists will discuss three components of potential reinvestment strategies:

- ***Debt Finance:*** *When continued equity financing faces challenges, what **debt financing options** specific to life sciences companies are available **to create liquidity**?*
- ***Financial Restructuring:*** *When continued debt financing faces challenges, what **restructuring options** specific to life sciences companies are available **to preserve value**?*
- ***Distressed Acquisition:*** *When financial restructuring is not sufficient to preserve value, what **acquisition options** specific to life sciences companies are available **to make a distribution to creditors and equityholders**?*

Debt Finance

When continued equity financing faces challenges, life sciences companies may be able to draw on their unique assets and other strengths to obtain debt financing in various forms – each with its advantages and disadvantages:

- ***"Regular Way" (Unsecured) & Secured Loan Facilities*** – Developmental and Commercial Companies

- ***Revenue and Royalty Sale and Finance Transactions*** – Commercial and Near-Commercial Companies

- ***Hybrid Transactions: Loan Facilities with Revenue Participation Components*** – Commercial and Near-Commercial Companies

- ***"Hard Way" Secured Loan Facilities:*** Structured Loans – Developmental and Commercial Companies

Debt Finance

"Regular Way" (Unsecured) & Secured Loan Facilities – Developmental and Commercial Companies

Advantages	Disadvantages
May be the most broadly available type of debt	Will limit/prevent any other debt financing transactions
Will retain more "upside" value for company	May conflict with plans to sell assets/business lines
Leverages operating health of company	Will impose broad operating covenants
Leverages financial health of company	May impose financial covenants

Debt Finance

Revenue and Royalty Sale and Finance Transactions – Commercial and Near-Commercial Companies

Advantages	Disadvantages
Focused on single revenue/royalty streams	May require changes to corporate structure
Leverages value of specific assets	Will take asset out of play for other value generation
May be cheaper than more comprehensive debt facilities	Will retain less "upside" value for company

Debt Finance

Hybrid Transactions: Loan Facilities with Revenue Participation Components – Commercial and Near-Commercial Companies

Advantages	Disadvantages
Provides a "compromise" for retention of "upside"	Difficult to measure how much "upside" is being retained
Captures many advantages of "regular way" secured debt	Broad operational & possibly financial covenants
Generally easy to structure	May be costly to refinance

Debt Finance

"Hard Way" Secured Loan Facilities: Structured Loans – Developmental and Commercial Companies

Advantages	Disadvantages
Comparatively none; "last money in" lenders	Costly and difficult to put in place
	Will greatly restrict company's operations
	Costly to refinance

Financial Restructuring

When a life sciences company faces financial distress even after availing itself of equity and debt financing possibilities, restructuring measures may be necessary to preserve the company's value for the next stage of its lifecycle:

- **Creating "Runway" While Protecting IP and Business Value**
- **Preparing for Potential M&A or Dissolution Transactions**
- **"Quiet Wind-Downs" to Preserve Contingent IP Value**
- **Counterparty Perspective:** How Licensees and Partners of Distressed Life Sciences Companies Can Protect Themselves & Their IP

Financial Restructuring

Creating "Runway" While Protecting IP and Business Value

- **Importance of Cash / Liquidity**: the 13-week (& beyond) cash-flow budget
- **Employee Issues**: preserving core talent; RIFs, WARN Act liabilities, severance, statutory liabilities
- **Amendment and Forbearance Discussions with Lenders**: discounted payoff possibilities
- **Individual Creditor/Contract Negotiations**
- **Diligence Regarding In-Licenses and Other Value Triggers**
- **Managing Disclosure and Compliance Issues**
- **Hiring a Financial Advisor**: balancing industry experience & financial distress experience

Financial Restructuring

Preparing for Potential M&A or Dissolution Transactions

- **Cash Conservation**: especially if a reverse merger transaction remains a possibility
- **Cleaning Up Legacy Structural Issues**
- **Hiring an Investment Banker**: balancing industry experience & financial distress experience

Financial Restructuring

"Quiet Wind-Downs" to Preserve Contingent IP Value

- Distinguishing operating value & value potential from "static asset" value & value potential
- Identifying ancillary needs to maintain IP value
  - **Contractual requirements**
  - **Know-how**
  - **IP maintenance expertise and cost**
- Identifying the best entity vehicle to store/preserve/deliver contingent IP value
- Ruling out judicial wind-down options and other "nonconsensual" proceedings

Financial Restructuring

Counterparty Perspective: How Licensees and Partners of Distressed Life Sciences Companies Can Protect Themselves & Their IP

- **Financial distress of a *licensor/collaborator*** can put significant pressure on licensees/counterparties
- **Waiting until the financial distress occurs** can leave licensees/counterparties with few options
- **Risk mitigation** when a license/collaboration is negotiated is the best solution

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- **Financial distress of a *licensee*** can create economic & "alienability" risk
- ***Economic risk*** is difficult to mitigate
- ***"Alienability" risk*** may be mitigated in contract language

Distressed Acquisition

When a life sciences company is unable to borrow or restructure itself out of financial distress, an acquisition transaction of one type or another may be the best option to provide a distribution to creditors and equityholders:

- **Out-of-Court Distressed M&A**
- **Section 363 Bankruptcy Sales for Life Sciences Companies**
- **Dissolutions for Life Sciences Companies**
- **CVRs and Trust Interests as a Means for Preserving Contingent IP Value**

Distressed Acquisition

Out-of-Court Distressed M&A

- **Options** for out-of-court distressed M&A **diminish as the financial distress increases**
- **Reverse mergers** may be the first transactions to fall away as financial distress begins
- Asset sales can also become difficult as buyers become sensitive to **fraudulent transfer and successor liability risks**
- **Required corporate (shareholder) consents may further limit options**, especially where shareholders stand to gain little or nothing and where proxy costs may be prohibitive

Distressed Acquisition

Section 363 Bankruptcy Sales for Life Sciences Companies

- Life science companies have more frequently turned to bankruptcy to effectuate M&A transactions in recent years
- This trend is supported by the **maturing life sciences industry** as well as the **maturing judicial case law** regarding the treatment of IP and IP licensing in bankruptcy
- As more successful life sciences asset sales are conducted in chapter 11 (and cross-border) bankruptcy cases, buyers are becoming more comfortable, and more savvy, in that environment
- ***For buyers,*** section 363 sales can provide high levels of risk mitigation; potential stalking horse protections; and potential access to transactions that would not otherwise have been open to public bidding
- ***For sellers,*** section 363 sales can maximize value and overcome the need for shareholder consent

Distressed Acquisition

Dissolutions for Life Sciences Companies

- Outside of formal bankruptcy, life sciences companies may dissolve through one or more methods:
  - **Judicial dissolution under state law**
  - **Assignments for the benefit of creditors**
  - **Non-judicial dissolution under state law**
  - **Administrative dissolution under state law**
- The choice of the dissolution method involves a complex balancing of the needs of the company and its constituents, and includes:
  - **consideration of required corporate consents**
  - **cooperation/antagonism of creditors**
  - **director & officer willingness to work through a dissolution and to manage risk of post-dissolution litigation**

Distressed Acquisition

CVRs and Trust Interests as a Means for Preserving Contingent IP Value

- In some cases, a life sciences company is **quite solvent** but material shareholder value may be locked up in **longer-term, contingent payment streams**
- Where the market for a present sale of the payment stream (*e.g.*, a royalty or revenue sale or financing) is not strong or where valuation is difficult, shutting down the company but preserving the contingent value for shareholders is desirable
- **Contingent Value Rights (CVRs) and related trust vehicles** are used, in connection with dissolution methods mentioned earlier, to create efficient structures to preserve shareholder value and minimize on-going operational and transaction costs

Questions

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