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by Kristopher Brown and Daniel Mazzone
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Increasingly, corporations in the healthcare and life sciences industries are supplementing their own internal research and development and business development efforts by participating in the equity funding of start-up and early stage companies which may over time be able to provide the corporation's business with potential strategic and sometimes even financial gain. In order to effectively and efficiently deliver practical legal and business advice to the investment professionals within a corporate strategic investor, in house counsel advising on these matters must be sure to consider a variety of issues unique to these types of transactions.

In contrast to the limited involvement an in house lawyer may have when working with a traditional investor involved in what generally is a one-off purely finance-driven venture capital investment decision, in house counsel and their investment professional colleagues within corporate strategic investors often must provide ongoing legal and business guidance and support throughout the life cycle of a strategic portfolio company. In house counsel advising a strategic investor must be prepared to provide legal services at all stages of the relationship, from assisting in the seed funding of small start-ups to advising on strategic collaborations or partnerships, to overseeing exit strategies as portfolio companies are acquired or undertake initial public offerings. In addition, strategic portfolio companies often require advising on expansion capital rounds and structuring complex business arrangements and milestone dependent future equity or debt infusions that may accompany strategic relationships, often with affiliates of the strategic investor itself. First-hand knowledge of today's healthcare and life sciences business and legal market is crucial at each of these steps, as can be working relationships with traditional venture capital firms and third party financing sources, such as venture lenders, focused on the industry who also may be involved in these transactions.

The strategic nature of many corporate equity investments often also require increased scrutiny and analysis by in house lawyers of ancillary legal issues that can accompany the strategic relationship, including intellectual property review, tax structuring, analysis of licensing arrangements, structuring employment and equity compensation matters, navigating complex FDA or reimbursement-related regulatory environments, overseeing and understanding potential litigation, and sometimes even structuring around or advising on bankruptcy-related issues when a portfolio company finds itself in distress.

Corporate equity investors face a number of investment considerations unique from those of more traditional financial investors, such as venture capital firms. For example, the decision of whether or not a corporate investor should have a board seat on a private company it has invested in but may also have a strategic interest in is a question that needs to be carefully considered. In such cases, in house lawyers may be asked to help implement internal structures that will shield their investment professional colleagues who could be assuming certain fiduciary roles at their portfolio companies, from their separate business colleagues who may potentially be engaging in ancillary activities as part of the corporation's over all strategy that are competitive to the portfolio company. In house lawyers working on these types of transactions must also be aware of the ability for their investment professional colleagues to opt for a non-voting board observer seat type role and to consider how such a position might impact the corporate strategic investor's ability to monitor its portfolio company relationship, from each of a financial and strategic perspective.

Similarly, large corporate investors must structure their investments to be sure that certain standard provisions in investment documents are properly tailored to protect the corporation from reputational and financial liability. For example, it is critical to focus carefully on publicity and confidentiality provisions, to insure that a portfolio company does not use the corporate investor's involvement to improperly promote its business or financing prospects in a manner that might lead to a shareholder suit or similar litigation if the business does not perform as promised. While the corporate investor is unlikely to be directly drawn into any such litigation, it presumably will not want its own reputation tarnished through its affiliation with a portfolio company.

In addition, it is critical to carefully review technical investment provisions, such as so-called "drag-along" provisions to make clear that the strategic investor will not have to represent to any subsequent buyer of the business anything about the business' operations, or have an indemnity obligation that is uncapped or joint and several with other stockholders who may not have the same financial means as the strategic investor.

For corporate strategic investors, it often will be necessary for in house counsel to implement unique investment provisions. Consider, for example, covenants that might need to be added to permit the strategic investor which is itself a corporation, unlike the partnership form generally used by more traditional venture capital funds, from having to consolidate its financial statements from an accounting perspective with those of its new portfolio company.

In house counsel to corporate strategic investors often are asked to assist in preparing and putting in place investment approval processes, forms of confidentiality agreements that do not "taint" investment professionals or other business personnel who may be working within the investor's greater business in areas competitive to a possible portfolio company, forms of equity investment and bridge loan documents, and guidelines for how to handle a distressed portfolio company that may be facing bankruptcy or litigation. Working to standardize these processes and agreements facilitates and simplifies additional investments and the monitoring of existing portfolio companies.

Equity investments by corporate investors raise unique issues for both the corporation and its portfolio companies, and in house lawyers working on these types of transactions must be well prepared to navigate and address these issues in order best to help achieve the long-term legal and business objectives of their company's business.

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