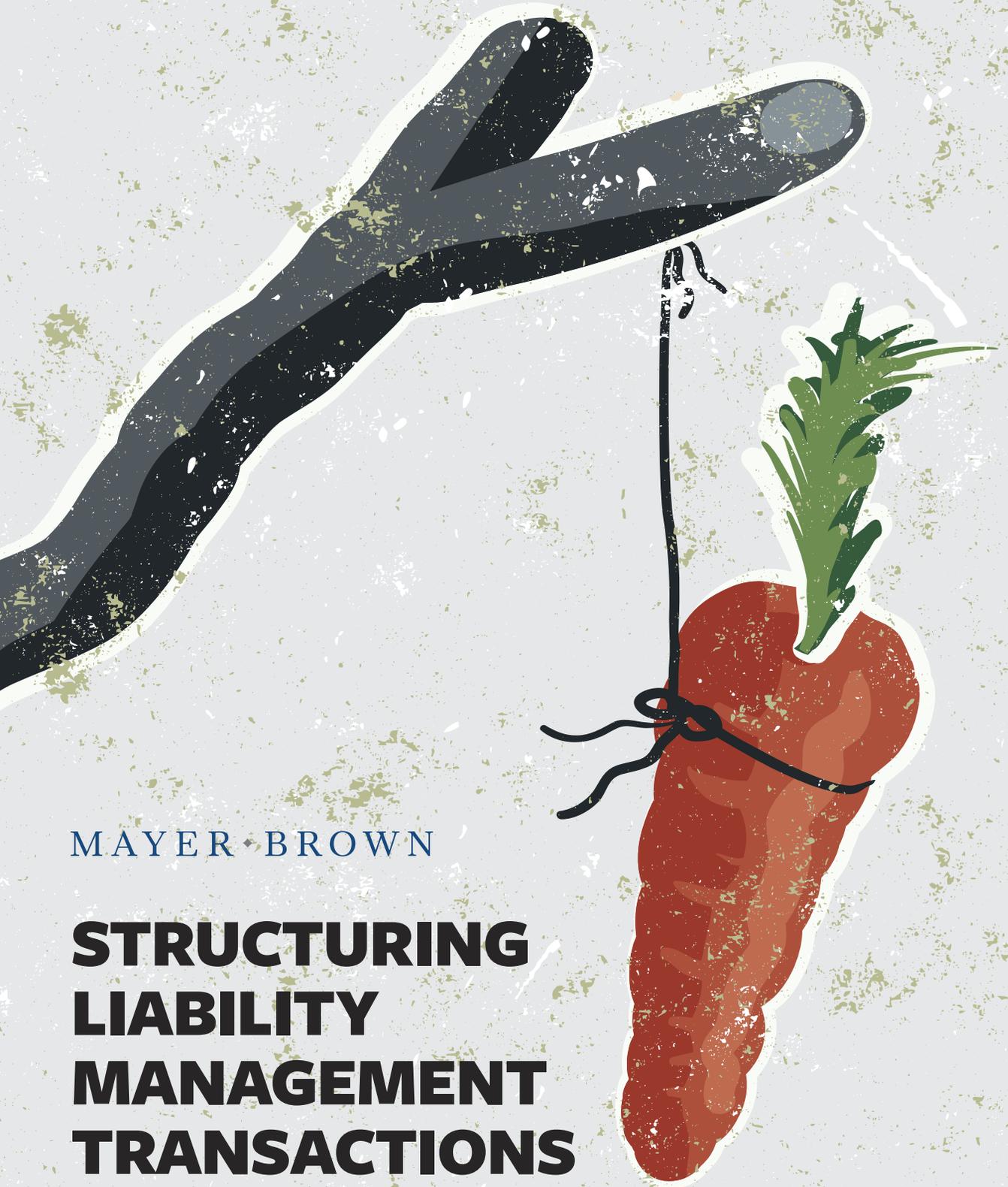


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INTERNATIONAL FINANCIAL LAW REVIEW



MAYER BROWN

**STRUCTURING
LIABILITY
MANAGEMENT
TRANSACTIONS**

ABOUT THE FIRM

Mayer Brown lawyers regularly represent issuers, as well as dealer-managers, solicitation agents, information agents and other parties in connection with liability management transactions, including repurchases, exchange offers, tender offers, issuer self-tenders and consent solicitations.

For many issuers, a liability management transaction may be part of an overall funding and liquidity management strategy. For others, an exchange offer, consent solicitation or tender offer may be undertaken in connection with a restructuring or recapitalisation. For our financial services clients, a liability management transaction may serve to address regulatory capital considerations. In any case, we bring to bear the experience of our capital markets, bankruptcy and restructuring, financial services regulatory and tax colleagues. Our tax colleagues are particularly noted for their experience in addressing the concerns faced by issuers in connection with structuring debt issuances, repurchases and exchange offers, including the minimisation of cancellation of indebtedness income, the preservation of net operating losses, the conservation of cash and recapitalisations or other reorganisations on a tax-free basis.

ABOUT THE AUTHORS

Edward S. Best is a partner in Mayer Brown's Chicago office and co-leader of the firm's capital markets and financial institutions groups. Mr. Best also serves on Mayer Brown's Partnership Board. He is widely recognised as one of the nation's leading capital markets attorneys. His experience includes representing issuers and underwriters in connection with public and Rule 144A offerings of debt, equity, convertible and hybrid securities in the US and Europe; continuously offered debt and equity programmes; liability management transactions, including equity and debt self-tenders, exchange offers, and consent solicitations; particular emphasis on offerings by financial institutions, including banks, insurance companies, brokers and specialty finance companies, and cross-border offerings.

David J. Goett is an associate in Mayer Brown's New York office and a member of the tax practice. He works with banks on the tax aspects of domestic and international capital markets offerings and also has experience with restructurings, mergers and acquisitions, real estate investment trusts and joint ventures.

Thomas A. Humphreys is a partner in Mayer Brown's New York office and a member of the tax transactions & consulting practice. He has extensive experience with the tax aspects of capital markets transactions; financial instruments; real estate investment trusts; mergers and acquisitions; bankruptcy and reorganisation; tax controversy, including transfer pricing; and international transactions. Mr. Humphreys also works with investment banks and issuers on developing new financial products.

Anna T. Pinedo is a partner in Mayer Brown's New York office and co-leader of the firm's capital markets practice. She concentrates her practice on securities and derivatives, and represents issuers, investment banks/financial intermediaries and investors in financing transactions, including public offerings and private placements of equity and debt securities, as well as structured notes and other hybrid and structured products. Ms. Pinedo works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. In the derivatives area, she counsels a number of major financial institutions acting as dealers and participants in the commodities and derivatives markets. Ms. Pinedo advises on structuring issues, as well as on regulatory issues, monetisation, and hedging techniques. Her work focuses on foreign exchange, equity and credit derivatives products, and structured derivatives transactions.

Remmelt Reigersman is a partner in Mayer Brown's Palo Alto office and a member of the tax transactions & consulting practice. He concentrates his practice on federal and international tax matters. Remmelt advises on a wide variety of sophisticated capital markets transactions and represents issuers, investment banks/financial institutions and investors in financing transactions, including public offerings and private placements of equity, debt and hybrid securities, as well as structured products. Mr. Reigersman's areas of experience also include restructurings (both in and out of bankruptcy), debt and equity workouts, domestic and international mergers, acquisitions, reorganisations and joint ventures.

STRUCTURING LIABILITY MANAGEMENT TRANSACTIONS

About the firm	1
About the authors	2
Chapter 1: Liability management: an overview	5
Chapter 2: The role of a financial intermediary in liability management transactions	18
Chapter 3: Debt repurchases	23
Chapter 4: Cash debt tender offer guidance	29
Chapter 5: Abbreviated tender offer and exchange offer guidance	42
Chapter 6: Section 3(a)(9) exchange offers	46
Chapter 7: Tender and Dutch auction guidance	57
Chapter 8: Tax issues	69
Chapter 9: Securities exchange rules	76
Epilogue	79
Appendices	
Appendix A: Liability management: summary of options	82
Appendix B: Liability management continuum	86
Appendix C: Rule 14e	87
Appendix D: Compliance & disclosure interpretations: tender offers and schedules	91
Appendix E: Exchange Act Rule 14e-1 opinions for debt tender offers	94
Reference materials	
Abbreviated tender and exchange offer no-action letter guidance	103

CHAPTER 1

Liability management: overview

In this guide to structuring liability management transactions, we provide a summary of the legal framework, including guidance provided in numerous no-action letters issued over many years, applicable to debt repurchases, tender offers and exchange offers. As we note throughout, and as (hopefully) suggested by the cover, structuring a transaction that addresses an issuer's capital structure, including its debt obligations, financial and other covenant limitations, and debt maturity profile, will likely involve compromise. The carrot and stick analogy is ever present in the context of contemplating an appropriate liability management transaction that balances the issuer's objectives and also provides sufficient incentives for existing security holders to agree to a repurchase or exchange. Perhaps because this area is shaped largely by informal guidance, is highly fact-specific, and involves some measure of judgment, issuers may benefit from an appreciation of the complexities inherent in any liability management exercise. The years following the financial crisis have been marked by historically low interest rates. Issuers have accessed the debt markets to take on cheap debt and in some cases have refinanced through liability management transactions. Increased liability management activity is likely in the years to come.

An issuer's objectives

Often, market participants assume erroneously that only issuers in some state of financial distress or issuers that are highly levered are likely candidates for liability management transactions. More often than not, however, a liability management transaction will be undertaken on an opportunistic basis by an issuer in good financial health. The transaction may be motivated by an accounting, regulatory or tax objective, or may simply allow the issuer to refinance at attractive rates.

To that end, an issuer might consider a liability management transaction as a result of:

- *New business and market realities.* Financial downturns, whether generalised or specific to an industry sector, may lead an issuer to contemplate a restructuring.
- *Deleveraging efficiently.* An issuer may be able to effect an efficient repurchase or tender given market conditions, depending on the levels at which its debt securities are trading and prevailing market rates, and thereby reduce its interest expense.
- *US tax considerations.* US federal tax considerations may make the repurchase of debt securities attractive.
- *Investor perceptions.* Investors may be willing to consider exchange and restructuring opportunities. Investors may

seek liquidity or appreciate the opportunity to move up in the capital structure.

Liability management alternatives

An issuer with cash on hand might consider a:

- *redemption* – a purchase of outstanding debt securities for cash in accordance with the terms of the security;
- *repurchase* – an opportunistic repurchase of debt securities for cash, including a privately negotiated or an open market repurchase; or
- *tender offer* – an offer made to all debt holders to repurchase outstanding debt securities for cash.

An issuer may not have sufficient cash to effect a redemption, repurchase or tender offer, or the issuer may view the use of cash to effect such a transaction as an inefficient alternative under the circumstances. In that event, an issuer might instead consider a transaction that does not require deploying cash, such as a:

- *private exchange offer* – an exempt debt-for-debt exchange made in reliance on section 4(a)(2) of the Securities Act of 1933, as amended (the Securities Act) usually made only to qualified institutional buyers (QIBs) as defined under Rule 144A under the Securities Act and to non-US persons under Regulation S;
- *section 3(a)(9) exempt exchange offer* – an exchange offer made in reliance on section 3(a)(9) of the Securities Act;
- *registered exchange offer* – an exchange offer registered with the Securities and Exchange Commission (SEC) and subject to the tender offer rules; or
- *exchange involving non-debt securities* – an exchange of securities that is subject to the tender offer rules.

Choosing an approach

Legal, accounting, ratings, regulatory capital and tax considerations all should be considered when determining the best approach. Of course, other factors, such as the following, also will guide the issuer's choice:

- *Cash?* As noted above, if the issuer has cash on hand, open market repurchases or a tender offer will be possible.
- *No cash?* If the issuer does not have cash on hand, or a repurchase would not be considered a prudent use of its resources, the issuer should consider an exchange offer.
- *Holdings?* The issuer will have to consider whether the

securities are widely held as well as the status (retail versus institutional) and location of the holders.

- *Buying back a whole class of debt securities?* Open market repurchases will provide only selective or limited relief for the issuer. A tender offer may be necessary to retire all or a significant portion of a class of outstanding securities.
- *Straight debt? Convertible debt? Hybrid?* The issuer's options also will depend on the characteristics of the outstanding security. A repurchase or tender for straight debt securities typically will be less complex than a repurchase or tender relating to convertible debt securities.
- *Tender?* Again, the rating of, and the characteristics of, the outstanding security may affect the issuer's ability to effect a fixed spread or fixed price offer.
- *Covenants?* Is the issuer concerned about ongoing financial or operating covenants as well as de-leveraging? If the issuer seeks to effect a consent solicitation in connection with its liability management transaction, that will limit its alternatives.
- *Part of a broader effort?* The issuer should consider whether a repurchase is only a precursor to a restructuring or recapitalisation, as well as whether an exchange offer or tender is only one element of a more complex process.
- *Mix and match?* Well, not really. While it may be possible to present an issuer with a variety of attractive liability management transaction alternatives, and a transaction may have multiple components, an issuer should structure any liability management transaction carefully. An open market repurchase in contemplation of a tender offer, for example, may be problematic. Similarly, an abbreviated tender or exchange offer may not be feasible to the extent that the transaction is part of a broader restructuring effort.

Benefits associated with a repurchase or exchange of debt securities

There may be a number of benefits to the issuer from a repurchase or exchange of debt securities, including:

- perception – a buyback may signal that an issuer has a positive outlook;
- deleveraging;
- recording of accounting gains if securities are repurchased at a discount to par;
- reducing interest expense;

- potential earnings per share improvement;
- potential regulatory capital and ratings benefit; and
- avoiding a more fundamental restructuring or potential bankruptcy.

Repurchases and exchanges (debt-for-debt, hybrid or debt-for-equity) can be particularly important for financial institutions. Many financial institutions face deadlines to comply with the regulatory capital requirements arising from the implementation of the Basel III framework, as well as the requirement to maintain specified amounts of eligible long-term debt that qualifies as total loss-absorbing capacity for regulatory purposes. These requirements may motivate financial institutions to restructure and retire hybrid securities that no longer qualify for favorable regulatory capital treatment, exchange outstanding debt that would not qualify as eligible long-term debt for qualifying debt, or structure similar transactions in order to obtain certain tax benefits.

Structuring challenges

In structuring a debt repurchase, particularly a tender offer, an issuer may face a number of challenges.

- *Holdouts* – The issuer and its financial adviser should consider how to address potential holdouts—one approach may be to include a high minimum tender or exchange condition (such as 90% or higher).
- *Timetable* – Starting out with a timetable that complies with both contractual deadlines and applicable tender offer rules is key to a successful process.
- *Bondholder committees* – A bondholder committee may be helpful in the context of a broad restructuring or recapitalisation. However, the interests of bondholders may not be aligned. For example, the interests of hedge fund holders of convertible debt may not be compatible with those of institutional investors that hold straight debt. Disagreements among committee members can delay or prevent a successful tender or exchange offer.

Securities law considerations

In addition to the disclosures to debt holders required in connection with a repurchase or tender offer (discussed below), an issuer has ongoing disclosure obligations to all its security holders under the Securities Exchange Act 1934, as

amended (the Exchange Act). In relation to a repurchase or tender offer, these obligations include requirements to disclose on a Current Report on Form 8-K entry into or termination of a material definitive agreement, creation of a direct financial obligation or an obligation under an off-balance sheet arrangement and unregistered sales of equity securities. An issuer may also need to file a Current Report on Form 8-K for a cash tender if the tender may be considered an acceleration of a financial obligation.

Further, the issuer may also conclude that before it can undertake a repurchase or redemption, it must disclose other material nonpublic information. To avoid violating the antifraud provisions of the federal securities laws, particularly Rule 10b-5 under the Exchange Act, by purchasing a security and/or issuing a security at a time when the issuer has not disclosed material nonpublic information, whether or not related to the repurchase, the issuer should bear in mind disclosure considerations. Examples of material information include unreleased earnings or an unannounced merger, both of which may need to be disclosed before purchasing securities from a debt holder. In addition, if an issuer engages in privately negotiated or open market repurchases in advance of conducting a tender offer, it may be considered manipulative – the issuer will have prior knowledge of its intention to commence a tender that it did not disclose to holders from whom it is purchasing securities.

Redemptions

An issuer may redeem its outstanding debt securities in accordance with their terms, assuming that the debt securities do not prohibit a redemption. A credit line may prohibit prepayment and the debt securities may have absolute call protection and may not be redeemable. An issuer also may find that other debt securities have limited call protection, and may be redeemable following expiration of a certain period of time after issuance, often five or 10 years. The terms of the debt securities, which were negotiated at the time of issuance, usually specify the redemption price. The process for redeeming an outstanding debt security generally also is spelled out in the instrument governing the debt security, usually the indenture. In connection with any redemption of outstanding debt securities, an issuer must also ensure that it has complied with securities law antifraud provisions.

Privately negotiated and open market debt repurchases

An issuer that has cash on hand, or can obtain it quickly, may determine that a privately negotiated or open market repurchase of its debt securities is an efficient use of capital. In the context of a debt repurchase, an issuer will also need to review the terms of all of its outstanding debt instruments and other securities to determine that repurchases are permissible. The terms of the indenture will not dictate the purchase price payable by an issuer in connection with repurchases. As a result, an issuer may (and should) negotiate the purchase price with security holders in order to achieve the best possible pricing. As we discuss in the following chapters, repurchases may be conducted with little advance preparation, require limited or no documentation and generally can be conducted for little cost to the issuer (outside of the purchase price). Privately negotiated and open market purchases are usually most effective if the issuer is seeking only to repurchase a small percentage of an outstanding series of debt securities, or if the class of debt securities is held by a limited number of holders.

Avoiding the tender offer rules

An issuer repurchasing its debt securities, either in privately negotiated transactions or in open market purchases runs the risk that it may inadvertently trigger the tender offer rules of the SEC. The tender offer rules were adopted in order to ensure that issuers, and others, tendering for equity securities would be prohibited from engaging in manipulative practices in respect of those tenders. With equity securities, in particular, the market price is subject to manipulation as it fluctuates with market pressures. However, debt securities are not subject to the same considerations as equity securities and therefore, a debt tender poses less risk of manipulation. For a debt tender, it is generally possible to structure repurchases in order to avoid the application of these rules.

Section 14(e) of the Exchange Act does not define a tender offer. Without a clear definition from the SEC, courts have provided a set of eight factors to help differentiate between a tender offer and other public solicitations. The eight-part test (and the case implementing that test) involved equity securities. It is likely, though, that any discussion of debt securities and tender offers would begin with the eight characteristics listed below. An issuer considering an open

market or privately negotiated repurchase of its debt securities should carefully review the impact of these factors. Courts have found the following eight characteristics indicative of a tender offer:

- (1) active and widespread solicitation of public shareholders for the shares of an issuer;
- (2) solicitation is made for a substantial percentage of the issuer's stock;
- (3) offer to purchase is made at a premium over the prevailing market price;
- (4) terms of the offer are firm rather than negotiable;
- (5) offer is contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;
- (6) offer is open only for a limited period of time;
- (7) offeree is subjected to pressure to sell his stock; and
- (8) public announcements of a purchasing program concerning the target issuer precede or accompany a rapid accumulation of large amounts of the target issuer's securities.

As we discuss in more detail in subsequent chapters, these elements need not all be present for a transaction to constitute a tender offer, and the weight given to each element varies with the individual facts and circumstances.¹ To ensure that a debt repurchase does not trigger application of these rules, it should be made for a limited amount of securities and to a limited number of holders, preferably sophisticated investors, should be made over an extended period of time (with no pressure for holders to sell), and prices should be privately, and individually, negotiated with each holder, with offers that are independent of one another.

Regulation 14E

In 1968, Congress amended the Exchange Act to add provisions relating to tender offers. The statutory amendments together with the SEC's rules adopted in 1968 are typically referred to collectively as the Williams Act. The rules were significantly amended in 1999. Regulation 14E and Rules 14e-1, 14e-2 and 14e-3 under the Exchange Act apply to all tender offers – both equity and debt. However, these rules do not apply to tenders or exchanges of securities that are exempt securities under section 3(a) of the Securities Act. In addition, the SEC staff has provided no-action guidance that limits the applicability of some of these rules

to tenders for nonconvertible debt securities that meet specified conditions. If the tender involves equity securities (which for purposes of the tender offer rules, includes debt securities with equity components, such as convertible or exchangeable notes), additional rules apply. Rule 14e-1 sets forth certain requirements for tender offers generally, including the following, which we discuss in more detail in Chapter 4:

- *Offer period* – Rule 14e-1 provides that a tender offer must generally be held open for at least 20 business days from the date the tender offer commences.² The offer must also stay open for at least 10 business days from the date of a notice of an increase or decrease in: (1) the percentage of securities to be acquired pursuant to the tender (if the change exceeds two percent of the original amount); (2) the consideration offered, without any *de minimis* exception; or (3) any dealer-manager's solicitation fee, is first published or sent to the holders of the relevant securities. By analogy to the requirements of Rule 14d-4, a tender offer subject only to Regulation 14E must remain open for a minimum of five business days for any other material change to the offer or waiver of a material condition.
- *Extension of offering period* – Rule 14e-1 also provides that any extension of the offer period must be made by a press release or other public announcement by 9.00am Eastern time, on the next business day after the scheduled expiration date of the offer, and the press release or other announcement must disclose the approximate number of securities tendered to date.³
- *Prompt payment* – The offeror must either pay the consideration offered or return the securities tendered promptly after termination or withdrawal, respectively, of the offer.

Debt tender offers

In some cases, privately negotiated or open market repurchases of debt securities may not provide an issuer with the desired results, particularly if the issuer wishes to retire all or a significant portion of a class of outstanding debt securities. Privately negotiated or open market purchases may not be efficient for an issuer if the debt securities are widely held or the issuer plans a concurrent consent solicitation. In those situations, a tender offer may be the

most appropriate way to restructure the indebtedness. A tender offer allows an issuer to approach or make an offer to all of the holders of a series of its debt securities. Because tender offers do not have to close until specified (and disclosed) conditions are satisfied (including receipt of consents from the debt holders to modify the terms of the debt securities that remain outstanding, completion of any necessary financing for the tender offer and receipt of other necessary consents from third parties), it may be possible to conduct a tender offer and achieve the issuer's objectives.

Cash tenders for nonconvertible debt securities

Cash tender offers for nonconvertible, or straight, debt securities may be completed more quickly and at a lower cost than other tender offers because of the absence of specific disclosure or structuring requirements. In a cash tender for straight debt securities, an issuer typically will mail tender offer materials to holders describing the terms of the offer and providing them with material information. An issuer often will announce the commencement of a tender offer in a press release, and may even supplement that announcement by publishing notice of the tender in a nationally circulated newspaper.

While a cash tender for straight debt securities can be a relatively straightforward transaction, if a cash tender is combined with a consent solicitation, the process may become more complicated. Further, because cash tender offers for straight debt securities are not subject to the best price rules applicable to equity tender offers, it is common practice to encourage participation in the tender by providing for an early tender premium. Holders that tender early in the offering period, typically within the first 10 business days, may receive the total consideration. Holders that tender after the early tender period terminates will receive less consideration for their securities. The early tender feature benefits the issuer because it may gain greater visibility regarding the success of the tender offer. An issuer needs to be mindful that the falling away of the premium may, in certain circumstances, constitute a change in consideration that may require that the tender stay open for an additional 10 days as discussed above.

The requirements of Regulation 14E may be limiting for an issuer conducting a tender offer. Specifically, if an issuer must

keep the offer open for 20 business days or extend the offer period if there are any changes in the consideration or percentage sought, it can adversely affect the tender because the issuer is subject to market risk during this time. Since 1986, based in large measure on the belief that issuer debt tender offers for cash for any and all nonconvertible, investment grade debt securities may present considerations that differ from any and all or partial issuer tenders for a class or series of equity securities or non-investment grade debt, the SEC staff consistently granted relief to issuers of investment grade debt in the context of tenders for their debt securities. Based on those no-action letters, which have, to an extent, been superseded by the issuance in January 2015 of a more recent no-action letter (discussed below), an issuer need not keep the tender open for 20 business days, provided certain specified conditions are met.⁴ With the assistance of counsel, an issuer should be able to structure its tender offer for nonconvertible debt securities to fit within existing no-action letter guidance.

Cash tender offers for convertible debt securities

Certain provisions of the Williams Act are applicable only to tenders of equity securities, including tenders of convertible or exchangeable debt. If an issuer has a class of equity securities registered under the Exchange Act or is otherwise reporting under the Exchange Act, tenders for a debt security with equity features must comply with these provisions, including Rule 13e-4, which regulates tender offers by issuers. The obligation to comply with these provisions makes tender offers for convertible or exchangeable debt securities more complicated and time-consuming, and subject the offer to SEC review, which could result in additional time delays.

Requirements of tenders subject to Rule 13e-4

The principal additional requirements for a tender subject to Rule 13e-4 include the following:

- *Filing with the SEC* – Rule 13e-4 requires that an issuer file a Schedule TO for a self-tender for convertible or exchangeable debt securities on the day that such tender offer commences. Schedule TO has a number of specific disclosure requirements. Schedule TOs are subject to review by the SEC, and material changes in the

information provided in the Schedule TO must be included in an amendment filed with the SEC. Rule 13e-4 also requires that all written communications regarding the tender offer be filed with the SEC.⁵ By reason of the Schedule TO filing obligation, the tender offer then becomes subject to the requirements of Regulation 14D, which governs the form and content of the Schedule TO.

- *Offers to all holders* – Under Rule 13e-4, generally tender offers must be made to all holders of the relevant securities.
- *Best price* – The consideration paid to any security holder for securities tendered in the tender offer must be the highest consideration paid to any other security holder for securities tendered in the tender offer. Note that this does not prevent an issuer from offering holders different types of consideration as long as the holders are given an equal right to elect among each type of consideration, and the highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration.
- *Dissemination* – Rule 13e-4 provides alternative methods for disseminating information regarding an issuer tender offer.
- *Withdrawal rights* – Rule 13e-4 requires that the tender offer permit tendered securities to be withdrawn at any time during the period that the tender offer remains open. In addition, Rule 13e-4 specifically permits withdrawal after 40 business days from the commencement of the tender offer if the securities have not yet been accepted for payment.
- *Purchases outside the tender offer* – Rule 13e-4(f)(6) provides that until the expiration of at least 10 business days after the date of termination of the issuer tender offer, neither the issuer nor any affiliate shall make any purchases, otherwise than pursuant to the tender offer, of: (1) any security that is the subject of the issuer tender offer, or any security of the same class and series, or any right to purchase any such securities; and (2) in the case of an issuer tender offer that is an exchange offer, any security being offered pursuant to such exchange offer, or any security of the same class and series, or any right to purchase any such security.⁶

The requirements of Rule 13e-4 result in less flexibility for tenders for convertible or exchangeable debt securities compared to tenders for straight debt securities. A good

illustration of this reduced flexibility is that it is not possible for issuers to sweeten the tender offer for convertible or exchangeable debt securities with an early tender premium as is the case for straight debt securities.

Accounting and other considerations

Convertible or exchangeable debt securities raise special accounting issues and issuers should carefully consider the accounting aspects of repurchasing their convertible debt before doing so. While some effects (such as the elimination of the retired debt from the issuer's balance sheet) may be more intuitive, others may not be. Issuers may wish to consult their accountants early in the process. Issuers that intend to restructure their outstanding convertible debt also should consider the effects of such tender on any of their call spread transactions or share lending agreements.

Special rules for European tenders

It may be the case that the holders of an issuer's debt securities are located in foreign jurisdictions. For instance, an issuer may have sold its securities pursuant to Rule 144A in the US and pursuant to Regulation S outside the US. Many frequent debt issuers issue and sell their debt securities pursuant to euro medium-term note programmes, or market and sell US registered securities into the European Union or other foreign jurisdictions. For these tenders, an issuer must not only focus on the various considerations spelled out above, but also must be cautious that its tender does not violate any rules in the home country of its security holders.

Regulation M

Although Regulation M does not apply to investment grade non-convertible debt securities, it does apply to equity securities, non-investment grade debt and convertible debt. An issuer that engages in a tender offer must ensure that it complies with Regulation M. Rule 102 under Regulation M makes it unlawful for an issuer or its affiliates 'to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period.' This prohibition is intended to prevent an issuer from manipulating the price of its securities when the issuer is about to commence or is engaged in a distribution.

Exchange offers

If an issuer does not have or does not want to use its available cash resources, an alternative to a cash tender is an exchange offer. In an exchange offer, the issuer offers to exchange a new debt or equity security for its outstanding debt or equity securities. For distressed issuers, an exchange offer may be the best non-bankruptcy restructuring option. Exchange offers enable an issuer to reduce interest payments or cash interest expense (by exchanging debt securities with a high rate for a lower one), reduce the principal amount of outstanding debt (in the case of a debt equity swap), manage its maturity dates (by exchanging debt securities that are coming due for debt securities with an extended maturity) and reduce or eliminate onerous covenants (if coupled with an exit consent). Another benefit to conducting an exchange offer is that the issuer may sweeten the deal by providing a cash payment to the holder as an inducement to exchange.

Securities Act considerations

An exchange offer must comply with the tender offer rules. However, because an exchange offer involves the offer of new securities, it also must comply with, or be exempt from, the registration requirements of the Securities Act. For this reason, documentation for an exchange offer will be more detailed than that for a cash tender offer and must describe the terms of the new securities. In addition, because the exchange involves the offer of new securities, participants are liable under the antifraud protections of section 11 of the Securities Act. If an issuer engages a financial intermediary to assist with the solicitation of tenders, the intermediary may be subject to statutory underwriter liability and will conduct its own diligence review of the issuer, including delivery of legal opinions and comfort letters.

An exchange offer may either be exempt from registration or registered with the SEC. An issuer may rely on the private placement exemptions provided under section 4(a)(2) of the Securities Act or the exemption provided by section 3(a)(9) of the Securities Act. In addition, an exemption pursuant to Regulation S for offers and sales to non-US persons may be available on a standalone basis or combined with other applicable securities exemptions.

Private exchange offers

An exchange offer may be conducted as a private placement. Because the issuer must structure the exchange within the confines of section 4(a)(2), it may not engage in a general solicitation of its security holders. In addition, any offerees must be sophisticated investors. Typically, if an issuer is relying on section 4(a)(2) for its exchange, it will limit its offer only to qualified institutional investors, or QIBs,⁷ as a precaution. To ensure that the offer restrictions are satisfied, an issuer often will pre-certify its holders to ensure that they meet the requirements (either QIB or accredited investor⁸ status). If the issuer has engaged a financial intermediary, the intermediary will identify debt holders and contact them in advance. Often, the financial intermediary will have certifications on file for the debt holder and verify its status, or it may obtain the requisite certification on the issuer's behalf. This typically can be accomplished by requiring that the holder sign a letter confirming its status. As with any other restructuring, an issuer must ensure that the transaction is permitted under the governing debt instrument, as well as under its other financial arrangements.

If an issuer conducts a private exchange, the newly issued securities will not be freely tradable, as they were issued pursuant to an exemption from registration. In the past, an issuer covenanted with the holders to register the securities issued in the exchange, either through a resale registration statement or via a registered exchange. In light of the 2007 amendments to Rule 144 that shortened the holding period for restricted securities, holders may no longer require an issuer to register their securities issued in the exchange. Whether registration rights are requested may depend on the type of security issued (for instance, holders exchanging equity for debt may want liquidity sooner than holders exchanging debt for debt). Rule 144(d)(3)(ii) provides that a holder of a security may tack the holding period of the underlying security to its holding period for an exchanged security in certain circumstances. Rule 144(d)(3)(ii) states:

'If the securities sold were acquired from the issuer solely in exchange for other securities of the same issuer, the newly acquired securities shall be deemed to have been acquired at the same time as the securities surrendered for conversion or exchange, even if the securities surrendered were not convertible or exchangeable by their terms.' (emphasis added)

Section 3(a)(9) exchange offers

Another option is an exchange offer exempt pursuant to section 3(a)(9). Section 3(a)(9) of the Securities Act applies to any securities exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange. Section 3(a)(9) has five requirements:

- *Same issuer* – the issuer of the old securities surrendered is the same as the issuer trying to effectuate an exchange of the new securities.
- *No additional consideration from the holder* – the security holder must not be asked to part with anything of value besides the outstanding security.
- *Offer only to existing holders* – the exchange must be offered exclusively to the issuer's existing security holder.
- *No remuneration for solicitation* – the issuer must not pay any commission or remuneration for the solicitation of the exchange.
- *Good faith* – the exchange must be in good faith and not as a plan to avoid the registration requirements of the Securities Act.

Securities issued in a section 3(a)(9) exchange may be subject to limitations on transfer because section 3(a)(9) is a transactional exemption only. In a section 3(a)(9) transaction, the newly issued securities are subject to the same restrictions on transferability, if any, of the original securities. An issuer also needs to be cautious of having its exchange offer integrated with other securities offerings conducted in close proximity to the exchange.

Registered exchange offers

If an issuer is unable to conduct a private exchange, or to rely on section 3(a)(9), it may instead conduct a registered exchange offer. As with a tender offer, additional Exchange Act rules will apply to exchanges of debt with equity characteristics, such as convertible debt.

The registration statement

A registered exchange offer must be registered on a Form S-4 registration statement (Form F-4 for foreign private issuers).⁹ It may be time consuming to prepare a registration statement, particularly if the issuer does not have the ability

to incorporate by reference information from its Exchange Act filings. The SEC review process and uncertainty concerning timing may make a registered exchange offer a less desirable option for an issuer. Except to the limited extent described below, the exchange offer may not be commenced until the registration statement is declared effective.

Early commencement activities

Rule 162 under the Securities Act provides some flexibility by allowing an issuer to elect early commencement of its exchange offer. It permits solicitations of tenders in certain exchange offers before the registration statement is declared effective. An issuer may begin the offering period prior to effectiveness (shortening the time after effectiveness that it must remain open), provided that no securities are actually exchanged/purchased until the registration statement is effective and the tender offer has expired in accordance with the tender offer rules. Rule 162 is available for exchange offers that comply with Rule 13e-4 and Regulation 14D.

In December 2008, Rule 162 was amended so that it might be available for exchange offers for straight debt securities provided that: (1) the offeror provides the same withdrawal rights as it would if the offering were for equity securities; (2) if a material change occurs in the information published, sent or given to the debt holders, the offeror disseminates information about the material change to the debt holders in compliance with Rule 13e-4; and (3) the offer is held open with withdrawal rights for the minimum periods specified in Rule 13e-4 and Regulation 14D. For exchange offers of straight debt securities, an issuer must decide whether the benefits of early commencement outweigh the ability to provide no or limited withdrawal rights, or to provide for an early tender option.

Consent solicitations

Often, an issuer may wish to solicit consents from its debt holders, whether on a standalone basis or coupled with a tender offer or exchange offer. The purpose of soliciting such a consent is to modify the terms of the debt security being tendered or exchanged. The first step is to undertake a review of the applicable indenture provisions to determine the consent requirements for amendments or waivers. In

addition, amendments involving a significant change in the nature of the investment to the remaining holders may result in the remaining securities being deemed a new security that would have to be registered under the Securities Act or be subject to an exemption from registration.¹⁰ There are a few limitations with respect to consents, in that under most indentures and under section 316(b) of the Trust Indenture Act of 1939, as amended, consents cannot reduce principal or interest, amend the maturity date, change the form of payment or make other economic changes to the terms of the debt securities held by non-tendering debt holders. Several recent court cases have reinforced the significance of the Trust Indenture Act's protections and the need to avoid any coercive consent solicitation that would result in depriving non-consenting holders from any source of payment on their securities.

Standalone consents

In certain situations, in order, for example, to permit a potential transaction, such as an acquisition, reorganisation or refinancing, an issuer may want to conduct a standalone consent solicitation as a means of amending restrictive covenants or events of default provisions under an existing indenture that otherwise would limit its ability to engage in the transaction. In the current environment, some issuers must modify indenture covenants that restrict or prohibit a restructuring of other debt in order to preserve going concern value and avoid bankruptcy. Because consenting holders will remain subject to the terms of the indenture as amended or waived, holders may be reluctant to agree to significant changes. Standalone consent solicitations typically remain open for a minimum of 10 business days, although a supplemental indenture giving effect to the amendments or waivers sought may be executed and delivered as soon as the requisite consents from security holders are obtained.

Exit consents

If an issuer would like to significantly change restrictive indenture provisions, a tender offer or exchange offer coupled with a consent solicitation can be an attractive option. Exit consents are different from standalone or ordinary consent solicitations because the consents are given by tendering or exchanging debt holders (who are about to

give up their old securities) as opposed to continuing holders of the old debt securities. The tendering debt holders will be required to consent to the requested amendments as part of the tender of securities pursuant to the tender offer or exchange offer.

If the requisite percentage of holders (specified in the indenture) tender their securities, the issuer will be able to amend the terms of the indenture and bind all the holders. Exit consents can prove to be a useful incentive to participate in a tender or exchange offer and to address holdout problems. These amendments or waivers generally will not affect the tendering holders that receive cash or new securities upon the consummation of the offer.¹¹ However, the result of obtaining the requisite consents is that non-tendering holders will be bound by the changes. Accordingly, when an issuer announces that the requisite number of holders (for example a majority) has decided to participate in the tender offer or exchange offer, for all practical purposes the remaining debt holders must decide whether to tender/exchange, or be left with a debt obligation with significantly reduced protections. This should be a significant inducement to holders to participate in a tender or exchange offer.

Generally, a consent solicitation is not subject to any legal framework other than that applicable to tender offers and exchange offers. US courts have viewed exit consents as permissible contract amendments governed by basic contract law principles.¹² The total consideration offered in a tender or exchange may include a consent payment available only to holders that tender on or prior to the consent deadline, typically 10 business days after the commencement of the offer and consent solicitation (a tender offer or exchange offer must be kept open for 20 business days). Typically, the payment deadline also is the expiration time for withdrawal rights, unless such rights are required by statute to remain available longer.

In some instances, the modifications effected by the consent solicitation or exit consent may rise to the level of a modification for tax purposes.

Other types of exchange offers

Debt-for-equity swaps

A debt-for-equity swap is another means of recalibrating an issuer's balance sheet. In a debt-for-equity swap, the issuer exchanges already outstanding debt for newly issued equity securities. It is, in essence, an exchange offer. A debt-for-equity swap may be executed with a bank lender, or it may be executed with holders of an issuer's debt securities. In fact, in recent years, it has become more common for a bank or other lender to engage in a debt-for-equity swap rather than force a defaulting issuer into bankruptcy. Lenders often hope that they will receive a higher return on their investment by taking an equity position. The issuer, by changing its debt-to-equity ratio, benefits financially from the exchange, and may improve its ratings.

Securities law considerations

There are a number of considerations that an issuer must bear in mind in carrying out a debt-for-equity swap. The issuer must be mindful that any exchange of securities must comply with the tender offer and exchange rules described above. If a lender extinguishes a bank line in exchange for equity, the issuance of the equity securities must comply with all applicable securities laws – namely it must either be registered or exempt from registration. In addition, an issuer needs to be mindful of the disclosure obligations that may be triggered by such an event, as it may constitute a material event.

Corporate governance and other considerations

The number of shares to be issued depends on the value of outstanding debt to be exchanged. An issuer seeking to engage in a debt-for-equity swap must ensure that it has sufficient authorised capital available prior to commencing the exchange. If the issuer lacks sufficient authorised capital, it may be necessary to amend the issuer's certificate of incorporation to increase the share capital. This can often be a time-consuming process since it entails seeking shareholder approval. An issuer also needs to determine the percentage of equity securities that may be issued; an issuance of over 20% of pre-transaction total shares outstanding may trigger national securities exchange limits, and may require

shareholder approval. Because the issuance of equity securities as part of a debt equity swap will be dilutive to existing holders, this may prove difficult.

Because the lender or debtholder will be effectively subordinating its position by giving up its creditor status, it may require a sweetener – this may come in the form of issuing preferred stock or convertible preferred stock, or issuing participating preferred stock. An issuer needs to consider carefully the terms of the security it will offer, including the class, voting rights and dividend.

Equity-for-equity exchanges

When an issuer tenders for its own equity securities, a number of additional considerations arise. First, an issuer must ensure that it is permitted to engage in the exchange under state law. Section 160(a)(1) of the Delaware General Corporation Law prohibits a corporation from purchasing its own stock if the entity's capital is impaired or if such purchase would impair capital.

In the context of an equity-for-equity exchange, an issuer must be mindful of its disclosure obligations under Regulation FD and the securities law antifraud provisions, particularly Rule 10b-5. Under Rule 10b-5 an issuer is prohibited from purchasing its securities when it is in possession of material nonpublic information. The same considerations that apply to a purchase of debt securities are applicable in this context.

In addition, an issuer must comply with all tender offer rules when conducting an equity exchange. Sections 13(e), 14(d), 14(e) and 14(f) all are applicable to an equity exchange. An issuer also is required, as it is with an exchange of convertible debt, to file a Schedule TO with the SEC.

An issuer must be cautious that its equity exchange does not inadvertently trigger the going private rules under Rule 13e-3 of the Exchange Act. These rules apply if any purchase of an issuer's equity securities is intended to cause the equity security of an issuer registered under section 12(g) or section 15(d) of the Exchange Act to be held by fewer than 300 persons. Rule 13e-3(g)(2) contains an exemption from the going private rules if the security holders are offered or receive only an equity security that: (1) has substantially the same rights as that being tendered, including voting, dividends, redemption and liquidation rights (except that this requirement is deemed satisfied if non-affiliated holders are offered common stock);

(2) is registered pursuant to section 12 of the Exchange Act (or reports are required to be filed by the issuer pursuant to section 15(d)); and (3) is listed on a national securities exchange or authorised to be quoted on Nasdaq (if the tendered security also was so listed or quoted).

If an equity exchange involves a distribution under Regulation M, the issuer is prohibited from making bids for, or purchasing, the offered security. These prohibitions will not apply to investment grade rated, nonconvertible preferred stock, however. These restrictions typically commence when the exchange offer materials are mailed and continue through the conclusion of the offer.

Incentives and disincentives — the so-called carrot and stick

There are a number of structural considerations that may create incentives to tender or to tender early. An issuer should consider some or all the following depending on the structure and legal requirements of the tender or exchange:

- *Minimum threshold.* To discourage holdouts require, as a condition to the tender or exchange, that a substantial percentage (typically 90% or higher) of the outstanding securities be tendered.
- *Proration.* An issuer may include proration provisions in its tender offer as a means of inducing holders to tender or exchange. For example, if an issuer includes proration provisions, and an offer is oversubscribed before the end of the proration period, old securities tendered after the proration period will not be purchased. If the minimum threshold set out is not attained before the end of the proration period, then, all old securities tendered before the proration period expiration will be accepted in full and after the expiration of the period, securities tendered will be accepted only on a first-come first-served basis.
- *Sweeteners.* Encourage acceptance of the tender or exchange offer by providing a cash payment or better terms for the new securities. Consider offering tendering/exchanging holders an inducement in the form of a warrant kicker or common stock (if there is potential for future upside), or exchanging high coupon, unsecured debt for low coupon, secured debt. In addition, consider providing recourse to collateral.
- *Exit consents.* Solicit exit consents simultaneous with the tender or exchange offer to penalise holdouts (by

stripping protective covenants and events of default from the old securities).

- *Early tender premium or consent payment.* Motivate holders to tender early by establishing an early tender premium or early consent payment. The best price rule does not apply to tender and exchange offers for straight debt securities.
- *The bankruptcy threat.* In a restructuring, convey that bankruptcy is unavoidable if the tender or exchange offer fails and that debt holders will be in a better position if bankruptcy is avoided. This involves a delicate balancing act.

Conclusion

For balance sheet restructuring, like so many other things in life, timing can be everything. Issuers are cautioned not to wait too patiently for their fortunes to improve. The most effective balance sheet restructuring occurs when an issuer's balance sheet is neither too healthy nor too stressed. It's a bit like Goldilocks' porridge – best eaten when not too hot and not too cold.

ENDNOTES

- 1 *Wellman v Dickinson*, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979). For example, an open-market purchase of 25% of an issuer's stock was held not to constitute a tender offer because: (1) the purchaser contacted only six of the 22,800 security holders; (2) all six of those security holders were highly sophisticated; (3) the purchasers did not pressure the security holders in any way that the tender offer rules were designed to prevent; (4) the purchasers did not publicise the offer; (5) the purchasers did not pay a significant premium; (6) the purchasers did not require a minimum number of shares or percentage of stock; and (7) the purchasers did not set a time limit for the offer. *Hanson Trust PLC v SMC Corp.*, 774 F. 2d 47, 57-59 (2d. Cir. 1985).
- 2 The date on which the tender offer is first published or sent or given to the holders of the relevant securities is the first business day.
- 3 If the securities are registered on one or more national securities exchange, the announcement must be made by the first opening of any one of such exchanges on the business day following expiration.
- 4 See SEC No-Action Letter, Salomon Brothers Inc. (March 12 1986); SEC No-Action Letter, Goldman Sachs & Co. (March 26 1986); SEC No-Action Letter, Merrill Lynch, Pierce, Fenner & Smith Inc. (July 2 1986).
- 5 Issuers must be sensitive to whether there are written communications, such as in a press release or a Form 10-K, Form 10-Q or Form 8-K, that are often made in advance of the commencement of the tender offer, and that must be filed pursuant to Rule 13e-4(c) – for example, by checking the box on the cover of Form 8-K.
- 6 This requirement is in addition to the prohibition in Rule 14e-5 that, with certain exceptions, prohibits covered persons from, directly or indirectly, purchasing or arranging to purchase any subject securities or any related securities (that is, securities immediately convertible or exchangeable for the subject securities) except as part of the tender offer. Covered persons include the offeror, its affiliates and the dealer-manager and its affiliates.
- 7 Qualified institutional investor is defined in Rule 144A under the Securities Act.
- 8 Accredited investor is defined in Rule 501 of Regulation D under the Securities Act.
- 9 Forms S-3 and F-3 are available only for offerings for cash; they are not available for an exchange offer.
- 10 An attempt to revise key payment terms such as maturity, interest rate or type of interest paid may be considered an offer and sale of a new security under SEC interpretations, which would be treated as an exchange offer for securities law purposes. See Bryant B. Edwards and Jon J. Bancone, 'Modifying Debt Securities: The Search for the Elusive "New Security" Doctrine,' 47 BUS LAW, 571 (1992). See also the Trust Indenture Act of 1939, 15 USC secs. 77aaa-77bbbb.
- 11 The effectiveness of the amendments and waivers is typically subject to the condition that the tendered securities have been accepted for payment or exchange pursuant to the offer.
- 12 See, for example, *Katz v Oak Industries*, 508 A. 2d 873 (Del. Ch. 1986).

CHAPTER 2

The role of the financial intermediary

When should an issuer engage an investment bank or other financial intermediary to assist with liability management transactions? The short answer is that it depends. It depends on the issuer's financial condition, its objectives and the transaction contemplated. Generally, the more complex and significant a restructuring, the more helpful it may be to engage an investment bank as financial adviser. The investment bank will help formulate a restructuring plan, locate and identify security holders, structure the transaction, solicit participation, assist with presenting the structure to the various stakeholders, assist with rating agency discussions and manage the marketing efforts in order to achieve a successful restructuring. Issuers should consider a number of factors, such as the number of debt holders, their organisation and sophistication, and whether the issuer has information about, and any contact with, its debt holders. In a distressed situation, the challenges that many issuers face often lead them to engage an investment bank. Typically, such investment banks have liability management, restructuring or workout teams specialised in debt restructurings. Issuers that wish to take advantage of declining secondary market prices for their debt securities also may benefit from engaging an investment

bank to locate, contact and negotiate with debt holders to sell (or exchange) their debt securities. The type of transaction will dictate the investment bank's role, which ranges from merely an advisory role or responsibilities as an agent, principal or as dealer-manager, as well as any limitations on its activities.

Debt repurchases

If the issuer has few debt holders that are already known to it, it may not need assistance from an investment bank. However, an investment bank may be involved in open market debt repurchase transactions, for example, to contact and bring unknown debt holders to the table, acting either as an agent (acting as a broker for the issuer) on behalf of the issuer, or as principal (buying the debt securities from the debt holder and then selling them back to the issuer). In the case of opportunistic debt repurchases, it may be more seamless for an investment bank to contact debt holders and to initiate discussions with the debt holders regarding their interest in having their securities repurchased. An investment bank may have better and closer relationships with the debt holders, may have a sense for the terms on which such holders may have acquiesced

to other debt repurchase offers from other issuers, and may understand whether there are particular strategic approaches to such holders that likely will prove more successful. To the extent that an issuer seeks to engage the services of an investment bank to assist it with debt repurchases, the issuer and the investment bank typically will enter into an engagement letter. Among other things, the engagement letter will specify the role to be played by the investment bank (ie whether it will act as agent or principal), the maximum amount of debt securities that the issuer would seek to repurchase, oftentimes the price ranges at which the issuer would be prepared to repurchase the debt securities, the term of the engagement and related matters. In the engagement letter, the investment bank will expect to receive representations and warranties from the issuer regarding its authority to undertake a repurchase, the absence of any contractual or other commitments that would prevent it from engaging in a repurchase, and a representation that the issuer is not in possession of material nonpublic information. Typically, an investment bank will receive a financial advisory fee in connection with its services. This may be a flat fee. There may also be a fee that is based on the principal amount of debt securities that are repurchased. The investment bank also will expect to be indemnified in respect of breaches of representations, warranties and covenants, as well as being indemnified with respect to certain securities law matters.

Both the issuer and its advisers must be mindful of any activities that put a repurchase at risk of being deemed a tender offer. The issuer, its counsel and the investment bank will want to consider whether the debt securities that the issuer seeks to repurchase are nonconvertible or convertible securities, whether the securities are investment grade rated or non-investment grade rated, and whether the securities are widely held. Usually, it is possible to structure open market debt repurchase transactions such that these are not considered part of a tender offer. Repurchases would be negotiated bilaterally, between the investment bank and the debt holder, with no single repurchase transaction being made contingent on any other repurchase transaction. There should not be a specified time period or expiration time for the offer to repurchase or other similar conditions imposed on the debt holders. The repurchase transactions should not be subject to or conditioned on the issuer having attained a specified principal amount.

Tender offers

The investment bank's role varies in tender offers. In a cash tender offer for nonconvertible debt, an issuer may engage an investment bank in an advisory role. In a tender offer for convertible debt securities, which is subject to additional tender offer rules, an issuer may choose to engage an investment bank in an advisory role in order to contact and negotiate the terms with debt holders or to act as an active dealer-manager. In a tender offer coupled with a consent solicitation or a public tender offer for all outstanding debt securities, issuers usually engage a dealer-manager to manage the entire process. In these transactions, issuers also often use an investor relations firm or other professional services firm to act as information agent during the process. There are no specific rules regarding compensation preventing issuers from using – and paying – an investment bank to solicit tenders.

The issuer will engage the dealer-manager pursuant to the terms of a dealer-manager agreement. The dealer-manager agreement may be the only agreement between the issuer and the investment bank, or it may supersede an engagement letter relating to the mandate. Usually, the dealer-manager's counsel will prepare the draft agreement. The agreement will detail the dealer-manager's obligations in respect of the transaction and set out the agreement relating to the fees payable to the dealer-manager. The issuer will make representations and warranties to the dealer-manager related to the offer to purchase and other offer materials used in connection with the tender, as well as make representations regarding receipt of all necessary authorisations (if any), corporate approvals, and make other representations comparable to those found in an underwriting agreement. Generally, the dealer-manager agreement will be executed just prior to commencement of the offer. Usually the agreement will call for certain documents, including officers' certificates and legal opinions to be delivered to the dealer-manager at various junctures during the tender offer period.

Exchange offers

Private exchange offers

An issuer may choose to engage an investment bank in an advisory role for a private exchange offer, however, because the exchange involves a limited number of debt holders, a more active dealer-manager may not be needed.

Issuers may engage the bank that acted as the initial purchaser for the old debt securities, this way, in an exchange offer made in reliance on section 4(a)(2) to QIBs, the bank may have existing QIB letters on file to pre-qualify holders. There are no specific rules regarding compensation preventing issuers from using, or paying, an investment bank to solicit private exchanges.

As in the case of a tender offer, to the extent that the issuer engages an investment bank as dealer-manager to assist with a private exchange offer, it will enter into a dealer-manager agreement. The dealer-manager agreement will address the matters mentioned above in connection with the discussion of dealer-manager agreements for tender offers. Of course, in a private exchange offer, the dealer-manager will be a distribution participant involved in the issuance of, or introduction of, the new securities into the market. As a result, in connection with a private exchange or a registered exchange offer, the dealer-manager and its counsel will undertake due diligence as they would in the context of a securities offering. In addition, the dealer-manager's counsel usually will negotiate and seek to obtain a comfort letter from the issuer's auditors relating to the financial information included in or incorporated by reference in the exchange offer materials. This is in addition to the delivery of legal opinions, negative assurance letters, and other deliverables.

Section 3(a)(9) exchange offers

As we discuss in more detail below in connection with section 3(a)(9) exchange offers, issuers are permitted to engage third parties, such as financial advisers and investor relations firms, to assist with section 3(a)(9) exchanges, but their role must be limited. Under section 3(a)(9), an issuer cannot pay anyone, including a financial adviser or dealer-manager, to solicit exchanges. Pursuant to SEC no-action guidance, a financial adviser may undertake certain activities so long as it is not paid a success fee. Issuers facing a complex restructuring may decide that they need a dealer-manager to solicit exchanges and manage the process to ensure a successful restructuring.

The SEC has provided guidance as to how an investment bank may be compensated in a section 3(a)(9) exchange. In general, an investment bank can:

- engage in pre-launch discussions or negotiations with legal and financial representatives of bondholder committees;

- provide a fairness opinion;¹ and
 - only provide debt holders with information that was included in communications sent directly by the issuer.
- In general, an investment bank cannot:
- solicit (directly or indirectly) exchanges or consents; and
 - make recommendations regarding the exchange offer to debt holders or their advisors.

If an investment bank is involved in a section 3(a)(9) exchange offer, it should be paid a fixed advisory fee, as opposed to a success fee for its services. Although paid promotion is strictly off-limits, the issuer can still reimburse an advisor for expenses related to the exchange.

The issuer may rely on an investor relations firm or an information agent to inform security holders of the exchange offer.² Filling this role with an investment bank is efficient as the firm that sold the securities in the first place may be in the best position to contact holders. The permitted activities are limited to contacting security holders to confirm that the issuer's materials were received, that the security holder understands the mechanical requirements necessary to participate in the exchange, and to determine whether the security holder intends to participate in the exchange offer.³ Under this arrangement, however, payment would have to be made on a flat, per-contact basis, and communications with security holders may not include any recommendation regarding the decision to accept or reject the exchange offer.⁴ An issuer should instruct its agents to defer on all questions relating to the merits of the offer if the issuer wishes to use the section 3(a)(9) exemption. Typically, an issuer will enter into an engagement letter with an investment bank pursuant to which it will engage the bank to act as financial adviser and undertake certain limited activities for a flat fee. Given that liability management transactions may be fluid, an engagement letter may be entered into that relates to liability management transactions generally, and that contemplates a transaction-based fee in the event that the bank assists the issuer with debt repurchases, and a flat fee to the extent that it assists the issuer in the context of a section 3(a)(9) exchange offer. To the extent that the engagement letter was entered into in contemplation of a private or a registered exchange offer, and provides for a transaction-based fee, a new letter may be required to be negotiated if the transaction format changes and it takes the form of a section 3(a)(9) exchange offer.

Registered exchange offers

In a registered exchange offer, there is more flexibility regarding the investment bank's role. Often, an issuer engages an investment bank to act both as adviser and as dealer-manager (which includes soliciting holders if the exchange offer is coupled with a consent solicitation). The dealer-manager for a registered exchange offer (or a public tender offer) may actively solicit acceptances and be compensated for these activities, including with a success fee. Because of the heightened liability standard involved with a registered exchange offer, the dealer-manager will want to conduct due diligence comparable to the diligence conducted for an ordinary registered offering of securities. In addition, the dealer-manager may require pursuant to the dealer-manager agreement, the delivery of legal opinions, a 10b-5 negative assurance letter with respect to the exchange offer materials, and a comfort letter or agreed upon procedures letter.⁵ The dealer-manager must keep in mind all rules relating to pre-filing or pre-launch communications with debt holders in order to avoid gun-jumping issues and Regulation FD issues.

ENDNOTES

- 1 An issuer is permitted to hire an investment bank to render a fairness opinion on the terms of the exchange; however, if the investment bank also is acting as a dealer-manager and conducting solicitation activities, the SEC has held that obtaining a fairness opinion would violate section 3(a)(9). *See* SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Securities Act Sections (number 125.07) (November 26 2008), available at www.sec.gov/divisions/corpfin/guidance/sasinterp.htm
- 2 Other permitted activities involve confirming debt holder contact details, confirming their receipt of all requisite materials and reminding debt holders of approaching deadlines.
- 3 SEC No-Action Letter, Dominion Mortgage & Realty Trust (April 3 1975).
- 4 This second requirement applies to any of the issuer's agents who contact the security holders, and not only to dedicated sales departments.
- 5 These deliverables are usually also requested by the dealer-manager in a tender offer. The scope of these deliverables can significantly increase the cost of the tender offer or exchange offer and are often negotiated between the parties.

CHAPTER 3

Debt redemptions and repurchases

An issuer considering debt repurchases faces a series of important decisions regarding the scope of its repurchases, the terms and other related matters. For example, an issuer may purchase debt securities in open market transactions or, conversely, in a redemption according to the terms of the applicable indenture or note purchase agreement. Alternatively, the issuer may exchange outstanding securities for a new series of securities.¹

Depending on the path taken, issuers will have to be mindful of various requirements and obligations. Some, such as the anti-fraud provisions of the securities laws, apply regardless of the route taken. Others, such as the conditions relating to reliance on the section 3(a)(9) exemption from registration under the Securities Act, affect only certain exchanges.

Redemptions

Complying with the terms of the governing indenture

Depending on the terms of the governing indenture, an issuer may be able to redeem its outstanding debt securities at a pre-determined price without the holder's consent. The

redemption price is likely to be based on the holder's yield to maturity. Some indentures, typically those governing zero coupon obligations or debt with a relatively short maturity, have absolute call protection and do not permit redemptions. Other indentures include restrictions on the time period (referred to as no-call periods) during which issuers can redeem the securities.

An issuer may have the most difficulty with indenture provisions that restrict the source of funds the issuer can use to redeem outstanding debt securities. These types of provisions typically prohibit an issuer from financing a redemption of its outstanding debt securities with the proceeds of offerings of new, lower-cost debt securities. In addition, an issuer should consider any provisions in its credit agreements or bank facilities, which may contain prohibitions on redemptions of debt securities. Many credit agreements limit an issuer's ability to redeem other outstanding debt. The usual areas of concern include definitions of, and restrictions on, permitted indebtedness, permitted re-financings, permitted liens and restricted payments, as well as covenants regarding incurrence of indebtedness. An issuer should carefully review its existing credit facilities in order to ensure that a redemption of outstanding debt securities is permitted and that a

redemption would not trigger repayment obligations under its credit facilities. There also may be other, non-financial agreements, such as lease agreements or even acquisition agreements, which may affect an issuer's ability to redeem its securities. In addition, a redemption of a series of outstanding debt securities may require prior approval by the issuer's board of directors.

Courts permit an issuer to demonstrate that, despite a concurrent lower-cost offering of securities, the direct source of the funds used to repurchase the old debt originated elsewhere.² One court allowed an issuer to make a tender offer for its own debt securities using the proceeds of the tainted, lower-cost securities, while simultaneously redeeming those debt securities not tendered with cash raised through other means.³ Nevertheless, these cases hinge on the contractual terms of the relevant indenture. An issuer redeeming its securities should not mistake favourable judicial precedent for certainty, absent a thorough review, that its own indenture would permit a particular strategy. At the very least, an issuer must be careful to segregate the funds used to redeem debt securities from the proceeds of any other new, lower-cost debt securities offerings. Even if an issuer takes such precautions, however, it is possible the market will perceive the issuer as having breached the terms of the indenture.

The terms of the debt securities, which were negotiated at the time of issuance, usually specify the redemption price. The redemption price typically will reflect the holders' yield to maturity on the outstanding debt securities and debt holders will be made whole. The price will typically equal the face amount of the debt security, plus the present value of future interest payments (referred to as make-whole payments). The effect of this is that the debt securities usually will be redeemed at a premium. For issuers with limited cash on hand, a redemption may not be a viable option. In addition, as an issuer generally is required to provide at least 30 days' prior notice of redemption, if it announces a redemption on fixed rate debt securities, it runs the risk that the cost of the proceeds it intends to use to fund the redemption, which at the time the redemption notice was issued were available at a lower cost, may have increased, and may even increase above the redemption cost.

The process for redeeming an outstanding debt security is spelled out in the instrument governing the debt security, usually the indenture. Typically, an issuer must give holders

no more than 60 and no less than 30 days' prior notice of redemption. This notice also may require that the issuer include other information, such as the redemption price, the redemption date, and identify the securities (if not all) that are being selected for redemption. If not all of the securities of the series or class of outstanding debt securities are being redeemed, the debt securities will be redeemed either on a pro rata basis or by lot; the process for a redemption usually is determined by the trustee or by the trustee working with the depository.

Providing adequate disclosure

In connection with delivery of a redemption notice, an issuer often will announce via press release that it has decided to redeem the debt securities in accordance with their terms. An issuer should publicly disclose a redemption, to the extent that its broader impact on an issuer's financial condition would be viewed as material, prior to contacting debt holders. During the financial crisis, there were a few notable instances in which the failure by issuers to disclose their intention to redeem certain securities gave rise to allegations by the SEC of selective disclosure (violating the issuer's Regulation FD obligations), as well as bondholder claims.

An issuer that redeems its securities must consider the applicability of the anti-fraud provisions of the securities laws. Though the terms of the relevant indenture may permit various activities, no private contract can waive the anti-fraud protections afforded by the Securities Act and the Exchange Act. For example, one court found that, despite the issuer's compliance with the terms of the indenture, its failure to disclose all relevant facts regarding the redemption violated Rule 10b-5.⁴ An issuer must comply with the terms set forth in the indenture as well as consider the anti-fraud provisions of the securities laws.

Repurchasing debt securities in the open market

Unlike a redemption, wherein an issuer repurchases its debt securities without the requirement to obtain consent of the holders, an open market repurchase is a voluntary transaction between the issuer and a willing debt holder. As with a redemption, an issuer will need to have cash on hand

in order to effect a debt repurchase. Unlike a redemption, which may allow an issuer to retire a series of outstanding debt securities, there is no assurance with a debt repurchase that the issuer will be successful in retiring a substantial portion of the outstanding series of debt securities. In fact, the primary challenge for an issuer undertaking an open market purchase is to ensure that the transaction will not be regarded by the SEC as a tender offer. Tender offer or not, however, an issuer repurchasing securities in the open market must be mindful of the SEC's disclosure requirements.

Avoiding the definition of tender offer

Section 14(d) of the Exchange Act requires certain filings and disclosures when any person or group makes a tender offer, resulting in the ownership of greater than five percent of a given class of securities. Section 14(e) is an anti-fraud provision that forbids misstatements, omissions and fraudulent or misleading acts in connection with any tender offer. These two sections, and the rules promulgated under these sections, apply to the extent that a transaction constitutes a tender offer.

Congress, in adopting the Williams Act of 1968 and section 14(d), did not define tender offer in order to give the courts and the SEC flexibility.⁵ In its rules promulgated under sections 14(d) and 14(e), the SEC also has not defined tender offer in order to preserve flexibility in applying the rules. Courts have filled this gap, providing a set of factors useful in differentiating between tender offers and other public solicitations. The test used by a majority of courts lists eight characteristics that are typical of a tender offer:

1. active and widespread solicitation of public shareholders for the shares of an issuer;
2. solicitation made for a substantial percentage of the issuer's stock;
3. offer to purchase made at a premium over the prevailing market price;
4. terms of the offer are firm rather than negotiable;
5. offer is dependent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;
6. offer is open for only a limited period of time;
7. offeree is subjected to pressure to sell his or her stock; and

8. public announcements of a purchasing programme concerning the target company precede or accompany rapid accumulation of large amounts of the target company's securities.⁶

Not all of these elements need to be present for a transaction to be deemed to constitute a tender offer, and the weight given to each element varies with the circumstances. For example, an open-market purchase of 25% of a corporation's stock was not considered to constitute a tender offer for various reasons. The purchaser contacted only six of the 22,800 security holders, all six of those security holders were highly sophisticated and the purchaser did not pressure them in any way that the tender offer rules were designed to prevent. Additionally, the purchaser did not publicise the offer, the purchasers did not pay a significant premium – nor were they required to hold or sell a minimum number of shares or percentage of stock, and the purchaser did not set a time limit for the offer.⁷ In determining whether a tender offer has occurred, this Court noted that courts should be guided by the statutory purpose to protect the ill-informed solicitee.

The eight-part test and above case implementing it both involved equity securities. Congress and the SEC have acknowledged that tender offers for nonconvertible debt securities are usually less problematic from both a tender offer and public policy perspective.⁸ However, any discussion of a repurchase of debt securities should begin with consideration of the eight characteristics listed above. An issuer considering an open-market repurchase of its debt securities should therefore be mindful of the eight factors if it wishes to avoid the strictures of the tender offer rules.

Usually, it will be feasible for an issuer to structure its activities to avoid having its open-market repurchases considered a tender offer. As we discussed in Chapter 2, an issuer may retain an investment bank to assist the issuer in contacting debt holders and in negotiating, on a bilateral basis, the terms on which each debt holder would agree to have its debt securities repurchased.

Disclosure requirements for open-market transactions

An issuer that repurchases its debt securities in the open market must comply with the anti-fraud provisions of the securities laws. For repurchase programmes, the primary

concern is adequate disclosure. Before repurchasing its securities, an issuer must consider whether it is in possession of material nonpublic information that the securities laws require it to disclose. Both Rule 10b-5 and Regulation FD place disclosure obligations on parties who possess material nonpublic information about the securities they purchase. Examples of material information include unreleased earnings or an unannounced merger – both of which would need to be disclosed before repurchasing securities from a bondholder.

It is possible that the repurchase programme itself constitutes material nonpublic information. For example, an issuer that drastically reduces the total amount of its outstanding debt through a repurchase program should consider disclosing the programme as material. This would also be true if the repurchase programme is likely to significantly reduce the issuer's cash reserves. Generally speaking, an issuer's plans to repurchase some of its debt will not constitute a material event, so long as a significant principal amount of debt remains outstanding after the repurchase. This is also the case if the public float of a given series remains constant (that is, if the issuer repurchases bonds only from insiders). An issuer should consult with counsel if it is concerned about the materiality of a planned transaction.

Private negotiations with creditors, including debt holders, can trigger disclosure or other obligations under Regulation FD. In particular, concerns may arise when an issuer conducts discussions with one or more bondholder groups to test the waters with respect to a particular repurchase plan. Regulation FD provides, subject to certain exceptions, that whenever an issuer, or any person acting on its behalf, such as a financial adviser, discloses any material nonpublic information regarding that issuer or its securities to market professionals or holders of the issuer's securities who may trade on the basis of such information, the issuer shall make public disclosure of that information either simultaneously, in the case of an intentional disclosure, or promptly, in the case of a non-intentional disclosure. In the context of privately negotiated repurchases, the fact that an issuer is conducting these repurchases may be considered material nonpublic information in and of itself. A repurchase that is part of a restructuring, because of its broader impact on an issuer's financial condition and in many circumstances, its ability to operate, would likely be viewed as material.

Disclosure of the repurchases to a debt holder may trigger a disclosure obligation on the issuer's part. However, the issuer may avoid the obligation to disclose such information if the person that receives the information is either under a duty of trust or confidentiality or such person expressly agrees to keep the information confidential. An issuer should consider whether to use a confidentiality agreement.

An issuer also should consider when it will disclose information regarding a repurchase to the public. If the issuer engages in private repurchases over time, it may not be appropriate to disclose each repurchase until the process ends. Similarly, negotiations over the terms of a restructuring (including a tender or exchange offer) may take time or may ultimately be fruitless. In those cases, debt holders may object to being kept out of the market for such an extended time, and may negotiate a specific time or event by which disclosure must be made public by the issuer or a determination made that the information is no longer material or current for any reason, including because of the occurrence of superseding events.

An issuer has at least two options should it decide it must disclose a plan to repurchase debt securities. The issuer may announce the debt repurchase programme with a press release and file the release as an exhibit to a current report on Form 8-K. A more subtle approach would be for the issuer to disclose its intentions in a periodic report, such as in the liquidity discussion in the management discussion and analysis (MD&A) section of an annual report on form 10-K or a quarterly report on Form 10-Q. The disclosure need not be very detailed and may simply state that the issuer will repurchase its debt securities in the open market or in privately negotiated transactions if market conditions warrant. More specific disclosure may be problematic.

Regulation M and other considerations

Although Regulation M does not apply to investment grade nonconvertible debt securities, it does apply to equity securities, non-investment grade debt securities and convertible debt securities. An issuer that is engaged in a distribution while effecting a repurchase programme must ensure that it complies with Regulation M. Rule 102 under Regulation M makes it unlawful for an issuer or its affiliates 'to bid for, purchase, or attempt to induce any person to bid

for or purchase, a covered security during the applicable restricted period.’ This prohibition is intended to prevent an issuer from manipulating the price of its securities when the issuer is about to commence or is engaged in a distribution. A distribution may be deemed to take place in connection with a proxy mailing. In addition, issues under Regulation M arise when an issuer uses the proceeds from a new offering to repurchase outstanding debt securities. The new offering may be a distribution under Regulation M and any purchases under the buyback may be prohibited. An issue also arises if the debt repurchases are for debt securities that are convertible into the issuer’s equity securities. Under certain circumstances, repurchases of convertible debt securities could be deemed a forced conversion and, therefore a distribution of the underlying equity security for the purposes of Regulation M.

ENDNOTES

- 1 See section 3(a)(9) exchange offers.
- 2 *Morgan Stanley & Co Inc v Archer Daniels Midland Co*, 570 F. Supp. 1529, 1536 (S.D.N.Y. 1983); *Franklin Life Insurance Co v Commonwealth Edison Co*, 451 F. Supp. 602, 614 (S.D. Ill. 1978).
- 3 *Mutual Savings Life Insurance Co v James River Corp of Virginia*, 716 So. 2d 1172, 1178 (Ala. 1998). See also, Part II.
- 4 *Harris v Union Electric Co*, 787 F. 2d 355, 370 (8th Cir. 1986). Harris provides a lesson on the need for careful drafting of the original offering document, although the tone in Harris is so harsh that there is an inference there was more to the Court's decision than merely failure to disclose material information (an earlier Missouri Court of Appeals decision in the matter had held that the redemption process complied with the indenture). See *Harris v Union Electric Co*, 622 S.W.2d 239 (Mo.Ct.App. 1981).
- 5 *Hanson Trust PLC v SMC Corp*, 774 F. 2d 47, 56 (2d Cir. 1985). The Hanson Court noted Congressional concern that a 'rigid definition would be evaded.'
- 6 *Wellman v Dickinson*, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979); see also Hanson Trust, supra note 5.
- 7 *Hanson Trust*, supra note 5 at 57-59.
- 8 While both equity and debt tender offers are subject to sections 14(d) and 14(e) and the rules thereunder, equity tender offers are also subject to the requirements of Rule 13e-4.

CHAPTER 4

Cash debt tenders: an overview and summary of no-action advice

Defining the tender offer

The comprehensive regulation of tender offers came about with the enactment of the Williams Act in 1968. The Williams Act and the SEC's implementing regulations are designed to require the dissemination of material information about a tender offer, while providing sufficient procedural protections so that security holders have an opportunity to consider the disclosure when deciding whether to tender their securities in the offer. The tender offer rules apply in the case of a third party tender offer for the securities of another issuer, as well as to a tender offer by an issuer for its own securities.

The term tender offer is not specifically defined in statute or in the SEC's regulations. The lack of a specific definition has permitted the SEC and the courts to apply the tender offer rules to a broad range of transaction structures. The analysis of whether an offer constitutes a tender offer begins with the often-cited eight-factor test in the *Wellman v Dickinson* case:¹

- An active and widespread solicitation of public shareholders for the shares of an issuer.
- A solicitation is made for a substantial percentage of the issuer's securities.
- The offer to purchase is made at a premium over the prevailing market price.
- The terms of the offer are firm rather than negotiable.
- The offer is contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased.
- The offer is open only for a limited period of time.
- The offeree is subjected to pressure to sell his or her security.
- Public announcements of a purchasing programme concerning the target issuer precede or accompany a rapid accumulation of large amounts of the target issuer's securities.

These eight factors need not all be present for a transaction to be deemed a tender offer, and the weight given to each element varies with the individual facts and circumstances. While these factors were cited in the context of an offer for equity securities, the principles would equally apply to tender offers involving debt securities or equity securities other than common stock. The eight-factor test may be applied in the context of both third party offers, as well as offers by an issuer for its own securities.

Courts have also applied a totality-of-the-circumstances test in determining whether a transaction involves a tender offer that should be subject to the statutory requirements

and the SEC's rules. In this context, the courts have examined whether, in the absence of disclosure and procedures required under the tender offer rules, there will be a substantial risk that the offeree lacks the information needed to make an investment decision with respect to the offer.² The SEC staff has historically focused on whether a tender offer involves an investment decision on the part of the offeree, particularly where the protections afforded by the tender offer requirements would appear to be necessary based on the nature of the transaction.

Requirements applicable to all tender offers

Section 14(e) of the Exchange Act is an antifraud provision that establishes the baseline for tender offer regulation. It prohibits an offeror from making any untrue statement of a material fact, or omitting to state any material fact necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading. Section 14(e) also prohibits any fraudulent, deceptive or manipulative acts in connection with a tender offer, and applies to cash tender offers, as well as to exchange offers subject to the tender offer requirements.

Pursuant to the authority specified in section 14(e), the SEC has adopted Regulation 14E.³ Regulation 14E specifies requirements applicable to all tender offers, and for those tender offers where additional requirements apply (such as tender offers for equity securities), the requirements of Regulation 14E must still be satisfied. Regulation 14E applies to cash tender offers, as well as exchange offers subject to the tender offer requirements. In addition, Regulation 14E applies to both third party tender offers as well as issuer tender offers.

Regulation 14E requirements

Regulation 14E sets forth certain requirements for tender offers that must be carefully followed throughout the course of an offer. These requirements seek to prevent practices that would be deemed fraudulent, deceptive or manipulative acts in connection with a tender offer. It requires that:

- A tender offer must be held open for at least 20 business days.
- The percentage of the class of securities being sought or

the consideration being offered may not be increased or decreased unless the tender offer remains open for at least 10 business days from the date that the notice of such increase or decrease is first published or sent or given to security holders.

- The offeror promptly pay the consideration, or return tendered securities, upon termination or withdrawal of the tender offer.
- Public notice be provided in connection with the extension of a tender offer, and such notice must include disclosure of the amount of securities already tendered.
- The issuer subject to a tender offer disclose to its security holders its position with respect to the offeror's tender offer.
- Certain trading be avoided when a person is in possession of material nonpublic information relating to the tender offer.
- The tendering person must have a net long position in the subject security at the time of tendering and at the end of the proration period in connection with partial tender offers (and not engage in short-tendering and hedged tendering in connection with their tenders).
- No covered person directly or indirectly purchase or arrange to purchase any subject securities or any related securities except as part of the tender offer, from the time of public announcement of the tender offer until the tender offer expires.

Each of these requirements is described in more detail below.

Minimum offer period

Rule 14e-1(a) provides that a tender offer must remain open for at least 20 business days from the date the tender offer commences.⁴ Rule 14e-1(b) provides that the offer must also stay open for at least 10 business days from the date a notice is first published or sent or given to the holders of the subject securities of an increase or decrease in: (i) the percentage of securities to be acquired pursuant to the tender offer (if the change exceeds 2% of the original amount); (ii) the consideration offered, without any *de minimis* exception; or (iii) any dealer-manager's solicitation fee. The SEC has stated that a tender offer subject only to Regulation 14E must remain open for a minimum of five business days for any other material change to the offer or waiver of a material condition.⁵

Prompt payment

Rule 14e-1(c) provides that the offeror must either pay the consideration offered or return the securities tendered promptly after termination or withdrawal, respectively, of the tender offer.

The SEC staff has generally taken the view that prompt payment under Rule 14e-1(c) requires the payment of consideration or the return of tendered securities no later than three business days after the conclusion of the tender offer.

Extension of offering period

Rule 14e-1(d) provides that any extension of the offer period must be made by a press release or other public announcement by 9:00am, Eastern time, on the next business day after the scheduled expiration date of the offer, and the press release or other announcement must disclose the approximate number of securities tendered to date. If the securities are registered on one or more national securities exchanges, the announcement must be made by the first opening of any one of such exchanges on the next business day following the scheduled expiration date of the tender offer.

Disclosure of position regarding the offer

Rule 14e-2 requires that an issuer that has securities subject to a tender offer disclose to its security holders its position with respect to the offeror's tender offer, in other words, whether the issuer recommends the offer, expresses no opinion with respect to the offer or is unable to take a position. The disclosure must be provided no later than 10 business days after the tender offer is first disseminated to security holders. In the event of any material change in the disclosure, the subject company must promptly disseminate a statement to security holders noting the material change. Given that Rule 14e-2 is not expressly limited to third party tender offers, it is common for an issuer conducting an issuer tender offer to include in its tender offer materials a statement that the issuer makes no recommendation as to the tender.

Prohibited trading

Rule 14e-3 contains an antifraud prohibition on the activities of a person conducting a tender offer. If such person is in possession of material nonpublic information that he or she knows or has reason to know is nonpublic and knows or has reason to know was acquired from the offering person, the issuer or any of its directors, officers or employees, it is unlawful for that person to purchase or sell or cause to be purchased or sold any of the securities that are the subject of the tender offer. The prohibition applies even if the trading does not occur in breach of a duty or trust or confidence. In the case of an issuer tender, an issuer must be careful not to conduct a tender at a time when it possesses material nonpublic information. Material nonpublic information for this purpose may include unreleased earnings, a potential change in an issuer's credit ratings or an unannounced merger. The issuer should, to avoid any issues, disclose any such material nonpublic information prior to commencing a tender offer.

Prohibited transactions in connection with partial tender offers

Partial tender offers typically involve the risk to security holders that not all of the securities that the security holder tenders will be accepted in the tender offer (commonly referred to as proration risk). Rule 14e-4 prohibits security holders from engaging in the practice of short tendering, which occurs when the security holder tenders more shares than they own in order to avoid or mitigate the proration risk, or hedged tendering, which occurs when a security holder tenders securities but then sells a portion of its shares before the proration deadline to a person that could then tender those shares. Under Rule 14e-4, a tendering person must have a net long position in the subject security at the time of tendering and at the end of the proration period.

Prohibited purchases outside of a tender offer

Rule 14e-5 provides that, subject to certain exceptions, no covered person may directly or indirectly purchase or arrange to purchase any subject securities or any related securities except as part of the tender offer. The prohibition in Rule 14e-5 applies from the time of public announcement of the tender offer until the tender offer expires, but does not apply

to any purchases or arrangements to purchase made during the time of any subsequent offering period as provided for in Rule 14d-11, as long as the consideration paid or to be paid for the purchases or arrangements to purchase is the same in form and amount as the consideration offered in the tender offer.

For purposes of Rule 14e-5, a covered person is defined broadly to include: (i) the offeror and its affiliates; (ii) the offeror's dealer-manager and its affiliates; (iii) any advisor to any of the persons specified in (i) and (ii) above, whose compensation depends on the completion of the offer; and (iv) any person acting, directly or indirectly, in concert with any of these persons in connection with any purchase or arrangement to purchase any subject securities or any related securities. Subject securities are defined for the purposes of Rule 14e-5 to include the securities or class of securities that are sought to be acquired in the transaction or that are otherwise the subject of the transaction.

The period during which purchases outside of the tender offer are prohibited runs from the potentially earlier date of public announcement as compared to commencement of the tender offer. Public announcement is defined for the purposes of Rule 14e-5 as 'any oral or written communication by the offeror or any person authorised to act on the offeror's behalf that is reasonably designed to, or has the effect of, informing the public or security holders in general about the tender offer.' Given the potentially broad reach of this definition, offerors must be very careful about what is stated in advance of any potential cash tender offer or exchange offer, particular when it is contemplated that purchases of subject securities or any related securities may occur in advance of commencement of the offer.

Exceptions to the Rule 14e-5 prohibition on purchases outside of the tender offer include:

- the exercise, conversion or exchange of related securities into subject securities, as long as the related securities were held prior to public announcement of the tender offer;
- purchases or arrangements to purchase by or for a plan that are made by an agent independent of the issuer;
- purchases during odd-lot offers;
- purchases by or through a dealer-manager or its affiliates that are made in the ordinary course of business and made either on an agency basis not for a covered person; or as principal for its own account if the dealer-manager or its affiliate is not a market maker, and the purchase is made

to offset a contemporaneous sale after having received an unsolicited order to buy from a customer who is not a covered person;

- purchases or arrangements to purchase a basket of securities containing a subject security or a related security under specified conditions;
- purchases or arrangements to purchase to cover a short sale or the exercise of an option by a non-covered person, if: (i) the short sale or option transaction was made in the ordinary course of business and not to facilitate the offer; (ii) the short sale was entered into before public announcement of the tender offer; and (iii) the covered person wrote the option before public announcement of the tender offer;
- purchases or arrangements to purchase pursuant to a contract, if an unconditional and binding contract was entered into before public announcement of the tender offer, and the existence of the contract and all material terms including quantity, price and parties are disclosed in the offering materials;
- purchases or arrangements to purchase by an affiliate of a dealer-manager under specified conditions;
- purchases by connected exempt market makers or connected exempt principal traders under certain conditions; and
- purchases made during cross-border tender offers under specified circumstances.

What is not required by Regulation 14E?

Under Regulation 14E, an issuer is not required to file any tender offer documents with the SEC, and Regulation 14E does not prescribe any form requirements with respect to offering materials. Any offer to purchase, and other tender offer documentation, is subject, however, to the general anti-fraud provisions of the Exchange Act, notably section 10(b), Rule 10b-5 and section 14(e), and, therefore, may not contain any material misstatement or omission. Some courts have found that section 14(e) does not impose a scienter requirement (like Rule 10b-5), because, among other things, section 14(e) prohibits 'any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer' in addition to a Rule 10b-5 scienter-based approach that forms part of the first clause in section 14(e). For

example, the Ninth Circuit recently held that section 14(e) requires only a showing of negligence, without a showing of scienter, to bring a case in connection with alleged misstatements or omissions in connection with a tender offer.⁶

Regulation 14E does not specifically require that an offeror provide withdrawal rights to offerees.⁷ Similarly, the proration, best price, all holders and other provisions set forth in section 14(d) and Rule 13e-4 of the Exchange Act are only applicable to tender offers conducted pursuant to Regulation 14D and Rule 13e-4, and do not apply to tender offers subject only to Regulation 14E.

SEC staff relief for investment grade debt securities

The requirements of Regulation 14E may still be limiting for an issuer conducting a tender offer for straight debt securities. Specifically, if an issuer must keep the offer open for 20 business days or extend the offer period for 10 business days if there are any changes in the consideration or percentage sought, it can adversely affect the tender because the issuer is subject to market risk during this time. Most debt tender offers occur when interest rates are low; the issuer is trying to lower its cost of funds by retiring high interest rate debt securities with the proceeds from new securities issued at a lower rate, or a lower-interest rate credit facility. If interest rates decline during the offer period, an issuer will not retire as much debt and if rates increase, the retired debt will come at a higher price. Longer offer periods translate into increased uncertainty.

Because the SEC staff historically believed that issuer debt tender offers for cash for any and all nonconvertible, investment grade debt securities may present considerations that differ from any and all or partial issuer tenders for a class or series of equity securities or non-investment grade debt, it consistently granted relief to issuers of investment grade debt in the context of tenders for their debt securities.

Structuring a debt tender offer in light of no-action letter guidance

It may not be possible for an issuer to ensure that the SEC will not regard an open-market repurchase programme as a tender offer. In that case, the issuer/buyer and any dealer-

manager will need to comply with the requirements of Rules 14e-1, 14e-2 and 14e-3 of the Exchange Act – each of which is applicable to all tender offers (Rule 13e-4 applies only to tender offers for equity securities).⁸ As mentioned above, the most problematic requirement associated with these rules has traditionally been that the offer remain open for 20 business days, and that following any change in consideration or in the amount of securities sought, the offer must remain open for ten business days.

The SEC staff has consistently granted relief from the requirement that nonconvertible debt tender offers be held open for 20 business days, provided certain conditions are met.⁹ The SEC staff has also provided additional relief from other provisions of paragraphs (a) and (b) of Rule 14e-1, as issuers and their dealer-managers have proposed new methodologies for tender offers. In many of the no-action letters (particularly the earlier ones establishing the general relief) the staff has stated an often unelaborated belief. This is that issuer debt tender offers for cash, for any and all nonconvertible debt securities of a particular class or series, may present considerations different from any-and-all issuer tender offers for a class or series of equity securities or non-investment grade debt.¹⁰

With the assistance of counsel, an issuer should be able to structure a tender offer to fit within existing no-action guidance and avoid the need to file for its own no-action relief. Structuring within the existing guidance will spare the issuer from the 20 and 10 business day requirements. As we discuss below, based upon recently issued no-action letter guidance, in any and all tenders that meet certain requirements, the time period may be shortened to five business days.

The following discussion addresses the different methodologies for debt tender offers in light of SEC no-action letter guidance prior to the 2015 guidance on abbreviated tender and exchange offers discussed in Chapter 5.¹¹

Nonconvertible debt tender for cash: background and basic conditions

In its no-action relief, the staff had consistently required the following four basic conditions. These were established in a series of nearly identical 1986 no-action letters to investment

banks, following amendments to sections 14(d) and 14(e) of the Exchange Act requiring that all tender offers remain open for 20 business days:

- Offers to purchase are made for any and all nonconvertible debt of a particular class or series.
- The offers are open to all record and beneficial holders of that class or series of debt.
- The offers are conducted in a manner designed to provide all record and beneficial holders of that class or series of debt with a reasonable opportunity to participate in the tender offer. This includes dissemination of the offer on an expedited basis in situations where the tender offer is open for a period of less than 10 calendar days.
- The offers are not made in anticipation of or in response to other tender offers for the issuer's securities.¹²

In many of the no-action letters, the proposed debt tender offers are open for ten calendar days (or seven calendar days if the expedited procedure indicated above is used), and any extension following a change in number of securities sought or consideration offered can be less than ten business days. However, not all of these no-action letters requested relief from the 20 business day requirement.

The no-action letters that established these basic conditions did not indicate whether the debt was investment grade. However, in a 1990 no-action letter response, the staff advised Salomon Brothers that its 1986 response letters were limited to investment grade debt securities only.¹³

Investment grade debt: fixed spread pricing

As discussed earlier, the principal concern when conducting a debt tender offer is that prevailing market interest rates will change, so that holders will not tender or any tender will become more expensive. In addition to shortening the time period for the tender offer in order to limit exposure to interest rate fluctuations, another protective measure is to price the tender using fixed spread pricing.

Fixed spread pricing permits an issuer/offeree to choose a specific yield spread between the debt being tendered for and a benchmark US Treasury security (benchmark treasury security), which matures at or near the earliest redemption date for such debt security. The purchase price is calculated

as the present value of the security subject to the tender offer, discounted at an interest rate equal to the applicable spread.¹⁴ While the actual price to be paid in the tender offer is not fixed at the commitment of the tender offer, the formula for determining the price is. The greater the spread, the higher the discount rate, resulting in a lower present value and purchase price.

The no-action letter guidance has focused on the timing of the fixed spread calculation and has required additional conditions for these kinds of tenders. All of these no-action letters involve investment grade securities.¹⁵

1. Date of, or date immediately preceding date of, tender – Salomon Brothers (October 1 1990)

Salomon Brothers suggested the issuer would offer to purchase its debt securities from tendering holders at a price determined on each day during the tender period. This would be by reference to a fixed spread over the then-current yield on a specified benchmark US Treasury security, determined as of the date, or date preceding the date, of tender. The staff, in granting no-action relief, required the following additional conditions:

- Information regarding such benchmark treasury security will be reported each day in a daily newspaper of national circulation.
- All tendering holders of that class or series of debt are paid promptly for their tendered securities after such securities are accepted for payment (in this no-action letter, daily settlement was contemplated).

2. Real-time fixed spread offer – Merrill Lynch, Pierce, Fenner & Smith Incorporated (July 19 1993)

Merrill Lynch refined the fixed spread pricing initially created by Salomon Brothers. It proposed to use a fixed spread pricing methodology in connection with issuer tender offers. However, the nominal purchase price in the offer would be calculated by reference to a stated fixed spread over the most current yield on a benchmark treasury security, determined at the time that the holder of the debt security tenders the security. This is rather than by reference to the yield on a benchmark treasury security as of the date, or date preceding the date, of tender. Merrill Lynch called this a real-time fixed spread offer.

The staff said it would not recommend enforcement action in respect of a real-time fixed spread offer, subject to the

following additional conditions:

- The offer identifies the specific benchmark treasury security and specifies the fixed spread to be added to the yield on the benchmark treasury security.
- States the nominal purchase price that would have been payable under the offer be based on the applicable reference yield immediately preceding commencement of the offer.
- Indicates the daily newspaper of national circulation that will provide the closing yield of the benchmark treasury security on each day of the offer.
- Indicates the reference source to be used during the offer, establishing current yield information on the benchmark treasury security.
- Describes the methodology to be used to calculate the purchase price paid for the tendered securities.
- Indicates that the current yield on the benchmark treasury security and the resulting nominal purchase price of the debt securities will be accessible on a real-time basis – either by calling the dealer-manager collect or through an 800 telephone number established for each offer.¹⁶
- Provides that all tendering holders of that class or series of debt will be paid promptly for their tendered securities after such securities are accepted for payment, within the standard settlement time frame for broker-dealer trades (then five and now two business days from the date of tender).

In addition to these conditions, the dealer-manager must make and maintain records showing at least the following information in connection with any real-time fixed spread offer:

- the date and time of the tender;
- the current yield on the benchmark treasury security at the time of the tender;
- the purchase price of the tendered securities based on that yield; and
- no later than the next business day, send a confirmation to the tendering debt holder providing the specifics of the tender offer transaction, including, upon request, the time of the tender.

3. *Continuously priced fixed spread tender offer / single simultaneous settlement – Goldman Sachs (December 3 1993)*

Goldman Sachs created its own version of Merrill Lynch's real-time fixed spread offer and named it a continuously

priced fixed spread tender offer. It was described as being similar to the real-time fixed spread offer described above, but with a provision for simultaneous settlement. Although the target securities would be irrevocably accepted for payment on a continuous basis throughout the tender offer period, the issuer would pay for validly tendered securities on a single simultaneous settlement date promptly after the termination of the tender offer, if the holder were to make such election.

The benefit to the holder of making the election is that the target securities would continue to accrue interest to the settlement date. The staff indicated it would not recommend enforcement action in respect of a continuously priced fixed spread tender offer, subject to the same conditions required in the Merrill Lynch 1993 letter. However, the staff also required the following slightly different conditions with respect to the dealer-manager's obligations:

- Records must be maintained showing at least the following information:
 - the date and time of the tender;
 - the current yield on the benchmark treasury security at the time of the tender;
 - the purchase price of the tendered securities based on that yield; and
 - the date the simultaneous settlement procedure is made available, whether or not the holder tendering securities elected to receive payment on a single settlement date rather than within the standard time frame.
- No later than the next business day, send a confirmation to the tendering debt holder providing the specifics of the tender offer transaction, including the date and (upon request), the time of the tender, price to be paid for the tendered securities, and the settlement date.

4. *Indirect obligor – Embassy Suites (April 15 1992)*

Embassy Suites requested confirmation that the staff would not recommend any enforcement action be taken under Rule 14e-1(b) in regard to a cash tender offer for certain nonconvertible investment grade debt securities. Embassy Suites was not the direct obligor on the debt securities. The existing structure for the debt securities involved a direct pay letter of credit from a bank,¹⁷ and following a series of spin-off and merger transactions Embassy Suites became one of the obligors party to a reimbursement agreement – although Holiday Inn, a former affiliate, was still the nominal obligor.

The proposed transaction involved an offer to purchase any and all of the series of notes, which Embassy Suites would then submit to the trustee for cancellation. The tender offer would be a fixed spread issuer tender offer for nonconvertible investment grade debt. The request letter stated that ‘from an economic standpoint, Embassy and [its parent] have assumed the primary repayment liability on the Notes through assumption of the Reimbursement Agreement and the indemnification obligations.’

Embassy Suites described the requirements of the Salomon Brothers no-action letter, dated October 1 1990, and indicated that it would comply with those requirements. The staff indicated it would not recommend enforcement action pursuant to Rule 14e-1(b), and emphasised the following factors in addition to the ones already described in earlier no-action letters:

- The offer will be held open for at least 20 business days from the date the offer is first published or sent or given to note holders.
- Since the pre-offer agreements between the issuer and the bidder eliminate any risk that the bidder could use the notes acquired in the offer to influence the issuer, there are no control implications to the offer.
- The bidder has the same economic interests in the pricing and completion of the offer and retirement of the notes as an issuer of debt securities would have in an issuer debt tender offer.

5. Market Conditions and fluctuations – *Citizens Republic Bancorp (August 21 2009) and Lloyds Banking Group (May 28 2010)*

Issuers also have adjusted pricing mechanisms to more fully reflect market conditions and fluctuations. They have also asked the staff for no-action letter relief for such pricing mechanisms under Rule 14e-1(b). In *Citizens Republic Bancorp*, the staff provided no-action letter relief for an exchange offer of nonconvertible subordinated notes and trust preferred securities for common shares. This was where the pricing mechanism included an averaging period, which was the five trading days ending on the second day before the expiration date of the offer.¹⁸

As part of the exchange, the issuer would issue common shares having a value (based on their average volume-weighted average price (VWAP)) equal to a fixed dollar amount specified in the related prospectus at the time of the

offer’s launch. Average VWAP was defined as the arithmetic average of the daily VWAP, over an averaging period of five trading days ending on the day of expiration. In addition, the related prospectus included a link to a webpage that would show:

- Indicative average VWAP and resulting indicative exchange ratios calculated as if that day were the last of the exchange offer. This was done by 4:30pm (New York time) on each trading day before the first day of the averaging period.
- Indicative average VWAP and resulting indicative exchange ratios using actual cumulative trading date during the VWAP averaging period, updated every three hours starting at 10:30am (New York time) on each trading day.
- The last closing price for the common shares each time the webpage was updated.

The issuer argued the pricing mechanism should be permitted under Rule 14e-1(b) by citing free and ready access to updated indicative exchange ratios, which would enable informed decisions about whether or not to tender. The issuer also pointed out that the pricing mechanism would result in a fixed, constant dollar value exchange, provide greater certainty about the ultimate return to investors, and allow investors to better predict the value they would receive in the exchange offer compared to a fixed exchange ratio.

In *Lloyds Banking Group*, the staff provided no-action letter relief under Rule 14e-1(b) for an exchange offer of nonconvertible notes for ordinary shares, where the pricing formula included as a data input the US dollar/UK pound exchange rate.¹⁹ More specifically, the exchange ratio was specified as a stated dollar amount divided by the dollar VWAP, which was defined as the product of the average daily VWAP in British pounds sterling (UK pound), for the securities tendered. These were reported by Bloomberg for each LSE-trading day in the 10-LSE trading period, prior to the expiration date. It was also defined as the product of the US dollar/UK pound spot exchange rate as reported by Bloomberg at or about 4:00pm (London time) on the expiration date.

Additionally, the pricing formula operated, and the final pricing was disclosed, on the expiration date of the offer. The maximum amount of securities that would be accepted in the offer, and the possible application of proration to securities tendered, depended on the results of the pricing

formula's operation on the expiration date of the offer.²⁰ The issuer said the pricing formula was important to holders because the tendered securities were US dollar-denominated, and the offer enabled holders to receive an amount of consideration with a value that reflected the most recent exchange rate for the US dollar.

Corporate restructurings, multiple series of debt securities

The staff has also provided no-action letter guidance for debt tender offers in the context of corporate mergers, acquisitions and divestitures – particularly when the issuer is tendering for more than one series of debt, or there are other factors involved. These include consent solicitations and exchange offers (rather than solely cash tender offers). Because of the potential complexity of these transactions, the staff imposes additional conditions.

1. Multiple Transactions – Playtex FP (November 22 1988)

In connection with certain acquisitions, divestitures and mergers pertaining to the Playtex group of companies, four Playtex entities sought an exemption from Rule 10b-6 (superseded by Regulation M). This was with respect to concurrent cash tender offers for three series of existing debt securities, an exemption under Rule 10b-6 with respect to a public offer of a new series of notes, which would include change of control provisions and confirmation that the staff would not recommend enforcement action under Rule 14e-1(b).²¹

The staff said it would not recommend enforcement action under Rule 14e-1(b) if Playtex complied with the following tender offer features that Playtex described:

- Notice of the offering and tender offer will be given to all holders of the pertinent class of existing debt securities. The tender offer will be made to all holders of such class.
- The tender offers will remain open for at least 20 business days.
- Existing debt securities tendered pursuant to a tender offer may be withdrawn at any time until the expiration of such offer.
- If, for any reason, the price to be offered to holders in a tender offer is increased after such offer is made, the increased price will be paid to all holders tendering pursuant to the tender offer.

2. Consent Solicitation – The Times Mirror Company (November 15 1994)

The Times Mirror Company had entered into a merger agreement to dispose of its cable television business to Cox Cable. As part of the merger, The Times Mirror Company was to turn New Times Mirror into a spin-off. In connection with this spin-off, The Times Mirror Company proposed to conduct a cash tender offer for a series of notes, a separate exchange offer for a different series of notes and a related exit consent solicitation.

The cash tender offer would be priced as a stated fixed spread over the yield on a specified benchmark treasury security, as of 2:00pm New York time on the business day immediately preceding the expiration date of the offer. As a condition to accepting the tender offer, tendering noteholders would be required to give their consent to certain indenture amendments. In the exchange offer, notes of an old series would be exchanged for new notes issued by the New Times Mirror. Exchanging noteholders would be required to give the same consent to certain indenture amendments as in the cash tender offer. Notes not repurchased or exchanged would remain outstanding obligations of The Times Mirror Company.

The exit consent solicitation was intended to avoid the situation where both Cox Cable and New Times Mirror would become co-obligors with respect to the notes that remained outstanding after completion of the cash tender offer and exchange offer. The Times Mirror Company indicated that previous no-action letters had not specifically allowed for tender offer structures, where a debtholder's right to tender is conditioned on such holder giving an exit consent.

The staff indicated it would not recommend enforcement action under Rule 14e-1(b) if Times Mirror conducted a cash tender offer for the notes at a price determined as described above. This was subject to the conditions applicable for a fixed price spread offering (as described above), plus an additional requirement that withdrawal of the tendered notes shall be deemed a withdrawal of the exit consent solicitation.

Debt-like securities

The staff has also provided no-action guidance for securities not denominated as debt, but with debt-like characteristics – such as certain kinds of preference shares.

1. Preference Shares – *BBVA Privanza et al* (December 23 2005)

BBVA and Banco Bilbao proposed to make a cash tender offer for all of the outstanding non-cumulative guaranteed preference shares, series D of BBVA Privanza International (Gibraltar), including preference shares represented by American Depositary Shares. It was a condition to the tender that all such shares be validly tendered and not withdrawn. The intention was to price the tender offer based on a stated fixed spread over the yield on a specified benchmark treasury security. This was to be from 2:00pm New York time, on the second business day immediately preceding the expiration date of the offer (the 18th business day of the offer period). BBVA and Banco Bilbao said the tender offer would be made consistent with the principles established in prior no-action letters, as relating to formula pricing in issuer tender offers for equity securities. Additionally, the offer would be substantially similar to the tender offers covered by no-action letters relating to the use of fixed spread pricing methodologies for nonconvertible, investment grade debt tender offers.

The staff stated that it would not recommend enforcement action under Rule 14e-1(b) against BBVA or Banco Bilbao if the tender offer used the pricing mechanism described, and if the tender offer was otherwise conducted in the manner represented. In granting the requested relief, the staff noted, in addition to the typical conditions for fixed spread transactions, that:

- The subject securities are represented as being valued by investors on the basis of their yield. This is considering the issuer's credit spread, compared to a benchmark yield. The yield of the subject securities fluctuates in response to changes in prevailing interest rates.
- The final offer price will be set at least two trading days prior to the scheduled expiration of the offer.
- The offering party will issue a press release to publicly announce the final offer price prior to the close of business on the pricing date.

2. Trust preferred securities

The staff has also provided informal oral advice that trust preferred securities are sufficiently debt-like. This means that tender offers for trust preferred securities would be subject to the requirements applicable to debt tender offers or exchange offers, and not the more restrictive requirements applicable to equity tender offers under Rule 13e-4. The staff's position is predicated on, among other things, the applicable instruments being qualified under the Trust Indenture Act.²²

Non-investment grade debt

Until the issuance of the abbreviated tender and exchange offer no-action letter in January 2015, the SEC had not issued written no-action relief for tender offers for non-investment grade debt securities. The SEC staff's informal advice had been premised on the notion that fixed spread tender offers for non-investment grade debt securities had different characteristics than those for investment grade securities and less flexible pricing terms. The pricing must be fixed on a pricing date, which should be no later than the second business day preceding the offer's expiration.²³ This results in all holders receiving the same purchase price. While not providing real time pricing, as with investment grade tenders, this pricing mechanism does mitigate the interest rate risks faced by both the issuer/purchaser and the holder. In addition to this pricing mechanism the staff requires the following conditions, which the issuer/purchaser must agree in writing to undertake:

- The securities:
 - trade on the basis of a spread over the US treasury market;
 - are liquid based on trading volume and the number of market makers; and
 - are widely followed (evidence for which includes a rating by at least one nationally recognised statistical rating organisation).
- The offer to purchase, and each press release regarding the tender, will provide a toll-free number to allow holders to ask questions about the offer.
- The offer must be open for at least 20 business days.
- A press release announcing the purchase price will be issued no later than the business day immediately following the pricing date.

The SEC has also required additional conditions if a consent solicitation is part of the non-investment grade debt tender offer, including the following:

- Withdrawals of tenders and consents are allowed until the consents from holders of the required amount of securities are obtained.
- If consent to removal of indenture covenants is sought, the issuer or purchaser must prove that the changes to the covenants should not have a material effect on the trading value of the securities not tendered in the offering.
- If a consent fee is paid and the consent period ends prior to expiration of the tender itself, the tender offer will remain open for five business days following the end of the consent solicitation period.
- If the consent solicitation period expires on the tenth business day of the tender, but the tender price is not fixed until later (day 18), the offering materials state when the consent payment will be made.
- A press release announcing that the requisite number of consents has been received must be issued no later than the opening of business on the day immediately following the date the threshold is reached.
- If an exit consent is required in order to tender, the offer must specify that the withdrawal of the tendered securities will be deemed a withdrawal of the consent.
- If the consent fee is payable only until a specified date (the consent expiration date) or the date that a majority of consents is obtained, the majority must be obtained by the consent date. If not, withdrawal rights for tendered securities and consents must be extended until at least 6.00pm on the business day following the issuer's public announcement (in a press release) that the issuer has received consents from holders representing a majority in principal amount of the outstanding securities tendered for.
- That the revised covenant terms (typically set forth in a supplemental indenture), will not become effective until the tender offer is consummated.
- If the consent solicitation is amended resulting in material adverse change to the rights of security holders, the solicitation period will be extended for ten business days to allow holders to revoke their consents.

ENDNOTES

- 1 475 F. Supp. 783, 823–24 (S.D.N.Y. 1979), *aff'd* on other grounds, 682 F.2d 355 (2d. Cir. 1982), cert. denied, 460 U.S. 1069 (1983). *See SEC v Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 950 (9th Cir. 1985).
- 2 *See Rand v Anaconda-Ericsson, Inc.*, 794 F.2d 843, 848–49 (2d Cir. 1986), cert. denied, 479 U.S. 987 (1986) (citing *Hanson Trust PLC v SCM Corp.*, 774 F.2d 47 (2d Cir. 1985)).
- 3 Regulation 14E applies to tender offers for any securities other than exempt securities as defined by section 3(a)(12) of the Exchange Act. As a result, the rules that comprise Regulation 14E apply to tender offers for debt securities, equity securities, and the securities of companies that do not have a class of securities registered under section 12 of the Exchange Act or are otherwise required to file reports under the Exchange Act.
- 4 Rule 14d-1(g) states that when ‘computing any time period under section 14(d)(5) or section 14(d)(6) of the Act or under Regulation 14D or Regulation 14E, the date of the event which begins the running of such time period shall be included.’ Therefore, the date on which the tender offer is first published or sent to holders of the subject securities is counted as the first day of the 20-business day period.
- 5 *See* SEC Release No. 34-42055 (October 22 1999).
- 6 *See Varjabedian v Emulex Corp.*, No. 16-55088, 2018 U.S. App. LEXIS 10000 (9th Cir. April 20 2018).
- 7 In tender offers for straight debt securities, it is standard practice to provide holders with withdrawal rights. These withdrawal rights typically expire after an initial period, often after the first 10 business days. An issuer also should consider whether it should reinstate limited withdrawal rights following the occurrence of any material change in the terms of the tender offer or the waiver of a material condition.
- 8 *See* Appendix A for the texts of Rules 14e-1, 14e-2 and 14e-3.
- 9 Tender offers for debt securities that are convertible into equity securities, such as common stock, are treated as equity tender offers.
- 10 *See* example, SEC No-Action Letter, Merrill Lynch, Pierce, Fenner & Smith Inc (July 2 1986) (‘For example, because of the modest premiums typically offered in an Issuer Debt Tender Offer, it is not clear that participation in the tender offer by individual non-institutional debtholders would be materially increased by requiring that tender offer be held open for twenty business days.’)
- 11 The following discussion highlights the most significant no-action letters concerning structuring debt tender offers, and is not exhaustive of all the no-action guidance.
- 12 SEC No-Action Letters, Salomon Brothers, Inc. (March 12 1986); Goldman Sachs & Co. (March 26 1986); First Boston Corporation (April 17 1986); Kidder, Peabody, & Co, Inc. (May 5 1986); and Merrill Lynch, Pierce, Fenner & Smith, Inc. (July 2 1986).
- 13 *See* SEC No-Action Letter, Salomon Brothers Inc (October 1 1990).
- 14 *See id.* The total purchase price for a debt security would be the sum of (1) the present value as of the payment date of (a) the interest payments on the debt from the payment date until maturity or the earliest call date and (b) any principal payments to and redemption premium at the earliest call date or maturity, plus (2) any accrued and unpaid interest to the purchase date.
- 15 It is interesting to note that in the first of the fixed price spread requests, SEC No-Action Letter, Salomon Brothers, Inc. (October 1 1990), Salomon did not refer to investment grade but the staff’s response was specifically limited to investment grade debt securities.
- 16 Now this methodology should also include access to a website with such information.
- 17 In a direct pay letter of credit transaction, the letter of credit bank makes the payments on the securities and then seeks reimbursement from the ultimate obligor. This credit-enhancing structure results in the debt security taking on the credit rating of the bank and not of the ultimate obligor.
- 18 SEC No-Action Letter, Citizens Republic Bancorp, Inc (August 21 2009).
- 19 SEC No-Action Letter, Lloyds Banking Group plc (May 28 2010).
- 20 The staff has previously permitted a formula pricing method in which the pricing formula operated, and the final pricing was disclosed, on the expiration date of the relevant offer. *See, eg* SEC No-Action Letter,

- Lazard Frères & Co (August 11 1995), SEC No-Action Letter, AB Volvo (May 16 1997), SEC No-Action Letter, Epicor Software Corporation (May 13 2004), SEC No-Action Letter, TXU Corp (September 13 2004), SEC No-Action Letter McDonald's Corporation (September 27 2006), SEC No-Action Letter, Weyerhaeuser Company (February 23 2007), SEC No-Action Letter, Halliburton Company (March 23 2007), SEC No-Action Letter, Kraft Foods, Inc. (July 1 2008), SEC No-Action Letter, Citizens Republic Bancorp, Inc., *supra* note 21, SEC No-Action Letter, Thermo Fisher Scientific (November 13 2009), and SEC No-Action Letter, Towers Watson Co (May 17 2010).
- 21 Prior to the repeal of Rule 10b-6 and the adoption of Regulation M, it was necessary to obtain an exemption under Rule 10b-6 if an issuer engaged in a distribution of new debt securities at or about the same time as it made a tender offer for outstanding debt securities of the same class and series. See Johnson and McLaughlin, *Corporate Finance and the Securities Laws*, section 13.02 (2009). The restrictions of Rules 101 and 102 announced under Regulation M apply only to securities that are identical in all of their terms to the securities being distributed. The staff granted no-action relief in Playtex with respect to Rule 10b-6.
- 22 The staff has previously indicated that '[the Trust Indenture] Act generally would apply...to preferred securities issued by a trust that represent an interest in debt issued by a single obligor.' See SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Trust Indenture Act of 1939 (Question 101.04) (March 30 2007), available at www.sec.gov/divisions/corpfm/guidance/tiainterp.htm
- 23 The staff has allowed some alternatives to this second business day pricing models, but its goal appears to be to ensure that holders of non-investment grade debt have information early in the process regarding the final expected price, rather than a price to be calculated based on yield. This reflects the staff's concern that the market for non-investment grade (or high yield) debt securities is less liquid and may be more susceptible to manipulation.

CHAPTER 5

Abbreviated tender offer and exchange offer guidance

As noted above, historically, the SEC staff drew a clear distinction between tender and exchange offers for investment grade debt securities and those for non-investment grade debt securities. In structuring tender and exchange offers, market participants relied on the no-action letter guidance discussed in the prior chapter, as well as on informal guidance sought from the SEC staff.

In January 2015, the SEC staff issued a no-action letter (see Appendix E) that addresses certain tender and exchange offers to the extent that these meet specified conditions and, for the first time, provides relief comparable to that available for investment grade securities to offers for non-investment grade nonconvertible securities. It is important to keep in mind that this guidance, which may provide additional flexibility, especially for addressing outstanding non-investment grade securities, is not available in each and every case. Many tender and exchange offers will continue to be made in reliance on the pre-existing no-action letter guidance.

Summary of abbreviated tender and exchange offer guidance

On January 23 2015, the SEC responded to a request submitted by a consortium representing a group of issuers,

investment banks, investors and their counsel. It issued a no-action letter indicating that it would not recommend SEC enforcement action in connection with a tender offer or exchange offer for nonconvertible debt securities that is held open for as few as five business days, to the extent that the offer is conducted in accordance with certain specified conditions outlined in the letter.

This no-action letter (which, to the extent the conditions in the letter are satisfied, supersedes the prior no-action letters) eliminates the distinction between investment-grade and other debt securities. It also permits debt tender offers (including tender offers conducted in the context of certain exchange offers) to be held open for as few as five business days if the specified conditions are satisfied.

The significant conditions include:

- The offer must be made available to all holders of the debt securities and for all of the outstanding securities (in other words, the offer must be structured as an any and all offer, but, as the staff subsequently clarified in Compliance & Disclosure Interpretations, may include a minimum tender condition).
- The offer must be made by the issuer of the debt securities or a parent or a wholly owned subsidiary of the issuer. Consequently, third parties tendering for debt securities

of an issuer will not be permitted to avail themselves of the shortened tender period.

- The offer must be open to all record and beneficial holders of the targeted debt securities. It is still possible to restrict an exchange offer to QIBs or non-US persons provided that all other holders of the targeted debt securities have the option to receive cash in an amount equal to the approximate value of the exchange offer consideration.
- The offer must be made solely for cash or other qualified debt securities, which term is defined as securities that are materially identical to the securities that are the subject of the tender offer.
- The consideration offered in the tender offer must be fixed or based on a benchmark spread, which may include US Treasury rates, Libor or swap rates.
- The offer cannot be combined with an exit consent to amend or eliminate covenants or with any other consent solicitation to amend the provisions of the indenture or the debt securities.
- Holders must be entitled to withdrawal rights until the earlier of the expiration date and, if the offer is extended, the tenth business day following the launch. They also must be allowed to withdraw tenders after the 60th business day following the launch if the offer has not been consummated by such time.
- The offer must permit tenders prior to the expiration time through guaranteed delivery procedures by means of a certification by or on behalf of a holder that the holder is tendering securities beneficially owned by it and that the delivery of such securities will be made no later than the close of business on the second business day after expiration.

As outlined above, the consideration must consist solely of cash or nonconvertible debt securities that are (i) identical in all material respects to the targeted debt securities (including as to obligors, collateral, lien priority, covenants and other terms) except for payment-related dates, redemption provisions and interest rate; (ii) have interest terms payable only in cash; and (iii) a weighted average life to maturity that is longer than that of the targeted debt securities.

The no-action letter is not available for partial tenders or for tenders or exchanges with exit consents. In addition, the relief is not available:

- if there exists a default or event of default under the

- relevant indenture, or under any other indenture or material credit agreement to which the issuer is a party;
- at a time when the issuer is the subject of bankruptcy or insolvency proceedings, or otherwise has commenced activity geared toward accomplishing an out-of-court restructuring or pre-packaged bankruptcy or the issuer's board of directors has authorised discussions with creditors in connection with a consensual restructuring of its outstanding indebtedness;
- in anticipation of or in response to, or concurrently with, a change of control or other extraordinary transaction involving the issuer, such as a merger, business combination, or sale of all or substantially all of the issuer's assets;
- in anticipation of or in response to a competing tender offer;
- concurrently with a tender offer for any other series of the issuer's securities made by the issuer or certain affiliates of the issuer if the effect of such offer would result in a change to the capital structure of the issuer (eg addition of obligors or collateral, increased priority of liens or shortened weighted average life to maturity of such other series); or
- in connection with a material acquisition or disposition that would require the furnishing of pro forma financial information with respect to the transaction pursuant to article 11 of Regulation S-X (whether or not the issuer is an SEC-reporting company).

An issuer cannot finance a tender or exchange offer with the proceeds of any senior indebtedness. Senior indebtedness is incurred to finance all or a portion of the consideration in the offer, including indebtedness or borrowings under any credit or debt facility existing prior to the commencement of the offer, if such indebtedness (i) has obligors, guarantors, or collateral (or more senior priority with respect to collateral) that the subject debt securities do not have; (ii) has a weighted average life to maturity less than that of the subject debt securities; or (iii) is otherwise senior in right of payment to the subject debt securities.

As discussed below, as a result of these various limitations, there are a number of instances where issuers will be relegated to continuing to rely on the prior no-action letters.

Widespread dissemination

The offer must be announced no later than 10:00am Eastern time, on the first business day of the five-business day period, through a widely disseminated press release. The press release must include all of the basic terms of the offer and contain a hyperlink to the offer to purchase and letter of transmittal as well as any other relevant documents or instructions. If the issuer is an SEC-reporting company, the press release announcing the offer also must be furnished pursuant to a Current Report on Form 8-K (or, as the staff clarified in Compliance & Disclosure Interpretations, a Form 6-K in the case of a foreign private issuer) filed with the SEC prior to 12:00pm Eastern time, on the commencement date for that day to count as the first day of the offer. The issuer must use commercially reasonable efforts to send the press release by email or other electronic communication to investors that subscribe to corporate action email lists or other similar subscription lists.

Changes in the offered consideration or other material terms of the offer may result in the requirement to extend the offer period, such that at least five business days remain from and including the announcement of any change in the offered consideration, and at least three business days remain from and including the announcement of any other material change in the offer. In a manner similar to the announcement of these expedited offers, issuers must notify investors of these material changes by a widely disseminated press release, and SEC-reporting issuers must describe changes to the offered consideration almost immediately in a Current Report on Form 8-K. The results of the offer also must be announced through a press release.

Qualified debt securities

Pursuant to the no-action letter guidance, an issuer may structure a transaction as an exchange offer, permitting five business day tender offers that include offers of qualified debt securities to eligible exchange offer participants.

As discussed above, qualified debt securities are nonconvertible securities identical in all material respects, including issuer, guarantor, collateral, payment priority, security, and covenants, to the debt securities that are the subject of the offer, except for the maturity date, interest payment dates, record dates, redemption provisions, and interest rate. Qualified debt securities must have all interest

payable only in case and have a weighted average maturity that is no longer than the debt securities that are the subject of the offer.

Consistent with prior no-action letter guidance, the offer consideration may be a fixed amount or may be an amount that is based on a fixed spread to a benchmark. In the case of qualified debt securities, the rate on the securities may be based on a spread to a benchmark. The spread must be announced at the commencement of the offer, but the terms of the qualified debt securities do not have to be fixed at the commencement of the offer. The issuer may specify the rate or the spread that will be used to determine the interest rate for the qualified debt securities at the commencement of the offer as a range of not more than 50 basis points with the final interest rate or spread to be announced by no later than 9:00am Eastern time, on the business day prior to the expiration of the offer. The exact consideration and interest rate on any qualified debt securities must be fixed by no later than 2:00pm Eastern time, on the last day of the offer and a minimum acceptance amount must be announced at the commencement of any offer where the consideration includes qualified debt securities.

Offers to eligible exchange offer participants

Eligible exchange offer participants are QIBs and/or non-US persons as defined under Regulation S. If there are holders of the debt securities that are the subject of the offer who are not eligible exchange offer participants, the exchange offer must be made in conjunction with a concurrent cash offer to those non-eligible exchange offer participants. The cash offer must, in the reasonable judgment of the offeror, be approximately the same as the value of the qualified debt securities offered to the eligible exchange offer participants. The staff clarified in Compliance & Disclosure Interpretations that the issuer may calculate the cash consideration due to the non-eligible exchange offer participants by reference to a fixed spread to a benchmark to the extent that the calculation used is the same as that used to determine the amount of qualified debt securities.

Exempt offers

The no-action letter requires that exchange offers be structured as exempt offers, including an exempt offer made pursuant to section 3(a)(9); however, as noted above, the information about the exchange offer, including the relevant offer documents, must be made available through the internet by means of hyperlinks. Some practitioners have raised concerns that the availability of the offer materials on an unrestricted website may be deemed to constitute a general solicitation.

Limitations of the abbreviated tender and exchange offer guidance

While the no-action letter guidance is very helpful, particularly for non-investment grade securities, it contains a number of prescriptive requirements. Many issuers may not want to comply with the many administrative requirements. For example, the guidance imposes a fixed period for the offer, requires compliance with the notification procedures, requires that holders be offered withdrawal rights, and must include the ability for holders to guarantee delivery.

The relief is not available in connection with an offer that includes a consent solicitation. For many issuers, this will limit its utility. Similarly, the fact that the new guidance is not available for offers made in connection with or in close proximity to a restructuring transaction may be limiting. Finally, the relief is not available for partial tender offers or for waterfall tender offers.

CHAPTER 6

Section 3(a)(9) exchange offers

In an exchange offer, the issuer offers to exchange new debt or equity securities for its outstanding debt or equity securities. An exchange offer often is used as an alternative to a cash tender offer if an issuer does not have available cash or does not want to use its available cash resources to repurchase outstanding debt or equity securities. For distressed companies, an exchange offer may be the best non-bankruptcy restructuring option. An exchange offer enables an issuer to, among other things:

- reduce interest payments or cash interest expense (by exchanging debt securities with a high interest rate for debt securities with a lower interest rate);
- reduce the principal amount of outstanding debt (in the case of a debt-for-equity swap);
- manage the maturity dates of outstanding debt (by exchanging debt securities that are coming due for debt securities with an extended maturity);
- modify the terms of securities (for example, interest payment dates, conversion ratios or redemption provisions); or
- reduce or eliminate onerous covenants (if coupled with an exit consent).

An issuer may need to comply with the tender offer rules in connection with an exchange offer, depending on the facts and

circumstances. Because an exchange offer also involves the offer of new securities, it must comply with, or satisfy an exemption from, the registration requirements of the Securities Act.¹ An issuer may rely on the private placement exemption provided under section 4(a)(2) of the Securities Act (referred to as a private exchange offer) or the exemption provided by section 3(a)(9) of the Securities Act. In addition, an exemption pursuant to Regulation S for offers and sales to non-US persons may be available on a standalone basis or combined with other applicable exemptions from registration. An issuer also must be mindful of Regulation M's prohibitions on bidding for, or purchasing, its securities when it is engaged in an exchange offer.²

A section 3(a)(9) exchange offer presents a number of advantages compared to other types of exchange offers and restructuring options, including the following:

- It can be completed quickly, as there is no registration required and, therefore, no SEC staff review (however, if the exchange offer is subject to the tender offer filing requirements, then it is likely that the Schedule TO would be reviewed).³
- It is flexible (an issuer can retire an entire series or class of debt securities).
- It does not require cash on hand (there are only minimal costs).

- There is no section 11 liability with regard to an offer to exchange, as there is no registration statement required.
- It can be paired with a consent solicitation.
- It often can be accomplished largely tax-free for debtholders.

However, a section 3(a)(9) exchange offer also has a number of disadvantages compared to other exchange offers and restructuring options, including the following:

- The new securities issued in the exchange offer may be restricted securities, depending on the status of the securities surrendered for exchange.
- There is a limited ability to engage and compensate an investment bank or other third parties in connection with the exchange offer.
- There may be holdout issues.
- The exchange offer may be integrated with other offers made by the issuer in close proximity to the exchange offer.
- If the exchange offer is subject to the tender offer rules, the offer must be made to all existing security holders.
- If the exchange offer is subject to the tender offer rules, all investors of the same class must be paid the same price.

Requirements under section 3(a)(9)

Section 3(a)(9) of the Securities Act applies to ‘any securities exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange.’⁴ The exemption from registration provided by section 3(a)(9) is a transactional exemption only.⁵ This means that the new securities issued are subject to the same restrictions on transferability, if any, of the old securities surrendered in the exchange, and any subsequent transfer of the newly issued securities will require registration or another exemption from registration. For example, if the old securities were issued without registration in a section 4(a)(2) private placement and then were exchanged by a holder for new securities in a section 3(a)(9) exchange offer, the holder could only sell or transfer the new securities without registration pursuant to Rule 144, pursuant to section 4(a)(1), or, with respect to securities held by affiliates, in a section 4(a)(1-1/2) private transaction.⁶

The four main requirements of section 3(a)(9) are as follows:

- *Same issuer.* The issuer of the old securities being surrendered is the same as the issuer trying to exchange into the new securities.
- *No additional consideration from the security holder.* The security holder must not be asked to part with anything of value besides the outstanding securities.
- *Offer only to existing security holders.* The exchange must be offered exclusively to the issuer’s existing security holders.
- *No remuneration for the solicitation.* The issuer must not pay any commission or remuneration for the solicitation of the exchange.

In addition, as a general matter and similar to other exempt offerings, any exchange offer under section 3(a)(9) must be made in good faith and not as part of a plan to avoid the registration requirements of the Securities Act.

Same issuer

Section 3(a)(9) exempts any securities exchanged by the issuer with its security holders. This means that the new securities being issued and the securities that are being surrendered must originate from a single issuer. Although this concept seems relatively straight forward, there are a number of scenarios that can complicate the identity of issuer analysis. In fact, over the years the SEC staff has granted no-action relief in response to facts and circumstances that do not fit neatly within the single issuer requirement. For example, in *Echo Bay Resources*, the SEC granted no-action relief under section 3(a)(9) for an exchange of guaranteed debt securities of a finance subsidiary for the securities of the parent-issuer guarantor.⁷ The incoming letter in *Echo Bay Resources* emphasised the economic reality of the transaction. This included the relationship between the parent issuer and the subsidiary; the SEC noted that the subsidiary was established by the parent-issuer to issue securities and finance the activities of the parent-issuer and the subsidiary had minimal assets and liabilities that were tied to the issuance of securities.⁸

It should be noted that the SEC staff takes the view that there is no identity of issuer between a subsidiary and its parent where the subsidiary had outstanding a class of debentures guaranteed by its parent and the subsidiary proposed to offer a new debenture that would not be guaranteed by its parent in exchange for the guaranteed

debenture.⁹ However, the SEC staff has provided no-action relief in the case where there is an exchange of a new parent security for an outstanding parent security that has one or more upstream guarantees from the parent's wholly-owned subsidiaries.¹⁰

In *Suntrust Banks*, the SEC staff provided no-action relief in connection with the same issuer requirement under section 3(a)(9), in a situation where the trust preferred trust securities of an existing trust and the substantially similar trust preferred securities of a newly formed trust were deemed to constitute securities of their parent, given that the trusts had limited purposes and the obligations of the trusts were guaranteed under backup arrangements between the parent and the trusts.¹¹

In *Grupo TMM*, an issuer transferred its common stock to a trust in order to facilitate the exchange of old securities for new ones.¹² The issue in the no-action request was whether the issuance by the trust, which was ostensibly a different issuer, would preclude the issuer from relying on the section 3(a)(9) exemption. The SEC staff, without agreeing with counsel's analysis (and noting policy considerations), provided no-action relief from Securities Act registration requirements. The incoming letter noted that the trust was a special purpose entity established for the sole purpose of allowing investors to obtain the economic right in a security and the trust did not engage in any activities unrelated to this purpose and has no independent financial or economic activity. More significantly, the SEC staff's approach, along with the approach taken in *Echo Bay Resources*, *Suntrust Banks* and similar no-action letters, indicates that the SEC will focus on the underlying economic reality of the exchange for the purposes of the identity of issuer analysis.¹³

Consistent with these precedents, issuers have relied on section 3(a)(9) to exchange common or preferred stock for trust preferred securities. On June 30 2005, Foster Wheeler announced an offer to exchange, in reliance on section 3(a)(9), its common shares for all outstanding shares of its nine percent trust preferred securities.¹⁴ On June 3 2009, KeyCorp announced an offer to exchange, in reliance on section 3(a)(9), its common shares for any and all trust preferred securities of KeyCorp Capital I, KeyCorp Capital II, KeyCorp Capital III and KeyCorp Capital IV.¹⁵

Another frequent concern with the identity of an issuer arises when, through a merger, acquisition or other transaction, an issuer has unconditionally assumed the

obligations of the securities of another issuer. The SEC staff is of the view that the section 3(a)(9) exemption is available for the exchange of the securities of one issuer for the debt securities of another issuer when the obligations on those debt securities have been fully and unconditionally assumed by the issuer of the new security.¹⁶ However, the SEC staff has indicated that a US parent may not rely on section 3(a)(9) to exempt the conversion of shares of a Canadian subsidiary into US parent shares, even though holders of the Canadian subsidiary shares indirectly share the same dividend, liquidation and voting rights held by common stockholders of the US parent.¹⁷

In summary, the SEC staff has recognised that a lack of complete identity of the issuer in certain contexts would not preclude reliance on the Section 3(a)(9) exemption to the extent that the securities involved offer a similar investment – that is the investor looked to the creditworthiness and overall financial condition of the parent, as guarantor or otherwise, or where two entities comprise a single indivisible business. For example, the SEC staff has issued no-action letter guidance in proposed exchanges where: an issuer is relying on a depositary (technically, the issuer) that performs a ministerial role in facilitating an exchange of unit American depositary shares;¹⁸ in the case of parent guarantees which are exchangeable for new parent securities where although two or more issuers are involved, the investor can be assumed to have regarded the exchange of the outstanding parent securities for a new parent security as the substance of the exchange; in reorganisations, where an issuer reorganises to create a holding company and the new parent guarantees the outstanding securities of the issuer, which are thereafter exchangeable for a parent security; and in the case of paired securities, such as securities of a parent and a subsidiary which were deemed to represent the same economic risk in the parent company as did the parent company for which they were to be exchanged.¹⁹

No additional consideration from the security holder

Under section 3(a)(9), the consideration that security holders exchange must consist only of the old securities. However, there are two limited exceptions to this requirement. First, under Rule 150 under the Securities Act, an issuer can make payments to its security holders 'in connection with an

exchange of securities for outstanding securities, when such payments are part of the terms of the offer of the exchange.’ The SEC staff has provided no-action relief where these payments included cash or a cash equivalent²⁰ and even when paid by an affiliate of the issuer.²¹ Second, under Rule 149 under the Securities Act, a security holder can make any cash payments that may be necessary ‘to effect an equitable adjustment, in respect of dividends or interest paid or payable on the securities involved in the exchange, as between such security holder and other security holders of the same class accepting the offer of exchange’. For example, an equitable adjustment may be necessary when, due to the timing of interest payments and sales between security holders, one security holder receives the benefit of an interest payment due to another security holder. In this case, the issuer can require the unjustly enriched security holder to reimburse the issuer for the extra interest payment. In addition, an issuer can also require the security holders to waive the right to receive an interest payment or other consideration accruing from a security.²²

Offer only to existing security holders

An exchange offer conducted in reliance on section 3(a)(9) may be made only to existing security holders. Although this requirement also appears straightforward, it may not be satisfied if an issuer is conducting an offering of new securities for cash at the same time as the exchange offer. In this case, the issuer must take care to keep the two offerings separate and avoid their integration, which would require the registration of the combined offerings or the application of another exemption from registration. The determination regarding integration is fact specific, and the issuer may apply the SEC’s five-factor integration test by analogy.

Further, if any part of the issue in the same transaction as the exchange is sold for cash, or intended to be sold for cash, or provided to creditors (as opposed to security holders), even if those portions of the transaction are exempt pursuant to another exemption or are registered, then section 3(a)(9) would not be available.²³

There is no requirement, however, that a section 3(a)(9) offering be made to all members of a given class of security holders (assuming that tender offer rules do not apply to the transaction). As a result, an issuer may choose to rely on

section 3(a)(9) to exchange with securities with one or a limited group of investors.

No remuneration for solicitation

Section 3(a)(9) expressly prohibits an issuer from paying a person or entity a commission or other remuneration either directly or indirectly for soliciting the exchange. When determining what activity and/or commission or other remuneration is permissible under section 3(a)(9), an issuer or a third party involved in the exchange should consider the following factors:

- the relationship between the issuer and the person or entity furnishing the services;
- the nature of the services performed; and
- the method of compensation for the services.

Issuer’s activities

As a general rule, an issuer may solicit holders of target securities without jeopardising the use of the section 3(a)(9) exemption. An issuer soliciting holders of target securities should adhere to the following guidelines:

- The personnel chosen to contact the security holders, which may include the issuer’s directors, officers, and key employees (the so-called corporate solicitors), should have significant responsibilities with the issuer other than the solicitation of the exchange and should not be hired for the purpose of soliciting the exchange.
- No special bonus, commission, fee, or any other type of remuneration should be paid to the corporate solicitors for their solicitation activities, which means they should be paid no more than their regular salary.
- The corporate solicitors should attend to their regular duties, with their solicitation efforts only being additional assignments.²⁴

Third party activities

An issuer also may engage third parties, such as financial advisers, investment banks, and investor relations firms, to assist in the exchange offer, subject to certain limitations. Whether an issuer should engage a third party assist with an exchange offer and the services that the third party will provide depends on the issuer’s particular situation and the

type of transaction contemplated. Generally, the more complex and significant a restructuring (for example, a restructuring for a distressed company), the more helpful it may be for an issuer to engage a financial intermediary, such as an investment bank. The type of transaction will dictate an investment bank's role (including any limitations on its activities), which ranges from merely an advisory role to responsibilities as an agent or principal.

However, an issuer merely interested in taking advantage of declining secondary market prices for debt securities also may benefit from engaging an investment bank to locate, contact, and negotiate with security holders to retire (or exchange) their securities on favorable terms. In either case, an investment bank, which typically has a liability management, restructuring or workout team specialising in debt restructurings, will help create a restructuring plan, structure the transaction, solicit participation, and manage the marketing efforts to achieve a successful restructuring. Some important factors to consider in determining whether to engage a third party include the number of security holders and their organisation and sophistication and whether the issuer has information about, or any contact with, its security holders.

Impermissible activities – Services may be provided by persons or entities other than the issuer in a section 3(a)(9) exchange, subject to the following limitations:

- Such person cannot make any recommendation regarding the exchange to any security holder, or to any adviser or other representative of any such security holder.²⁵
- When communicating with security holders, such person can provide only that information which is included in the various communications sent by the issuer to the security holders.
- Such person should limit its activities to performing functionary services or administrative assistance in the distribution of exchange materials and providing information about the mechanics of the exchange.

If any security holder or any adviser or other representative to any security holder asks for a third party's opinion on an investment-related attribute of the exchange, the third party should direct the holder of the target securities to contact the appropriate officer or employee of the issuer. The third party may respond to questions from security holders regarding substantive elements of the exchange that are addressed in the exchange materials by directing the security

holder to the pertinent portion of the exchange materials; however, the third party must not convey management's views or recommendations on the exchange, even if those views or recommendations or both are contained in the exchange materials.

Permissible activities – Permissible activities can be grouped into two broad categories: (1) advice to the issuer with respect to the terms and mechanics of the exchange; and (2) services that are administrative, ministerial, or mechanical in nature in furtherance of the exchange.²⁶ Any services not deemed administrative, ministerial, or mechanical must be ancillary to the effective mechanical operation of the process of formulating a restructuring proposal.²⁷

For example, in *Seaman Furniture*, the SEC granted no-action relief in connection with a proposed exchange offer for which the issuer hired Merrill Lynch to act as its financial adviser.²⁸ The issuer characterised the services and activities provided by its financial adviser as follows:

'Since their engagement by the Company in July 1989, the investment bankers from Merrill Lynch Capital Markets who have acted as the Company's financial advisors have performed the following services for the Company: (1) performed financial analyses; (2) assisted the Company in formulating a restructuring proposal; (3) advised the Company with respect to the terms of the new securities to be issued in connection with the restructuring and the new capital structure of the Company; (4) participated in meetings between representatives of the Company, on the one hand, and the banks, on the other hand; (5) participated in meetings between representatives of the Company, on the one hand, and the legal and financial advisors to the Committee, on the other hand; and (6) conversed by telephone with representatives of the banks and the legal and financial advisors to the Committee. Merrill Lynch Capital Markets will not: (1) be named as a dealer-manager of the Exchange Offer; (2) deliver a fairness opinion with respect to the Exchange Offer; or (3) communicate directly with any holder of Existing Sub Debt with respect to substantive matters relating to the restructuring or the Exchange Offer. The Company understands that during the aforementioned telephone conversations and meetings its financial advisors have: (1) outlined the current status of negotiations between the Company and the other creditors of the Company; (2) discussed the Company's financial statements and projections; (3) presented the Company's current proposals with respect to the terms of the Exchange Offer and the restructuring to the banks and the legal and financial advisors

to the Committee; and (4) received and discussed the counterproposals of the banks and the legal and financial advisors to the Committee and relayed such counterproposals to the Company. We understand that the Company's financial advisors have not: (1) expressed to the banks or the legal or financial advisors to the Committee their views as to (a) the fairness of the proposed restructuring or the Exchange Offer or (b) the value of the securities to be issued in connection with the Exchange Offer or (2) made any recommendation to the banks or the legal and financial advisors to the Committee with respect to the restructuring or the Exchange Offer.²⁹

The argument made by the issuer that such services and activities were permitted under section 3(a)(9) was that there was no direct contact between the issuer's financial advisers and any debt holder with respect to substantive matters relating to the exchange offer.³⁰ In addition, the issuer stated that the activities of the issuer's financial advisers constituted activities effecting rather than promoting an exchange because (1) the exchange offer had not been made, (2) the issuer's financial advisers had not and would not make any recommendation to the debt holders or their advisers with respect to the proposed exchange offer, and (3) it is customary for an issuer involved in a complex financial transaction to engage an investment banker to act as an intermediary among the parties to a negotiation, especially when the other parties are professional legal and financial advisers.³¹ A financial adviser may advise the issuer with respect to virtually all aspects of developing and executing the exchange. The SEC has taken a no-action position with respect to each of the following advisory services:³²

- performance of financial analysis for the issuer;
- formulation or assistance in the formulation of a restructuring proposal for the issuer's approval;
- advice on the issuer's capital structure following the restructuring;
- advice on the timing and organisation of the restructuring proposal;
- advice on the proposed terms and mechanical procedures for the exchange;
- advice on the proposed terms of the new securities;
- assistance in the preparation of the various exchange materials to be sent by the issuer to the security holders;
- advice to employees of the issuer on the procedures to be used in conversations with security holders concerning the exchange;

- engaging in pre-launch discussions or negotiations with legal and financial representatives of debt holder committees;
- providing a fairness opinion regarding the exchange;³³ and
- consulting with institutional investors as to what they would consider to be an acceptable exchange offer.

A third party can engage in administrative, ministerial, or mechanical services designed to convey the information in the exchange materials to security holders.³⁴ These activities can be divided into two groups: (1) those in which the third party merely serves as a functionary in disseminating information; and (2) those in which the third party communicates directly with security holders or their advisers or other representatives. However, the latter group of services should be conducted with great care.

The SEC staff has acknowledged in no-action letters that third parties may provide each of the following functionary services in disseminating information to security holders:³⁵

- obtain a list of the issuer's security holders from the issuer, and confirm the accuracy of the addresses of the security holders;
- mail or otherwise assist in the distribution of exchange materials;
- maintain records on the exchange;
- be named as a financial intermediary in the exchange materials;
- contact nominees holding target securities and ascertain the number of the exchange materials needed by each brokerage house for transmittal to beneficial holders;
- deliver sufficient quantities of the exchange materials to brokerage houses, trust officers, other banks, and other nominees for distribution to beneficial holders of the target securities; and
- mail duplicate copies of exchange materials to security holders who appear to have lost or mislaid those originally sent to them.

The issuer may rely on a third party, such as an investor relations firm or other sales force or an information agent, to inform security holders of the exchange offer.³⁶ A third party can contact security holders directly for the following administrative, mechanical, or ministerial purposes, subject in all instances to the requirement that no solicitation take place as a result of any such contacts:

- to determine whether the security holders received the exchange materials;

- to determine whether the security holders understand the procedures for participating in the exchange (for example, expiration dates and to whom to forward documents);
- to answer questions or resolve any confusion about the procedures for participating in the exchange;
- to contact back-office personnel of nominees who hold securities for the benefit of others to make sure that they promptly forward exchange materials to the nominees;
- to urge back-office personnel to check with the beneficial holders of the target securities about whether such holders have received the exchange materials, understand procedurally how to participate in the exchange, and are generally aware of the relevant dates and deadlines;
- to determine whether the security holders intend to participate in the exchange and to communicate their responses to the issuer;
- to remind the security holders of all appropriate deadlines; and
- to respond to the questions of security holders that do not concern the mechanical aspects of the exchange by directing the security holders to the relevant portions of the exchange materials.

Fees paid to third parties

Section 3(a)(9) does not specify the types of fees that third parties can receive in an exchange. However, the SEC staff has indicated through various no-action letters that a financial adviser may only receive a fixed fee for its services, not contingent upon the success of the exchange, plus reasonable expenses related to the exchange. A fixed fee arrangement eliminates one factor that might otherwise support the inference that the financial adviser had an incentive to engage in a solicitation of security holders. Therefore, whenever paid third parties are contacting security holders within permissible guidelines, it is advisable that their fees be a fixed amount not tied to the success of the exchange offer. Nevertheless, determining whether a paid solicitation has occurred is a fact-specific analysis that will turn on the facts present in a particular transaction. Note that this determination is not necessarily based upon the method of payment of fees to the third party. In addition, if the issuer relies on an investor relations firm, sales force, information agent or others to inform security holders of the exchange, then the issuer can

only pay a fee on a flat, per-contact basis to that financial intermediary.³⁷

Redemption standby agreement

A redemption standby agreement between an issuer and an investment bank can be combined with an exchange of securities under section 3(a)(9). An issuer engages an investment bank as a standby purchaser when it plans to force the conversion of convertible debentures (or other similar instruments) by calling the debentures for redemption. But under such circumstances, the issuer would like to protect itself from having to make substantial cash outlays in the event that the issuer's stock price declines in the period between the redemption notice and the redemption date and the holders elect for redemption.

A standby agreement between an issuer and an investment bank is similar to an underwriting agreement for a primary distribution of securities. The investment bank agrees, for a fee, to purchase at a price slightly above the redemption price all of the debt securities that are offered to it before the redemption date, and then to convert those debt securities into common stock. The issuer can rely on section 3(a)(9) to exempt the exchange of its common stock for the debt securities acquired by the investment bank.³⁸

Open market purchases

An investment bank also can itself effect open market purchases of an issuer's securities as a principal and then later exchange those securities with the issuer for new securities in reliance on section 3(a)(9). However, all of the conditions under section 3(a)(9) must be satisfied, which means that the investment bank cannot receive any commission or remuneration in connection with the open market purchases.

Other considerations

Involvement of affiliates

In some circumstances, affiliates of an issuer may seek to exchange the issuer's debt or equity securities. This may occur on the corporate level, such as when a parent exchanges securities of its subsidiaries or when subsidiaries exchange

securities of their parent or other subsidiaries, or when officers, directors or significant shareholders seek to exchange the issuer's securities. In these instances, the affiliates would generally be considered insiders of the issuer and subject to the same disclosure obligations as the issuer. In many circumstances, the involvement of an affiliate may preclude reliance on the section 3(a)(9) exemption for an exchange offer.

Qualification under the Trust Indenture Act

Exchange offers of debt securities that are exempt from registration under section 3(a)(9) are not exempt from qualification under the Trust Indenture Act.³⁹ Unless an indenture for a debt security is qualified under section 305 of the Trust Indenture Act, which covers registered offerings, or is exempt from qualification under section 304 (which does not include an exemption for section 3(a)(9) exchange offers), the sale of a debt security pursuant to a section 3(a)(9) exchange would generally violate section 306 of the Trust Indenture Act unless an application for qualification of the related indenture has been filed with the SEC.⁴⁰ Qualification under the Trust Indenture Act is accomplished by filing a Form T-3 with the SEC, which is subject to review by the SEC staff. The solicitation of the exchange offer may not commence until the Form T-3 is filed, and no sales may be made until the Form T-3 is declared effective by the SEC staff.

Securities exchange requirements

As we discuss elsewhere, the securities exchanges, including the New York Stock Exchange (NYSE), the Nasdaq Stock Market and the NYSE American, require shareholder approval for the issuance of equity securities by listed issuers in various situations.⁴¹ Each exchange also applies these shareholder approval provisions to offerings of securities that are convertible into, or in the case of the NYSE and Nasdaq, exchangeable for, common stock, such as convertible debt. For example, the requirement for shareholder approval for issuances of common stock in an amount more than 20% of the pre-transaction total shares outstanding of common stock, at a price below the greater of book or market value, has resulted in many section 3(a)(9) exchange offers

structured with a price floor for the common stock or a maximum amount of common stock issued just below the appropriate threshold. An issuer also must carefully review the securities exchange rules if the security to be exchanged is either actual equity or convertible or exchangeable debt, or if the exchange offer cannot be categorised as a public offering. In addition, the securities exchanges require shareholder approval when an issuance will result in a change of control of the issuer.⁴²

Liability considerations

Restructuring transactions, including exchange offers, involve the purchase and sale of securities. Therefore, these transactions are subject to the general antifraud provisions of section 10(b) of the Exchange Act and Rule 10b-5 under the Exchange Act. Section 10(b) provides an implied cause of action covering all transactions in securities and all persons who use any manipulative or deceptive devices in connection with the purchase or sale of any securities. Rule 10b-5 covers substantially the same ground as section 10(b) and prohibits, among other things, the making of any untrue statement of a material fact or the omission of a material fact necessary to make the statements made not misleading. Under Rule 10b-5, the issuer, its directors, officers and employees, and its agents, including third parties retained by the issuer, may be held liable. Exchange offers may also be subject to section 14(e) of the Exchange Act, which, in addition to specific procedural requirements, contains prohibitions regarding material misstatements and omissions similar to those in section 10(b) and Rule 10b-5.

ENDNOTES

- 1 For this reason, the documentation for an exchange offer (including the offer to exchange) must be more detailed than that for a cash tender offer; for example, the offering materials must describe the terms of the new securities.
- 2 If the securities being exchanged are debt securities convertible into equity securities, under certain circumstances, repurchases of the convertible debt securities could be deemed a forced conversion and, therefore, a distribution of the underlying equity securities for Regulation M purposes.
- 3 When debt securities are offered, an indenture may need to be qualified under the Trust Indenture Act and the Form T-3 filed for the purpose of qualifying the indenture may be subject to SEC staff review.
- 4 Section 3(a)(9).
- 5 The exemption does not apply with respect to a security exchanged under Chapter 11 of the US Bankruptcy Code. Other exemptions, such as section 1145 of the US Bankruptcy Code, may apply with respect to securities exchanged pursuant to a plan of reorganisation. If an issuer relies on section 3(a)(9) for a solicitation of security holders prior to a bankruptcy filing, and then, following the bankruptcy filing, completes the exchange pursuant to section 1145 of the US Bankruptcy Code, the issuer would need to file a Form T-3 before commencing the pre-bankruptcy filing solicitation. See SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Securities Act Sections (Question 125.11) (June 4 2010), available at www.sec.gov/divisions/corpfin/guidance/sasinterp.htm
- 6 See SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Securities Act Sections (Question 125.08) (November 26 2008), available at www.sec.gov/divisions/corpfin/guidance/sasinterp.htm
- 7 See SEC No-Action Letter, Echo Bay Resources Inc. (May 18 1998).
- 8 The incoming letter stated: 'In economic reality, it is the [parent issuer's] financial position and business prospects and the value of the [parent issuer's] securities to be issued...that will be of interest to investors in making their investment decisions.'
- 9 See SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Securities Act Sections (Question 125.05) (November 26 2008), available at www.sec.gov/divisions/corpfin/guidance/sasinterp.htm
In this circumstance, the SEC staff views the guarantee and the debenture as separate securities, therefore the exchange of the old parent guarantee for the subsidiary's new debenture would not involve an exchange between the same issuer, even though the exchange of the primary security is exempt from registration.
- 10 See SEC No-Action Letter, Section 3(a)(9) Upstream Guarantees (January 13 2010). As a result of this guidance, issuers of securities with upstream guarantees: (1) will not be required to maintain a shelf registration statement effective for the term of an outstanding convertible security to cover exercises; and (2) will have an attractive option for effecting exchange offers in addition to registration (which has timing implications) and relying on a private placement exemption (which limits the number of potential offerees).
- 11 See SEC No-Action Letter, Suntrust Banks, Inc. (July 16 1999).
- 12 See SEC No-Action Letter, Grupo TMM, S.A. de C.V. (June 27 2002).
- 13 There are a number of other no-action letters and additional SEC materials that provide guidance regarding the section 3(a)(9) requirements. See SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Securities Act Sections, available at www.sec.gov/divisions/corpfin/guidance/sasinterp.htm, SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Securities Act Rules, available at www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm, and SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Trust Indenture Act of 1939, available at www.sec.gov/divisions/corpfin/guidance/tiainterp.htm
- 14 See Press Release, 'Foster Wheeler Launches New Equity-for-Debt Exchange' (June 30 2005), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=80422&p=irol-newsArticle&ID=725266&highlight=>
- 15 See Press Release, 'KeyCorp Commences Separate Exchange Offers for \$503,530,000 of Its Series A

- Preferred Stock and for \$797,647,000 Trust Preferred Securities of Four Affiliated Trusts' (June 3 2009), available at <http://finance.yahoo.com/news/KeyCorp-Commences-Separate-prnews-15424331.html?.v=1>
- 16 See SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Securities Act Sections (Question 125.02) (November 26 2008).
- 17 See SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Securities Act Sections (Question 125.10) (August 14 2010). The offering structure in this instance was designed to take advantage of a Canadian tax exemption for the disposition of shares in a Canadian enterprise through a business combination where the consideration is paid in securities of another Canadian issuer.
- 18 See SEC No-Action Letter, Klabin S.A. (July 14 2014).
- 19 See SEC No-Action Letter, Bamboo.com (December 20 1999), SEC No-Action Letter, Ageas SA/NV and Ageas N.V. (March 20 2012), and SEC No-Action Letter, H&R Real Estate Investment Trust and H&R Finance Trust (May 29 2012).
- 20 See The News Corporation Limited, SEC No-Action Letter (May 15 1992) and International Controls Corp., SEC No-Action Letter (August 6 1990).
- 21 See Carolina Wholesale Florists, Inc., SEC No-Action Letter (August 17 1976).
- 22 See SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Securities Act Sections (Question 125.04) (November 26 2008), available at www.sec.gov/divisions/corpfin/guidance/sasinterp.htm
- 23 The five-factor integration test under Regulation D requires that an issuer consider: (1) whether the offerings are part of a single plan of financing; (2) whether the offerings involve issuances of the same class of securities; (3) whether the offerings are made at or about the same time; (4) whether the same type of consideration is received; and (5) whether the offerings are made for the same general purposes. See SEC Release No. 33-4552 (November 6 1962).
- 24 See Release No. 33-2029 (August 8 1939).
- 25 See SEC No-Action Letter, URS Corporation (May 8 1975).
- 26 See SEC No-Action Letter, Dean Witter & Co., Inc. (November 21 1974). See also SEC No-Action Letter, Stokley-Van Camp, Inc. (March 31 1983).
- 27 See SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Securities Act Sections (Question 125.03) (November 26 2008), available at www.sec.gov/divisions/corpfin/guidance/sasinterp.htm
- 28 See SEC No-Action Letter, Seaman Furniture Co., Inc. (October 10 1989). An issuer also needs to be particularly mindful of those third parties, such as investor relations firms, that communicate with security holders. Hiring a firm to communicate with security holders could be construed as payment for solicitation. The SEC, however, allows investor relations firms to participate in exchange offers in a limited capacity.
- 29 See *id.*
- 30 See *id.*
- 31 See *id.*
- 32 See, for example, SEC No-Action Letter, Seaman Furniture Co., Inc. (October 10 1989); SEC No-Action Letter, Mortgage Investors of Washington (September 8 1980); SEC No-Action Letter, Hamilton Brothers Petroleum Corp. (August 14 1978); SEC No-Action Letter, Valhi, Inc. (September 15 1976); and SEC No-Action Letter, Dean Witter & Co., Inc. (January 22 1975).
- 33 An issuer is permitted to hire an investment bank to render a fairness opinion on the terms of the exchange. However, if the investment bank also is acting as a dealer-manager and conducting solicitation activities, the SEC has held that obtaining a fairness opinion would violate section 3(a)(9). See SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Securities Act Sections (Question 125.07) (November 26 2008), available at www.sec.gov/divisions/corpfin/guidance/sasinterp.htm
- 34 See SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Securities Act Sections (Question 125.06) (April 24 2009), available at www.sec.gov/divisions/corpfin/guidance/sasinterp.htm
- 35 See, for example, SEC No-Action Letter, Mortgage Investors of Washington (September 8 1980); SEC No-Action Letter, Barnett Winston Investment Trust (October 11 1977); and SEC No-Action Letter, Dominion Mortgage & Realty Trust (April 3 1975).

- 36 Relying on an investment bank in this instance may be efficient as the firm that initially sold the securities may be in the best position to contact its former customers.
- 37 *See supra* note 29.
- 38 *See* SEC No-Action Letter, TransTechnology Corp. (February 23 1983); SEC No-Action Letter, Foster Wheeler Corp. (July 2 1973); SEC No-Action Letter, Kewanee Oil Co. (February 5 1973); and SEC No-Action Letter, Squibb Corp. (June 23 1971).
- 39 *See* SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Trust Indenture Act of 1939 (Question 101.05) (March 30 2007), available at www.sec.gov/divisions/corpfin/guidance/tiinterp.htm
See also SEC No-Action Letter, Mississippi Chemical Corp. (November 25 1988) and SEC No-Action Letter, Mississippi Chemical Corp. (June 23 1989).
- 40 Section 306 of the Trust Indenture Act does not apply to exchange offers that are exempt under section 3(a)(9) where the offering does not exceed \$5 million and section 304(a)(8) and Rule 4a-1 under the Trust Indenture Act otherwise are available. *See* SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Trust Indenture Act of 1939 (Interpretation 207.01) (March 30 2007), available at www.sec.gov/divisions/corpfin/guidance/tiinterp.htm
- 41 *See, for example*, Nasdaq Marketplace Rule 5635(a)-(f), and related publicly available interpretive guidance; NYSE Issuer Manual Sections 312.00 – 312.07; and NYSE American Company Guide Sections 710-713.
- 42 *See* Nasdaq Rule 5635(b); NYSE Rule 312.03(d); and NYSE American LLC Company Guide Section 713(b).

CHAPTER 7

Issuer tender offers for equity securities and Dutch auction guidance

A key consideration in formulating a liability management strategy is the extent to which the SEC's tender offer rules apply to the contemplated transaction, given that these rules can substantially affect the manner in which the transaction is conducted, the timing of the transaction, as well as the issuer's ability to conduct other transactions in its securities around the time of the tender offer. The tender offer rules can apply when a company is offering securities and/or cash for its outstanding securities, and the level of regulation of the offer (in terms of timing and mandated procedural protections) varies depending on the type of security that is the subject of the offer. In the case of exchange offers, the tender offer rules may apply in addition to the requirement that the issuer must either register the transaction (ie a registered exchange offer) or meet the conditions for an exemption from registration under the Securities Act (ie a private exchange offer or a section 3(a)(9) exchange offer).

Requirements applicable to issuer tender offers for equity securities

Pursuant to Rule 13e-4 under the Exchange Act, an issuer with equity securities registered under section 12 or that is

required to file periodic reports with the SEC pursuant to section 15(d) is required, in connection with any tender offer for its own equity securities, to file a tender offer statement (on Schedule TO) to make certain disclosures to offerees. Rule 13e-4 is intended to prevent fraudulent, deceptive or manipulative acts in connection with issuer tender offers.

In general, Rule 13e-4 imposes disclosure, filing, and procedural requirements on issuers and their affiliates in connection with issuer tender offers. For purposes of this rule, issuer tender offer is defined as a tender offer for, or a request or invitation for tenders of, any class of equity security made by the issuer of that class of security or by an affiliate of that issuer. As soon as practicable on the commencement date of the issuer tender offer, the issuer or affiliate making the offer must comply with the filing, disclosure and dissemination requirements specified in the rule.

Applicability of Rule 13e-4 to equity securities

The term 'equity securities' used in Rule 13e-4 is not defined in the rule. Section 3(a)(11) of the Exchange Act provides a general definition of the term equity security, which includes

‘any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of a similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.’ Under the statute, the SEC has discretion to evaluate the nature of a security and to consider public policy implications in determining the characterisation of the security. Based on this definition, the term equity securities for the purposes of the applicability of Rule 13e-4 includes debt securities convertible or exchangeable for equity securities.

In the past, the SEC staff has provided limited no-action letter relief in respect of offers that should be excluded from the application of Rules 13e-3 and 13e-4 based on whether the subject securities were deemed equity securities for purposes of these rules. In a no-action letter to American Financial Corporation,¹ the staff concluded it would not recommend enforcement action if, in reliance on an opinion of counsel, the issuer proceeded with an exchange offer relating to non-voting, non-participating, mandatorily redeemable preferred stock without compliance with either Rule 13e-3 or Rule 13e-4. Counsel to the issuer had concluded that in economic substance the preferred stock was equivalent to a debt security. The staff later affirmed this view in a subsequent no-action letter issued to American Financial Corporation.² In between these two letters, the staff issued no-action letter guidance to Republic New York Corporation.³ In Republic New York Corporation, the staff concluded that it could not assure the company that it would not recommend enforcement action if the issuer were to undertake purchases of shares of its cumulative preferred stock without compliance with Rule 13e-3.

On the other hand, the staff has provided informal, oral advice that trust preferred securities are sufficiently debt-like so that tender offers for trust preferred securities would be subject to the requirements applicable to debt tender offers or exchange offers, and not the more restrictive requirements applicable to equity tender offers or exchange offers under Rule 13e-4. The staff’s position is predicated on the applicable instruments being qualified under the Trust

Indenture Act.⁴ The staff also has focused on the nature of the legality opinions issued by counsel in connection with the original registration with the SEC of the offer of the trust preferred securities.

Further, in a no-action letter for BBVA Privanza International Limited and Banco Bilbao Vizcaya Argentaria,⁵ BBVA and Banco Bilbao proposed to make a cash tender offer for all of the outstanding non-cumulative guaranteed preference shares, series D of BBVA Privanza International (Gibraltar), including preference shares represented by American depositary shares. It was a condition to the tender that all such shares be validly tendered and not withdrawn. The intention was to price the tender offer based on a stated fixed spread over the yield on a specified benchmark US Treasury security as of 2.00pm New York time, on the second business day immediately preceding the expiration date of the tender offer (the 18th business day of the offer period).

BBVA and Banco Bilbao described that the tender offer would be made consistent with the principles established in prior no-action letters relating to formula pricing in issuer tender offers for *equity* securities, and that the offer would be substantially similar to the tender offers covered by no-action letters relating to the use of fixed spread pricing methodologies for nonconvertible, investment grade debt tender offers.

The staff stated that it would not recommend enforcement action under Rule 14e-1(b) against BBVA or Banco Bilbao if the tender offer uses the pricing mechanism described and if the tender offer was otherwise conducted in the manner represented. In granting the requested relief, the staff noted, in addition to the typical conditions for fixed spread transactions, that:

- The subject securities are represented as being valued by investors on the basis of their yield, taking into account the issuer’s credit spread, compared to a benchmark yield, and the yield of the subject securities fluctuates in response to changes in prevailing interest rates.
- The final offer price will be set at least two trading days prior to the scheduled expiration of the offer.
- The offerors will issue a press release to publicly announce the final offer price prior to the close of business on the pricing date.

Filing requirements

Unlike under Regulation 14E, Rule 13e-4 requires that an issuer⁶ engaged in an issuer tender offer must file with the SEC a tender offer statement on Schedule TO as soon as practicable on the commencement date of the offer.⁷ In addition, the issuer is required to file:

- any of its written communications relating to the issuer tender offer, from and including the first public announcement, as soon as practicable on the date of the communication;
- an amendment to the Schedule TO reporting promptly any material changes in the information disclosed in the previously filed Schedule TO and amendments thereto;⁸ and
- a final amendment to the Schedule TO reporting promptly the results of the issuer tender offer.

A significant amount of disclosure is required to be filed under cover of Schedule TO.⁹ Most of the specific line item requirements are satisfied by reference to a separate offer to purchase or offer to exchange document that is filed as an exhibit to the Schedule TO. The information required by Schedule TO includes:

- a summary term sheet;
- information about the issuer;
- the identity and background of the filing persons;
- the terms of the transaction;
- any past contacts, transactions and negotiations;
- the purposes of the transactions and plans or proposals;
- the source and amount of funds or other consideration for the tender offer;
- interests in the subject securities;
- persons/assets retained, employed, compensated or used in connection with the transaction;
- financial statements, if material;
- additional information;
- exhibits; and
- to the extent applicable, information required by Schedule 13E-3.

In addition to the Schedule TO filing, an issuer conducting an issuer tender offer must file any pre-commencement written communications under cover of Schedule TO, marking the box on the cover page to note the status of the materials as pre-commencement communications.¹⁰ Pursuant to instruction 3 to Rule 13e-4(c), each pre-commencement written communication must

include a prominent legend in clear, plain language advising shareholders to read the tender offer statement when it becomes available because it contains important information.

If pre-commencement communications are made in connection with an exchange offer that is registered under the Securities Act, then the issuer can file the communications solely under Rule 425 under the Securities Act, and such communications will be deemed filed for the purposes of Rule 13e-4.

Disclosure requirements

An issuer making an issuer tender offer under Rule 13e-4 must publish, send or give to shareholders:

- the summary term sheet required by Item 1 of Schedule TO; and
- the information required by the remaining Schedule TO items for issuer tender offers, except for Item 12 (exhibits), or a fair and adequate summary of the information.

To the extent that there are any material changes to the information previously disclosed to shareholders, paragraphs (d)(2) and (e)(3) of Rule 13e-4 require that the issuer disclose those changes promptly to shareholders in a manner reasonably calculated to inform them of the change.

If an issuer disseminates the issuer tender offer by means of summary publication as discussed below, any summary advertisement used by the issuer must not include a letter of transmittal that would permit shareholders to tender securities, and the advertisement must disclose at least the following information:

- the identity of the issuer (or affiliate);
- the material terms and purposes of the transaction, as specified in Items 1004(a)(1) and 1006(a) of Regulation M-A;
- instructions as to how shareholders can promptly obtain a copy of the disclosure statement required by Rule 13e-4(d)(1), at the issuer's expense; and
- a statement that the information contained in the disclosure statement discussed above is incorporated by reference.

Dissemination requirements

With respect to issuer tender offers in which the consideration offered consists solely of cash and or securities exempt from registration under section 3 of the Securities Act, an issuer must disseminate the required disclosure to security holder by one or more of these methods: long-form publication of the information, the use of security holder lists or through summary publication.

Rule 13e-4(e)(1)(i) provides that dissemination may occur by making adequate long-form publication of the tender offer in a newspaper or newspapers on the commencement date of the issuer tender offer. For this purpose, the instruction to paragraph (e)(1) specifies that adequate publication may require publication in a newspaper with a national circulation, a newspaper with a metropolitan or regional circulation, or a combination of the two, depending on the specific facts and circumstances.

Alternatively, Rule 13e-4(e)(1)(iii) permits publication of a summary advertisement in a newspaper or newspapers on the commencement date including the disclosures referenced above, and by mailing or otherwise furnishing promptly the Rule 13e-4(d)(1) disclosure statement and a transmittal letter to any security holder upon request.

Tender offer materials may also be disseminated by using security holder lists and security position listings. Under the procedures specified in 13e-4(e)(1)(ii), the materials may be distributed by:

- mailing or otherwise furnishing promptly the disclosure required by Rule 13e-4(d)(1) to each security holder whose name appears on the issuer's most recent security holder list;
- contacting each participant on the most recent security position listing of any clearing agency within the possession or access of the issuer, and inquiring of each participant as to the approximate number of beneficial owners of the subject securities held by the participant;
- furnishing to each participant a sufficient number of copies of the Rule 13e-4(d)(1) disclosure statement for transmittal to the beneficial owners; and
- agreeing to reimburse each participant promptly for its reasonable expenses incurred in forwarding the statement to beneficial owners.

In an exchange offer where the consideration consists solely or partly of securities that are registered under the Securities Act, then Rule 13e-4(e)(2) provides that the issuer must:

- file a registration statement containing all of the required information, including pricing information; and
- deliver to shareholders a preliminary prospectus or a prospectus that meets the requirement of section 10(a) of the Securities Act, along with a letter of transmittal.¹¹

Material changes

Rule 13e-4(e)(3) specifies that when a material change occurs in the information that the issuer has published, sent or given to security holders, then the issuer must promptly disseminate disclosure of the material change 'in a manner reasonably calculated to inform security holders of the change.'

In the case of a registered exchange offer, special timing provisions govern the dissemination of material changes when the issuer has disseminated a preliminary prospectus in accordance with Rule 13e-4(d)(2). Rule 13e-4(e)(3) specifies that the offer must remain open from the date on which the issuer disseminates material changes to the tender offer materials to shareholders, as follows:

- five business days for a prospectus supplement containing a material change other than price or share levels;
- 10 business days for a prospectus supplement containing a change in price, the amount of securities sought, the dealer's soliciting fee, or other similarly significant change;
- 10 business days for a prospectus supplement included as part of a post-effective amendment to the registration statement; and
- 20 business days for a revised prospectus when the initial prospectus was materially deficient.

Procedural requirements

Rule 13e-4(f) prescribes the manner in which issuers may conduct an issuer tender offer, including specific requirements with respect to the period during which the tender offer must remain open, the availability of withdrawal rights, pro rata acceptance, any increases in consideration, prompt payment for or return of securities tendered, purchases outside of the tender offer and the all holders and best price protections.

Offering period

Rule 13e-4(f)(1)(i) specifies that, unless withdrawn, an issuer tender offer must remain open until expiration of:

- at least 20 business days from commencement of the issuer tender offer; and
- at least 10 business days from the date that notice of an increase or decrease in one of the following is first published, set or given to security holders:
 - the percentage of the class of securities being sought;¹²
 - the consideration being offered (subject to no *de minimis* exception); or
 - the dealer's soliciting fee to be given.

Withdrawal rights

Rule 13e-4(f)(2) provides that the issuer making an issuer tender offer must permit shareholders to withdraw securities tendered pursuant to the issuer tender offer:

- at any time during the period when the issuer tender offer remains open; and
- if tendered securities have not yet been accepted for payment, after the expiration of 40 business days from the commencement of the tender offer.

Pro rata acceptance

Rule 13e-4(f)(3) requires that if the tender offer by the issuer or affiliate is for fewer than all of the outstanding equity securities of a class, and the number of securities tendered exceeds the number that the issuer is bound or willing to take up and pay for, the issuer or affiliate must accept and pay for the securities as nearly as may be pro rata, disregarding fractions, according to the number of securities tendered by each shareholder during the period that the offer remains open.

Rule 13e-4(f)(3) does not prohibit the issuer making an issuer tender offer from:

- accepting all securities tendered by shareholders who own no more than a specified number of shares less than 100 and who tender all of their securities, before pro rating securities tendered by others; or
- accepting by lot securities tendered by shareholders who tender all of their shares and who elect to have all or none (or at least a minimum amount and none) accepted, if the issuer or affiliate first accepts the securities tendered by persons who have not made such an election.

Increase in consideration

Rule 13e-4(f)(4) requires equal treatment of security holders in the event of an increase in the consideration offered. If the issuer increases the consideration offered after the tender offer has commenced, then the issuer must pay that increased consideration to all shareholders whose tendered securities are accepted for payment.

Prompt payment or return

Under Rule 13e-4(f)(5), an issuer must either pay the consideration offered, or return the tendered securities, promptly after the termination or withdrawal of the tender offer.

Purchases outside the tender offer

Rule 13e-4(f)(6) prohibits purchases outside of the tender offer. Until at least 10 business days after the termination of the tender offer, the issuer and its affiliates cannot purchase (other than pursuant to the tender offer) any subject security, any security of the same class and series, or any right to purchase such securities. With respect to exchange offers, this prohibition applies to the purchases of any security being offered in the exchange offer, any securities of the same class and series, and any right to purchase such a security.

All holders requirement

Rule 13e-4(f)(8)(i) provides that the tender offer must be open to all security holders¹³ of the class of securities subject to the tender offer.¹⁴

This all holders requirement would not prohibit an issuer or affiliate from excluding all security holders in a state where the tender offer is prohibited by administrative or judicial action under a state statute after a good faith effort to comply with the statute.

Best price requirement

Rule 13e-4(f)(8)(ii) requires that the consideration paid to any security holder for securities tendered in the tender offer is the highest consideration paid to any other security holder for securities tendered in the tender offer.

Rule 13e-4(f)(10) specifies that the best price requirement does not prohibit more than one type of consideration being offered in a tender offer, provided that: (i) security holders have an equal right to elect among each of the types of consideration offered; and (ii) the highest consideration of each type paid to any shareholder is paid to any other shareholder receiving that type of consideration.

Under Rule 13e-4(f)(11), if the offer and sale of securities constitute consideration offered in the tender offer, and the issuer or affiliate has made a good faith effort to register or qualify the offer and sale in a particular state, but is prohibited by the appropriate authority of that state, the issuer or affiliate may offer shareholders in that state an alternative form of consideration. The alternative form of consideration need not be offered or paid to shareholders in any other state.

Antifraud provisions

Rule 13e-4(j) specifies antifraud requirements applicable to issuer tender offers, prohibiting issuers and affiliates, in connection with an issuer tender offer, from:

- employing any device, scheme or artifice to defraud any person;
- making any false statement of material fact or omission of material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading; or
- engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit on any person.

Rule 13e-4(j) also states that, as a means reasonably designed to prevent fraudulent, deceptive, or manipulative practices in connection with an issuer tender offer, it is unlawful for an issuer or affiliate to make an issuer tender offer unless it complies with the requirements of Rule 13e-4(b), (c), (d), (e), (f) and (j). In addition, the other antifraud and anti-manipulation provisions of the Exchange Act would apply to an issuer tender offer, including section 10(b) and Rule 10b-5 thereunder, as well as section 14(e).

Exemptions

Certain transactions are exempt from the application of the rule under Rule 13e-4(h) from the issuer tender offer

provisions. Specifically, Rule 13e-4 does not apply to:

- calls or redemptions pursuant to the governing instrument;¹⁵
- offers to purchase evidenced by a scrip certificate, order form, or similar document that represents a fractional interest in a share of stock;
- offers to purchase shares of dissenting shareholders in accordance with a statutory procedure;
- tender offers subject to Exchange Act section 14(d);
- offers to purchase from owners of up to a specified number of shares less than 100, provided that the offer satisfies the all holder provisions of the rule with respect to shareholders who own a number of shares equal to or less than the specified number of shares (except that the issuer can exclude participants in certain plans for employees or security holders, and can exclude security holders who do not own their shares as of a specified date); and the equal consideration provisions of rule are satisfied or consideration paid is determined on the basis of a uniformly applied formula based on the subject security's market price;
- issuer tender offers made solely to effect a rescission offer, provided that: (1) the offer is registered under the Securities Act; and (2) the consideration equals the price paid by each security holder, plus legal interest if the issuer elects or is required to pay legal interest;
- offers by closed-end management investment companies to repurchase equity securities under Investment Company Act Rule 23c-3;
- issuer tender offers by a foreign private issuer under certain conditions relating to: (1) the maximum percentage of US holders of the subject class of securities; (2) the equal treatment of US holders and other holders; and (3) dissemination of informational documents; and
- transactions exempted by the SEC, on written request or on its own motion, either unconditionally or subject to conditions.

An offer may qualify for the Tier I exemption from the tender offer rules if it can be established that 10% or less of the securities are held by US resident holders, looking through to the beneficial owners. For purposes of this exemption, holders of notes held in bearer form may be presumed to be outside the US unless the issuer 'knows or has reason to know that these securities are held by US residents.' Pursuant to amendments to the tier I exemption, an offeror may calculate

ownership by US resident holders as of any date no more than 60 days before, and no more than 30 days after, the public announcement of the transaction, rather than as of the date that is 30 days prior to the publication of the offer document as was previously required. In situations where the offeror is unable to conduct the necessary analysis of beneficial holders within the applicable 90-day period, the SEC now permits the use of a date not more than 120 days before the public announcement. Pursuant to the amendments, individual holders of more than 10% of the subject securities are no longer excluded for the purposes of calculating the level of US ownership.

SEC staff review

When a Schedule TO is filed, the SEC staff may review and comment on the disclosure in the Schedule TO, the offer to purchase or offer to exchange, and any other related documents, as well as compliance with Rule 13e-4 and Regulation 14E. The staff Office of Mergers & Acquisitions in the Division of Corporation Finance reviews the Schedule TO. Typically, the staff tries to issue comments quickly (within five to seven business days), because the tender offer is only required to be open for 20 business days. The staff's comments may require that the issuer file amendments to the Schedule TO and disseminate changes in order to address the staff's concerns.

Considerations for liability management transactions

Debt versus equity tender offers

The requirements of Rule 13e-4 result in significantly less flexibility for tender offers or exchange offers for convertible or exchangeable debt securities, common stock and preferred stock, when compared to tender offers or exchange offer for nonconvertible debt securities. For example, it is not possible for issuers to sweeten a tender offer or exchange offer for convertible or exchangeable debt securities, preferred stock or common stock with an early tender premium as is sometimes the case in tender offers or exchange offers for nonconvertible debt securities. Holders that tender early in the offering period, typically within the first 10 business days, may receive the total consideration. Under this

approach, holders that tender after the early tender period terminates will receive lesser consideration for their securities. The early tender feature benefits the issuer because the issuer may have greater visibility regarding the success of the tender offer. An issuer needs to be mindful that the falling away of the premium may, under in certain circumstances, constitute a change in consideration that may require that the tender stay open for an additional 10 days, as discussed above.

Moreover, in a nonconvertible debt tender offer, an issuer has the flexibility to choose to accept tenders of securities on a first-come, first-served basis, or offer limited or no withdrawal rights, or conduct a Dutch auction or modified Dutch auction for pricing purposes.

Modified Dutch auctions

Typically, in its tender offer documents, an issuer will specify the amount of securities it is seeking to purchase, as well as the price at which it will purchase these securities (or the method of calculating the purchase price). However, in some cases, an issuer may specify the amount of securities to be tendered, but may set the price using a modified Dutch auction pricing structure. In this structure, the issuer sets a cascading range of prices at which a holder may tender its securities. The purchase price will be the highest price at which the issuer is able to buy all of the securities for which it has solicited a tender (or a smaller amount, if not all the securities are tendered). This price is often referred to as the clearing price.¹⁶

The SEC staff has permitted tender offers to proceed without the issuer disclosing the range of prices in the tender offer documents, so long as the aggregate amount of securities to be purchased is disclosed and the range of securities to be purchased if the offer were fully subscribed. Usually, the permitted price range is very narrow: often no more than 15% of the minimum price. In this regard, modified issuer Dutch auction tender offers have been permitted under Rule 13e-4, subject to several additional conditions:

- Disclosure in the tender offer materials reflects the minimum and maximum consideration to be paid.
- Pro rata acceptance occurs throughout the offer with all securities purchased participating equally in pro-rating.

- Withdrawal rights are available throughout the offer.
- The issuer makes a prompt announcement of the purchase price, if determined prior to the expiration of the offer.
- The purchase of all accepted securities is made at the highest price paid to any security holder under the offer.¹⁷

In prior no-action letter guidance, the staff had noted its belief that issuers conducting modified Dutch auction tender offers could not satisfy the requirements of (then) Schedule 13e-4 by stating a range of shares to be sought in the tender offer. In this regard, the staff appeared to be concerned that an issuer would have discretion to select a number from within that range that might be purchased in the tender offer.¹⁸

More recently, in a no-action letter to Alliance Semiconductor Corporation,¹⁹ the staff considered a modified Dutch auction tender offer in which the issuer suggested that the total number of securities may be disclosed in terms of the maximum number that can be purchased, subject to the number of shares tendered and at which price those shares are tendered. In the proposed tender offer, the offer to purchase was to state that the maximum number of shares is 10,909,090, and that if the offer was fully subscribed, the issuer would buy an amount of shares between 10,000,000 and 10,909,090, with the exact number dependent on the terms of the offer, not a decision on the part of the issuer. As a result of this structure, the amount that would be purchased in the tender offer is determined as a function of the prices at which shares are validly tendered and the number of shares tendered. Alliance Semiconductor argued that Rule 13e-3(f)(1)(ii) would not require extending the offer for 10 days after the purchase price (and hence the exact number of shares to be purchased) was determined, and that the disclosure of the range of shares presented would satisfy the requirement of Item 1004(a)(1)(i) of Regulation M-A to disclose the total number and class of securities.

In providing its response that no enforcement action would be recommended if the offer was conducted as described in the letter, the staff noted that:

- The total number and dollar value of securities being sought in the offer is disclosed in the offer materials as required by Item 1004(a)(1)(i) of Regulation M-A.
- The maximum number of shares that may be purchased in the offer is stated on the cover page of the offer to purchase.

- The offer to purchase discloses the range of shares that will be purchased if the offer is fully subscribed.
- The exact number of shares to be purchased in the offer will be based on the purchase price established by the shareholders determined in accordance with the terms of the offer as disclosed in the offer to purchase.

Other pricing mechanisms

Issuers also have adjusted pricing mechanisms to more fully reflect market conditions and fluctuations, and have asked the staff for no-action letter relief for such pricing mechanisms under Rules 13e-4(d)(1),

13e-4(f)(1)(ii) and 14e-1(b). In *Thermo Fisher Scientific*, the staff provided no-action relief in the context of a cash tender offer for convertible notes when the issuer proposed to offer to pay cash for the tendered securities in an amount determined by reference to the average volume-weighted average price (VWAP), defined as the simple arithmetic average of the daily VWAP over an averaging period of 21 consecutive trading days ending on the expiration date of the tender offer.²⁰ In granting the relief, the staff particularly noted that:

- The offer to purchase would disclose the pricing mechanism for determining the final purchase price per subject security that is equal to the sum of the parity value (defined as the number of shares of common stock into which a subject security is currently convertible) plus a fixed amount of cash (together with any accrued and unpaid interest).
- The offer to purchase would include an illustrative table showing calculations of the purchase price.
- The offer to purchase would disclose a fixed minimum purchase price that will be paid by the company for each subject security tendered and purchased.
- The pricing mechanism and the minimum price would remain fixed throughout the duration of the offer; and, if there was a change in the pricing mechanism or the minimum price, the offer would remain open for at least 10 business days.
- The common stock used as the reference security in the pricing mechanism was listed on the NYSE.
- The company's belief that the value of the subject securities was directly correlated to the trading price of the common stock.

- The company would publish the daily indicative calculated purchase prices per subject security on a webpage maintained for the offer and provided a toll-free number that holders of the subject securities could use to obtain pricing related information.
- The company would publish the final purchase price on the offer webpage and in a press release no later than 4.30pm, New York time, on the expiration date of the offer, and electronically file that information on an amended Schedule TO.
- The company would make available forms of a voluntary offering instructions form, or VOI, and notice of withdrawal in its printed offering materials and on the offer webpage, will permit tenders and withdrawals to be made until midnight on the expiration date, and will disclose the procedures for making tenders and withdrawals in the offering materials.
- The offer to purchase would include disclosure informing beneficial holders of the subject securities that they must make arrangements with their brokers or similar institutions for such brokers or similar institutions to fax a VOI or notice of withdrawal (as applicable) to the depositary on such beneficial holders' behalf prior to midnight, New York time, on the expiration date.
- The offer to purchase disclosed that the company was seeking to buy any and all of the subject securities.

Following the Thermo Fischer Scientific letter, the SEC staff has provided similar relief in the context of cash tender offers and combined cash and common stock offers wherein the offers involved similar formula-based pricing mechanisms.²¹ In each case, there were structural protections incorporated in the tender offers, such as a determinable and fixed pricing formula, daily publication of indicative purchase prices on a webpage available to holders, final pricing based on readily observable trading prices for securities listed on a national securities exchange, and dissemination of pricing and related information by the issuer. The time periods incorporated in the VWAP averaging pricing formulae in each case may have varied in order to address the particular market factors affecting the subject security. The SEC staff appears to have focused principally on certainty related to the pricing formula, and information transparency as it relates to the indicative pricing.

More recently, the SEC staff provided no-action letter guidance in the case of a tender offer conducted by Yahoo! prior to a contemplated sale to Verizon Communications. The tender offer was structured as a modified Dutch auction tender in which shareholders who tendered shares would select a multiple that would be fixed throughout the tender period. The final multiple that would result in the clearing amount (the total aggregate consideration—in this case, \$3 billion) and that multiple would be applied to the per share daily VWAP for certain reference securities used in the pricing formula.²² This no-action letter represents an extension of the staff's prior guidance since, in this case, the issuer was relying on the use of multiples (instead of share prices) in the formula pricing mechanism. The shareholders would still have an opportunity to consider multiples within a specific range of multiples and the application of the multiples in connection with the trading price of the reference securities in making their decision. Throughout the tender period, the shareholders also would have access to information about the indicative offer consideration and the per share price to be paid for the tendered stock based on the reference securities.

Concerns with creeping tender offers and purchases outside of the offer

In certain circumstances, purchases of securities in the market or through negotiated transactions could be deemed to constitute tender offer that is not in compliance with the rules described above. Further, when a tender offer commences around the time of open market or negotiated purchases, security holders could potentially object to the terms of the transactions outside of the tender offer.

Courts that have addressed the issue of tender offer integration have taken disparate approaches. Most claims have arisen in connection with claims of violations of the best price and all holders provisions applicable to tender offers, or violations of the prohibitions on purchases outside of a tender offer. Some courts have strictly construed the time frame of the tender offer to start with public announcement or commencement and end with withdrawal or termination, while others have adopted an approach of determining whether the questioned transaction was an integral part of the tender offer. More specifically, several courts have held that share purchases by the acquirer made

in advance of a tender offer are not improper, because the tender offer rules are only applicable upon announcement or commencement of the tender offer.²³ Some courts, however, have taken a broader view in interpreting whether transactions occurring before or after the precise technical commencement and termination or withdraw of the tender offer were considered part of the tender offer.²⁴

Issuers must carefully structure any ongoing market purchases or negotiated acquisitions of securities so as to comply with the prohibitions on purchases outside of the tender offer in Rules 13e-4 and 14e-5. In this regard, it is often important to analyse whether the targeted securities in the outside purchases are of a separate class from the class of securities that are the subject of a tender offer. Class is not defined specifically for the purposes of Rule 13e-4 and Regulation 14E, however, the term has been defined for other purposes under the Exchange Act. In section 12(g)(5), it is defined to include ‘all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges.’ Further, the SEC has provided guidance regarding the determination of whether different series of preferred stock are the same class for purposes of Rule 144A, stating that the test under Rule 144A to determine whether securities would be of the same class would be the same test as under section 12(g)(5) of the Exchange Act and would be interpreted in the same manner.

Regulation M

While Regulation M does not apply to investment grade nonconvertible debt securities, it does apply to equity securities, non-investment grade debt and convertible debt. An issuer that engages in a tender offer must ensure that it complies with Regulation M. Rule 102 under Regulation M makes it unlawful for an issuer or its affiliates ‘to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period.’ This prohibition is intended to prevent an issuer from manipulating the price of its securities when the issuer is about to commence or is engaged in a distribution. If debt being exchanged in an exchange offer is convertible into the issuer’s equity securities, under certain circumstances, repurchases of convertible debt securities could be deemed a forced conversion and, therefore, a distribution of the underlying equity security for Regulation M purposes.

Special rules for European tenders

It may be the case that the holders of an issuer’s securities are located in foreign jurisdictions. For instance, if an issuer sold its securities pursuant to Rule 144A in the US and pursuant to Regulation S outside the US. Many frequent debt issuers issue and sell their debt securities pursuant to euro medium-term note programmes or market and sell US-registered securities into the EU or other foreign jurisdictions. For these tenders, an issuer must not only focus on the various considerations described above, but also must be cautious that its tender does not violate any rules in the home country of its security holders.

ENDNOTES

- 1 SEC No-Action Letter, American Financial Corporation (December 20 1982).
- 2 SEC No-Action Letter, American Financial Corporation (March 9 1989).
- 3 SEC No-Action Letter, Republic New York Corporation (March 5 1985).
- 4 The Staff has previously indicated that ‘[the Trust Indenture] Act generally would apply...to preferred securities issued by a trust that represent an interest in debt issued by a single obligor.’ *See* SEC Division of Corporation Finance, Compliance and Disclosure Interpretations: Trust Indenture Act of 1939 (#101.04) (March 30 2007), available at www.sec.gov/divisions/corpfm/guidance/tiinterp.htm
- 5 SEC No-Action Letter, BBVA Privanza International Limited and Banco Bilbao Vizcaya Argentaria, S.A., (December 23 2005).
- 6 The requirements of Rule 13e-4 applicable to issuers are also applicable to affiliates of the issuer. For purposes of this discussion of Rule 13e-4, references made to the issuer also include affiliates of the issuer.
- 7 For the purposes of Rule 13e-4, commencement means 12.01am on the date that the issuer has first published, sent or given the means to tender to security holders. The means to tender includes the transmittal form or a statement regarding how the transmittal form may be obtained.
- 8 Instruction I to Schedule TO provides that information previously disclosed in the Schedule TO may be omitted in an amendment disclosing a material change.
- 9 At the time of making the initial Schedule TO filing, the issuer will be required to pay a filing fee computed in accordance with Rule 0-11 of the Exchange Act. If a fee has been paid under section 6(b) of the Securities Act with respect to any of the securities issued in connection with the proposed transaction, then the required fee is reduced by that amount. Similarly, the fee required for a Securities Act registration statement would be reduced by the amount of any fee paid in connection with the Schedule TO filing.
- 10 *See* Instruction 1 to Rule 13e-4(c). The filing person need not respond to the specific line items of Schedule TO when filing pre-commencement written communications, and no fee is required with the filing.
- 11 Instruction 2 to Rule 13e-4(e)(2) provides that a preliminary prospectus cannot omit information under Rule 430 or 430A of the Securities Act. Instruction 3 to Rule 13e-4(e)(2) provides that when a preliminary prospectus is used and the issuer must disseminate material changes, the tender offer must remain open for the period specified in Rule 14d-4(d)(2). If a preliminary prospectus is used, tenders may be requested in accordance with Securities Act Rule 162(a), pursuant to Instruction 4 to Rule 13e-4(e)(2).
- 12 An issuer may accept for payment up to an additional two percent of the class without triggering the additional 10 business days. For purposes of this rule, the percentage of the class is calculated in accordance with section 14(d)(3) of the Exchange Act.
- 13 Rule 13e-4(a)(6) specifies that the term security holders means both holders of record and beneficial owners of securities of the class that is the subject of the tender offer. As a result, a tender offer open to only holders of record would not satisfy the all holders requirement.
- 14 The SEC has indicated that a tender offer may be made for fewer than all outstanding securities, but all security holders must be eligible to accept the offer if they choose. *See* Release No. 34-23421 (July 11 1986).
- 15 In the SEC staff’s view, a put option whereby the issuer is obligated to repurchase securities at specific dates pursuant to the terms of an indenture would not be considered a redemption for the purposes of this exemption.
- 16 Under the SEC’s guidance, all security holders whose securities are accepted in a modified Dutch auction issuer tender offer subject to Rule 13e-4 must be paid the highest consideration paid to any other security holder whose securities are accepted. *See* Release No. 34-23421 (July 11 1986). The Release also notes that pure Dutch auctions are not permitted under Rule 13e-4, stating: ‘In a pure Dutch auction cash tender offer, the bidder invites security holders to tender securities to it at a price to be specified by the tendering security holder, rather than at a price specified by the bidder. Securities are accepted, beginning with those for which the lowest price has been specified, until the bidder has purchased the desired number of securities.’

- 17 See Release No. 34-23421 (July 11 1986) at note 64.
- 18 See SEC No-Action Letter, Tektronix, Inc. (June 19 1987); SEC No- Action Letter, Janet S. Thiele (December 21 1987).
- 19 SEC No-Action Letter, Alliance Semiconductor Corp. (September 22 2006).
- 20 SEC No-Action Letter, Thermo Fisher Scientific Inc. (November 13 2009)
- 21 See *for example*, the letters issued to: Textron (October 7 2011), CNO Financial Group (February 11 2013), Group 1 Automotive (May 16 2014), Sonic Automotive (July 24 2012) and American Equity Investment Life Holding Company (August 23 2013).
- 22 SEC No-Action Letter, Yahoo! Inc. (May 12 2017).
- 23 See, *eg Lerro v Quaker Oats Co.*, 84 F.3d 239, 257 (7th Cir. 1996); *Kahn v Virginia Retirement Sys.*, 13 F.3d 110, 113 (4th Cir. 1993); *Heine v The Signal Companies, Inc.*, 1977 US Dist. LEXIS 17071 (S.D.NY 1977).
- 24 See, *eg Millionerrors Investment Club v General Electric Co. PLC*, 2000 Dist. Lexis 4803 (W.D. Pa. March 21 2000); *Perera v Chiron Corporation*, 1996 US Dist. Lexis 22503 (ND. Cal. May 8 1996); *Field v Trump*, 850 F.2d 938 (2d Cir. 1988), cert. denied, 109 S. Ct. 1122 (1989) (April 23 1990).

CHAPTER 8

Tax issues

Tax issues can be an important consideration in any liability management transaction. Even with sound tax advice certain tax consequences are inescapable and must be carefully considered. The following sections discuss several additional nuances that arise when reshuffling a corporation's liability structure as well as some of the most recent and significant changes to the Internal Revenue Code and Treasury regulations thereunder affecting liability management.

Cancellation-of-indebtedness income

Corporations with outstanding debt may be subject to tax on cancellation-of-indebtedness (COD) income when all or a portion of such debt has been economically cancelled. COD income can arise in a number of circumstances, including forgiveness of debt by the debt holder, the repurchase of debt by the issuer at a discount, the exchange of one debt instrument of the issuer for another, the modification of debt and the exchange of debt for equity of the issuer. Additionally, repurchases or exchanges by persons related to the issuer can create COD income.

Section 108(a) of the Code provides a number of exceptions to the inclusion of COD income, including exceptions related to insolvency and bankruptcy. In each

case, the COD income is permanently excluded from taxation. As a price for the bankruptcy and insolvency exclusions, the tax attributes of the taxpayer (for example, its net operating losses, tax credits or adjusted tax basis in property) are correspondingly reduced.

OID and AHYDO

Original issue discount (OID) generally arises when a note is originally issued at a discount to its face amount or, more technically, its stated redemption price at maturity. OID equals the amount of the discount. Issuers generally accrue and deduct, and holders generally accrue and include in income, OID on a current, constant yield basis, subject to an exception for instruments issued with a *de minimis* amount of OID.

An applicable high yield discount obligation (AHYDO) is a debt instrument with: (i) a maturity in excess of five years; (ii) a yield that equals or exceeds the sum of the applicable federal rate¹ plus five percentage points; and (iii) significant original issue discount.² The issuer of an AHYDO is denied a deduction for a portion (the disqualified portion) of OID.³ In addition, the non-disqualified portion of OID is deductible only when paid.

Exchanges or modifications of publicly traded debt instruments

An issuer of a debt instrument that exchanges its existing debt for newly issued debt faces the possibility of recognising COD income. Conversely, an exchange generating COD income could generate a corresponding amount of OID. In addition, an investor that had purchased such exchanged debt instrument at a discount could recognise again if such exchange was not a recapitalisation for tax purposes. Note the same consequences obtain when an existing debt instrument is significantly modified, in which case, for federal income tax purposes, a deemed exchange of a new debt instrument (having the modified terms) for an old debt instrument (having the original terms) occurs.

Generally, the amount of COD income and OID resulting from an exchange equals the excess of the par amount of the old debt instrument over the issue price of the new debt instrument. Similarly, the amount of any gain recognised by an investor equals the excess of the issue price of the new debt instrument over such investor's cost tax basis in the instrument.

The issue price of a debt instrument issued in an exchange differs markedly depending on whether such instrument, or the instrument for which it has been exchanged, is publicly or privately traded for federal income tax purposes. While public trading results in an issue price equal to the fair market value of the instrument, private trading generally results in an issue price equal to par. Such a difference leads to markedly different tax consequences, as reflected in the following example:

- A debt instrument with an outstanding principal amount equal to its original issue price of \$100 is purchased by an investor for \$30 in an over-the-counter transaction for a price negotiated between a securities dealer and the investor. The investor and issuer subsequently agree to lengthen the maturity and reduce the interest rate on the debt instrument in a manner such that the modification is significant for federal income tax purposes. The debt instrument after the modification is quoted at a purchase price of \$35.
- If the debt instrument was publicly traded, the issue price of the new debt instrument would be \$35. The issuer would recognise COD income of \$65 (\$100 par less \$35 issue price), the debt instrument could have \$65 of OID and the purchaser could recognise \$5 of gain (\$35 issue

price less \$30 of tax basis). By contrast, if the instrument was not publicly traded and no change was made to the outstanding principal amount, the issue price of the new debt instrument would be \$100. The issuer would not recognise COD income on the deemed exchange and no OID would arise but the purchaser could recognise \$70 of gain (\$100 issue price less \$30 basis).

For these purposes, property, such as a debt instrument, is publicly traded – or more precisely, traded on an established market – in the following situations: (1) the sales price for property is reasonably available;⁴ (2) a firm price quote to buy or sell the property is available;⁵ or (3) a price quote (ie an indicative quote) is provided by a dealer, broker or pricing service.⁶ Furthermore, a debt instrument is not considered to be publicly traded if at the time the determination is made the outstanding stated principal amount of the issue that includes the debt instrument does not exceed \$100 million (or equivalent amount if the debt is denominated in a currency other than the US dollar). The fair market value of such property is presumed equal to its trading price, sales price or quoted price, whichever is applicable.⁷ If more than one price quote exists, taxpayers can reconcile the competing prices in a reasonable manner. In the case of an indicative quote, however, if the taxpayer determines the quote materially misrepresents fair market value the taxpayer is entitled to use a reasonable method to determine fair market value.

If a debt instrument is repurchased by an issuer for a price in excess of its adjusted issue price, then the excess of the purchase price over the adjusted issue price is treated as repurchase premium and may be deductible as interest for the taxable year in which the repurchase occurs. If the issuer repurchases the debt in a debt-for-debt exchange (or a significant modification of the debt instrument occurs which causes a deemed repurchase for federal income tax purposes), the repurchase price is generally the issue price of the newly issued debt instrument.

Contingent convertible debt instruments

US corporations have raised billions of dollars by issuing so-called contingent convertible debt instruments (CoCos). CoCos are debt instruments convertible into stock of the issuer that provide for the payment of contingent interest.

For example, a typical CoCo may provide that the amount of interest payable equals the amount of the dividends paid on the stock into which the debt converts and that the CoCo becomes convertible only after the CoCo's price exceeds a percentage (for example, 120%) of its adjusted issue price. As a result of the contingent interest feature, CoCos are treated as contingent payment debt instruments for US federal income tax purposes, and the issuer and holder are subject to the non-contingent bond method rules provided for in applicable Treasury regulations. Under this method, the holder is required to include in income, and the issuer deducts, as interest over the term of the CoCo based on the comparable yield of non-contingent debt instruments of the issuer. Differences between taxable income included and cash received are reconciled when a contingent payment is made (which, often, is not until maturity or conversion of the CoCo into stock of the issuer).

On a restructuring or repurchase of a CoCo prior to maturity, the issuer's COD income is not determined by reference to the CoCo's face amount but rather by reference to its accreted adjusted issue price, which generally increases as interest is deemed to accrue under the non-contingent bond method. For example, a CoCo issued 10 years ago with a face amount of \$1000x and a comparable yield at the time of issuance of five percent currently has an adjusted issue price of approximately \$1600x. As a result, a repurchase of the CoCo by the issuer prior to maturity for its face amount would result in COD income to the issuer of \$600x. Even absent a repurchase or modification of the CoCo, the issuer faces the same situation at maturity of the instrument. If the CoCo is retired at maturity for its face amount, the issuer would have to include \$600x in income. Issuers of CoCos must carefully weigh all available options – alternatives that have substantially the same economic result may not have substantially the same tax result.

Different, and at times more complicated, tax issues arise if the debt instrument is not publicly traded. Such instruments can result in the restructured debt instrument being split into two components for US federal income tax purposes: a non-contingent component and a contingent component. The application of these rules can be extremely complex and must be carefully worked through by issuers and holders that participate in debt restructurings and workouts involving non-public debt (or that result in non-public debt).

Debt reopenings

Debt issues are often reopened, meaning an issuer issues an additional tranche of notes at some point after the issuance of the original notes. The additional notes bear the same terms and security identification code (for example, the CUSIP number) as the original notes. The issuer's intent is that the original notes and the additional notes be indistinguishable and, therefore, completely fungible. One benefit of fungibility is that it adds liquidity to the market for the notes. Reopening a debt issue can cause significant tax consequences, particularly where the additional notes are issued with OID.

By way of background, OID is an attribute of a note itself (in other words, OID travels with the note and does not vary depending on whether an original investor or a secondary market investor holds the note). In contrast, market discount generally arises when an investor purchases a debt instrument in the market at a discount after original issue. Unlike OID, unless the holder elects otherwise market discount is not currently taxable as it accrues but is taxable on retirement or disposition of the note. Original notes often are not issued with OID. Nevertheless, additional notes may be priced at a non *de minimis* discount because, for example, interest rates have risen after original issue. Notwithstanding the foregoing, a holder generally would prefer the original notes and the additional notes be fungible from a tax standpoint, so that the additional notes are not treated as having been issued with OID, but rather are treated as being acquired with market discount. The reopening rules discussed below police the boundaries within which additional notes may be treated as fungible with original notes in this manner. If original and additional notes do not meet the requirements described below, the tax law treats the additional notes as a fresh issuance issued with OID and, accordingly, the original and additional notes would not be fungible from a tax standpoint.

To be fungible from a tax standpoint, the original and additional notes must have terms identical in all respects and must satisfy one of five tests, the first of which focuses entirely on time of issuance and the rest which focus on whether the reopening is qualified.

Under the first test, the original notes and the additional notes must be issued within a 13-day period of each other, beginning on the day on which the original notes are issued.

Under the second test, a reopening of debt instruments

will be a qualified reopening, and hence will result in fungible notes, if:

- The original notes are publicly traded within the meaning of applicable Treasury regulations.
- The issue date of the additional notes is not more than six months after the issue date of the original notes.
- On the pricing date of the reopening (or, if earlier, the announcement date), the yield of the original notes (based on their fair market value) is not more than 110% of the yield of the original notes on their issue date (or, if the original securities were issued with no more than a *de minimis* amount of OID, their coupon rate).

Under the third test, a reopening of debt instruments (regardless of whether the reopening occurs within six months of original issuance) is treated as a qualified reopening if:

- The original notes are publicly traded.
- The additional notes are issued with no more than a *de minimis* amount of OID.

The fourth test applies to non-publicly traded debt. A reopening of non-publicly traded debt will be a qualified reopening if:

- The additional notes are issued for cash to persons unrelated to the issuer.
- One of the following requirements is met:
 - The issue date of the additional notes is not more than six months after the issue date of the original notes and, on the pricing date of the reopening (or, if earlier, the announcement date), the yield of the additional notes (based on their cash purchase price) is not more than 110% of the yield of the original notes on their issue date (or, if the original securities were issued with no more than a *de minimis* amount of OID, their coupon rate).
 - The additional notes are issued with no more than a *de minimis* amount of OID.

The fifth test allows for qualified reopenings more than six months after the original notes were issued where:

- The additional notes are either publicly traded or are issued for cash to persons unrelated to the issuer.
- On the pricing date of the reopening (or, if earlier, the announcement date), the yield of the additional notes (based on their fair market value or cash purchase price, whichever is applicable) is more than 100% of the yield of the original notes on their issue date (or, if the original

securities were issued with no more than a *de minimis* amount of OID, their coupon rate).

As a practical matter, if neither the original notes nor the additional notes would be viewed as issued with OID (each tested on a separate basis), the original notes and the additional notes may, nonetheless, be fungible for tax purposes regardless of whether the reopening is a qualified opening.

If the original and additional notes are not fungible under the foregoing rules but the original and additional notes are, nonetheless, issued as indistinguishable (issued with the same terms and CUSIP number), it would be impossible for secondary market purchasers or, for that matter the Internal Revenue Service, to trace such notes through the chain of intermediate ownership and determine whether a particular note was issued as part of the original issuance (without OID) or the additional issuance (with OID). As a result, there is a risk that additional, non-fungible notes may taint original notes, with the Internal Revenue Service treating both the original and additional notes as having OID.

Source rules for guarantee income

Subject to numerous exceptions, the US generally imposes a 30% withholding tax on US-source fixed or determinable, annual or periodical income (FDAP) of a nonresident alien individual or foreign corporation that is not effectively connected with the conduct of a US trade or business. FDAP includes interest and guarantee fees. Under section 861(a)(9) of the Internal Revenue Code, US-source income includes: (i) amounts received (directly or indirectly) from a non-corporate resident or a domestic corporation for the provision of a guarantee of indebtedness of such person; and (ii) amounts received from a foreign person (directly or indirectly) for the provision of a guarantee of indebtedness of that foreign person if the payments received are effectively connected with the US trade or business of such foreign person.

In addition, this rule applies to payments made indirectly for the provision of a guarantee. The legislative history provides the following example:

A foreign parent of a US subsidiary guarantees the debt of such US subsidiary owed to a foreign bank. However, instead of receiving a guarantee fee from its US subsidiary, the foreign parent receives a fee from the foreign bank, which

recoups this cost by charging additional interest to the US subsidiary.

In this case, section 861(a)(9) would treat the fees received by the foreign parent from the foreign bank as US-source guarantee fees.

Foreign Account Tax Compliance Act

The Hiring Incentives to Restore Employment Act of 2010 incorporated the Foreign Account Tax Compliance Act (FATCA). FATCA included provisions which: (i) impose a 30% withholding tax on certain payments, including interest, made to foreign entities that fail to comply with specified reporting or certification requirements; and (ii) effectively end the practice whereby US issuers sold bearer bonds to foreign investors by repealing the US bearer bond exception. The new withholding tax began applying to payments made after June 30 2014.

Withholding tax

FATCA introduced a new 30% withholding tax (subject to refund or credit under certain circumstances) on any withholdable payment made to a foreign entity unless such entity complies with certain reporting requirements or otherwise qualifies for an exemption. A withholdable payment includes interest. Beginning January 1 2019, it also may include gross proceeds from the sale of property that is of a type that can produce US-source dividends or interest, such as debt issued by domestic corporations. In response to FATCA, numerous countries have entered into intergovernmental agreements with the US to modify the reporting requirements with respect to that country's financial institutions.

Repeal of bearer bond exception

In 1982, Congress passed the Tax Equity and Fiscal Responsibility Act (TEFRA), which restricted the issuance of debt instruments in bearer form. Under TEFRA, issuers of debt instruments in bearer form generally are denied deductions for interest paid with respect to such debt instruments and are subject to an excise tax equal to one percent of the principal amount of such instruments times the number of years to maturity. Various additional sanctions

also apply to holders. However, the aforementioned sanctions have not applied with respect to bearer debt instruments issued under circumstances in which they are unlikely to be sold to US persons. These circumstances include an issuance of foreign-targeted bearer debt instruments that complies with Treasury regulations referred to as TEFRA C and TEFRA D. In addition, Congress provided that debt instruments in bearer form do not qualify for the portfolio interest exemption from the 30% withholding tax generally applicable to the payment of interest to foreign persons unless such instruments are issued in compliance with the foreign-targeted requirements imposed by TEFRA.

Prior to FATCA, many US issuers had European medium-term note or other foreign-targeted programmes under which they issued bearer notes to non-US investors. These issuances complied with the TEFRA regulations and, as such, the instruments were not subject to the sanctions described above or to US withholding tax. In addition, many non-US issuers include TEFRA restrictions in their debt offerings outside the US to ensure they are not subject to the TEFRA excise tax.

FATCA effectively ended the practice of US issuers selling bearer bonds to foreign investors under TEFRA C and TEFRA D. With respect to US issuers of foreign-targeted bearer bonds, FATCA repealed the exception to a denial of interest deduction for interest on bearer bonds. In addition, interest paid on such bonds no longer qualifies for treatment as portfolio interest. As a result, US issuers revised their existing programmes to prohibit bearer debt. FATCA did, however, preserve the exception to the excise tax for bearer bonds issued under TEFRA-compliant procedures. As a result, foreign issuers of a foreign-to-foreign bearer debt offering that is TEFRA-compliant are not subject to the excise tax.

Tax Cuts and Jobs Act

On December 22 2017, legislation commonly known as the Tax Cuts and Job Act (TCJA) was passed into law. The TCJA is an amalgam of the tax bills passed by each chamber of Congress and marks the most sweeping changes to the US tax system in 30 years. In addition to reducing corporate rates and overhauling the US taxation of non-US business

activity, the TCJA introduced new limits on interest deductibility and imposed a new base erosion tax on passive payments between related entities.

Interest Limitation

The TCJA limits the ability to deduct business interest expense to the sum of (i) business interest income and (ii) 30% of adjusted taxable income. For taxable years beginning after December 31 2017 and before January 1 2022, adjusted taxable income is computed without regard to depreciation and amortisation deductions (ie EBITDA rather than EBIT). This change functions as a phase-in of the limitation. Any business interest disallowed in a given year could be carried forward indefinitely. Certain exceptions to the limitation are provided, including for electing real estate businesses (which must forgo immediate expensing as a trade-off) and certain regulated utility companies.

With regard to partnerships, the limitation applies at the partnership level. Rules are provided so that income is not double counted (once when earned by the partnership and again when it is passed through to the partner). In addition, income that is not counted by a partnership in determining its interest deduction may be considered by the partner in determining its interest expense.

The base erosion minimum tax

The TCJA introduces a minimum tax regime, beginning in 2018, based on a modified taxable base that adds back deductions for base erosion payments. The base erosion avoidance tax (BEAT tax) equals the excess of (i) 10% (five percent for taxable years beginning in calendar year 2018) of the taxpayer's modified taxable income for the tax year over (ii) the regular tax liability for the year reduced by the excess of certain tax credits over the research credit. Taxpayers that are members of an affiliated group that includes a bank or a registered securities dealer will be subject to an 11% rate (six percent for 2018) when calculating their BEAT tax. Beginning in 2026, the rate for the BEAT tax will be 12.5% (and 13.5% for members of affiliated groups that include a bank or a registered securities dealer). The modified taxable income over which the minimum tax is calculated is the taxpayer's taxable income determined without regard to (i) any deductions with respect to any base erosion payments

or (ii) a portion of the taxpayer's NOL carryovers. A base erosion payment is any amount paid or accrued to a related foreign person if such amount is deductible or includable in the basis of a depreciable or amortisable asset.

This BEAT tax applies to corporations (other than a RIC, REIT or S corporation) that (i) have average annual gross receipts of at least \$500 million over the preceding three-year period (gross receipts of foreign affiliates are only taken into account to the extent they are effectively connected income) and (ii) have a base erosion percentage of three percent or higher (two percent or higher in the case of taxpayers that are members of an affiliated group that includes a bank or a registered securities dealer) for the tax year.

ENDNOTES

- 1 The applicable federal rates are interest rates published monthly by the US Treasury for purposes of applying various provisions of the Code.
- 2 Under section 165(i)(2) of the Code, OID is significant if, immediately before the close of any accrual period ending more than five years after issue, the aggregate amount that has been included in gross income with respect to an instrument exceeds the sum of actual interest payments plus an amount equal to the product of the instrument's issue price and yield to maturity.
- 3 Under section 165(e)(5), the disqualified portion of OID is the lesser of (i) all OID or (ii) the product of (a) the sum of OID and stated interest on the instrument and (b) the ratio of (X) an amount by which the yield to maturity exceeds six percent plus the AFR to (Y) the yield to maturity.
- 4 Treas. Reg. § 1.1273-2(f)(2).
- 5 Treas. Reg. § 1.1273-2(f)(3).
- 6 Treas. Reg. § 1.1273-2(f)(4).
- 7 Treas. Reg. § 1.1273-2(f)(5).

Chapter 9

Securities exchange rules

The securities exchanges, the NYSE, Nasdaq and the NYSE American (collectively, the exchanges), require shareholder approval for the issuance of equity securities by their listed issuers in various situations.¹ Each exchange also applies these shareholder approval provisions to offerings of securities that are convertible into or, in the case of the NYSE and Nasdaq, exchangeable for, common stock, such as convertible debt. An issuer must carefully review the exchange provisions if the security to be exchanged in a restructuring or exchange offer is either actual equity or convertible or exchangeable debt, or if the transaction cannot be categorised as a public offering.

Under Nasdaq Rule 5635 and NYSE American Rules 712 and 713, shareholder approval is required for transactions involving the issuance of:

- five percent or more of the current outstanding common stock in an acquisition, if a director, officer, or substantial security holder of the issuer has a five percent interest (10% if a group) in the company or assets to be acquired;
- 20% or more of the current outstanding common stock in an acquisition; or
- 20% or more of the current outstanding common stock in any transaction other than a public offering (as defined by the exchanges) completed at a discount.

Under NYSE Rule 312.03, shareholder approval is a prerequisite to issuing additional shares equal to:

- More than one percent of the current outstanding common stock to an insider (an officer or director, or an entity affiliated with an officer or director) or a substantial holder; however, if the purchaser is only a substantial holder (and not an officer or director) and the cash purchase price is at least as great as each of the book and market value of the issuer's common stock, then shareholder approval will not be required unless the number of shares of common stock to be issued (or into which the security may be convertible or exercisable), exceeds either five percent of the outstanding common stock before the issuance.
- Twenty percent or more of the current outstanding common stock other than an issuance involving a public offering or a bona fide private financing (as defined in NYSE Rule 312.04(g)).

The percentages in all cases apply both to outstanding common equity or common voting power.²

Each exchange also requires shareholder approval when an issuance will result in a change of control of the issuer.³ None of the exchanges however have adopted a definition of what constitutes a change of control. A general rule of thumb

(there are variations among the exchanges) is that purchases of between 20% and 30% of the outstanding voting stock may be deemed a change of control, unless preexisting control positions are not displaced by the transaction. It is prudent to consider both the change of control rule and the 20% rule in any transaction that involves an issuance of voting stock close to 20% of the pre-transaction total shares outstanding. In many cases, it will be appropriate to consult the relevant exchange early in the transaction process.

Shareholder approval is not required for financing transactions (involving share issuances) that are structured as public offerings under the rules or policies of any of the three exchanges. It is important to note that an offering is not deemed to be a public offering for these purposes merely because it is effected pursuant to a registration statement. The Nasdaq and NYSE American staffs will consider all relevant factors when determining whether an offering will qualify for the public offering exemption, including, but not limited, to: (i) the type of offering;⁴ (ii) the manner in which the offering is marketed; (iii) the extent of the offering's distribution, including the number of investors who are solicited regarding, and who participate in, the offering; (iv) the offering price; and (v) the extent to which the issuer controls the offering and its distribution. The NYSE does not offer formal guidance to determine when a particular offering would qualify as a public offering in the context of a restructuring. It should also be noted that restructurings effected under Rule 144A of the Securities Act are, by definition, not public offerings despite the fact that such offerings typically having many of the indicia of a public offering.

Staff at each of the NYSE, Nasdaq and NYSE American have indicated that mere filing of tender offer documents with the SEC does not necessarily make the tender offer a public offering, and that they should be contacted when a particular transaction arises for a definitive determination.⁵ The NYSE American suggested that two factors to be considered are: (i) the market price of the security when issued compared to the price at which it is being exchanged; and (ii) the original price at which the debt was being issued and the reset. Because of the uncertainty regarding whether a registered exchange offer will be categorised as a public offering, exchange offers may be structured with a cap (in other words, the exchange is capped at 19.9% and the remaining percentage above 20% is subject to shareholder approval).⁶

Finra requirements

If a financial intermediary (such as a dealer-manager) is involved in the restructuring, the requirements of The Financial Industry Regulatory Authority (Finra) may also apply. Finra Rule 5110, known as the Corporate Financing Rule, requires certain filings with Finra to determine whether the compensation to the financial intermediary in an offering subject to the rule is fair. However, the financial intermediary does not have to file with Finra (although it will be required to comply with the substantive provisions of Finra Rule 5110) if the transaction is an exchange offer where the securities to be issued are listed on Nasdaq, the NYSE or the NYSE American; or the issuer qualifies to register an offering on Forms S-3, F-3, or F-10 under the Securities Act.⁷ Finra Rule 5110 will not apply at all if the transaction is a tender offer made pursuant to Regulation 14D, which regulates tender offers for equity securities. Absent any such exception, a registered exchange offer involving a Finra member firm has to be filed with Finra for its review.

Involvement of affiliates

Under certain circumstances, affiliates of an issuer may seek to purchase the issuer's debt securities. This may occur at the corporate level, such as when a parent purchases its subsidiaries' securities or when subsidiaries purchase securities of the parent or of other subsidiaries. It may also occur if officers, directors or significant shareholders seek to purchase the securities. In these instances, the affiliates would generally be considered insiders of the issuer and subject to the same disclosure obligations as the issuer. The issuer should coordinate closely with the affiliate in structuring any repurchase program, including to ensure that other corporate requirements are not implicated, such as an affiliate running afoul of the corporate opportunity doctrine. In many circumstances, involvement of an affiliate may preclude reliance on the section 3(a)(9) exemption for an exchange offer.

ENDNOTES

- 1 *See, for example*, Nasdaq Marketplace Rule 5635 (the Nasdaq rules) and related publicly available Nasdaq interpretive guidance; NYSE Issuer Manual Sections 312.00 – 312.07 (the NYSE rules); and NYSE American LLC Company Guide Sections 710-713 (the NYSE American Rules).
- 2 Nasdaq Rule 5635(e)(1) and NYSE Rule 312.04(d) each provide that only shares actually issued and outstanding (excluding treasury shares or shares held by a subsidiary) are to be used in making any calculation provided for in this paragraph (i). Unissued shares reserved for issuance upon conversion of securities or upon exercise of options or warrants will not be regarded as outstanding. NYSE American does not have a similar rule.
- 3 *See* Nasdaq Rule 5635(b), NYSE American Rule 713(b) and NYSE Rule 312.03(d).
- 4 For example, this may include: (1) whether the offering is conducted by an underwriter on a firm commitment basis; (2) whether the offering is conducted by an underwriter or placement agent on a best effort basis; or (3) whether the offering is self-directed by the issuer. *See* Nasdaq Interpretive Material 5635-3; Commentary to NYSE American Section 713.
- 5 Telephone conversations with representatives of each of the exchanges.
- 6 In certain circumstances, if the issuance of the original securities was structured to comply with the 19.9% cap, the exchanges may, unless the issuer can demonstrate a change of circumstances, aggregate any securities issued in the exchange with the remaining outstanding non-tendered securities for purposes of calculating the percentage. In addition, the exchange may calculate the percentage based on the issuer's outstanding share capital as of the original issue date as opposed to the exchange date.
- 7 For Finra purposes only, an issuer's qualification to register an offering on Form S-3, F-3 or F-10 is based on the eligibility requirements prior to October 21 1992, which were conditioned on a 36-month reporting history and \$150 million aggregate market value of the voting stock held by non-affiliates (or \$100 million and an annual trading volume of three million shares).

Epilogue

Restructurings may lead to legal challenges. The legal challenges usually come from holders of securities that do not participate in the restructuring and believe the value of these securities or the protections afforded by their securities are adversely affected. In addition, because the all holders rule does not apply to tender offers for straight debt securities, holders who are not offered the right to participate (for example, because the offering is limited to QIBs) may also claim that their securities are impaired. The effects of litigation can be burdensome. In some instances, the litigation will enjoin the issuer from completing the tender or exchange offer. However, if litigation is resolved after the completion of the transaction, it is unclear how the violation would be remedied because in the case of an exchange, holders already hold the new securities.

Realogy case

A 2008 Delaware court case crystallises some of the challenges associated with debt restructurings. In the *Realogy* case, Realogy announced an exchange offer for its outstanding notes (senior notes due 2014, senior toggle notes due 2014 and senior subordinated notes due 2015) for

up to \$500 million of additional term loans issued pursuant to an accordion feature under Realogy's senior credit facility.¹ This accordion feature allowed Realogy to incur additional indebtedness under the credit facility. The new term loans would be secured, whereas existing notes were unsecured. The terms of the offer set a priority as to which holders were entitled to accept the offer – holders of senior subordinated notes (\$125 million), then holders of senior notes (\$500 million) and then holders of toggle notes (\$500 million, less any amounts tendered by the other classes). As a result of this priority, holders of toggle notes would likely be unable to participate in the exchange offer and would, effectively, be subordinated to tendering holders from the other classes who would receive secured debt.

The trustee and a noteholder controlled by Carl Icahn, High River, sued Realogy on the basis that, among other things, the exchange offer violated the terms of the indenture, specifically the negative pledge covenant. The senior credit facility allowed permitted refinancing indebtedness to refinance the notes, provided the refinancing indebtedness had no greater security than the debt being refinanced. Because the new loans were secured, and the notes being exchanged were not, the court found in favour of the trustee, reasoning that the new loans were not

permitted refinancing indebtedness and, as a result, the liens securing the new loans were not permitted liens under the indenture. The court granted the plaintiffs summary judgment and the exchange offer did not proceed.

This case turned on contract negotiation and the specific terms of the contracts, and it highlights the need to ensure that a thorough and complete review of the underlying documents, other debt instruments and an issuer's capital structure is completed before commencing any refinancing.

Trust Indenture Act cases

In recent years, debtholders have sought to invoke the protections of the Trust Indenture Act in connection with various restructurings leading to significant confusion.

For example, in various decisions arising in connection with a restructuring by Education Management and brought by Marblegate and in various cases relating to a restructuring undertaken by Caesars Entertainment, courts considered the applicability of section 316 of the Trust Indenture Act. In relevant part, section 316(b) of the Trust Indenture Act provides that a bondholder's right to receive payment of principal and interest on the respective due dates shall not be impaired or affected without the bondholder's consent:

*'Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates shall not be impaired or affected without the consent of such holder.'*²

In *Marblegate Asset Management v Education Management Corp.*, a debtholder, Marblegate, challenged the company's restructuring raising concerns regarding the scope of the protection afforded by the Trust Indenture Act. Education Management LLC had significant debt outstanding, including notes guaranteed by its parent, Education Management Corp. Consistent with many indentures, the indenture relating to the notes at issue provided that the parent guarantee could be released if a majority of noteholders consented or if the secured lenders released the parent's guarantee pursuant to a secured credit agreement. The indenture was qualified under the Trust Indenture Act. A

restructuring agreement was negotiated between the company and a creditor group pursuant to which, among other things, the secured lenders would release the parent guarantee under the secured credit agreement and foreclose on substantially all of the assets of the parent and its subsidiaries. The foreclosed assets would be conveyed to a new subsidiary of the parent that would distribute new debt and equity securities to consenting holders. The non-consenting holders would receive no distribution and would retain their old notes that provided a claim against the issuer of such notes, which had no assets as a result of the foreclosure and asset transfer. Marblegate sought to block the intercompany sale.³ A district court denied the injunctive relief but agreed that the plaintiffs had demonstrated a likelihood of success on the merits that the intercompany sale outside of bankruptcy violated section 316(b) of the Trust Indenture Act, which provided, in the court's view, protection against a nonconsensual debt restructuring that would impair the holder's right to recover on its claim.⁴ In another decision, the Southern District Court followed the Marblegate analysis holding that the nonconsensual release of a guarantee violated section 316(b) of the Trust Indenture Act.⁵ This line of decisions created a great deal of uncertainty regarding the applicability of section 316(b) in restructurings, and seemed to raise the possibility that a noteholder could effectively block restructurings that would impair a noteholder's right to recover even where a restructuring does not result in a change to contractual payment terms or make bonds payable in something other than cash.

This broad reading of the Trust Indenture Act provisions was not applied in a different restructuring that was not, in the court's view, an involuntary out-of-court restructuring. In *Waxman v Cliffs Natural Resources*, retail noteholders claimed that an exchange of new secured notes for unsecured notes made available only to institutional investors violated their rights under the indenture as well as pursuant to Trust Indenture Act section 316(b).⁶ The terms of the notes of the retail investors were not changed following the exchange offer, although they were effectively subordinated to the new notes to the extent of the value of the collateral securing the new notes. While the decision in Cliffs did not directly address Marblegate I and Marblegate II's interpretation of section 316(b), it did circumscribe the broad application of that provision to instances of restructurings that were effectively bankruptcies.

Finally, in 2017, the Second Circuit rejected the lower court's broad reading of section 316(b) and overturned the decision concluding that the section only prohibits nonconsensual amendments to an indenture's core payment terms and not the practical ability to receive payment.⁷ While the Second Circuit court decision restored certainty regarding certain provisions of the Trust Indenture Act, and provided a path forward for restructurings, the area of liability management transactions and particularly transactions involving distressed restructurings remain in the spotlight. Other recent decisions have raised questions regarding the interpretation of make whole and similar customary indenture provisions.⁸ As a result, issuers considering a liability management transaction are well advised to consult counsel and proceed cautiously.

ENDNOTES

- 1 *The Bank of New York Mellon and High River Limited Partnership v Realogy Corporation*, 979 A.2d 1113, Del. Ch. LEXIS 186 (Del. Ch. 2008).
- 2 Trust Indenture Act, 15 USC sect 77ppp(b).
- 3 *Marblegate Asset Mgmt. v Educ. Mgmt. Corp.*, 75 F. Supp. 3d 592 (S.D.N.Y. 2014), referred to as Marblegate I.
- 4 *Marblegate Asset Mgmt. v Educ. Mgmt. Corp.*, 111 F. Supp. 3d 542 (S.D.N.Y. 2015), referred to as Marblegate II.
- 5 *Meehancombs Global Credit Opportunities Funds, LP Relative Value-Long-Short Debt v Caesars Entertainment Corp.*, 80 F. Supp. 3d 507 (S.D.N.Y. 2015), often referred to as Caesars I, and *BOKE, N.A. v Caesars Entertainment Corp.*, 2015 WL 5076785 (S.D.N.Y. 2015), often referred to as Caesars II.
- 6 *Waxman v Cliffs Natural Resources, Inc.*, Case No. 16-cv-1899 (S.D.N.Y. 2016).
- 7 *Marblegate Asset Mgmt. v Educ. Mgmt. Corp.*, Docket No. 15-2124-cv (CON) (2d. Cir. January 17 2017), referred to as Marblegate III.
- 8 *See, for example, Wilmington Sav. Soc'y, FSB v Cash Am. Int'l, Inc.*, No 15-CV 5027 (JMF), 2016 WL 5092594 (S.D.N.Y. September 19 2016), *In re Energy Future Holdings Corp.*, 842 F. 3d 247 (3d. Cir. 2016), *In re MPM Silicones LLC*, No. 15-1771 (2d. Cir. October 20 2017) and related cases.

APPENDIX A

Liability management: summary of options

Choosing the right liability management alternative to restructure or retire outstanding debt securities or to manage risk and reduce funding costs may depend on a number of factors. Below we summarise the principal considerations for issuers.

	BENEFITS	CONSIDERATION
Redemptions	<ul style="list-style-type: none"> • Efficiency (no registration required, no documentation needed) • Flexibility (may redeem all or part of an outstanding class of debt securities) 	<ul style="list-style-type: none"> • Requires deploying cash on hand • Expensive (redemption price usually preserves yield to maturity) • Notice must be outstanding between 30 and 60 days (rates may fluctuate)
Repurchases	<ul style="list-style-type: none"> • Efficiency (no registration required and no documentation needed) • Privately negotiated • Pricing takes advantage of market fluctuations • Less transparency • For financial institutions, may help improve Tier 1 regulatory capital position • May be part of an ongoing repurchase programme 	<ul style="list-style-type: none"> • Requires deploying cash on hand • May result in retiring only a small percentage of securities from a limited number of holders • May trigger public disclosure • May trigger the application of tender offer rules

BENEFITS

CONSIDERATION

Debt tenders

- Efficiency (no registration required and not subject to SEC review, unless the securities are convertible debt)
 - Flexibility (able to retire an entire series or class of debt securities)
 - Able to approach all holders (subject to compliance with the tender offer rules)
 - May engage investment bank to undertake the tender
 - Can be paired with a consent solicitation
- Requires deploying cash on hand
 - If subject to the tender offer rules, debt tenders must be held open for a specified time period and be in compliance with other conditions
 - Holdout issue
 - Convertible debt tenders generally are subject to the tender rules for equity securities
 - Must pay all investors of the same class the same price (if subject to the tender offer rules)

Private exchange offer

- Efficiency (no registration required and not subject to SEC review, unless convertible debt)
 - Does not require deploying cash on hand
 - Flexibility (able to retire an entire series or class of debt securities)
 - May engage investment bank to solicit
 - Able to pre-certify investor status
 - No section 11 liability in respect of offering memorandum
 - Can be paired with a consent solicitation
 - Often can be accomplished on a tax-free basis for debtholders
- Generally limited to qualified institutional buyers and non-US investors
 - Holdout issue
 - The new securities issued in the exchange may be restricted (but holder may be able to tack its holding period from the original issue date of the tendered security)
 - Holders may request registration of the resale of the new securities

3(a)(9) exchange offer

- Efficiency (no registration required and not subject to SEC review)
 - Flexibility (able to retire an entire series or class of debt securities)
 - Does not require cash on hand (only minimal costs)
 - Able to approach all holders (subject to compliance with the tender offer rules)
 - No section 11 liability with regard to offering memorandum
 - Can pair with a consent solicitation
 - Often can be accomplished largely tax-free for debtholders
- New securities may be restricted (but holder may be able to tack its holding period)
 - Limited ability to engage and compensate investment bank
 - Holdout issue
 - May be integrated with offers made in close proximity
 - Must pay all investors of the same class the same price (if subject to the tender offer rules)

BENEFITS

CONSIDERATION

Registered exchange offer

- Efficiency (able to retire an entire series or class of debt securities)
 - Does not require deploying cash on hand
 - New securities are freely transferable
 - May engage an investment bank to solicit exchanges; no restrictions on compensation to the investment bank
 - Able to approach all holders (subject to compliance with the tender offer rules)
 - Can be paired with a consent solicitation
 - Often can be accomplished on a tax-free basis for debt holders
- Time consuming (subject to SEC review and filing requirements)
 - Generally must remain open for 20 business days (if subject to the tender offer rules)
 - Section 11 liability
 - Holdout issue
 - Must pay all investors of the same class the same price (if subject to the tender offer rules)

Debt-for-equity exchanges

- Often used by issuers under distressed conditions or even as an alternative to bankruptcy because of upside potential for investors
 - Improves the issuer's debt-to-equity ratio, also potentially improving the issuer's credit ratings
 - Does not require deploying cash on hand (only minimal costs)
 - Can be paired with a consent solicitation
 - often can be accomplished on a tax-free basis for debtholders
- If registered, can be time consuming (subject to SEC review and filing requirements)
 - Must remain open for a specified time period if subject to the tender offer rules
 - Equity issuance may trigger securities exchange issuance limitations or shareholder vote requirement
 - Terms of equity securities may be onerous
 - Must pay all holders of the same class the same price (if subject to the tender offer rules)

Equity-for-equity exchanges

- Does not require deploying cash on hand
 - Terms of new securities may be less onerous
 - Generally a tax-free transaction
 - Able to approach all holders subject to compliance with the tender offer rules
- Must be permitted under state law
 - If registered, can be time consuming (subject to SEC review and filing requirements)
 - Must remain open for a specified time period if subject to the tender offer rules
 - No balance sheet impact
 - Must pay all holders of the same class the same price if subject to the tender offer rules

BENEFITS

CONSIDERATION

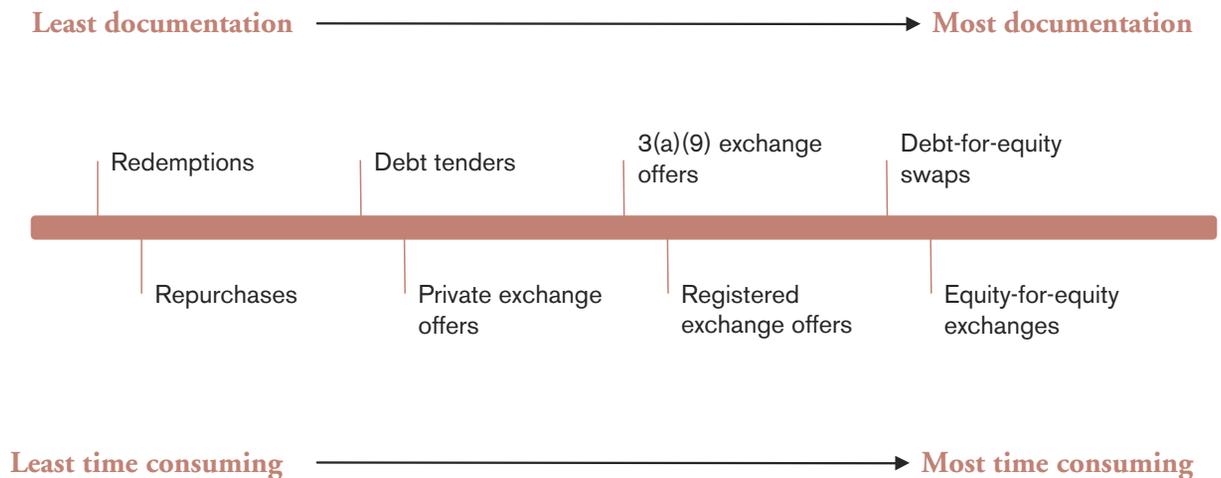
Consent solicitation

- May be undertaken alone or paired with a tender offer or exchange offer; however, SEC guidance does not permit exit consents to be solicited in connection with expedited tenders
 - Allows the issuer to modify onerous or restrictive covenants
 - Not subject to SEC review or to the tender offer rules
 - No section 11 liability
 - Does not require deploying cash on hand (only minimal costs)
 - Generally tax-free unless considered a significant modification of the outstanding debt securities
- May require a supermajority to enact modifications
 - Trust Indenture Act (TIA) of 1939 does not permit modification of interest, principal, maturity and other provisions without 100% approval; TIA provisions may serve to limit certain amendments that deprive holders of a right to a source of payment
 - Modifications may result in the remaining securities being considered 'new' for Securities Act purposes
 - Holdout issue

APPENDIX B

Liability management continuum

We often detail for clients their liability management alternatives on a continuum, focusing in particular on describing the options from those that are least time-consuming and require less documentation, to those that are more involved and require preparation of offer materials and may entail review by the SEC. For convenience, we've illustrated below the continuum. In this book, we describe the alternatives in sequence, from left to right in the continuum.



APPENDIX C

Rule 14e-1 – unlawful tender offer practices

As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, no person who makes a tender offer shall:

- a. Hold such tender offer open for less than 20 business days from the date such tender offer is first published or sent to security holders; provided, however, that if the tender offer involves a roll-up transaction as defined in Item 901(c) of Regulation S-K and the securities being offered are registered (or authorised to be registered) on Form S-4 or Form F-4, the offer shall not be open for less than 60 calendar days from the date the tender offer is first published or sent to security holders.
- b. Increase or decrease the percentage of the class of securities being sought or the consideration offered or the dealer's soliciting fee to be given in a tender offer unless such tender offer remains open for at least 10 business days from the date that notice of such increase or decrease is first published or sent or given to security holders;
Provided, however, that, for purposes of this paragraph, the acceptance for payment of an additional amount of securities not to exceed two percent of the class of securities that is subject the tender offer shall not be deemed to be an increase. For purposes of this paragraph, the percentage of a class of securities shall be calculated in accordance with section 14(d)(3) of the Act.
- c. Fail to pay the consideration offered or return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of a tender offer. This paragraph does not prohibit a bidder electing to offer a subsequent offering period under Rule 14d-11 from paying for securities during the subsequent offering period in accordance with that section.
- d. Extend the length of a tender offer without issuing a notice of such extension by press release or other public announcement, which notice shall include disclosure of the approximate number of securities deposited to date and shall be issued no later than the earlier of:
 - i. 9.00am Eastern time, on the next business day after the scheduled expiration date of the offer; or
 - ii. If the class of securities which is the subject of the tender offer is registered on one or more national securities exchanges, the first opening of any one of such exchanges on the next business day after the scheduled expiration date of the offer.
- e. The periods of time required by paragraphs (a) and (b)

of this section shall be tolled for any period during which the bidder has failed to file in electronic format, absent a hardship exemption (Rules 232.201 and 232.202 of this chapter), the Schedule TO Tender Offer Statement (Rule 240.14d-100), any tender offer material required to be filed by Item 12 of that Schedule pursuant to paragraph (a) of Item 1016 of Regulation M-A, and any amendments thereto.

If such documents were filed in paper pursuant to a hardship exemption (see Rule 232.201 and Rule 232.202(d)), the minimum offering periods shall be tolled for any period during which a required confirming electronic copy of such Schedule and tender offer material is delinquent.

Rule 14e-2 – position of subject company with respect to a tender offer

- a. Position of subject company. As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, the subject company, no later than 10 business days from the date the tender offer is first published or sent or given, shall publish, send or give to security holders a statement disclosing that the subject company:
 1. Recommends acceptance or rejection of the bidder's tender offer;
 2. Expresses no opinion and is remaining neutral toward the bidder's tender offer; or
 3. Is unable to take a position with respect to the bidder's tender offer.

Such statement shall also include the reason(s) for the position (including the inability to take a position) disclosed therein.
- b. Material change. If any material change occurs in the disclosure required by paragraph (a) of this section, the subject company shall promptly publish, send or give a statement disclosing such material change to security holders.
- c. Any issuer, a class of the securities of which is the subject of a tender offer filed with the Commission on Schedule 14D-1F and conducted in reliance upon and in conformity with Rule 14d-1(b) under the Act, and any director or officer of such issuer where so required by the laws, regulations and policies of Canada and/or any of its provinces or territories, in lieu of the statements called for by paragraph (a) of this section and Rule 14d-9 under the Act, shall file with the Commission on Schedule 14D-9F the entire disclosure document(s) required to be furnished to holders of securities of the subject issuer by the laws, regulations and policies of Canada and/or any of its provinces or territories governing the conduct of the tender offer, and shall disseminate such document(s) in the United States in accordance with such laws, regulations and policies.
- d. Exemption for cross-border tender offers. The subject company shall be exempt from this section with respect to a tender offer conducted under Rule 14d-1(c).

Rule 14e-3 – transactions in securities on the basis of material, nonpublic information in the context of tender offers

- a. If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the offering person), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from:
 1. The offering person;
 2. The issuer of the securities sought or to be sought by such tender offer; or
 3. Any officer, director, partner, employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publically disclosed by press release or otherwise.
- b. A person other than a natural person shall not violate paragraph (a) of this section if such person shows that:
 1. The individual(s) making the investment decision on behalf of such person to purchase or sell any security described in paragraph (a) or to cause any such security to be purchased or sold by or on behalf of others did not know the material, nonpublic information; and
 2. Such person had implemented one or a combination of policies and procedures, reasonable under the circumstances, taking into consideration the nature of the person's business, to ensure that individual(s) making investment decision(s) would not violate paragraph (a), which policies and procedures may include, but are not limited to:
 - i. Those which restrict any purchase, sale and causing any purchase and sale of any such security; or
 - ii. Those which prevent such individual(s) from knowing such information.
- c. Notwithstanding anything in paragraph (a) to contrary, the following transactions shall not be violations of paragraph (a) of this section:
 1. Purchase(s) of any security described in paragraph (a) by a broker or by another agent on behalf of an offering person; or
 2. Sale(s) by any person of any security described in paragraph (a) to the offering person.
- d.
 1. As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, it shall be unlawful for any person described in paragraph (d)(2) of this section to communicate material, nonpublic information relating to a tender offer to any other person under circumstances in which it is reasonably foreseeable that such communication is likely to result in a violation of this rule except that this paragraph

shall not apply to a communication made in good faith,

- i. To the officers, directors, partners or employees of the offering person, to its advisors or to other persons, involved in the planning, financing, preparation or execution of such tender offer;
 - ii. To the issuer whose securities are sought or to be sought by such tender offer. Also to its officers, directors, partners, employees or advisors or to other persons, involved in the planning, financing, preparation or execution of the activities of the issuer with respect to such tender offer; or
 - iii. To any person pursuant to a requirement of any statute or rule or regulation announced thereunder.
2. The persons referred to in paragraph (d)(1) of this section are:
- i. The offering person or its officers, directors, partners, employees or advisors;
 - ii. The issuer of the securities sought or to be sought by such tender offer or its officers, directors, partners, employees or advisors;
 - iii. Anyone acting on behalf of the persons in paragraph (d)(2)(i) or the issuer or persons in paragraph (d)(2)(ii); and
 - iv. Any person in possession of material information relating to a tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from any of the above.

APPENDIX D

Compliance & disclosure interpretations: tender offers and schedules

(Last update: November 18 2016)

QUESTIONS AND ANSWERS OF GENERAL APPLICABILITY

Sections 101 to 102. [Reserved]

Section 13(e) and Rule 13e-4

Sections 103 to 129. [Reserved]

Section 14(d) and Regulation 14D

Sections 130 to 159.

Section 159. Rule 14d-101 – Schedule 14D-9

Question 159.01

Question: Item 5 of Schedule 14D-9 and Item 1009(a) of Regulation M-A together require a summary of all material

terms of employment, retainer or other arrangement for compensation regarding “all persons [] that are directly or indirectly employed, retained, or to be compensated to make solicitations or recommendations in connection with” a transaction subject to the provision. Is a financial advisor engaged by an issuer’s board or independent committee for the exclusive purpose of providing financial advice considered a person “directly or indirectly employed, retained, or to be compensated to make solicitations or recommendations” within the meaning of Item 1009(a), even if its opinion expressly states that it is not making a solicitation or recommendation to any of the target company shareholders?

Answer: Yes. Notwithstanding the disclaimer that it is not making a solicitation or recommendation, a financial advisor engaged by the issuer’s board or independent committee to provide advice with respect to the tender or exchange offer and whose analyses or conclusions are discussed in the issuer’s Schedule 14D-9 is “indirectly employed, retained, or to be compensated” to assist the issuer to make its Schedule 14D-9 solicitation or recommendation. [November 18, 2016]

Question 159.02

Question: Item 5 of Schedule 14D-9 and Item 1009(a) of Regulation M-A together require a “summary of all material terms” of employment, retainer or other arrangement for compensation paid or to be paid to all persons directly or indirectly employed, retained, or to be compensated to make solicitations or recommendations in connection with the transaction. Would disclosing that “customary compensation” will be paid to financial advisors engaged to assist the issuer in making its required response to a tender or exchange offer, without any further details, satisfy this requirement?

Answer: While such a determination ultimately depends on the relevant facts and circumstances, generic disclosure such as “customary compensation” will ordinarily be insufficient as it lacks the specificity needed to assist security holders in evaluating the merits of the solicitation or recommendation and the objectivity of the financial advisors’ analyses or conclusions used to support such solicitation or recommendation. See generally Exchange Act Release No. 16384 (Nov. 29, 1979)(stating that the disclosure in Schedule 14D-9 is intended to “assist security holders in making their investment decision and in evaluating the merits of a solicitation/recommendation”). While quantifying the amount of compensation payable to the financial advisors may not necessarily be required in all instances, disclosure of the summary of the material terms of the financial advisors’ compensatory arrangements would generally include:

- the types of fees payable to the financial advisors (e.g., independence fees, sale transaction or “success” fees, periodic advisory fees, or discretionary fees);
- if multiple types of fees are payable to the financial advisors and there is no quantification of these fees, then sufficiently-detailed narrative disclosure to allow security holders to identify the fees that will provide the primary financial incentives for the financial advisors;
- any contingencies, milestones, or triggers relating to the payment of the financial advisors’ compensation (e.g., the payment of a fee upon the consummation of a transaction, including with a bidder in an unsolicited tender or exchange offer); and
- any other information about the compensatory arrangement that would be material to security holders’ assessment of the financial advisors’ analyses or

conclusions, including any material incentives or conflicts that should be considered as part of this assessment. [November 18, 2016]

Section 14(e) and Regulation 14E**Section 160. [Reserved]****Section 161. Section 14(e)****Section 162. Rule 14e-1***Question 162.01*

Question: The *Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities* no-action letter (Jan. 23, 2015) states that if the issuer is an Exchange Act reporting company, the issuer must furnish a press release announcing the abbreviated offer on a Form 8-K filed prior to 12:00 noon, Eastern time, on the first business day of the abbreviated offer. Can a foreign private issuer satisfy this condition by filing a Form 6-K?

Answer: Yes. [November 18, 2016]

Question 162.02

Question: The *Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities* no-action letter (Jan. 23, 2015) states that abbreviated offers must be made “for any and all” subject debt securities. Does this mean that abbreviated offers cannot have minimum tender conditions?

Answer: No. Abbreviated offers can have minimum tender conditions. [November 18, 2016]

Question 162.03

Question: Under the *Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities* no-action letter (Jan. 23, 2015), abbreviated offers for cash consideration to all holders may be made for a fixed amount of cash or for an amount of cash calculated with reference to a fixed spread to a benchmark as of the last business day of the offer. The letter also provides that abbreviated offers for consideration consisting of Qualified Debt Securities, as defined in the

letter, may be made to all persons who are QIBs and non-U.S. persons for a fixed amount of Qualified Debt Securities or for an amount of Qualified Debt Securities calculated with reference to a fixed spread to a benchmark, so long as a fixed amount of cash consideration is concurrently offered to persons other than QIBs and non-U.S. persons to approximate the value of the offered Qualified Debt Securities. In the latter case, can the amount of cash consideration offered to persons other than QIBs and non-U.S. persons instead be calculated with reference to a fixed spread to a benchmark?

Answer: Yes, the amount of cash consideration offered concurrently to persons other than QIBs and non-U.S. persons can be calculated with reference to a fixed spread to a benchmark, provided that the calculation is the same as the calculation used in determining the amount of Qualified Debt Securities. [November 18, 2016]

Question 162.04

Question: Can offerors issue Qualified Debt Securities under Securities Act Section 3(a)(9), rather than Securities Act Section 4(a)(2) or Securities Act Rule 144A, to Eligible Exchange Offer Participants, as defined in the letter, and still conduct an abbreviated offer in reliance on the *Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities* no-action letter (Jan. 23, 2015)?

Answer: Yes. [November 18, 2016]

Question 162.05

Question: One of the conditions specified in the *Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities* no-action letter (Jan. 23, 2015) is that the abbreviated offer not be “commenced within ten business days after the first public announcement or the consummation of the purchase, sale or transfer by the issuer or any of its subsidiaries of a material business or amount of assets that would require the furnishing of pro forma financial information with respect to such transaction pursuant to Article 11 of Regulation S-X (whether or not the issuer is a registrant under the Exchange Act).” If the offeror announces one of these transactions, when can it announce the abbreviated offer?

Answer: Offerors may announce the abbreviated offer at any time, but should not commence the abbreviated offer

prior to 5:01 p.m. on the tenth business day after the first public announcement of a purchase, sale or transfer of a material business or amount of assets described in the letter. Note that, if the abbreviated offer is commenced after 5:01 p.m. on a particular business day, the first day of the five business day period would be the next business day. [November 18, 2016]

APPENDIX E

Exchange Act Rule 14e-1 opinions for
debt tender offers

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Exchange Act Rule 14e-1 Opinions for Debt Tender Offers

By Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee

I. INTRODUCTION

This report addresses legal opinions regarding the application of Rule 14e-1 under the Securities Exchange Act of 1934 (the “Exchange Act”) to tender offers for non-convertible debt securities (“debt tender offers”). Rule 14e-1 was adopted by the U.S. Securities and Exchange Commission (the “SEC”)¹ pursuant to its authority in section 14(e) of the Exchange Act by “rules and regulations[, to] define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.” When debt tender offers are structured to be consistent with the literal requirements of Rule 14e-1, the Rule 14e-1 opinion is straightforward. On the other hand, when debt tender offers are structured in ways that raise questions as to their consistency with those requirements (which is often the case), the Rule 14e-1 opinion raises issues for counsel that typically are not present in other types of opinions. In these circumstances, counsel delivering the opinion may rely on no-action letters, interpretive positions, and other forms of guidance provided by the SEC’s Division of Corporation Finance and its staff (the “Staff”), and should consider including appropriate language in the opinion to inform the recipient about counsel’s reliance on such guidance.² To the extent that relevant Staff guidance is unavailable, counsel delivering the opinion should consider including appropriate language in the opinion to inform the recipient of the absence of relevant guidance.

The Subcommittee has issued this report to assist lawyers in preparing Rule 14e-1 opinions. This report first discusses legal issues that commonly arise regarding compliance of debt tender offers with Rule 14e-1. It then discusses why Rule 14e-1 opinions are requested, the special considerations they present, and the ways those considerations can be addressed when Rule 14e-1 opinions are given. Included in this report are illustrative opinion forms that may be used as a starting point in drafting a Rule 14e-1 opinion.

1. Release No. 34-16384 (Nov. 29, 1979).

2. The guidance is provided sometimes in writing and other times orally. The Subcommittee believes that counsel is entitled to rely on all such guidance.

II. LEGAL ISSUES ARISING UNDER RULE 14E-1 IN DEBT TENDER OFFERS

In Rule 14e-1, the SEC has prescribed—as means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices—several requirements for tender offers, only two of which ordinarily are significant for debt tender offers that are the subject of Rule 14e-1 opinions:

- the tender offer must remain open for at least twenty business days; and
- the tender offer must remain open for at least ten business days after notice of a change in the consideration offered or in the percentage of the class of securities being sought in the offer is first provided to security holders.³

While these requirements are easy to understand, they present interpretive questions when applied to a range of debt tender offer features and structures common in the marketplace. For example, provisions for shorter acceptance periods, yield-based formula pricing, modified Dutch auction pricing mechanisms, waterfall priority structures, and capped tender offers with early settlement followed by a step down in pricing, each as described below, are common elements in debt tender offers and may not be consistent with a literal reading of Rule 14e-1.

- A tender offer may be held open for as few as five business days instead of the twenty business days specified in Rule 14e-1.⁴
- A tender offer may use yield-based formula pricing, with the offer price determined on the basis of a fixed spread over a reference rate, such as a Treasury rate or another benchmark rate that is readily available on a Bloomberg or similar trading screen or quotation service. Because the offer price, expressed as a dollar amount per security, is not established until the price determination date (which is likely to be fewer than ten business days prior to the expiration date for the tender offer), such pricing mechanisms raise a question as to compliance with the requirement to keep the tender offer open for ten business days after a change in the offer price.

3. Rule 14e-1 also requires prompt payment or return of tendered securities after termination or withdrawal of the tender offer, and prescribes the manner of announcing extensions of the tender offer. Because these requirements relate to actions to be taken after a tender offer is commenced, they are generally not addressed in a Rule 14e-1 opinion, which typically is delivered at the commencement of a debt tender offer. However, these requirements may be addressed based on an assumption that the tender offer is conducted in accordance with the terms set forth in the tender offer documentation as long as that documentation provides (i) for prompt payment or return of tendered securities after termination or withdrawal of the tender offer as required by Rule 14e-1, and (ii) that any extension of the tender offer (including requisite notice of any such extension) be effected in accordance with Rule 14e-1.

4. See *infra* note 13 for a discussion of the Staff's no-action relief on this practice.

- The tender offer may include a “modified Dutch auction” pricing mechanism, which allows holders who tender their securities to select the minimum price at which their securities may be purchased (or to tender their securities without any specified price, which will be taken to mean at the lowest price in the range specified by the offeror). The offer price may be expressed as a fixed dollar amount, a spread over a benchmark rate, or a premium to the face amount of the security. At the end of the tender offer period, the offeror pays the lowest price that will allow it to purchase the desired amount of securities, with holders who tendered at or below the final price receiving the same price for their securities to the extent accepted for purchase pursuant to the tender offer. Because the offer price is set at the end of the offer period and is based on the tenders received, a modified Dutch auction structure raises a question as to compliance with the requirement to keep the tender offer open for ten business days after a change in the offer price.
- The tender offer may incorporate a “waterfall” priority feature, pursuant to which the issuer offers to purchase multiple series of securities in the priority set forth in the offer to purchase; the offer may set a maximum principal amount of each series (the “cap”) that will be accepted pursuant to the tender offer; and all securities in higher priority series validly tendered (up to the cap, if any) are accepted before tenders of securities in lower priority series are accepted. Because the aggregate principal amount of lower priority series of securities to be purchased is determined only at the end of the offer period, based on tenders received of higher priority series, a waterfall priority feature raises a question as to compliance with the requirement to keep the tender offer open for ten business days after a change in the percentage of the securities that are the subject of the offer.
- The tender offer may be for up to a specified maximum amount of debt securities and contain a step down in price after ten business days and early settlement in respect of securities tendered prior to the step down. These features, depending on the particular structure of the offer, could raise a question as to compliance with the literal requirement to keep the tender offer open for at least twenty business days.

Further, because the features and structures of debt tender offers are continually evolving, new interpretive questions under Rule 14e-1 continue to arise.⁵

5. See Charles T. Haag & Zachary A. Keller, *Honored in the Breach: Issues in the Regulation of Tender Offers for Debt Securities*, 9 N.Y.U. J.L. & Bus. 199, 233–240, 243–47 (2012) (summarizing developments in structuring debt tender offers).

III. APPROPRIATENESS OF REQUESTING A RULE 14E-1 OPINION

The dealer manager for a tender offer typically requests that issuer's counsel deliver a Rule 14e-1 opinion. Notwithstanding this practice, the Subcommittee believes that the parties involved in a debt tender offer could usefully consider, in the circumstances of a particular tender offer, whether a Rule 14e-1 opinion serves a constructive purpose and therefore should be requested or delivered. Factors the parties might consider include the relative experience and background of counsel for the issuer and of the dealer manager and its counsel, their relative involvement in structuring the tender offer, and the relative novelty and complexity of the structure being used. Where counsel for the issuer and the dealer manager work together on structuring—a practice that generally is desirable—the significance of any disparities in experience or involvement in the tender offer may be reduced.⁶

In several respects, the circumstances of Rule 14e-1 opinions differ from those in which issuer's counsel typically gives an opinion in a securities offering. First, the dealer manager is acting as an agent of the issuer, rather than as a principal or counterparty, and does not have any direct financial exposure in connection with the debt tender offer. Second, the dealer manager for a cash tender offer is not subject to express liability provisions under the federal securities laws such as section 11 of the Securities Act of 1933, which imposes liability on underwriters in a registered offering of securities.⁷ Although the dealer manager usually assists the issuer in developing the structure of the debt tender offer, typically with the advice and assistance of the dealer manager's counsel as to legal aspects of the structuring, the issuer making the debt tender offer is ultimately responsible for compliance with Rule 14e-1. Why, then, are Rule 14e-1 opinions requested, and why are they addressed to the dealer manager?

One answer may be that Rule 14e-1 opinions, like other opinions, serve as a “building block” in the parties' diligence with respect to the transaction⁸ and as tangible evidence that attention was paid to compliance with legal requirements. Whether the opinion should come from issuer's counsel, however, is open to question.⁹ As in many other capital markets and financing contexts, dealer managers in debt tender offers typically are sophisticated and are represented by experienced counsel. From a practical perspective, however, dealer managers commonly regard a Rule 14e-1 opinion from issuer's counsel as a procedural check

6. If the tender offer includes features or structural provisions that raise significant interpretive considerations under Rule 14e-1 and dealer manager's counsel has had more dealings with the Staff on point than issuer's counsel, dealer manager's counsel should ensure that issuer's counsel has the opportunity to evaluate the relevant Staff guidance that the dealer manager's counsel has received (to the extent that client confidences are not implicated).

7. The antifraud provisions of the federal securities laws apply to debt tender offers, although these provisions are not addressed by the Rule 14e-1 opinion.

8. DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, *GLAZER AND FITZGIBBON ON LEGAL OPINIONS* § 1.3.1 (3d ed. 2008 & Supp. 2016) [hereinafter *GLAZER*]; see also *Honored in the Breach*, *supra* note 5, at 217 (describing the opinion letter as the culmination of the lawyer's role of overseeing the debt tender offer's compliance with the securities laws).

9. See *GLAZER*, *supra* note 8, §§ 1.1, 1.3.1 (discussing English practice of counsel addressing opinions to their own clients).

and as a way of increasing the chances that all parties (issuer and dealer manager and their respective counsel) would present a united front should questions later arise about the debt tender offer's compliance with the federal securities laws.

Why the Rule 14e-1 opinion is addressed to the dealer manager is less clear because, as noted above, the opinion may not reduce any legal exposure that the dealer manager might have in connection with a debt tender offer.¹⁰ By requesting a Rule 14e-1 opinion, the dealer manager may be seeking to address reputational concerns or potential exposure to enforcement actions from the SEC or other regulators that could result from improperly structured debt tender offers. However persuasive or unpersuasive these reasons may be, the Subcommittee recognizes the practice of issuer's counsel giving Rule 14e-1 opinions addressed to the dealer manager in these transactions.¹¹

IV. UNUSUAL NATURE OF THE RULE 14E-1 OPINION

Unlike a typical third-party legal opinion for which the accepted standard is that the opinion is an expression of "the opinion giver's professional judgment about how the highest court of the jurisdiction whose law is being addressed would appropriately resolve the issues covered by the opinion on the date of the opinion letter,"¹² Rule 14e-1 opinions, when given with respect to debt tender offers that do not comply with the literal requirements of Rule 14e-1, are understood by experienced dealer managers and their counsel to express the opinion giver's judgment that, as a regulatory and administrative matter, the SEC is unlikely to bring an enforcement action for non-compliance with the literal requirements of Rule 14e-1.

Section 14(e) of the Exchange Act provides that it shall be unlawful for any person to engage in any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer. When the Staff issues a no-action letter stating that it will not recommend that the SEC take enforcement action under Rule 14e-1 if the offeror conducts a tender offer as summarized in a no-action request,¹³ the Staff is implicitly expressing its view that the proposed tender

10. The Subcommittee is not aware of any civil actions or claims against dealer managers in respect of compliance with the procedural requirements of Rule 14e-1.

11. See GLAZER, *supra* note 8, § 1.3.1 (noting that "the practice of counsel for one party to a financial transaction in the United States giving the other party an opinion on the enforceability of an agreement drafted by that other party's counsel is well entrenched and has resisted all efforts by lawyers and bar association groups to change it").

12. TriBar Opinion Comm., *Third-Party "Closing" Opinions*, 53 BUS. LAW. 592, 595-96 (1998) [hereinafter 1998 *TriBar Report*]; GLAZER, *supra* note 8, § 3.1 ("an unqualified opinion expresses the opinion preparers' professional judgment that the highest court of the jurisdiction whose law is being addressed would, based on the facts on which the opinion preparers have relied, reach the conclusions stated in the opinion").

13. For example, in a 2015 no-action letter, the Staff permitted a tender offer to be held open for as few as five business days instead of the twenty business days specified in Rule 14e-1. *Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities*, U.S. SEC. & EXCH. COMMISSION DIVISION CORP. FIN. (Jan. 23, 2015), <https://www.sec.gov/divisions/corpfin/cf-noaction/2015/abbreviated-offers-debt-securities012315-sec14.pdf> [hereinafter 2015 *Abbreviated Tender Offer No-Action Letter*] ("This no-action position supersedes the letters issued to Goldman, Sachs & Co. (March 26,

offer does not constitute a fraudulent, deceptive, or manipulative act or practice.¹⁴ For this reason, the Subcommittee believes that an opinion giver may properly base a Rule 14e-1 opinion on no-action letters and other Staff guidance and may properly assume that an experienced dealer manager understands the basis for the opinion. Consistent with this understanding, Rule 14e-1 opinions commonly refer to no-action letters, interpretive positions, and other forms of Staff guidance or consultations as the basis for the opinion. Although the Staff's views, as expressed in no-action letters and other Staff guidance, are not binding on the SEC or the courts,¹⁵ the Subcommittee believes that a court reviewing a debt tender offer would likely give considerable weight to that guidance.¹⁶

The Subcommittee believes that, when counsel is comfortable that the dealer manager, with the advice of its counsel, understands the basis for the opinion it is receiving, counsel may properly rely, without stating that reliance, on Staff guidance in preparing a Rule 14e-1 opinion,¹⁷ even when that guidance contemplates that elements of a tender offer may not comply with a literal requirement of Rule 14e-1.¹⁸ Nevertheless, because of the unusual nature of Rule 14e-1 opin-

1986); Salomon Brothers Inc. (March 12, 1986); Salomon Brothers Inc. (October 1, 1990); and any similar letters relating to abbreviated offering periods in non-convertible debt tender offers;"); *see also* CHARLES J. JOHNSON, JR., JOSEPH McLAUGHLIN & ERIC S. HAUETER, *CORPORATE FINANCE AND THE SECURITIES LAWS* § 13.03 (5th ed. 2014) (describing debt tender offer structures and related no-action letters).

In addition to the 2015 *Abbreviated Tender Offer No-Action Letter*, the Staff has provided guidance from time to time in various forms, including other no-action letters, telephone advice, and statements at bar association meetings, securities law programs, and other public forums. Of course, counsel can always seek guidance directly from the Staff in connection with a specific pending transaction.

14. So, too, when the Staff provides other forms of guidance with respect to one or more aspects of a tender offer or tender offer practice.

15. In its online form for requesting interpretive advice (https://www.sec.gov/cgi-bin/corp_fin_interpretive), the Staff cautions that "[r]esponses to requests for interpretive advice are not rules, regulations, or statements of the Commission, and the Commission has neither approved nor disapproved the Staff's responses or interpretations. Due to their informal nature, these responses are not necessarily binding on the Staff, the Division of Corporation Finance or the Commission. Our responses do not constitute legal advice, for which you should consult with your own attorney. While the Division encourages written requests, the Staff's responses to these requests will be given telephonically."

16. *See* *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 342-43 n.11 (3d Cir. 2015) (stating that the court gives the body of no-action letters "careful consideration" because they represent the views of those who continuously work with the applicable regulation). This opinion, which involved a no-action letter regarding the excludability of a shareholder proposal under Exchange Act Rule 14a-8, also cites Donna M. Nagy, *Judicial Reliance on Regulatory Interpretation in S.E.C. No-Action Letters: Current Problems and a Proposed Framework*, 83 *CORNELL L. REV.* 921, 1002 (1998), as "maintaining that whether 'the staff has consistently maintained a particular regulatory interpretation in no-action letters over a long period of time is relevant' to whether the interpretation should merit some deference, as 'consistent, longstanding staff positions may signal Commission approval of these positions.'" *Id.* at 343.

17. *Cf.* GLAZER, *supra* note 8, § 3.1 (noting that even though an opinion may turn out to be wrong, the standard for liability "requires a failure by the lawyers who prepared the opinion to exercise due care").

18. Counsel must, of course, adhere to the relevant standard of care in connection with its preparation and delivery of a Rule 14e-1 opinion and exercise professional judgment as to the ability to rely on Staff guidance. *Id.* § 1.6.1 (noting that the lawyer must "exercise the competence and diligence normally exercised by lawyers in similar circumstances" when delivering a closing opinion; this duty of care is "one of reasonableness in the circumstances" and "what is reasonable in the case of closing

ions, the Subcommittee recommends that counsel make clear the basis for the professional judgment expressed in the opinion.¹⁹

When giving a Rule 14e-1 opinion, counsel may also be asked to opine on tender offer structures for which no specific Staff guidance or controlling judicial precedent exists. Under these circumstances, counsel should consider disclosing in the opinion the absence of guidance or judicial precedent so that the dealer manager, with the advice of its counsel, understands the basis for the opinion it is receiving.

V. FORMS OF RULE 14E-1 OPINIONS

FORM A

If the structure of a debt tender offer complies with the literal requirements of Rule 14e-1, counsel may use the following form as a starting point for the opinion:

(X.) The tender offer, if conducted in accordance with the terms and conditions set forth in the Offer to Purchase [and the related Letter of Transmittal], will²⁰ comply in all material respects with²¹ Rule 14e-1 [(a)]²² under the Exchange Act.

Except as set forth in the immediately preceding sentence, we express no opinion as to compliance of the Tender Offer with the Exchange Act, any other provision of any rule or regulation promulgated under the Exchange Act, or any other securities laws, or the rules and regulations adopted thereunder.

FORM B

If the structure of a debt tender offer does not comply with the literal requirements of Rule 14e-1 but is in compliance with or satisfies the conditions of spe-

opinions, unless otherwise agreed, is determined by the customary practice of lawyers who regularly give and who regularly represent recipients of opinions of the kind involved”).

19. Cf. 1998 *TriBar Report*, *supra* note 12, at 602–03 (discussing risk of misleading the opinion recipient).

20. The Rule 14e-1 opinion is generally delivered at the commencement of the tender offer, suggesting that the future tense is more appropriate, but the use of the future tense does not change the principle that the opinion speaks only as of its date. If counsel is asked to deliver a Rule 14e-1 opinion after commencement of the tender offer, counsel should consider whether any post-commencement changes to the structure of the tender offer or the conduct of the tender offer in fact suggest that Form C below would serve as a more appropriate form or whether delivery of the opinion is generally appropriate under the circumstances.

21. The use of “comply with” in the opinion should be understood to refer to Rule 14e-1 as it has been interpreted, administered and enforced by the SEC and the Staff. In addition, some law firms include a materiality qualifier (“in all material respects/in any material respect”) in their Rule 14e-1 opinions. The Subcommittee views the inclusion of such a qualifier as unobjectionable.

22. Assuming that the opinion is delivered at the commencement of the tender offer, limiting the opinion to clause (a) of Rule 14e-1 is appropriate because the specific intention to hold the tender offer open for the required twenty business days will be evidenced by the disclosure in the Offer to Purchase. However, if the tender offer documentation specifically states that the issuer will take the actions necessary to ensure that the procedural requirements of Rule 14e-1(b)-(d) are satisfied, the opinion need not be limited to clause (a) of the Rule, and issuer’s counsel in such circumstances may assume without so stating in its opinion that the tender offer is conducted in the manner set forth in the tender offer documents.

cific Staff guidance, counsel may use one of the following alternatives as a starting point for the opinion²³:

(X.) **Alternative 1:** *The tender offer, if conducted in accordance with the terms and conditions set forth in the Offer to Purchase [and the related Letter of Transmittal], will satisfy the conditions specified in the [name of no-action letter or Staff guidance] dated [X]. The position expressed in [the no-action letter or Staff guidance] is not binding on the Commission or the courts.*

Alternative 2: *The Division of Corporation Finance of the Commission would not recommend that the Commission take enforcement action under Rule 14e-1[(a)] under the Exchange Act if the tender offer is conducted in accordance with the terms and conditions set forth in the Offer to Purchase [and the related Letter of Transmittal]. In reaching this opinion, we have relied upon [name of no-action letter or Staff guidance] dated [X].²⁴ The position expressed in [the no-action letter or Staff guidance] is not binding on the Commission or the courts.*

Except as set forth in the immediately preceding sentence, we express no opinion as to compliance of the Tender Offer with the Exchange Act, any other provision of any rule or regulation promulgated under the Exchange Act, or any other securities laws, or the rules and regulations adopted thereunder.

FORM C

If the structure of a debt tender offer raises interpretive issues under Rule 14e-1 not addressed in specific Staff guidance, counsel may use one of the following alternatives as the starting point for the opinion:

(X.) **Alternative 1:** *The tender offer, if conducted in accordance with the terms and conditions set forth in the Offer to Purchase [and the related Letter of Transmittal], will comply in all material respects with Rule 14e-1[(a)] under the Exchange Act, as administered and enforced by the Securities and Exchange Commission and its Staff. [We note that no specific authority exists under Rule 14e-1 that expressly permits [early tender premiums, formula-based pricing, early settlement, different acceptance priority levels or a price determined on a single day by a fixed spread above a reference yield].]²⁵*

Alternative 2: *The Division of Corporation Finance of the Commission would not recommend that the Commission take enforcement action under Rule 14e-1[(a)] under the Exchange Act if the tender offer is conducted in accordance with the terms and conditions set forth in the Offer to Purchase [and the related Letter of Transmittal].*

23. Either of these alternatives could be given, for example, on a tender offer that is structured to comply with the 2015 *Abbreviated Tender Offer No-Action Letter*.

24. To the extent that a basis for the opinion is guidance that is not publicly available and was provided informally by the Staff to other counsel, then issuer's counsel should consider including appropriate explanatory language in its opinion.

25. Although not necessary, counsel may choose to include the bracketed language to alert the opinion recipient to the specific aspects of the tender offer that raise interpretive issues.

Additional Explanatory Language²⁶:

- [1] We are aware of no controlling judicial precedent or other binding authority that supports the conclusion expressed in this opinion. Accordingly, we can provide no assurance that a court or the Securities and Exchange Commission would reach the same conclusion.²⁷
- [2] This opinion is based on [no-action letters issued by] [, and] [discussions with,] the Staff of the Division of Corporation Finance of the Commission [between the Staff and our firm][,] [between the Staff and your counsel of which we are aware][,] [as well as discussions we are aware of between the Staff and other firms [including your counsel]] [, none of which specifically relates to the Tender Offer].
- [3] While we believe the Division would not object to the manner in which the Tender Offer is proposed to be conducted, we also note that the] [The] positions expressed in these [no-action letters] [and] [discussions] are not binding on the Commission or the courts.

Except as set forth in the immediately preceding sentence, we express no opinion as to compliance of the Tender Offer with the Exchange Act, any other provision of any rule or regulation promulgated under the Exchange Act, or any other securities laws, or the rules and regulations adopted thereunder.

26. Counsel should consider the need to include additional language in the opinion, such as the existence of interpretive issues and the basis for counsel's conclusions and the intended meaning of the opinion.

27. Although not necessary, counsel may choose to include additional explanatory language to alert the opinion recipient that no judicial or regulatory authority has passed upon the appropriateness of those aspects of the tender offer that raise interpretive issues. The inclusion of such language does not render the opinion "qualified" but is intended to inform the recipient and assist in its consideration of relevant regulatory and enforcement risks.

REFERENCE MATERIALS

Abbreviated tender and exchange offer
no-action letter guidance



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

January 23, 2015

Via Facsimile & U.S. Mail

James J. Clark, Esq.
Michael J. Ohler, Esq.
Cahill Gordon & Reindel LLP
Eighty Pine Street
New York, New York 10005

Re: Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities

Dear Mr. Clark and Mr. Ohler:

We are responding to your letter dated January 23, 2015 addressed to Michele M. Anderson, Daniel F. Duchovny, and David L. Orlic, as supplemented by telephone conversations with the staff. To avoid having to recite or summarize the facts set forth in your letter, a copy of that letter is attached to this response. Unless otherwise noted, capitalized terms in this letter have the same meaning as given to them in your letter.

On the basis of the facts and representations presented in your letter, and following conversations with you and representatives of the Credit Roundtable, the staff of the Division of Corporation Finance will not recommend that the Securities and Exchange Commission take enforcement action under Rule 14e-1(a) or Rule 14e-1(b) under the Securities Exchange Act of 1934 if an offeror conducts a Five Business Day Tender Offer in the manner described in your letter. This no-action position supersedes the letters issued to Goldman, Sachs & Co. (March 26, 1986); Salomon Brothers Inc (March 12, 1986); Salomon Brothers Inc (October 1, 1990); and any similar letters relating to abbreviated offering periods in non-convertible debt tender offers. None of the foregoing letters should be taken to express the Division's position with respect to tender offers commencing after the date hereof.

The foregoing no-action position is based on the facts presented and representations made in your letter. Any different facts or circumstances may require a different conclusion. Our position is strictly limited to the application of the rules noted above to the transactions described in your letter. This response expresses the Division's position on enforcement action only and does not express any legal conclusion on the question presented. In addition, this position reflects the staff's current views on the transactions described in your letter. We will continue to monitor developments in tender and exchange offers for non-convertible debt securities and may reconsider the position expressed in this letter in response to those developments.

James J. Clark, Esq.
Michael J. Ohler, Esq.
Cahill Gordon & Reindel LLP
January 23, 2015
Page 2

This response only reflects the staff's position on the provisions noted above and not on any other of the anti-fraud and anti-manipulation provisions of the federal securities laws, including Sections 9(a), 10(b) and 14(e) of the Exchange Act and Rule 10b-5 and Rule 14e-3 thereunder. The Division of Corporation Finance expresses no view with respect to any other questions that the tender or exchange offer may raise, including, but not limited to, the adequacy of the disclosure regarding, and the applicability of the Securities Act of 1933 or any other federal or state laws to, the tender or exchange offer.

Sincerely,

/s/ Michele M. Anderson

Michele M. Anderson
Chief, Office of Mergers and Acquisitions
Division of Corporation Finance

January 23, 2015

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Mergers and Acquisitions
100 F Street, N.E.
Washington, DC 20549

Attention: Ms. Michele Anderson, Chief
Mr. David Orlic, Special Counsel
Mr. Daniel F. Duchovny, Special
Counsel

Dear Ms. Anderson and Messrs. Orlic and Duchovny:

We hereby request¹ that the staff of the Division of Corporation Finance (the “Staff”) of the U.S. Securities and Exchange Commission (the “Commission”) confirm that it will not recommend any enforcement action to the Commission if an offeror were to (i) conduct a tender offer for non-convertible debt securities and hold the tender offer open for at least five business days (as that term is defined in footnote 12 below) from and including the date the tender offer is first published by means of Immediate Widespread Dissemination (as defined below), so long as such tender offer satisfies the applicable criteria described below (any such offer being referred to herein as a “Five Business Day Tender Offer”); (ii) hold open a Five Business Day Tender Offer for at least five business days from and including the date of the announcement of any change in the consideration offered and (iii) hold open a Five Business Day Tender Offer for at least three business days from and including the date of the announcement of any material change in the offer other than a change in the consideration offered.

The criteria applicable to a Five Business Day Tender Offer are that the offer would:

- be made for a class or series of non-convertible debt securities², regardless of any particular rating assigned thereto by any nationally recognized statistical rating or-

¹ The undersigned regularly represent a diverse group of issuers, dealer managers and investors in connection with debt tender offers. We believe the no-action relief requested herein reflects a broad consensus for appropriate relief and enjoys broad support among groups with diverse interests.

² Separate offers may be made for more than one class or series of debt securities as part of the same offer to purchase document.

ganization, as such term is defined in Section 3(a)(62) of the Securities Exchange Act of 1934, as amended, (the “Exchange Act”);

- be made by the issuer of the subject debt securities, or a direct or indirect wholly owned subsidiary of such issuer or a parent company that directly or indirectly owns 100% of the capital stock (other than directors’ qualifying shares) of such issuer;
- be made solely for cash consideration and/or consideration consisting of Qualified Debt Securities³, for any and all of such debt securities;
- be open to all record and beneficial holders of such debt securities; *provided* that exchange offers in which Qualified Debt Securities are offered would be restricted to Qualified Institutional Buyers (as defined in Rule 144A under the Securities Act of 1933, as amended (the “Securities Act”)) and/or non-U.S. persons (within the meaning of Regulation S under the Securities Act) (collectively, “Eligible Exchange Offer Participants”) in a transaction exempt from the registration requirements of the Securities Act; *provided, further*, that, holders who are not Eligible Exchange Offer Participants (or an affiliate thereof) would be given an option concurrent with such offer (which can be part of the same offer to purchase document) to receive cash (from either the offeror or a dealer manager) for such holders’ debt securities in a fixed amount determined by the offeror, in its reasonable judgment, to approximate the value of the Qualified Debt Securities being offered and such an amount is set forth at the commencement of the offer⁴;

³ The consideration offered may be a fixed amount of cash (and/or Qualified Debt Securities) or an amount of cash (and/or Qualified Debt Securities) based on a fixed spread to a benchmark and, in the case of Qualified Debt Securities, the coupon may be based on a spread to a benchmark. A “benchmark” includes U.S. Treasury Rates, LIBOR, swap rates and, in the case of securities denominated in currencies other than US dollars, sovereign securities or swap rates denominated in the same currency as the securities subject to the offer, in each case that are readily available on a Bloomberg or similar trading screen or quotation service. The spread used for determining the amount of consideration offered will be announced at the commencement of the tender offer. In the case of an offer of Qualified Debt Securities, if the interest rate or the spread used for determining the interest rate for such securities is not fixed and announced at the commencement of the offer, it will be announced at the commencement of the offer as a range of not more than 50 basis points, with the final interest rate or spread to be announced by 9:00 a.m., Eastern time, on the business day prior to the expiration of the offer. The exact amount of consideration and the interest rate (in the case of amounts or interest rate based on fixed spreads to a benchmark) on any Qualified Debt Securities will be fixed no later than 2:00 p.m., Eastern time, on the last business day of the offer. In addition, in the case of an offer of Qualified Debt Securities, a minimum acceptance amount would be announced at the commencement of the offer. “Qualified Debt Securities” means non-convertible debt securities that are identical in all material respects (including but not limited to the issuer(s), guarantor(s), collateral, lien priority, covenants and other terms) to the debt securities that are the subject of the tender offer except for the maturity date, interest payment and record dates, redemption provisions and interest rate; *provided* that Qualified Debt Securities must have (i) all interest payable only in cash and (ii) a weighted average life to maturity that is longer than the debt securities that are the subject of the offer.

⁴ In order to limit the amount of cash that an offeror (or a dealer manager) may have to pay to holders who are not Eligible Exchange Offer Participants (or their affiliates), an offeror may decide to include a condition precedent to its offer that no more than a specified maximum amount of cash would be required to be paid in the offer or else both the cash offer and concurrent exchange offer would terminate.

- not be made in connection with a solicitation of consents to amend the indenture, form of security or note or other agreement governing the subject debt securities (collectively, the “Indenture”);
- not be made if a default or event of default exists under the Indenture or any other indenture or material credit agreement to which the issuer is a party;
- not be made if at the time of the offer the issuer is the subject of bankruptcy or insolvency proceedings or has commenced a solicitation of consents for a “pre-packaged” bankruptcy proceeding or if the board of directors of the issuer has authorized discussions with creditors of the issuer to effect a consensual restructuring of the issuer’s outstanding indebtedness;
- not be financed with the proceeds of any Senior Indebtedness⁵;
- permit tenders prior to the expiration of the offer through a guaranteed delivery procedure by means of a certification by or on behalf of a holder that such holder is tendering securities beneficially owned by it and that the delivery of such securities will be made no later than the close of business on the second business day after the expiration of the offer;
- be announced via a press release through a widely disseminated news or wire service disclosing the basic terms of the offer (including the identity of the offeror, the class of securities sought to be purchased, the type and amount of consideration being offered and the expiration date of the offer), and containing an active hyperlink to, or an Internet address at which a record or beneficial holder could then obtain, copies of the offer to purchase and letter of transmittal (if any) and other instructions or documents (including a form of guaranteed delivery instructions) relating to the tender of such debt securities (collectively, “Immediate Widespread Dissemination”), in each case at or prior to 10:00 a.m., Eastern time, on the first business day of such five business day period⁶;
- if the issuer or the offeror is a reporting company under the Exchange Act (including “voluntary filers”), furnish the press release announcing the offer in a Current Report on Form 8-K filed with the Commission prior to 12:00 noon, Eastern time, on the first business day of the offer;

⁵ “Senior Indebtedness” means indebtedness that is incurred to finance all or a portion of the consideration in the Five Business Day Tender Offer (excluding indebtedness or borrowings under any credit or debt facility existing prior to the commencement of the offer) if such indebtedness (i) has obligors, guarantors or collateral (or a higher priority with respect to collateral) that the subject debt securities do not have; (ii) has a weighted average life to maturity less than that of the subject debt securities; or (iii) is otherwise senior in right of payment to the subject debt securities.

⁶ In addition to Immediate Widespread Dissemination, the offeror in any debt tender offer also would (i) use commercially reasonable efforts to send via email (or other form of electronic communication) the press release announcing the offer to all investors subscribing to one or more corporate action e-mails or similar lists; (ii) use other customary methods in order to expedite the dissemination of information concerning the tender offer to beneficial holders of the subject debt securities; and (iii) issue a press release promptly after the consummation of the offer setting forth the results of the offer.

- provide for communication by Immediate Widespread Dissemination at least five business days prior to the expiration of the offer of any change in the consideration being offered in the offer and at least three business days prior to expiration of any other material change to the offer, in each case at or prior to 10:00 a.m., Eastern time, on the first day of such five or three business day period, as applicable; and, if the issuer or offeror is a reporting company under the Exchange Act (including a “voluntary filer”), describe any change in the consideration being offered in a Current Report on Form 8-K filed with the Commission prior to 12:00 noon, Eastern time, on the first day of the aforementioned five business day period;
- provide for withdrawal rights that are exercisable (i) at least until the earlier of (x) the expiration date of the offer and (y) in the event that the offer is extended, the tenth business day after commencement of the offer, and (ii) at any time after the 60th business day after commencement of the offer if for any reason the offer has not been consummated within 60 business days after commencement;
- provide that the offeror will not pay the consideration in the offer until promptly after expiration of the offer pursuant to Rule 14e-1(c); and
- not be (i) made in anticipation of or in response to, or concurrently with, a change of control or other type of extraordinary transaction involving the issuer, such as a merger (or similar business combination), reorganization or liquidation or a sale of all or substantially all of its consolidated assets; (ii) made in anticipation of or in response to other tender offers for the issuer’s securities; (iii) made concurrently with a tender offer for any other series of the issuer’s securities made by the issuer (or any subsidiary or parent company of the issuer) if the effect of such offer, if consummated (by way of amendment, exchange or otherwise), would be to add obligors, guarantors or collateral (or increase the priority of liens securing such other series) or shorten the weighted average life to maturity of such other series; or (iv) commenced within ten business days after the first public announcement or the consummation of the purchase, sale or transfer by the issuer or any of its subsidiaries of a material business or amount of assets that would require the furnishing of pro forma financial information with respect to such transaction pursuant to Article 11 of Regulation S-X (whether or not the issuer is a registrant under the Exchange Act).

Discussion

Section 14(e) of the Exchange Act prohibits untrue statements of material fact, omissions of material fact, and fraudulent, deceptive and manipulative acts and practices in connection with tender offers.⁷ As a means reasonably designed to prevent these acts and practices, the Commission has promulgated specific rules that are applicable to tender offers in Regulation 14E.⁸ Particularly, Rule 14e-1(a) requires a minimum offer period for all tender offers—debt or equity—of 20 business days, in order to afford participants sufficient time to make a decision as to whether or not to tender securities owned by them and

⁷ 15 U.S.C. § 78n(e) (2012).

⁸ Regulation 14E and Rules 14e-1 through 14e-8. 17 C.F.R. §§ 240.14e-1 *et seq.*

Rule 14e-1(b) requires that a tender offer remain open for at least ten business days after any change in the consideration offered.⁹

Commencing in 1986, the Staff issued a series of no-action letters providing relief from the 20 business day requirement in the context of certain debt tender offers. In particular, the Staff granted no-action relief for issuer tender offers for non-convertible debt securities (later limited to only non-convertible debt securities with an investment grade rating) that are held open for a period of seven to ten calendar days and meet certain other qualifications.¹⁰

The Staff's existing no-action relief recognizes that debt tender offers may, in certain circumstances, present significantly different timing considerations than those involved in tender offers for equity securities. Debt tender offers frequently involve the refinancing of debt securities with high interest rates with a new issue of debt securities with a lower interest rate, or the refinancing of debt securities that will mature within a relatively short time frame with debt securities with a longer maturity being issued during a period of reasonably favorable market conditions. The ability of an issuer to effect such a refinancing in a relatively short period of time is important to lessen potential exposure to changing market conditions and to avoid having to pay "double interest" or "negative carry"—i.e., interest on the newly issued debt securities and on the outstanding debt securities until they can be purchased in the tender offer. A shortened tender period also is advantageous to the holders of outstanding debt securities who want to reinvest funds received in the tender to purchase a portion of the new issue, thus "rolling over" their investment. Unlike the significant premiums often paid in an equity tender offer, the tender price in a non-convertible debt tender offer is typically either a modest premium over the prevailing market price of the debt securities subject to the offer or a close approximation to the then-applicable redemption price, and the holder does not have to weigh any potential equity upside the holder is being asked to give up in exchange for the premium.¹¹

We believe that a number of the factors the Staff has previously recognized and relied on in granting prior no-action letters are equally applicable today to the requested no-action relief and that advancements in technology since 1986 enable investors to react efficiently to debt tender offers in a shorter time frame.

In connection with a Five Business Day Tender Offer, the requested no-action relief would vary from the Staff's existing no-action relief in the following principal respects:

⁹ Rule 14e-1(b) also requires that tender offers remain open for at least ten business days after certain increases or decreases in the percentage of the class of securities being sought in the subject offer, but since Five Business Day Tender Offers are defined as offers for any and all securities of a series or class of securities, there would be no change in the amount of securities being sought in the Five Business Day Tender Offer.

¹⁰ SEC No-Action Letter, *Goldman, Sachs & Co.* (March 26, 1986); SEC No-Action Letter, *Salomon Brothers Inc.* (March 11, 1986); SEC No-Action Letter, *Salomon Brothers Inc.* (Oct. 1, 1990).

¹¹ The Staff has also previously acknowledged that "because of the modest premiums typically offered in an Issuer Debt Tender Offer, it is not clear that participation in the tender offer by individual non-institutional debtholders would be materially increased by requiring that tender offers be held open for twenty business days." *Salomon Brothers Inc.* (March 11, 1986) at 7. We believe this observation remains accurate. In addition, given modern technology and the widespread use of electronic communications, we believe that individual investors will be better able to respond within the applicable time frame, especially in light of the Immediate Widespread Dissemination requirement.

- *Immediate Widespread Dissemination.* The relief requested hereby would be conditioned upon the offeror providing Immediate Widespread Dissemination of offer materials in a manner that we believe has broad investor support. This requirement is designed to be a benefit to investors not imposed by current relief and would further facilitate the ability of record and beneficial holders to make a tender decision within the time period contemplated.
- *Five business days vs. seven to ten calendar days.* The five business day requirement (as defined above) is similar to the seven to ten calendar day period under existing no-action relief. We believe, based on investor feedback, that using a business day construct is better than a calendar day construct. For example, five business days in almost all cases will require a seven calendar day period.¹² However, seven calendar days over a holiday period may result in the offer being held open for less than five business days. Given the advances in communications technology since 1986, we believe the requested relief, coupled with the requirement of Immediate Widespread Dissemination, places investors in a superior position to where investors were in 1986 before widespread public adoption of the Internet, when there was the potential for greater delay in the distribution of offer materials. Furthermore, in a tender offer that meets the criteria applicable for a Five Business Day Tender Offer, the holder does not have to evaluate the non-economic characteristics of an amended or new security that the holder would own, such as in the case of a tender offer accompanied by a consent solicitation or an exchange offer for new debt securities that are not Qualified Debt Securities. As a result, holders of debt securities in a Five Business Day Tender Offer can make the decision to sell or hold relatively quickly on a purely financial basis—in much the same manner investors make ordinary trading decisions in time periods that are much shorter than five business days. For similar reasons, the relief requested includes no-action relief if an offeror holds open a Five Business Day Tender Offer for at least five business days after any change in the consideration offered notwithstanding Rule 14e-1(b)'s requirements that a tender offer remain open for ten business days after a change in consideration offered and no-action relief if an offeror holds open a Five Business Day Tender Offer for at least three business days after any material change in the offer other than a change in the consideration offered.
- *Exchange offer of Qualified Debt Securities.* The relief requested would allow for offers to be made with Qualified Debt Securities. The inclusion of this alternative will allow issuers to use a Five Business Day Tender Offer to refinance existing debt securities with either cash proceeds from the issuance of new securities or the issuance of new debt securities directly to the holders of the existing debt securities. Since the Qualified Debt Securities must be identical in all material respects to the existing debt securities sought in the offer, other than maturity, weighted average life to maturity (which may not be less than the debt securities that are the subject of the tender offer), redemption provisions and interest rate (and related payment and record dates), the holder's decision is similar to that made in a cash offer—*i.e.*, is the value offered by the financial terms of the offer a favorable one or not. It is in essence a trading decision.¹³ As discussed above, these types of financial trading decisions are made by

¹² For purposes of the requested relief in this letter, a business day would be defined differently than in Rule 14d-1(g)(3). A business day for a Five Business Day Tender Offer would be any day, other than Saturday, Sunday or a federal holiday, and a Five Business Day Tender Offer would be treated as having commenced on the first business day on which the tender offer is made if Immediate Widespread Dissemination occurs at or prior to 10:00 a.m., Eastern time, on such business day. The last day of the tender offer would be treated as a business day if expiration occurs on or after 5:00 p.m., Eastern time, on such business day.

¹³ Because the Qualified Debt Securities would be a new issuance of securities, it is expected that the offer documents also would contain or incorporate by reference the same types of disclosures with respect to the

market participants every day in time periods that are much shorter than the five business days required under a Five Business Day Tender Offer. Investors would be protected because only Eligible Exchange Offer Participants (*i.e.*, qualified institutional buyers under Rule 144A and non-U.S. persons under Regulation S) would be able to participate in the exchange offer. We have been informed that dealer managers and banks have lists or databases that would allow them to easily identify holders of debt securities that are Eligible Exchange Offer Participants in advance of an exchange offer being commenced. If a holder does not qualify as an Eligible Exchange Offer Participant (or an affiliate thereof), such holder would have the option to tender subject debt securities and receive cash for such debt securities allowing them to receive an economic benefit of a cash offer if they decide to accept it. In substance, the exchange offer would be a refinancing transaction and, accordingly, fits within the rationale for the Five Business Tender Day Offer relief requested herein. We also believe that Eligible Exchange Offer Participants will benefit from an exchange offer of Qualified Debt Securities because, in many instances, it will enable them to match, on a dollar-for-dollar basis, a purchase of a new security of an issuer with the disposition of an old security of that same issuer without the potential mismatch of the amount of the new security purchased and the amount of the old security tendered and accepted that may occur in separately subscribing for an allocation of a new security being issued and tendering the old security in a cash tender offer. Finally, we believe that issuers will benefit from the ability to make an exchange offer of Qualified Debt Securities because there will be no timing lag or risk between the time of funding of the new debt securities and the time of retirement of the old securities and no “negative carry” associated with having the two debt securities outstanding at the same time.

- *Elimination of regulatory distinction between investment grade and non-investment grade debt securities.* Our requested relief eliminates the distinction in the existing 1986 relief between investment grade and non-investment grade debt securities. We believe eliminating this distinction is appropriate. First, holders of investment grade and non-investment grade debt securities are comprised of similar investor groups, and therefore we do not believe there is an investor protection concern that merits the distinction. If anything, our experience is that in many, if not most, cases, the holders of non-investment grade securities are more likely to be sophisticated institutional investors compared to holders of investment grade securities. Second, the factors cited in the 1986 no-action letters and the benefits to issuers and investors described above of shorter time periods apply to both investment grade and non-investment grade securities. Third, we believe the elimination of this distinction is consistent with Commission and Congressional policy. Both the Commission, in a series of 2008 proposals,¹⁴ and Congress, when it later passed Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, have recognized the undesirability, as a public policy matter, of making regulatory distinctions on the basis of the credit rating assigned to a particular security by a nationally recognized statistical rating organization.

For these reasons, we respectfully request that the Staff confirm that it will not recommend any enforcement action to the Commission (i) for Five Business Days Tender Offers having an expiration date

business and finances of the issuer as would be the case in a Rule 144A/Regulation S offering memorandum for a new issuance of securities.

¹⁴ See *References to Ratings of Nationally Recognized Statistical Rating Organizations*, Rel. No. 34-5870 (Jul. 1, 2008); *Security Ratings*, Rel. No. 33-8940 (Jul. 1, 2008); and *References to Ratings of Nationally Recognized Statistical Rating Organizations*, Rel. No. IC-28327 (Jul. 1, 2008).

of five business days after commencement of such offer, on the terms and conditions specified herein; (ii) if an offeror were to change the consideration offered in a Five Business Day Tender Offer and hold open such offer for at least five business days after such change is announced as provided herein; and (iii) if an offeror were to make any material change to a Five Business Day Tender Offer (other than the consideration offered) and hold open such offer for at least three business days after such change is announced as provided herein.

Conclusion

The Staff has acknowledged that certain tender offers for non-convertible debt securities subject to Regulation 14E do not merit enforcement action when held open for less than 20 business days. Extending the Staff's no-action position to a Five Business Day Tender Offer meeting the above criteria would be consistent with the Staff's existing no-action positions, the Commission's and Congress's views on the regulatory use of credit ratings, and the interests of all participants in such transactions. We therefore request the relief sought herein be granted and respectfully suggest that the Staff consider superseding the no-action letters that the Staff previously granted relating to the time period for which non-convertible debt tender offers must remain open, including those referred to in footnote 10 of this letter, with the relief requested herein.

If the Staff disagrees with our analysis, we would appreciate the opportunity to discuss this matter with you. Please do not hesitate to contact any of us if you have any questions or comments.

Very truly yours,

<p><u>/s/ James Clark</u> James J. Clark</p> <p><u>/s/ Michael J. Ohler</u> Michael J. Ohler</p> <p>Cahill Gordon & Reindel LLP Eighty Pine Street New York, NY 10005 (212) 701-3849 (212) 701-3139</p>	<p><u>/s/ Lawrence G. Wee</u> Lawrence G. Wee</p> <p>Paul Weiss, Rifkind, Wharton & Garrison LLP 1285 Avenue of the Americas New York, NY 10019 (212) 373-3052</p>	<p><u>/s/ Joseph A. Hall</u> Joseph A. Hall</p> <p><u>/s/ Michael Kaplan</u> Michael Kaplan</p> <p>Davis Polk & Wardwell LLP 450 Lexington Avenue New York, NY 10017 (212) 450-4565 (212) 450-4111</p>	<p><u>/s/ Senet S. Bischoff</u> Senet S. Bischoff</p> <p><u>/s/ Alexander F. Cohen</u> Alexander F. Cohen</p> <p><u>/s/ Casey T. Fleck</u> Casey T. Fleck</p> <p>Latham & Watkins LLP 355 South Grand Avenue Los Angeles, CA 90071 (213) 891-8589</p>
<p><u>/s/ Robert Evans III</u> Robert Evans III</p> <p>Shearman & Sterling LLP 599 Lexington Avenue New York, NY 10022 (212) 848-8830</p>	<p><u>/s/ Brian V. Breheny</u> Brian V. Breheny</p> <p><u>/s/ Gregg A. Noel</u> Gregg A. Noel</p> <p><u>/s/ Gregory A. Femicola</u> Gregory A. Femicola</p> <p>Skadden, Arps, Slate, Meagher & Flom LLP 4 Times Square New York, NY 10036 (202) 371-7180</p>	<p><u>/s/ John D. Lobrano</u> John D. Lobrano</p> <p><u>/s/ Marisa D. Stavenas</u> Marisa D. Stavenas</p> <p>Simpson, Thacher & Bartlett LLP 425 Lexington Avenue New York, NY 10017 (212) 455-2890</p>	<p><u>/s/ Corey R. Chivers</u> Corey R. Chivers</p> <p><u>/s/ Adé Heyliger</u> Adé Heyliger</p> <p>Weil, Gotshal & Manges LLP 767 Fifth Avenue New York, NY 10153 (212) 310-8893</p>
<p><u>/s/ Andrew J. Pitts</u> Andrew J. Pitts</p> <p>Cravath, Swaine & Moore LLP Worldwide Plaza 825 Eighth Avenue New York, NY 10019 (212) 474-1620</p>	<p><u>/s/ James J. Moloney</u> James J. Moloney</p> <p>Gibson, Dunn & Crutcher LLP 3161 Michelson Drive Irvine, CA 92612 (949) 451-4343</p>	<p><u>/s/ James P. Barri</u> James P. Barri</p> <p><u>/s/ Ettore Santucci</u> Ettore Santucci</p> <p>Goodwin Procter LLP Exchange Place 53 State Street Boston, MA 02109 (617) 570-1105</p>	<p><u>/s/ Laurie Green</u> Laurie Green</p> <p><u>/s/ David Cole</u> David Cole</p> <p>Holland & Knight 515 East Las Olas Boulevard, Suite 1200 Fort Lauderdale FL 33301 (954) 468-7848</p>
<p><u>/s/ J. Eric Maki</u> J. Eric Maki</p> <p>Jones Day 222 E. 41st Street New York, NY 10017 (212) 326-3780</p>	<p><u>/s/ Stuart A. Morrissy</u> Stuart A. Morrissy</p> <p>Milbank, Tweed, Hadley & McCloy LLP 1 Chase Manhattan Plaza New York, NY 10005 (212) 530-5224</p>	<p><u>/s/ David A. Sirignano</u> David A. Sirignano</p> <p>Morgan, Lewis & Bockius LLP 1111 Pennsylvania Avenue, NW Washington, DC 20004 (202) 739-5420</p>	<p><u>/s/ Edward D. Ricchiuto</u> Edward D. Ricchiuto</p> <p>Sidley Austin LLP 787 Seventh Avenue New York, NY 10019 (212) 839-8650</p>
<p><u>/s/ Alan J. Sinsheimer</u> Alan J. Sinsheimer</p> <p>Sullivan & Cromwell LLP 125 Broad Street New York, New York 10004-2498 (212) 558-3738</p>	<p><u>/s/ David Lopez</u> David Lopez</p> <p>Cleary Gottlieb Steen & Hamilton LLP One Liberty Plaza New York, NY 10006 (212) 225-2632</p>		



January 23, 2015

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Mergers and Acquisitions
100 F Street, N.E.
Washington, DC 20549
Attention: Ms. Michele Anderson, Chief
Mr. David Orlic, Special Counsel
Mr. Daniel Duchovny, Special Counsel

Dear Ms. Anderson and Messrs. Orlic and Duchovny:

The Credit Roundtable would like to express its enthusiastic support for the no-action relief request (the “Five Business Day Debt Tender Offer Letter”), dated January 23, 2015, by a group of nationally recognized law firms relating to the conduct of certain debt tender offers pursuant to Rules 14e-1(a) and (b) under the Securities Exchange Act of 1934, as amended. Capitalized terms used in this letter but not otherwise defined have the meanings given to them in the Five Business Day Debt Tender Offer Letter.

As you know, the Credit Roundtable is an association of fixed-income institutional investors and money managers that seeks to improve the regulatory and market environment for investors in corporate debt securities. We are grateful to have had the opportunity to work together with the various law firms and dealer-managers to craft a clear and common-sense approach to the conduct of the debt tender offers described in the Five Business Day Debt Tender Offer Letter that is fair and workable for issuers, investors, dealer-managers and legal counsel.

As described in more detail therein, the Five Business Day Debt Tender Offer Letter proposes various requirements for issuers and certain other parties to conduct a tender or exchange offer for non-convertible debt securities that is held open for five business days. The Credit Roundtable supports the no-action relief requested (the “Requested Relief”) in the Five Business Day Debt Tender Offer Letter for the following principal reasons:

- As a guiding principle, the Requested Relief is designed to be available for transactions that require decisions by investors that are based almost exclusively on the financial terms of the transaction (what we often refer to as “trading” decisions) and is not designed to be available for transactions that require investors to evaluate the substantive characteristics of the issuer, its operations and the subject securities (what we often refer to as “credit” decisions).

- The requirement to hold open Five Business Day Tender Offers for five business days (rather than seven calendar days, as previously required) provides more certainty with respect to the amount of time that investors and money managers have to respond to offers, since the period does not count holidays and weekends.
- The notice of guaranteed delivery procedure for Five Business Day Tender Offers permits tenders to occur up to the actual expiration date of the offer. We believe this feature is beneficial to investors and money managers because it counteracts the earlier deadlines (often two or three business days in advance of the actual expiration date) that often are imposed by custodian banks. To the extent that custodian banks cease imposing such earlier deadlines, the Credit Roundtable would be willing to consider supporting a modification of the notice of guaranteed delivery procedure.
- The requirement for Immediate Widespread Dissemination helps reduce or eliminate delays in investors receiving tender offer materials. Furthermore, the requirement that Exchange Act reporting companies (including “voluntary filers”) furnish the launch press release on Form 8-K increases the visibility of Five Business Day Tender Offers to investors and money managers.
- The ability of issuers to issue Qualified Debt Securities to eligible investors as consideration in Five Business Day Tender Offers makes pure refinancing transactions by issuers easier. In addition, it enables investors to avoid mismatches between the amount of existing securities tendered in a tender offer and the amount of new securities allocated to the investor in a refinancing transaction (which can occur if the tender offer is a separate process from the refinancing transaction). Finally, we believe this ability will increase the availability of corporate debt securities that are more similar to benchmark government securities, thus improving liquidity and facilitating investors’ portfolio management strategies.

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We believe that the Requested Relief represents a significant advance in protections for investors and a rationalization and formalization of consistent market practices that otherwise might be open to varied interpretation. Therefore, the Credit Roundtable enthusiastically supports the Requested Relief.

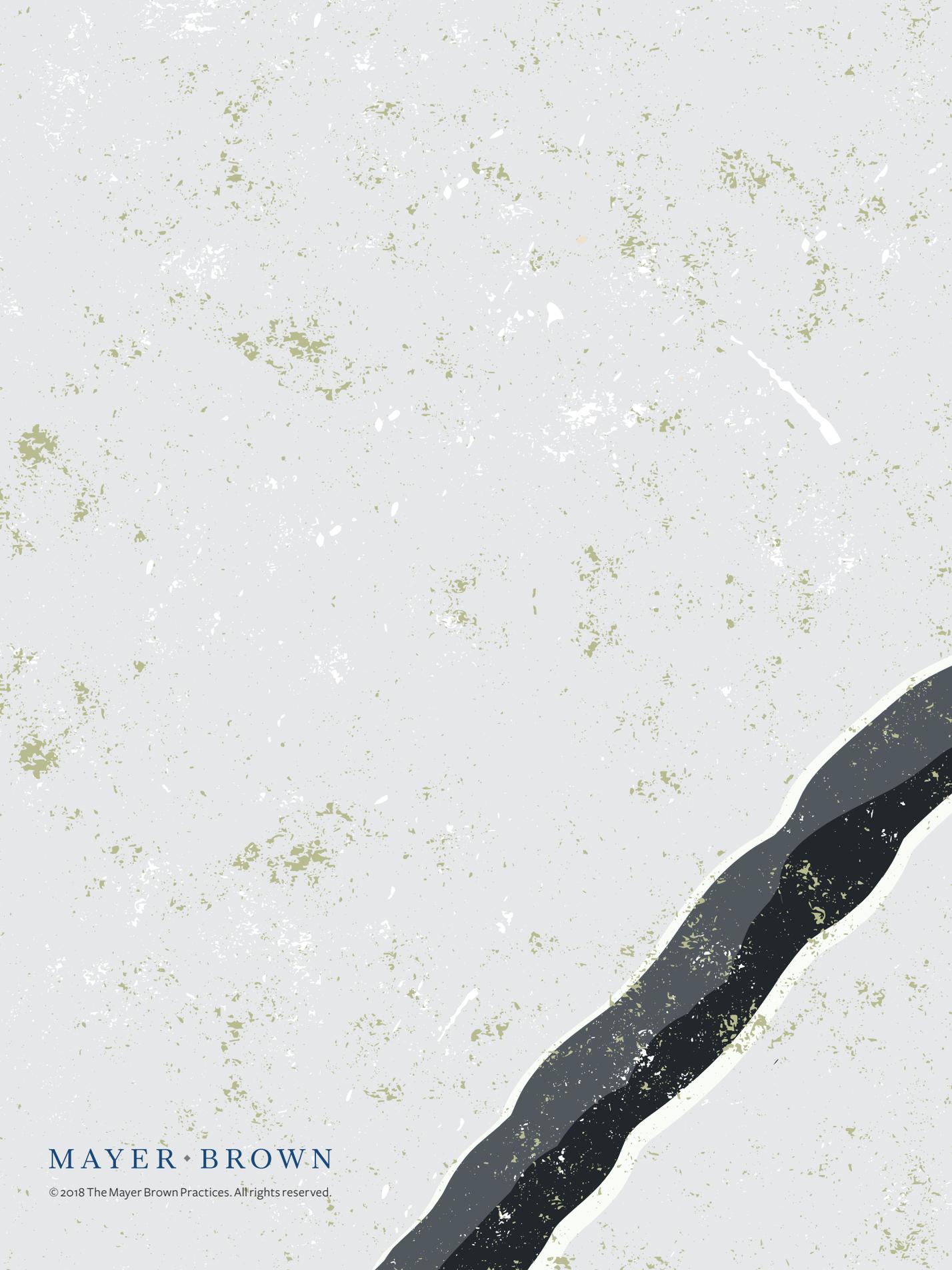
Yours Sincerely,



Lyn Perlmuth
Executive Director
Fixed Income Forum
On Behalf of the Credit Roundtable

225 Park Avenue South 7th Fl. | New York NY 10003
t: (212) 224 3074 | f: (212) 224 3838

e: lperlmuth@iimemberships.com | w: www.iimemberships.com



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