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**Raising Capital in the Current Environment II:
Liability Management Considerations, Bond
Repurchases, Exchanges and Debt Tender Offers**

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MCLE Credit Information

(1.0 Credit Hour)

- Most participants should anticipate receiving their certificate of attendance in 4-6 weeks following the webcast
- All questions regarding MCLE Information should be directed to Victoria Chan at (650) 849-5378 or vchan@gibsondunn.com

Today's Panelists



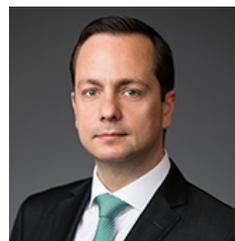
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Introduction

Liability Management Transactions

- Liability Management is a broad term that encompasses a range of capital markets transactions relating to securities that are already outstanding, including:
 - privately negotiated and open market purchases
 - cash tender offers
 - consent solicitations
 - exchange offers and debt-for-equity swaps
 - registered, private or 3(a)(9) exchanges
 - debt redemptions



Typical Participants

- Typical participants:
 - offeror (issuer/affiliate or third party)
 - investment banks, acting as dealer managers
 - information agent/tender agent
 - major players include Global Bondholder Services Corporation and D.F. King & Co., Inc.
 - bond trustee in debt liability management transactions
 - stock transfer agent in equity liability management transactions
 - depository (DTC, Euroclear and Clearstream)
 - relevant security exchanges (if securities are listed)



Cash Tender Offers

- Provides discretionary means to retire debt securities (as opposed to use of redemption rights under an indenture)
- Possible to approach all holders and repurchase any and all or a substantive portion of the outstanding debt securities
- Can be contingent upon a series of events (e.g., financing condition or an acquisition)

Consent Solicitations

- Debt tender offers may be coupled with a consent solicitation to obtain approval to amend the indenture
 - **Exit Consents**: consent to amend terms of existing debt securities, sought with concurrent tender of notes, including as means to incentivize holders to participate
 - Consents or waivers sought without concurrent debt tender are usually more limited in scope, as consenting holders will retain amended securities and may be less likely to agree to a significant diminution of their rights
- Normally, stand-alone consents are initially open for 10 days / 2 weeks
- Certain terms of the debt securities cannot be amended without consent of each affected holder (100% approval of entire series of securities)

Exchange Offers

- Offer to exchange new securities for outstanding securities, including “deemed issuance” based on substantial modification
 - debt/debt
 - debt/equity or /debt + equity
 - equity/equity
- Exchange offers may be in connection with:
 - typical liability management transactions (e.g., offer of new debt with different covenants/terms, in exchange for old debt), or
 - M&A transactions (e.g., offer of equity securities of the acquirer in exchange for equity securities of the acquired entity)
 - may also have liability management transactions in connection with M&A transactions (e.g., offer of new debt securities of the acquirer with the acquirer’s covenant package, in exchange of old notes from the acquired entity)

Exchange Offers

- Typical enhancements of new security offered to existing holders in debt exchange offers may include:
 - Higher coupon or additional principal
 - Guarantees or collateral (including by subsidiaries as to which the debt is structurally subordinated)
 - Higher ranking (subordinated to senior; unsecured to secured)
 - Structural seniority
 - Lower conversion price for convertible notes
- Benefits to issuer may include longer maturity, lower coupon, revised covenants or other benefits
- Key: the value of new security offered in the exchange is higher than the value of the existing security

Purposes of liability management transactions

- Allow companies to rebalance their debt / equity mix on balance sheet as a result of new business or market conditions and the desire to deleverage
- Reduce interest expense and/or alter maturity profile
- Offer liquidity or opportunity for investors to move up in the capital structure
- A buy back may signal that the company has a positive outlook
- Potential earnings per share improvement
- Potential regulatory capital and ratings benefit
- Tax considerations
- Accounting gains if securities are repurchased at a discount
- Alternative to more fundamental restructuring
- Liability management will also generally be a component of larger M&A transactions and corporate finance transactions

Tender Offers and Exchange Offers

Tender Offers	Exchange Offers
<ul style="list-style-type: none">• For cash	<ul style="list-style-type: none">• New securities will be issued
<ul style="list-style-type: none">• Focused on the mechanics of tender	<ul style="list-style-type: none">• Requires description of securities
<ul style="list-style-type: none">• Limited disclosure regarding issuer in Offer to Purchase	<ul style="list-style-type: none">• Requires prospectus/offering memorandum with disclosure regarding issuer
<ul style="list-style-type: none">• Limited due diligence and normally does not require opinion of counsel covering Rule 10b-5, because no new securities are being issued (but still subject to general anti-fraud rules)	<ul style="list-style-type: none">• Required due diligence and opinion of counsel covering Rule 10b-5.

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U.S. Legal Framework

U.S. Legal Framework - Background

- In 1968, Congress amended the Securities Exchange Act of 1933 to add provisions relating to tender offers
 - The statutory amendments together with the SEC's rules are typically referred to collectively as the "Williams Act"
- Regulation 14D, Rules 13e-4 and 14e-5 apply to equity securities
- Regulation 14E and Rules 14e-1 and 14e-3 apply to all tender and exchange offers, for equity and debt securities
- In addition, the SEC has provided no-action letters' guidance that limits the applicability of some of these rules to tender offers that meet certain conditions (e.g., Abbreviated Tender Offer Rules)

Tender Offer

- The term “tender offer” is not defined under the SEC rules and regulations
- Definitions have been previously proposed, but not adopted (see SEC Release 34-16385 in Appendix 1). Two tiers (satisfaction of either would qualify):
- Tier 1: 45-day period, directed to more than 10 persons and seeking acquisition of more than 5%, excluding offers by broker/dealer on a national securities exchange at the then current market or made in the over-the-counter market at the then current market if neither the offeror nor such broker/dealer solicits/arranges for the solicitation or any order to sell
- Tier 2: (A) are disseminated in a widespread manner, (B) provide for a price which represents a premium in excess of the greater of 5% or \$2 above the current market price, and (C) do not provide for a meaningful opportunity to negotiate the price and terms

Wellman's “Eight Factor Test”

- **Wellman's “Eight Factor Test”** adopted by the SDNY in *Wellman v. Dickinson* in 1979:
 1. Active and widespread solicitation of public security holders;
 2. The solicitation of substantial percentage of outstanding principal amount;
 3. The offer to purchase is made at a premium to prevailing market price;
 4. The terms of the offer are firm rather than negotiable;
 5. The offer is subject to a minimum condition and a fixed principal amount to be repurchased;
 6. The offer is open for only a limited period of time;
 7. The offerees are subject to selling pressure; and
 8. A public announcement of purchasing program precedes or accompanies rapid accumulations of large amounts of the company's securities
- The courts have not indicated how many of the eight factors are required, nor have they given any express indication of how the different factors might be weighted
- A tender offer can exist even if all Wellman's eight prongs have not been satisfied

U.S. Legal Framework – Rules and Regulations

- **Rule 13e-4**: tender offers for **equity** securities, by an **issuer** or an **affiliate**
 - (i) with equity securities registered under Section 12 of the 1934 Act,
 - (ii) that files reports under Section 13(d) of the 1934 Act, or
 - (iii) that is a closed-end fund registered under the 1940 Act
- **Regulation 14D**: tender offer for **equity** securities registered under Section 12 of the 1934 Act and the offer is being made by a **third party** (neither the issuer nor an affiliate)
- **Regulation 14E**: all tender offers made in the United States (except if securities could have been registered on Form 18 – e.g., sovereign securities)
- **Rule 10b-5** disclosure principles and general anti-fraud laws always apply
- See SEC Division of Corporate Finance – Manual of Publicly Available Telephone Interpretations in **Appendix 2**

U.S. Legal Framework – Liability Standards

- **Exchange Act Liability** – applies to open market purchases, tender offers and exchange offers
- common law fraud will apply to stand alone consent solicitations
- General antifraud provisions (Section 10(b) and Rule 10b-5)
- Regulation FD for U.S. issuers (However, foreign private issuers remain subject to applicable SRO rules and policies and subject to antifraud provisions)
- **Securities Act Liability** – applied to registered exchange offers
- Liability under Section 11 and Section 12 of the Securities Act of 1933 in the case of registered transactions
 - **Due diligence is necessary and appropriate to establish a defense to liability**

Tender Offers – Equity and Debt Securities

- Regulation 14E: All Tender Offers (including Debt Securities)
 - Applies to all tender and exchange offers
 - Offeror is not required to file tender offer documents with the SEC and the rules to not prescribe any form requirements
 - Regulation 14E does not specifically require withdrawal rights
 - However, it is standard practice to provide holders with withdrawal rights for tender offers for straight debt securities typically during the early tender period (first 10 business days)
 - Regulation 14E does not apply to pure consent solicitations and thus pure consent solicitations do not need to be held open for 20 business days (although a tender offer coupled with a consent solicitation does have to comply)

Tender Offers – Equity and Debt Securities

- Rule 14e-1: All Tender Offers (including Debt Securities)
- Duration: Must be open at least 20 business days (Rule 14e-1(a))
 - (except Abbreviated Tender Offers – see SEC No-Action Letter dated January 23, 2015 in Appendix 3)
- Modification: Must remain open for a minimum of 10 business days from the notice of increase or decrease of more than 2% of the class of securities subject to the tender offer or of the consideration offered or the dealer's soliciting fee (Rule 14e-1(b))
 - Note: only for equity securities, it must remain open for a minimum of five business days after any other material changes to the offer or waiver of material conditions (to allow dissemination to shareholders “in a manner reasonably designed to inform them of such change” under Rule 14d-4(c)) (See SEC Release 34-24296 in Appendix 4)

Tender Offers – Equity and Debt Securities

- **Rule 14e-1**: All Tender Offers (including Debt Securities)
 - **Prompt Payment**: Requires payment of the consideration offered or return of the securities deposited **promptly** after the termination or withdrawal of a tender offer
 - Payment is considered “prompt” if made consistent with the normal settlement cycle (currently, T+2)
 - SEC permits early settlement (after the early tender date)
 - Early Settlements are particularly useful in consent solicitations
 - **Extension of Offer Period**: Must disclose extension no later than the earlier of
 - (i) **9:00 a.m. ET** on the next business day after the scheduled expiration, or
 - (ii), if securities are registered on a national securities exchange, the **opening of such exchange** on the next business day after the scheduled expiration date(Rule 14e-1(d))

Tender Offers – Equity and Debt Securities

- Rule 14e-3: Material, Nonpublic Information
 - Prohibits persons from participating in a tender offer who are in possession of material information relating to such tender offer which information such person knows or has reason to know is nonpublic and which such person knows or has reason to know has been acquired directly or indirectly from:
 - the offering person,
 - the issuer of the securities sought or to be sought by such tender offer, or
 - Any officer, director, partner or employee or any other person acting on behalf of the offering person,
 - unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise

Equity Securities – Issuer or Affiliate

- **Rule 13e-4:** Equity Securities – Issuer or Affiliate
 - “**All Holders Rule**”: The tender offer must be open to all holders of the class of securities (Rule 13e-4(f)(8)(i))
 - “**Best Price Rule**”: 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 (Rule 13e-4(f)(8)(ii))
 - All communications by the Issuer/Affiliate relating to the tender offer must be filed with the SEC under cover of **Schedule TO**, including all pre-commencement communications, all exhibits, all amendments of any material changes in the information, and a final amendment with the results of the tender offer (Rule 13e-4(c))
 - Applicable only to Tender Offers. Communications made in connection with registered Exchange Offers must be filed only under Form 425

Equity Securities – Third Party

- Regulation 14D: Equity Securities – Third Party
 - Applies to tender offer for any class of any equity securities registered pursuant to Section 12 of the Securities Exchange Act
 - If, after consummation, such person would, directly or indirectly, be the beneficial owners of more than 5% of such class
 - “All Holders Rule” and “Best Price Rule” also applies
 - Tender offer for securities of a foreign private issuer are exempt from the requirements under Regulation 14D

Equity Securities – Issuer, Affiliate and Third Party

- Rule 13e-4 and Regulation 14D: Equity Securities
- Equity securities include generally common stock, preferred stock, convertible or exchangeable notes and warrants
- Trust preferred securities may be treated as debt securities (based on SEC Staff advice)
- Convertible or exchangeable securities which will only pay cash upon conversion (no equity) may also be treated as debt securities (based on SEC Staff advice)

Equity Securities – Issuer, Affiliate and Third Party

- **Rule 14e-5:** Prohibiting purchases of equity securities outside of a tender offer
 - No “covered person” may directly or indirectly purchase or arrange to purchase any subject securities or related securities except as part of the tender offer (Rule 14e-5(a))
 - The prohibition applies from the time of the public announcement of the Tender Offer until the Tender Offer expires (Rule 14e-5(a))
 - Rule 14e-5 lists excepted activities not prohibited by Rule 14e-5(a), including:
 - Exercises of securities (conversion, exchange or exercise, if related securities were owned before public announcement);
 - Purchases of plans (by an agent independent of the issuer);
 - Covering transactions, to satisfy an obligation to deliver a subject security from a short sale or exercise of an option (if in ordinary course and not to facilitate the offer, and, in the case of a short sale was entered before public announcement, and in the case of an option, the “covered person” wrote the option before public announcement); and
 - Contractual obligation (entered into before the public announcement)

Abbreviated Tender Offers – Conditions

- Abbreviated Tender or Exchange Offers established by the SEC No-Action Letter issued on January 23, 2015 (see [Appendix 3](#)) are limited *only*.
 - for [non-convertible debt](#) (regardless of any particular rating assigned)
 - by [issuer](#) or [wholly-owned subsidiary](#) or [parent](#)
 - for “[any and all](#)” of the debt securities (*no proration* allowed)
 - for cash and/or “[Qualified Debt Securities](#)”:
 - “[Qualified Debt Securities](#)” means non-convertible debt securities that are [identical in all material respects](#) (including 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
 - **Note:** Qualified Debt Securities can be issued under the Securities Act Section 3(a)(9), Section 4(a)(2) or Rule 144A and Regulation S (see [Question 162.04](#) in [Appendix 5](#))

Abbreviated Tender Offers – Conditions

- Must be open to all holders (non-QIBs can be offered cash rather than securities)
- No consent solicitation allowed
- Can have minimum tender conditions (See Question 162.02 in Appendix 5)
- Consideration can be a fixed amount or based on a fixed spread to a benchmark
- Cannot be financed with proceeds from any “Senior Indebtedness”
 - “Senior Indebtedness” means indebtedness that is incurred to finance all or a portion of the consideration in the 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

Abbreviated Tender Offers – Conditions

- Cannot 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;
 - if a default or event of default exists under the indenture or any other indenture or other material credit agreement to which the issuer is a party;
 - 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.

Abbreviated Tender Offers – Conditions

- Cannot be:
 - made in anticipation of/response to, or concurrently with, a change of control or other 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;
 - made in anticipation of/response to other tender offers of the issuer's securities;
 - made concurrently with other tender offer to add obligors, guarantors or collateral or shorten the weighted average life to maturity of such series;
 - commenced prior to 5:01 p.m. on the 10th 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) (See Question 162.05 in Appendix 5)

Abbreviated Tender Offers – Process

- Must be announced via press release no later than 10:00 a.m. ET, on first business day, through “Immediately Widespread Dissemination”
- Reporting offerors (including “voluntary filer”) must file Form 8-K prior to 12:00 p.m. ET on the same first business day (“Foreign Private Issuer” can satisfy by filing Form 6-K. See Question 162.01 in Appendix 5)
- Any material changes must be announced through “Immediately Widespread Dissemination” at or prior to 10:00 a.m. ET to count the day of the announcement as the first day of the applicable period:
 - change in the consideration being offered: at least five business days prior to the expiration
 - Any other material changes: at least three business days prior to the expiration

Abbreviated Tender Offers – Withdrawal Rights

- Provide for withdrawal rights exercisable:
 - (i) 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

Abbreviated Tender Offers – Guaranteed Delivery

- Guaranteed Delivery Procedures
 - Permit tenders through Guaranteed Delivery Procedures by means of a certification that delivery of securities being tendered will be made no later than the close of business on the second business day after the expiration of the offer
 - In practice, provides for the possibility of two settlement dates, at the issuer's option:
 - One at day T7 (T+2 after the expiration); and
 - One at day T8 or T9 (one or two days after the deadline for the Guaranteed Delivery)
 - A very small portion of the notes are tendered pursuant to the Guaranteed Delivery Procedures, and in most cases a portion of those are not delivered within the deadline

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Practice Points

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Debt Tender Offers

Debt Tender Offers – Initial Process

- Identify the original offering documents and indenture for the targeted securities
- Get Information/Tender Agent involved early in the process to:
 - obtain the list of banks and brokers that are custodians for beneficial owners, known as Security Position Report (SPR), from DTC, and
 - request a Non-Objecting Beneficial Owner (NOBO) list with a relevant service provider (most commonly, from Broadridge)
 - NOBO lists may take more than 3 business days to return
- Confirm CUSIP/ISIN and outstanding amounts
- Confirm if there were any tack-ons or if debt was sold with original issue discount (OID)
- Identify precedent documents with dealer managers and company
- Determine whether Letter of Transmittal will be required in addition to the Offer to Purchase

Debt Tender Offers – Typical Documentation

- Offer to Purchase – sets forth the terms and conditions
- Letter of Transmittal – used by holders to tender certificated securities and represents the agreement between holder and issuer (it is unnecessary if all securities are held in DTC and tenders can be made via ATOP)
- Press Releases and Form 8-K (launch, early results, pricing, final results)
- Dealer Manager Agreement – sets forth the dealer managers' responsibilities, contains representations, covenants, conditions, and indemnities for the benefit of the dealer managers
- Information Agent Agreement (and certificates) – typically D.F. King and Global Bondholder Services
- Issuer's counsel opinion (see The ABA Subcommittee on Securities Law Opinions in Appendix 6)
- Acceptance and Cancellation Order and Notice to Security Exchange (if listed)
- Supplemental Indenture and related certificates/opinion (in Consent Solicitations)

Debt Tender Offers – Documentation Process

- Company to confirm/draft resolutions authorizing transaction
- Company's counsel to draft offering documents and press releases
 - Discussion with dealer managers about right precedent to start from, with as many relevant structural elements as possible
- Dealer Managers' counsel to draft dealer manager agreement
- Information Agent and Tender Agent to provide form of agreement
- Abbreviated Tender Offers require filing of Form 8-K and posting offering documents in a website

Debt Tender Offers – Typical Timetable

- **Launch Date (T1)**: any time before 11:59 p.m. ET
 - **NOTE**: DTC requires documents before 5:00 p.m. ET in order to count as T1, or payment of \$2,000 per CUSIP tendered as late fees in order to announce after 5:00 p.m. ET
 - Offer to Purchase / Letter of Transmittal / Press Release finalized
 - Dealer Manager Agreement and Information Agent Agreement executed
 - Issuer's counsel opinion delivered
- **Early Bird and Withdrawal Rights (T10)**: at 5:00 p.m. ET on T10
 - Early Tender Results promptly after, before market opens on the following business day (T11)
- **Early Settlement (T11 or T12)**: DTC requires payment before 2:00 p.m. ET
 - Issuer's counsel opinion and Issuer's certificates delivered
 - If it includes a Consent Solicitation, Supplemental Indenture is executed and Officer's Certificate and Opinion to Trustee are delivered
- **Expiration (T20)**: at 11:59 p.m. ET on T20
 - Issuer's counsel opinion and Issuer's certificates delivered
- **Final Settlement (T21 or T22)**: same documents as in the Early Settlement
 - Final Tender Results promptly after, before market opens on the following business day (T21)

Abbreviated Tender Offers – Typical Timetable

- **Launch Date (T1)**: any time before 10:00 a.m. ET
 - **NOTE**: DTC will charge \$2,000 fee per CUSIP tendered
 - Offer to Purchase / Letter of Transmittal / Notice of Guaranteed Delivery / Press Release finalized and uploaded to an Internet address (to be included in the press release as an active hyperlink)
 - Dealer Manager and Information Agent Agreements executed and Issuer's counsel opinion delivered
- **Form 8-K (T1)**: any time before 12:00 p.m. ET
 - Furnish press release announcing the offer and including hyperlink with offer documentation
- **Pricing (T5)**: on or after 2:00 p.m. ET
 - Exact amount of consideration and interest rate (in the case of fixed spreads to a benchmark)
- **Expiration (T5)**: on or after 5:00 p.m. ET
 - Tender Offer Results announced by 9:00 a.m. ET on the following business day (T6)
- **Settlement (T6 or T7)**: DTC requires payment before 2:00 p.m.
 - Issuer's counsel opinion and Issuer's certificates delivered
- **Guaranteed Delivery Date (T7)**: on or after 5:00 p.m. ET
- **Guaranteed Delivery Settlement Date (T8 or T9)**: DTC requires payment before 2:00 p.m.
 - Issuer's counsel opinion and Issuer's certificates delivered

Debt Tender Offers – Proration and Withdrawal Rights

- **Proration**: In case of a partial offer with a cap, the offer must include proration procedures to determine portion of securities being purchased
- In the absence of an applicable “best price rule,” proration preference can be given to securities tendered in the first 10 business days of an offer
 - **Note**: proration is not allowed under the Abbreviated Tender Offer procedures
- **Withdrawal rights**: not required in traditional 20 business day debt tender offers, but customarily offered within the first 10 business days until the early tender date.
 - **Note**: withdrawal rights are required under the Abbreviated Tender Offer procedures
- The SEC has indicated that, if material changes are made to an offer, or there are material development relating to the offeror, after the termination of withdrawal rights, it may be necessary to reinstate withdrawal rights

Debt Tender Offers – Conditions

- In general, tender offers are subject to set of general conditions that allows the offeror to terminate the offer in certain events
- There should be some objectivity to the conditions to avoid an illusory offer
- Conditions can include minimum and maximum tender amount and closing of another offering (e.g., financing condition to raise funds for the purchase under the tender offer)
- Language that the offer may be terminated or withdrawn by the offeror at any time or for any reason should be qualified by “subject to applicable law”
- All conditions must be satisfied or waived by expiration of the offer:
 - The tender offers may not be subject to subsequent conditions and, if there is an early settlement, all conditions are deemed to be satisfied or waived at that point
- The satisfaction or waiver of a significant condition may require notice

Debt Tender Offers – Consideration and Pricing

- The offered price may be fixed or determined in accordance with a standard formula by reference to a spread over a benchmark (most commonly, U.S. Treasury securities)
- Offer documents will clearly specify the benchmark, the fixed spread, the pricing time and date and that the pricing results will be announced by press release
- For traditional 20 business day debt tender offers, the price determination date may be before the 10th business day or shortly thereafter
- Determining the price after the early tender period may be investor-friendly in partial offers, where investors may want to unwind a portion of a hedge
- Price must be disclosed by press release as soon as possible after it is determined
- **Note:** on Abbreviated Tender Offers, the consideration:
 - must be determined on or before 2:00 p.m. ET on the expiration date; and
 - offered concurrently to persons other than QIBs and non-U.S. persons can also be calculated with reference to a fixed spread to a benchmark, provided that the calculation is the same as the one used for the amount of Qualified Debt Securities (See [Question 162.03](#) in [Appendix 5](#))

Debt Tender Offers – Pricing – Dutch Auction

- SEC requires that the number of securities sought and a reasonable range of prices at which tenders will be accepted be established at launch
- **“Pure” Dutch auction:**
 - Offeror accepts securities at a price specified by the Holder
- **“Modified” Dutch auction:**
 - Permitted per SEC No-Action Letters and SEC Release 33-6653 (see [Appendix 7](#))
 - Holders tender securities at a price they select within a range
 - Offeror purchases all securities at the same price (the highest price paid to any holder whose securities are purchased in the offer)
 - Over-subscribed offers are prorated
- The high end of the price range generally should not be more than 15% greater than the low end of the price range
- Only practical for partial tender offers

Debt Tender Offers – Premium

- To encourage quick execution, most traditional 20 business day debt tender offers include an early tender premium (or consent fee for indenture amendments) that is only available during the first 10 business days
- Typically between \$20 and \$50 per \$1,000 of principal amount tendered
- The amount of the premium is commonly approximately 5% of the total consideration offered
- An over-large premium may raise Rule 14e-1 compliance issues
- Offer must remain open for at least 10 business days after the “price reduction”
- Early Tender Premium must be available to all securities tendered during the early tender period (as opposed to offering extra consideration on a “first come-first served” basis or, in the context of a consent solicitation, in respect of securities tendered before a minimum consent condition is satisfied)

Debt Tender Offers – Hypotheticals

1. Does the offeror have a concern with timing to consummate the tender offer?
 - Offerors' concerns vary while considering different liability management structures, including, more recently, concerns with market volatility (which can impact both the ability to issue, and the pricing of, new securities to fund a tender offer, and the consideration to be paid for the targeted securities).
 - For that reason, the number of Abbreviated Tender Offers for a fixed price have recently increased (minimizing the market volatility risk)
 - Common issues affecting the ability to use Abbreviated Tender Offers include:
 - (i) imposing a cap/maximum amount
 - (ii) the ability to have a financing condition with proceeds of any "Senior Indebtedness"
 - (iii) offers related to change of control or other extraordinary transactions involving the issuer
 - (iv) offers made within 10 business days after the first public announcement or the consummation of a purchase, sale or transfer of a material business or amount of assets,
 - (v) discussions with creditors for a consensual restructuring,
 - (vi) consent solicitations

Debt Tender Offers – Hypotheticals

2. Does the offeror have a maximum amount it would intend to spend?

- The traditional 20 business day debt tender offers allow for a waterfall structure with a maximum amount and sub-caps within each series/certain series
- The Abbreviated Tender Offer procedures require tender for “any and all” of the subject class or series of debt securities
 - However, recent developments in Abbreviated Tender Offers, based on running multiple concurrent, but separate, offers to purchase any of all of certain series of notes, have offered flexibility to tender for multiple series subject to overall limits.

Debt Tender Offers – Hypotheticals

3. If the issuer pursues concurrent, but separate, abbreviated tender offers for different series of debt securities, can it increase the maximum amount sought after commencing the tender offer?
 - The Abbreviated Tender Offer No-Action Letter requires
 - an offer for any and all of the debt securities and did not expressly discuss the possibility of concurrent, but separate, offers
 - at least five business days notice prior to the expiration in case of a change in the consideration being offered
 - at least three business days notice prior to the expiration in case of any other material change.

Debt Tender Offers – Hypotheticals

4. If the offeror changes the consideration being offered or makes any other material change that would require an extension of an abbreviated tender offer, does it need to extend withdrawal rights?
 - The Abbreviated Tender Offer No-Action Letter requires extension of withdrawal rights up to the tenth business day after commencement of the offer, if the offer is extended
 - If the offer is extended from T5 to any time between T6 and T10, the withdrawal rights must also be extended.
 - However, if the offer is extended from T5 to any time on or after T11, the withdrawal rights can be terminated on T10.
 - Note that the No-Action Letter also provides for withdrawal rights at any time after the 60th business day after commencement of the offer if, for any reason, the offer is not consummated within 60 business days after commencement. That does not mean the offer would need to extend withdrawal rights between T11 and T59, only on or after T60.

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Consent Solicitations

Consent Solicitations

- Identify amendments to be made to Indenture
- Important to get Trustee and their counsel involved early in the process
- Concern: certain modifications may create a new security for purpose of the Securities Act
- Consent solicitations are generally not subject to additional regulatory restrictions, but are subject to any applicable indenture provision
- Modification of key financial terms (i.e., interest rate, maturity and redemption rights) may result in the creation of a new security and require that there be an available exemption from registration if the transaction is not registered under the Securities Act

Stand-Alone Consent Solicitations

- Stand-alone consent solicitations tend to be more customized, because holders will remain invested in the amended security
- Consent solicitations can be structured with payment or payments subject to conditions subsequent
- Establish a record date for stand-alone consents (commonly 5:00 p.m. ET on the business day preceding commencement), with only holders of record entitled to deliver consents
- If securities are held in DTC, the tabulation agent, in the case of a consent solicitation coupled with a tender offer, must obtain an omnibus proxy from DTC

Consent Solicitations – Typical Documentation

- Consent Solicitation Statement
- Consent Form Transmittal / Letter of Consent
- Solicitation Agent Agreement (and certificates)
- Tabulation and Information Agent Agreement
- Press Releases / Form 8-K
- Opinion of counsel
- Supplemental Indenture (and certificates/opinions to Trustee)

Consent Solicitations – Practice Points

- **Consent Form Transmittal:** Stand-alone consent solicitation still use Consent Form Transmittal
 - There is no DTC program akin to ATOP that can be used in connection with a stand-alone consent solicitation and hence the consents forms need to be send directly to the tabulation agent
- **Revocation rights:** commonly permits consents to be revoked either at any time or at any time prior to the achieving the threshold
- Consent payment must be to all consents received (SEC may regard first-come, first-served payment arrangement as too coercive and manipulative)
- If amendments are subject to a **condition subsequent** (e.g., completion of an acquisition), the supplemental indenture should provide that it becomes effective upon it execution and delivery but that the proposed amendment will not become operative until the condition subsequent is satisfied

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Exchange Offers

Exchange Offers

- Privately Negotiated vs. Tender Offer
- Three approaches under the Securities Act of 1933:
 - Exempt 3(a)(9) exchange
 - Private 4(a)(2) exchange
 - Registered exchange
- Privately negotiated exchange can be conducted as 3(a)(9) and 4(a)(2)
- Tender offer can take any of the three approaches

Exchange Offers – Examples

- Straight Exchange Offer from issuer's new debt to old debt
- New parent debt in exchange for old subsidiary debt
- Back-End Exchange Offer of registered debt in exchange for Rule 144A / Regulation S unregistered debt
- Exchange Offers in the context of a merger or acquisition (either acquirer's equity or debt offered in exchange for target company's equity or debt)

Exchange Offers – Typical Documentation

- Exchange Offer Memorandum and Letter of Transmittal
- Dealer Manager Agreement (and certificates)
- Exchange Agent Engagement Agreement
- Counsel opinions; disclosure letter (launch and settlement)
- Press Releases: launch, price (depending on structure), early results, final results and expiration
- Acceptance and Cancellation Certificates to DTC / Trustee
- Registration Rights Agreement / Indenture
- Form 8-Ks, Comfort Letters, QIB Letters, Officers' Certificates required under the Dealer Manager Agreement

Exchange Offers – Typical Documentation

- Disclosure Document:
 - Information relating to terms of exchange and exchange mechanics
 - Pro forma financial information giving effect to the exchange (and the underlying merger, if applicable)
 - Description of the issuer, its business, financial statements (incorporation by reference)
 - Risks of exchanging and not exchanging

Exchange Offers – Practice Points

- **Registration:** Company must file a registration statement on Form S-4 or F-4
 - It is possible to register on Form S-3 or Form F-3 an offering of guarantees as consideration for consents
- **Effectiveness of Registration Statement:** even if issuer is “well-known seasoned issuer” (“WKSI”), the registration statement will not be declared effective automatically
 - “Early commencement” rules apply (unless “going private” transaction)
 - Exchange offer may be launched with preliminary prospectus
 - Effectiveness must be obtained prior to close
 - Any significant comments should be cleared with the SEC before launch
 - Straight debt: withdrawal rights must be granted and revised materials reflecting material changes must be disseminated in accordance with Rule 13e-4 and Regulation D

Exchange Offers – Practice Points

- **Dealer Manager**: similar to tender offers, typically one or more financial advisors will actively solicit participation in an exchange (provided that the offer is not a 3(a)(9) exchange)
- Statutory “Underwriter” – Key difference from a cash tender offer is that new securities are being offered
 - Full legal, accounting and business due diligence is required
 - Legal opinions and 10b-5 letters are required at launch and closing
 - Comfort letters are required at launch and closing
 - Officer’s and Secretary’s Certificate are required when opinions are delivered
 - Dealer Manager Agreement will include full set of underwriting representations, warranties and indemnities
 - Companies often use representations and warranties from historical underwriting or purchase agreement, if available

3(a)(9) Exchange Offers

- Provides an exemption from registration for
 - “any security 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”
- Requirements:
 - Same issuer (not parent for subsidiary) and cannot provide additional guarantees
 - Exception: a guarantor’s new securities can be exchanged for outstanding guaranteed debt
 - Limited to existing holders – no consideration for existing holders
 - No payment for soliciting exchange (so have limited role for banks)

3(a)(9) Exchange Offers

- **Advantages**

- No SEC review (no registration required)
- Exemption applies regardless of sophistication or number of holders
- Flexibility (allows for retirement of a portion or an entire series of notes)
- Minimal cost (does not require cash on hand)
- No Section 11 liability (and no registration statement)
- Can be paired with a consent solicitation

- **Disadvantages**

- New securities may be “restricted” (depending on the status of the securities surrendered)
- Limited role for banks, so limited ability to engage and compensate banks
- There may be holdout issues
- The exchange offer may be integrated with other offers done in close proximity
- If subject to tender offer rules:
 - the offer must be made to all existing security holders; and
 - all investors of the same class must be paid the same price

3(a)(9) Exchange Offers

- Bankers assistance:
 - Any payment must be a fixed fee, not a success fee (must be considered at the engagement letter stage)
 - Bankers may
 - advise issuer on structure, terms and procedures or communicating with holders (cannot provide financial analyses requested by holders)
 - provide a fairness opinion
 - Take care not to eliminate possibility of using exemption through banker calls to noteholders
 - Participation in discussions or negotiations with legal and financial representatives of noteholders prior to commencement of offer is not permitted under SEC C&DI
 - Note: certain no-action letters have permitted certain discussions

3(a)(9) Exchange Offers

- No recommendations regarding the exchange offer by financial advisor
- No solicitation of exchanges or consents by financial advisor
- No information can be provided other than in materials sent by the issuer
- Information agent may be paid for ministerial tasks
- May be safest to prohibit financial advisors from speaking with holders

4(a)(2) Exchange Offers

- Exempts securities issued in “transactions by an issuer not involving a public offering”
- Referred to as “144A Exchanges”
- Regulation D is commonly used safe harbor
 - Only requires “accredited investors”, but commonly restricted to “qualified institutions buyers” (“QIBs”) and non-U.S. investors under Regulation S
 - “Inquiry Letters” are sent to holders prior to launch to confirm status and only qualified holders may participate
 - Note: Sending the letter may “pre-announce” the deal and affect pricing
 - Section 14(e) rules apply
- No SEC review is necessary, although disclosure is comparable to a registered transaction
- Banks may be paid to solicit
- Can have different issuers and add guarantees
- New notes will be “restricted securities”

4(a)(2) Exchange Offers

- No private exchanges for convertible debt (because equity tender offer rules will require public SEC filing)
- Most note issues have both QIB and non-QIB holders, so it is not possible to exchange the entire issue in a private exchange
 - Must register or use the 3(a)(9) exemption if seeking 100% participation
 - But may not be possible to get 100% anyways, because of limitations under collateralized debt obligations (CDO) documentation

Registered Exchange Offers

- Useful where debt is widely held and goals of company cannot be achieved in privately-negotiated exchanges or in “144A” exchanges in which participation is limited to QIBs
- New notes are freely tradable
- Banks may be paid to solicit exchanges
- Can have different issuers and guarantors
- Discussions and negotiations with holders in advance of filing/effectiveness (may raise “gun jumping” and Regulation FD issues)
- Form S-4 must be filed with the SEC
- No “WKSI S-4”
 - SEC review can create significant timing issues and affect issuer ability to achieve goals, but SEC has a policy to complete its review in 20 business days if you launch early
 - Early commencement is permitted, but must allow withdrawal right for full 20 days
 - Inability to lock-up holders in advance of effectiveness can create execution hazard

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Private Transactions

Private Exchanges / Private Repurchases

- Privately negotiated exchanges/repurchases with a limited number of highly sophisticated investors
- Often employed for convertible notes refinancing because:
 - Notes generally held in high concentrations by small number of sophisticated investors
 - Out of the money convertible notes are generally not redeemable
- Intended to avoid “creeping tender” issues
 - Market practice has developed – approach no more than 10 investors holding up to 80% of the debt
 - Avoid other Wellman factors (no widespread solicitation, no reasonable deadlines on a decision, individual negotiations, no take-it-or-leave-it ultimatums)
- Newly issued notes placed under Rule 4(a)(2)
 - 3(a)(9) not as useful because limitation on fee/solicitation activities of placement agent
 - Tacking may be available under Rule 144(d)(3)(ii) to make new securities freely tradable
 - Requirement that securities be issued solely in exchange for other securities of the same issuer
- Issuance of new convertible notes requires analysis under Nasdaq/NYSE shareholder approval requirements for private placements

Private Exchanges / Private Repurchases

- **Advantages**

- Can be executed quickly
- Relatively little documentation
- Confidential until announcement of completion

- **Disadvantages**

- Stub of old series of notes remains outstanding
 - Care should be taken with subsequent repurchases and reverse inquiries to minimize “creeping tender” concerns
- Nasdaq/NYSE shareholder approval requirements can limit size
- No consent solicitation because not all holders solicited

Private Exchanges / Private Repurchases

- **Customary process**
 - Placement agent brings potential participants under NDA early in execution week
 - Negotiations take place over 2-3 days
 - Issuer signs exchange/purchase agreement with each investor
 - Issuer announces transaction on Form 8-K before market open on day after pricing
- **Documentation**
 - NDA script
 - Exchange/purchase agreement
 - Indenture and summary of changes from existing notes
 - Listing application
 - 8-K/press release
 - Issuer counsel opinion to DTC re: tacking (generally no other opinions/comfort letters)

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Appendices and Articles

List of Appendices

- [Appendix 1](#) – SEC Release 34-16385 – Proposed Amendments to Tender Offer Rules
- [Appendix 2](#) – SEC Division of Corporate Finance – Manual of Publicly Available Telephone Interpretations
- [Appendix 3](#) – SEC No-Action Letter, dated January 23, 2015 (Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities)
- [Appendix 4](#) – SEC Release 34-24296
- [Appendix 5](#) – SEC Compliance and Disclosure Interpretations – Tender Offer Rules and Schedules
- [Appendix 6](#) – ABA Subcommittee on Securities Law Opinions – Exchange Act Rule 14e-1 Opinions for Debt Tender Offers
- [Appendix 7](#) – SEC No-Action Letter, Tektronix Inc. (publicly available June 19, 1987), SEC No-Action Letter, Thiele (publicly available December 21, 1987), and SEC Release Nos. 33-6653 and 34-23421 (see footnote 64)

List of Related Articles

- **SEC Amends Tender Offer Best-Practice Rule**
<https://www.gibsondunn.com/sec-amends-tender-offer-best-price-rule/>
- **SEC Amendments to Tender Offer “Best Practice” Rule Became Effective**
<https://www.gibsondunn.com/sec-amendments-to-tender-offer-best-price-rule-effective-today/>
- **SEC Permits Five Business Day Issuer Tender Offers**
<https://www.gibsondunn.com/sec-permits-five-business-day-issuer-tender-offers-for-non-convertible-debt-including-non-investment-grade-debt/>
- **Deal Lawyer – Five Day Tender Offers: What Can Market Participants Expect?, by James Moloney, Glenn Pollner and Cem Surmeli**
<https://www.gibsondunn.com/wp-content/uploads/2018/07/deal-lawyers-3-15.pdf>
- **Deal Lawyer – Five Day Tender Offers: Conditions and Timelines, by James Moloney, Sean Sullivan and Todd Trattner**
<https://www.gibsondunn.com/wp-content/uploads/documents/publications/Moloney-Sullivan-Trattner-Five-Day-Tender-Offers-Conditions-Timelines-Deal-Lawyers-3.1.2015.pdf>
- **Deal Lawyer – Convertible Debt Exchange Offers; Considerations for Distressed Issuers, by James Moloney, Glenn Pollner and Matthew Shaw**
<https://www.gibsondunn.com/wp-content/uploads/documents/publications/Moloney-Pollner-Shaw-ConvertDebtExchangeOffers.pdf>
- **OM&A Staff Publishes Updated Guidance on Tender Offers**
<https://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=280>
- **OM&A Updated Guidance on Tender Offers, by James J. Moloney**
<https://corpgov.law.harvard.edu/2016/12/01/oma-updated-guidance-on-tender-offers/>

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Mr. Fabens is ranked as a leading Capital Markets lawyer by *Chambers USA: America's Leading Lawyers for Business*, *Chambers Global: The World's Leading Lawyers for Business*, *The Legal 500 US* and *IFLR1000*. He is noted as being able to "readily adapt to his client's style, understand what they need and deliver it," that he is "so amazingly even-keeled that nothing throws him," and is a "strong and knowledgeable lawyer" who is very "practical in terms of assessing risk and moving forward." BTI Consulting named Mr. Fabens to its 2018 BTI Client Service All-Stars list, recognizing the "lawyers who truly stand out as delivering the absolute best client service" as determined by a poll of corporate counsel.

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