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# Debt Exchange Offers: Legal Strategies for Distressed Issuers

## Navigating Complex Securities Laws When Restructuring Convertible Debt Securities

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

Lawrence G. Wee, Partner, **Paul Weiss Rifkind Wharton & Garrison**, New York

James J. Moloney, Partner, **Gibson Dunn & Crutcher**, Irvine, Calif.

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**Thursday, April 15, 2010**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

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Paul | Weiss

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## Recent Trends in Debt Restructurings

April 15, 2010

Lawrence G. Wee



### Situation Overview

- 2012 maturities are looming, and refinancing risk is significant.
  - LBO debt from acquisitions completed in 2007 is coming due, and sponsors are trying to address the maturities.
  - Debt capital markets are hot, but inconsistent. "Brittle."
  - Secured high-yield deals are getting done, but also a lot of proposed financings are getting pulled or pricing wide of the range due to market conditions.
  - Perception is that large-scale refinancings may not be possible or may have significant execution risk.
- LBO sponsors are likely to try various tactics to chip away at close-in maturities and de-lever.
  - Coercive debt exchange offers
  - Amend to extend credit facilities
  - Partial paydowns
  - Modifications of pro-rata sharing provisions and permitting borrower open-market purchases of credit facility debt



### Common Strategies in Out-of-Court Debt Restructurings

- A "standard playbook" has developed for debt exchange offers.
- Issuing a new secured bond in exchange for an existing bond (usually unsecured or lower in lien priority) at a discount to par:
  - Restricted Payments covenants in senior secured notes often permit the retirement of the existing junior bonds for value.
  - Definitions of "Permitted Refinancing Indebtedness" in senior secured notes often allow the incurrence of the new secured bonds without compliance with ratio tests.
  - Permitted Liens definitions in senior secured notes often permit the junior or pari-passu liens securing the new secured bonds.
  - These offers have a coercive element because holders who do not accept will be left with junior securities (often without covenants, since the covenants will be stripped in an associated consent solicitation).



### **Common Strategies in Out-of-Court Debt Restructurings**

- Issuing a structurally senior bond in exchange for an existing bond at a discount to par:
  - Holding company debt is vulnerable to this strategy, particularly formerly investment grade debt of LBO companies.
  - An issuer may try to drop a significant portion of its assets into a subsidiary and then offer the new bond from that subsidiary.
  - In high-yield covenant packages, liberal baskets may permit the transfer of significant portions of the issuer's assets to unrestricted subsidiaries.
  - These offers have a coercive element because holders who do not accept will be left with a structurally junior security (again, often without covenants, since the covenants will be stripped in an associated consent solicitation).



### **Common Strategies in Out-of-Court Debt Restructurings**

- Issuing a bond that is senior in right of payment in exchange for an existing subordinated bond at a discount to par:
  - Restricted Payments covenants may permit this.
  - New senior debt is likely not to be Permitted Refinancing Indebtedness, so a basket will be needed or the debt incurrence ratio test must be complied with on a pro forma basis. These offers are less common as a result.
  - These offers have a coercive element because holders who do not accept will be left with a contractually junior security (again, often without covenants, since the covenants will be stripped in an associated consent solicitation).



### Common Strategies in Out-of-Court Debt Restructurings

- Debt for equity exchanges:
  - Usually done by issuers with the holders of the most junior portion of the debt capital structure.
  - Often very dilutive to existing equity. Exchange-listed companies will be subject to a 20% limitation on the issuance of new equity securities without a shareholder vote, so there may not be enough available equity to issue immediately.
  - Often not eligible for Section 3(a)(9) exemption, so registration rights will be necessary.
  - Change of control risk if existing debt is being left outstanding. Avoid "group" issues.
  - Example: YRC Worldwide Exchange Offer (November 2009-February 2010). Additional coercion through stripping of put rights from a convertible note by majority vote. New money raised through post-vote convertible notes issuance.

## CDS and Debt Exchange Offers

- Credit Default Swaps may have a negative impact on the acceptance rate for out-of-court debt exchanges.
  - Protection buyers may hold a significant portion of an issuer's debt securities, particularly in the case of physically-settled CDS.
  - Bondholders that buy protection under CDS will be incentivized to force the issuer into bankruptcy in order to collect under their CDS and therefore will not participate in efforts to de-lever the issuer or extend close-in maturities.
  - The problem is exacerbated if an issuer requires a high participation rate in order to make the debt exchange offer economically viable.
  - It is essential for financial advisors and dealer-managers to advise an issuer that is considering an out-of-court debt exchange offer as to the potential impact of CDS.
  - Examples: YRC Worldwide, GM and GMAC/ResCap exchange offers.

# Debt Exchange Offers / Securities Law Issues to Consider

## [Strafford Publications' Webcast]

Presented by Jim Moloney

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# Debt Exchange Offers and Related Securities Law Issues - Overview

- Types of Exchanges:
  - Privately Negotiated Exchanges
  - Formal SEC Registered Exchange Offers
  - Section 3(a)(9) Exempt Exchange Offers
  - Section 4(2) / Rule 144A Exchanges
- Securities Law Issues
  - Communications with Existing Holders
  - Registration vs. Exemption
    - Straight Debt vs. Convertible Debt
  - Latest SEC Guidance / Interpretations



## Communications with Existing Holders

- Communications with existing debt security holders
  - Section 5 gun-jumping/solicitation concerns
  - Rules 165 / 166
- Desire to lock-up large holders
  - Tender/exchange agreements
  - Potential tender offer
    - Creeping tender offer?
    - Rule-of-thumb
    - Wellman 8-factor test

# Registration vs. Exemption

## Straight Debt vs. Convertible Debt

### Registration vs. Exemption

- Section 3(a)(9) – Limits on activities and compensation
- Section 4(2) / 144A – No general solicitation, qualified investors
- Registered Exchange (Form S-4)
  - SEC review
  - General solicitation
  - More likely a tender offer

### Straight Debt vs. Convertible Debt

- Different Rules Apply
  - Regulation 14E (straight) vs. Rule 13e-4 (convert)
- Early Tender/Participation Payment / Withdrawal Rights
- Consent Fee
  - Modification of terms
  - Covenant stripping



## SEC Guidance/Interpretations

- Tacking of Holding Periods
  - Rule 144(d)(3)
  - Restricted vs. non-restricted
- Approaching QIBS
  - How many is too many?
  - When is it a tender offer?
  - Can you ask what they would take in exchange?
- Lock-Ups
  - When is it a “done deal” (completed privately)
  - When does it become a tender offer?
  - the latest C&DIs

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# Factors to Consider in Conducting an Exchange Offer

Presented by  
**Michael Kaplan**  
Partner

April 15, 2010

**Davis Polk**

Davis Polk & Wardwell LLP

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**FACTORS TO CONSIDER IN CONDUCTING AN EXCHANGE OFFER**

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# Factors to Consider in Conducting an Exchange Offer

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**Conducting an exchange offer raises a number of issues for the Company and its financial advisor**

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# Company Issues

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## **Accurate disclosure**

- Companies potentially needing to conduct an exchange offer need to review their existing 34 Act disclosure and be sure it accurately conveys the situation and liquidity needs

# Company Issues *(cont.)*

## Regulation FD

Companies that want to discuss potential alternatives prior to announcement of a transaction need to consider Regulation FD.

Solutions include:

- Pre-emptive disclosure. Example:

“We intend to continue to explore various financing alternatives to improve our capital structure, including by reducing debt, extending maturities or relaxing financial covenants. These may include new equity or debt financings or exchange offers with our existing security holders (including exchanges of debt for debt or equity) and other transactions involving our outstanding securities, given their secondary market trading prices. We cannot assure you, if we pursue any of these transactions, that we will be successful in completing a transaction on attractive terms or at all.”

- Wall-crossing through execution of NDA

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## Company Issues *(cont.)*

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### **Section 5 issues if Pre-marketing**

- If transaction will be 4(2), ensure only meet with QIBs
- If transaction will be registered, Rule 166 permits
  - Pre-filing offers orally
  - Use of written materials so long as steps are taken to preserve confidentiality

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## Company Issues *(cont.)*

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### **Consummation of Exchange Offer**

- Will be an offering of securities and thus subject to 10b-5 liability
- If registered, also subject to Section 11 and Section 12

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# Financial Advisor Issues

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## Engagement letter

- If transaction will be 3(a)(9), need to ensure no success-based fee
  - What is a success-based fee?
- Covenant to comply with 3(a)(9)

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## Financial Advisor Issues *(cont.)*

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### **Discussions with investors**

- Regulation FD and Section 5 issues applicable to the Issuer
- In a 3(a)(9) transaction, significant limitations on advisors ability to negotiate with investors
  - Seamans, Calton and International Controls letters

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# Financial Advisor Issues *(cont.)*

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## Liability

- In a 3(a)(9) offering, should not have liability
  - Some advisors will do due diligence for franchise concern purposes
  - Documentation is limited to engagement letter with indemnity
- In 4(2) or registered offering, will have liability
  - Dealer-managers will then conduct as if its normal offering
    - DMA will include reps, indemnities
    - Will typically obtain 10b5 letters from both counsel and comfort letters from auditors