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Overview of Liability Management Transactions

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Agenda

- Overview of Liability Management and Benefits
- Redemptions
- Repurchases – Open Market and Private Transactions
- Debt Tender Offers
- Exchange Offers
- Consent Solicitations

Overview of Liability Management and Benefits

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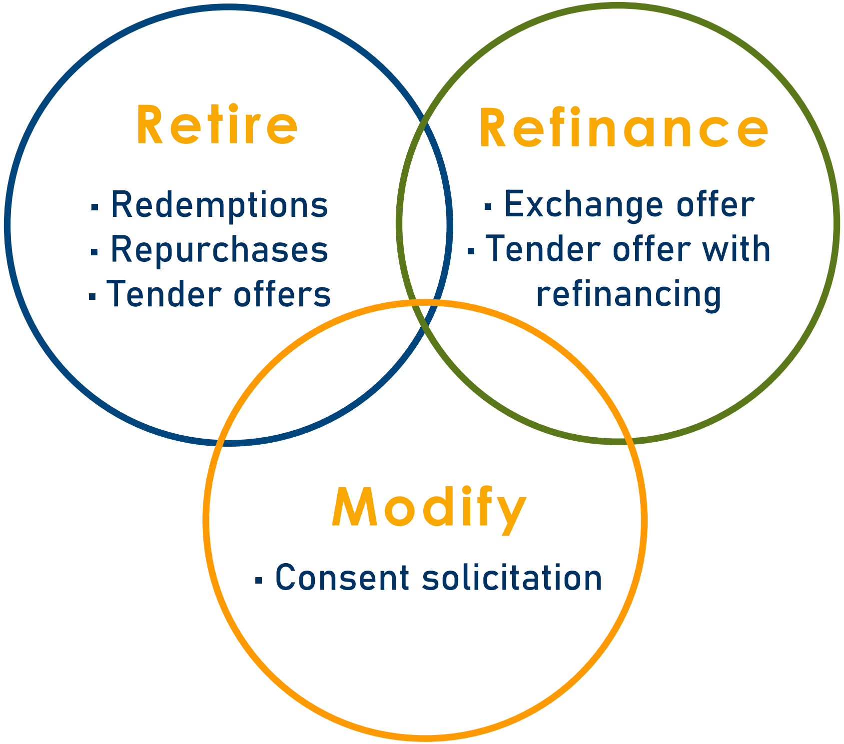
What is liability management?

- Liability management is concerned with helping issuers manage, modify and optimize their outstanding debt portfolio
- Liability management transactions are designed to achieve any or all of three primary goals: retiring debt; refinancing debt and/or modifying existing debt instruments



Why is liability management important?

- Deleveraging
- Reducing interest expense
- Capture positive economics
- Extending maturities
- Recording of accounting gain
- Potential EPS improvement
- Potential regulatory and ratings benefits
- Increasing flexibility through covenant relief or relaxation
- Proactively managing capital structure as an alternative to more fundamental restructuring or potential bankruptcy

How?

Repurchases for cash

- **Redemptions** – Purchase of outstanding debt securities for cash in accordance with their terms
- **Repurchases** – Open market or privately negotiated purchases of outstanding debt for cash
- **Cash Tender offers** – An offer made to holders of a series to repurchase outstanding debt securities for cash

Non-cash alternatives

- Exchange offers, including
  - Private exchange offers (e.g. Section 4(a)(2) private placements or Rule 144A/Reg S)
  - Section 3(a)(9) exempt exchange offers
  - Registered exchange offers (e.g. "A-B exchange offers" for 144A/Reg S offerings)

- Consent solicitations
  - Although the consent fee will require a cash payment

Choosing among the alternatives

- Will depend upon the <u>issuer's objectives</u>
  - De-leveraging? Redemption, repurchases or cash tender offers
  - Extend maturities or reduce interest expense? Exchange offer
  - Covenant flexibility? Consent solicitation, possibly with a tender or exchange offer
- Will depend upon the <u>issuer's financial condition</u>
  - Distressed exchange or opportunistic transaction
- <u>Practical constraints</u>, such as timing and the number of holders of the debt, and the legal or contractual requirements of the LM transaction
- <u>Other considerations</u>: accounting, ratings, regulatory capital and tax should all be factored into the choice

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Thinking ahead

- Other debt agreements may contain limitations on prepaying junior or pari passau debt
  - May be prohibited
  - May require a pro rata repayment under the other debt agreement
  - May require proceeds from a debt issuance to be used for a particular purpose
- Terms or features of any new debt (such as being secured or guaranteed) may be restricted by the issuer's other debt agreements

Redemptions

Redemptions

- Redeem outstanding debt securities in accordance with their terms (assuming governing documents permit redemption)
  - Full call protection - not redeemable
  - Limited call protection - not redeemable for a certain period of time after issuance
  - No call protection – callable at any time
- Indenture usually specifies the procedures
  - Usually provides a minimum and maximum notice period (e.g., not less than 30 nor more than 60 days)
  - If not all securities are being redeemed, redemption is usually by lot or pro rata

Redemptions *(cont'd)*

- Indenture specifies the redemption price
- Fixed price redemption:
  - After a non-call period (typically), the redemption price is a fixed percentage (generally, initially 100% plus half the coupon) declining ratably on an annual basis to par one to three years prior to maturity, plus accrued interest to the redemption date
  - Example (6.750% Senior Notes due 2032 (8 years)): "The Issuer may redeem the Notes, in whole or in part, at any time on or after April 15, 2027 upon not less than 15 nor more than 60 days' notice, at the following redemption prices (expressed as percentages of the principal amount) if redeemed during the twelve- month period commencing on April 15 of the year set forth below, plus, in each case, accrued and unpaid interest:

Redemption Year	Redemption Price
2027	103.375%
2028	101.688%
2029 and thereafter	100.000%"

Redemptions *(cont'd)*

- Make-whole redemption:
  - Redemption price is par (face amount of the bond) plus a "make-whole premium" plus accrued interest to the redemption date
  - Make-whole premium is the excess of (a) the present value of all future interest and principal payments through maturity or the first call date for a fixed redemption (calculated based on the interest rate of the US Treasury with an equivalent maturity as the bonds being called + [30 - 50] basis points) over (b) the par amount of the bond
- Some debt securities (such as high yield bonds) have both make-whole redemption (during the "non-call period") and fixed redemption.

Other considerations

- Be sure other debt instruments do not prohibit redemption
- Issuer must comply with the prohibitions against selective disclosure of material non-public information under Regulation FD
- Issuers often announce via press release or Form 8-K (in addition to providing the notice of redemption) their decision to redeem outstanding debt securities
  - An issuer should consider the broader impact a redemption will have on the company’s financial condition and whether investors would view that impact as material

Debt Repurchases

Overview

- A repurchase can be effected in a number of ways. The issuer may:
  - Negotiate the purchase price directly;
  - Engage a financial intermediary to negotiate and effect open market repurchases; or
  - Agree with a financial intermediary to repurchase debt securities that the financial intermediary purchases on a principal basis.

Benefits

- Ability to negotiate purchase price allows issuer to take advantage of fluctuating market prices
- Efficient means of refinancing because it requires little preparation, limited or no documentation and modest transaction costs
- Effective if the issuer is seeking to repurchase only a small percentage of debt, or if the debt is not widely held

Avoiding the tender offer rules

- An issuer repurchasing its debt securities runs the risk that it may inadvertently trigger the tender offer rules.
- The tender offer rules were adopted to ensure that issuer and others conducting tenders for equity securities would be prohibited from engaging in manipulative practices.
- Tender offer is <u>not</u> defined by statute. Courts apply an eight-factor test (the "Wellman test") to determine whether a repurchase is a tender offer:

    1. Active and widespread solicitation of public shareholders for the shares;
    2. Solicitation is made for a substantial percentage of an 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 time;
    7. Offeree is subjected to pressure to sell his stock; and
    8. Public announcement of a purchasing program concerning the target company precedes or accompanies rapid accumulation of large amounts of the stock.

Avoiding the tender offer rules *(cont'd)*

- Repurchases of debt securities should be structured:
  - For a limited amount of securities;
  - To a limited number of holders (preferably sophisticated investors);
  - With no pressure for holders to sell and preferably over an extended period of time;
  - At prices privately and individually negotiated; and
  - With offers and acceptances independent of one another.

Other considerations

- Be sure other debt instruments do not prohibit debt repurchases
- Comply with anti-fraud protections under the securities laws and the prohibitions against selective disclosure of material non-public information under Regulation FD
  - Issuer should disclose other material nonpublic information (unreleased earnings, potential changes to credit ratings) prior to engaging in repurchases
  - Violations of Reg FD may be avoided if the recipients of the information are subject to confidentiality agreements

Tax considerations

- Repurchase at discount
  - **Issuer**: Generally, cancellation of indebtedness (COD) income equal to adjusted issue price over repurchase price
  - **Holder**: Capital gain, subject to market discount rules, (or loss) to the extent repurchase price is greater (or less) than adjusted basis
- Repurchase at premium
  - **Issuer**: Repurchase premium may be deductible by the issuer as interest expense (Treas. Reg. section 1.163-7(c))
    - Amount in excess of adjusted issue price
    - Section 249: deduction only for a reasonable premium in the case of convertible bonds
  - **Holder**: Capital gain, subject to market discount bond rules

Tax considerations *(cont'd)*

- Related party (50% by value) debt repurchase - COD still realized by debtor
  - Direct purchase by related party
  - "Indirect" purchase where purchaser becomes related
- Exception for debt to be retired within a year
- Deemed issuance to related holder
  - Can create OID – issue price is deemed to be amount paid by related party for the debt
  - No gain or loss to related holder for deemed issuance, but potential for OID

Tender Offers

Overview

- The issuer or a third party makes an offer to purchase the debt for cash
  - The offer may be for "any and all" of the outstanding securities of one or more series or may be for a maximum principal or purchase amount
  - The price may be fixed, may be at a fixed spread to an identified treasury security or may be based on "Dutch auction" procedures
  - If the offer is for more than one series of securities, the securities may be purchased pursuant to a "waterfall"

% of Security to be Retired	**15 – 25%**	**25-60%**	**> 60%**	**100%**
Optimal Method	**Dutch Auction or Waterfall Tender**	**Waterfall or Any and All Tender**	**Any and All Tender**	**Make-whole**

Benefits

- Purchase a large amount of securities, typically larger than what is achievable in an open market repurchase program
- Typically able to purchase securities cheaper than redemption/make-whole options
- Able to reach the entire investor base to participate in the offer
- May be combined with a new issue to refinance a series
- May be combined with “exit consents” to amend the underlying indenture, including a covenant “strip” which serves a stick to encourage tender participation

Tenders for straight debt securities

- Tenders for straight debt securities are subject to Regulation 14E (Rules 14e-1, 14e-2 and 14e-3), but not the additional requirements applicable to equity securities
- A tender offer:
  - Must generally be held open for 20 business days
  - Must be held open for 10 business days if there are increases (by more than 2%) or decreases in the amount of securities sought, the consideration offered or the dealer manager's fee
  - Any extension must be announced via press release the day after scheduled expiration and must indicate the number of securities tendered
  - May be subject to various conditions to closing, such as receipt of financing or waivers
- An issuer may approach all the holders of a series of outstanding debt securities
- Regulation 14E does not require filing of tender offer documents

Investment grade v. non-investment grade debt

- Historically, tender offers for investment grade debt had been viewed differently by the SEC than those for non-investment grade debt
- For example, prior to recent no-action letter guidance (available for non-convertible debt, regardless of rating, subject to satisfaction of certain conditions), there were important distinctions between investment grade and non-investment grade:
  - Investment grade debt is not subject to the 10- and 20-business day requirements
  - Issuers of investment grade debt are able to price a tender offer based on a fixed-spread or a real-time fixed-spread over a benchmark security

SEC guidance regarding debt tender offers

- The SEC Staff's guidance relating to tender offers for non-convertible debt securities developed through no-action letters and also through more informal interactions
  - Cobbling together no-action letter guidance and reconciling to evolving market practice resulted in some confusion
- In January 2015, the SEC Staff issued no-action letter guidance applicable to tenders for non-convertible debt that provides for an abbreviated process for investment grade and non-investment grade debt, provided that the transaction meets certain conditions
- The 2015 abbreviated tender offer process will not be available in every debt tender or to every issuer. As a result, it remains important to understand the prior rules. Following the issuance of the 2015 no-action letter, both investment grade and non-investment grade tenders, which cannot be conducted in reliance on the relief, will be subject to the prior rules

Tenders for investment grade debt

- Historically, tenders for non-convertible investment grade debt were not subject to 20-business day (and 10-business day extension) requirements if:
  - Offers to purchase were made for any and all of the debt securities of a particular series;
  - Offer was open to all record and beneficial holders of the series;
  - Offer was conducted to afford all record and beneficial holders a reasonable opportunity to participate (including expedited dissemination if offer is open for fewer than 10 days); and
  - The tender was not being made in anticipation of, or in response to, other tender offers for the issuer's securities.

Investment grade v. non-investment grade
Debt pre-abbreviated tenders no-action relief

- Investment grade debt:
  - Generally, must remain open for seven to ten calendar days
  - Offer must be extended five calendar days for certain modifications to terms
  - Must be conducted to afford all holders the reasonable opportunity to participate, including dissemination of the offer material on an expedited basis (within two days after commencement)
  - Able to price using a fixed-price spread or a real-time fixed-price spread
- Non-investment grade debt:
  - Must remain open for 20 business days
  - Offer must be extended ten business days for certain modifications to terms
  - Able to use a fixed-price spread that is set two days prior to expiration of the exchange offer

Abbreviated Tender Offers

Background

- No-action letter was issued on January 23, 2015; C&DIs were issued on November 18, 2016
- Permits tender or exchange offers for non-convertible debt securities that are held open for as few as five business days (as opposed to the 20 business days required by Rule 14e-1(a)), with potential extensions of as little as five business days following changes in the offered consideration or three business days following changes in other material terms of the offer
- Letter applies to both investment grade and non-investment grade debt securities

Conditions

In order to rely on the relief, the offer must:

- Be made for <u>any and all</u> securities of a class or series of non-convertible debt;
- Be made by (i) the issuer of the securities, (ii) a wholly owned subsidiary of the issuer or (iii) a parent company of the issuer;
- Involve consideration consisting solely of cash or qualified debt securities, or a combination of both
  - "Qualified debt securities" are understood to mean non-convertible 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 the 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.
- Not be financed with debt that is senior to the subject securities;
- Be open to all record and beneficial holders of the targeted debt securities
  - Although an exchange offer could be restricted to Qualified Institutional Buyers (as defined in Rule 144A) or non-US persons (within the meaning of Regulation S) so long as other holders of the subject securities have the option to receive cash in an amount equal to the approximate value of the exchange offer consideration;
- Be announced no later than 10:00 am, Eastern time, on the first business day of the five-business day period, through a widely disseminated press release (and SEC reporting companies must immediately file a Form 8-K);
- Permit tenders through guaranteed delivery procedures;
- Provide for certain withdrawal rights; and
- Not include early settlement features.

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Modifications

- Material changes trigger a requirement to extend the offer period
- Offer period must be extended so 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
- An issuer must notify investors of a material change by a widely disseminated press release, and SEC reporting issuers must file a Form 8-K

Disqualifying events

- The abbreviated tender offer process is not available if the offer is made:
  - In connection with a consent solicitation to amend the documents governing the subject securities;
  - If there is a default or event of default under any of the issuer's material debt agreements;
  - If the issuer is the subject of bankruptcy or insolvency proceedings or has commenced an out-of-court restructuring or a pre-packaged bankruptcy process;
  - In anticipation of or in response to, or concurrently with, a change of control, merger or other extraordinary transaction involving the issuer;
  - 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 if the effect of such offer would result in a change to the capital structure of the issuer (e.g., 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.

Important considerations

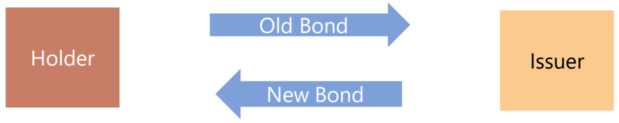
- For investment grade debt, prior no-action letters permitted:
  - Tender offers for investment grade debt to remain open for as little as 7 days (now, if conditions are met, the period can be as short as 5 business days)
  - Issuers to include an early settlement feature (new no-action letter does not allow early settlement)
  - Issuers to deny withdrawal rights (new no-action letter requires withdrawal rights)
  - Consent solicitation could be included in conjunction with the tender offer (abbreviated tender process is not available for an offer that includes an exit consent)
  - Payment in cash (new no-action letter permits cash and/or qualified debt securities)
- In addition, prior no-action letters:
  - Were silent on communication requirements, but the no-action letter specifically requires filing of an 8-K
  - Did not require guaranteed delivery
  - Did not include disqualifying events
- General solicitation would be required to be used in connection with satisfying the condition under the no-action letter that the offer be open to all holders of the subject securities
- No “waterfall” or “partial” tenders are permitted in reliance on the no-action letter
- Effectively, for any non-investment grade tender offer that does not qualify for the abbreviated tender relief, the tender offer will be subject to the more onerous 20-business day, and 10-business day extension, requirements, and, likely to the dissemination and related requirements of the abbreviated tender no-action letter

Exchange Offers

Overview

- The issuer offers investors to exchange a new series of securities for its outstanding securities
- Avoids a trip to the new issue markets/no cash raise required
- Potentially a more efficient means to refinance/extend term
- Typical drivers:
  - Maturity extension (e.g., distressed credit with no access to the new issue market)
  - NPV driven (e.g., refinance notes with lower cost funding)
  - Capital structure driven (e.g., change in obligor)
  - Accounting (e.g., avoid upfront EPS charge in retiring a premium bond)

Refinancing Alternatives

	Exchange Offer	Tender Offer/Redemption with Refinancing
Description	An offer to investors to directly swap their existing notes for new notes	An offer to repurchase existing notes for cash, funded with a new issue
Diagram		
Participation	Holders must be willing to take the same credit with different duration/coupon	Flexible since holder can participate in the tender, but is not required to buy the new issue (or vice versa)
Accounting Treatment	May be eligible to have the premium paid over book value amortized over the life of the new security (subject to accounting tests)	Upfront accounting charge of premium debt must be recognized upon retirement
New Issue Pricing	• Must be set at the launch of the exchange, remain outstanding for 5/20 business days and set without any price talk • May be priced as a concession to “fair” market due to limited investor base	• Determined after price talk • Can be issued in any maturity at any time based on market conditions • Book-building process is the most efficient pricing mechanism
New Issue Execution Risk	None, transaction is self-financing	Can be mitigated by making the tender contingent on the success of the new issue

= Preferred Alternative

Private exchange offers

- Private exchange offers conducted pursuant to Section 4(a)(2) are subject to limitations:
  - May not constitute a "general solicitation" and must be made only to "sophisticated investors," usually QIBs
  - Issuers often pre-certify holders to ensure they meet the sophistication standard
  - Securities issued will not be freely tradable securities:
    - Holders may request registration rights
    - Holders may sell under Rule 144 (may be able to tack)

Section 3(a)(9) exchange offers

- Section 3(a)(9) exempts from the registration requirements "any securities exchanged by the issuer with its existing securityholders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange."
- Section 3(a)(9) exchange has five requirements:
  - Securities must be of the same issuer
    - SEC will look at the underlying economic reality when examining this issue.
    - SEC provided no-action letter relief for the issuance of a new parent security in exchange for an outstanding parent security that has one or more "upstream" guarantees from the parent's 100% owned subs.
  - No additional consideration from holders
    - The securityholder cannot pay anything of value besides the outstanding security.
    - Rule 149 permits cash payments to effect an equitable adjustment in respect of interest or dividends paid.

Section 3(a)(9) exchange offers *(cont'd)*

- Exchange must be offered exclusively to the issuer's existing securityholders
  - An issuer may violate this requirement if conducting a simultaneous offering of new securities for cash.
- The issuer must not pay any commission or remunerations for the solicitation of the exchange; and
  - Must consider the relationship between the issuer and the person furnishing the services, the nature of the services performed and the method of compensation.
  - An issuer's directors, officers and employees may solicit, provided that is not their only role and they receive no bonus for such activities.
  - Activities by third parties must be "ministerial" or "mechanical."
- The exchange must be made in good faith and not as a means of avoiding registration.

Section 3(a)(9) exchange offers *(cont'd)*

- Considerations for Section 3(a)(9) exchanges:
  - Securities issued as part of the exchange are subject to the same transfer restrictions as the original securities
  - Exchange offer may be "integrated" with other securities offerings conducted in close proximity to the exchange
    - Issuer should apply the SEC's five-factor integration test in conducting this analysis
  - May require a Form T-3 filing

Tax considerations

- Same rules apply to a debt-for-debt exchange as an amendment of terms
- "Significant modification" rules
  - A modification is significant only if the legal rights or obligations that are altered and the degree to which they are altered are economically significant
  - Generally, modifications are "significant" if, among other things:
    - The yield changes by the greater of 25 basis points and 5% of the existing yield
    - Scheduled payments are materially deferred
      - Safe harbor equal to the lesser of 5 years or 50% of the original term
    - Modified credit enhancements change payment expectations
    - The nature of the security changes (*e.g.*, from debt to equity [without regard to decline in credit quality] or from recourse to nonrecourse)

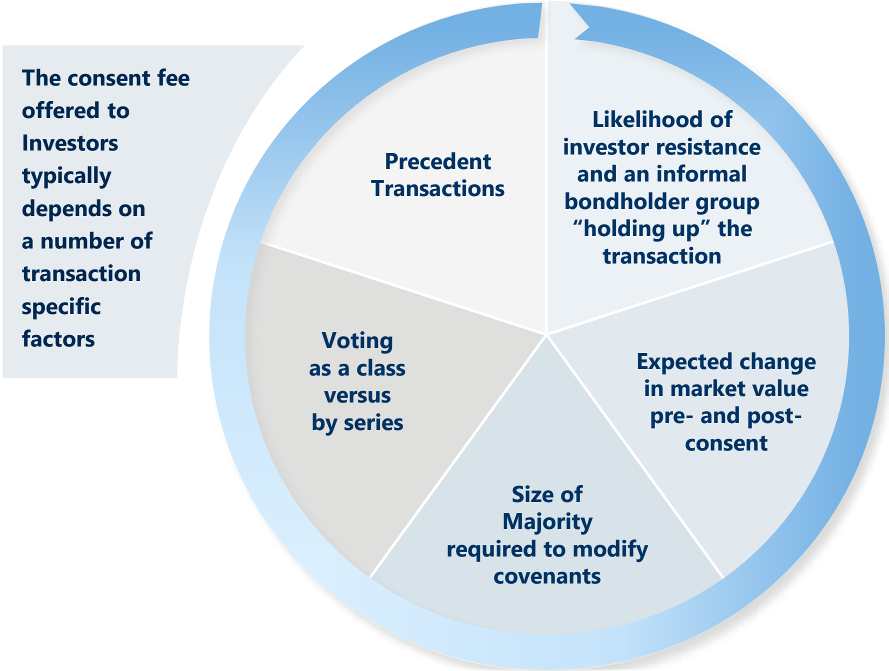
Tax considerations *(cont'd)*

- Consequences to parties
  - Publicly traded?
  - Issuer
    - Potential for COD and OID, exception for issuers in bankruptcy or that are insolvent
    - Corporations that issue obligations with OID as part of their restructuring need to be mindful of potential limitations on the deductibility of this discount
    - Repurchase premium may be deductible by the issuer as interest expense
  - Holder
    - Recapitalization: are the old notes and new notes "securities?"
    - If so, no generally gain or loss
    - If not, generally have gain or loss equal to the difference between the issue price of the new debt and the holder's basis in the debt instrument, which will usually be a capital gain or loss (except for accrued market discount)

Consent Solicitations

Overview

- Issuer solicits consent to amend the terms of the indenture governing outstanding securities
- Issuer typically offers a consent fee which may depend on how significant the proposed amendments are
- Consent solicitation may be coupled with a tender offer
- May be preceded by negotiation with one or more large holders



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Benefits

- Allows issuer to amend restrictive covenants
  - Provide greater operating flexibility under restrictive covenants
  - Permit a potential transaction
  - Incur additional debt
  - Pay dividend
- Modify indenture covenants that restrict or prohibit a restructuring of other debt in order to preserve “going concern” value and avoid bankruptcy
- Frequently linked with M&A related activity
  - *E.g.*, waive a change of control, amend a reporting requirement, etc.

Consent solicitations

- Must be permitted under the terms of the governing indenture
- The TIA and most indentures do not permit amendments that reduce principal or interest, amend the maturity date, change the form of payment or make other economic changes unless such amendments are consented to by all holders of the debt securities
- If the amendments involve a significant change in the nature of the investment, it may be considered an issuance of a “new” security

Consent solicitations *(cont'd)*

- Concerns
  - Holders may be unwilling to consent to significant modifications because they will still hold the securities afterward
  - Typically kept open for 10 business days
- Exit consents are used to change significantly restrictive provisions in connection with a tender or exchange offer
  - Given by tendering or exchanging holders (who are about to give up their securities) and bind non-tendering or non-exchanging holders
  - Act as a useful incentive to avoid the "holdout" problem because non-tendering and non-exchanging holders are left with securities that have lost most, if not all, of their protections
  - An issuer may include a "consent payment" to consenting holders as part of the consideration
  - Not subject to any legal framework other than contract law principles

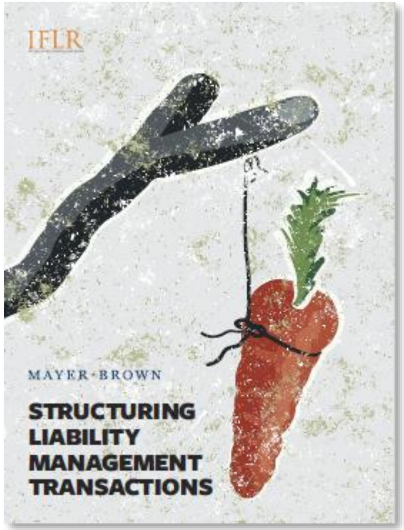
Tax considerations

- Consent solicitations that seek to change “customary accounting or financial covenants” would not, in themselves, be significant modifications
- Tax treatment of consent fees is unclear
  - Tax treatment to holders?
  - Subject to withholding tax if paid to non-US holders?
  - PLR 201105016

Additional resources

IFLR PUBLICATION

[Structuring Liability Management Transactions]



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Mayer Brown's summary of US legal framework, including guidance in numerous no-action letters applicable to debt repurchases, tender offers and exchange offers. Also presented are some main regulatory and tax considerations.

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LIABILITY MANAGEMENT RESOURCE PAGE

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- John has extensive experience advising both corporate and financial institutions in a broad range of capital markets transactions, including: investment grade and high yield debt offerings; initial public offerings and follow-on equity offerings; de SPAC transactions; preferred equity offerings; and liability management transactions.

- He also advises public companies on the securities laws aspects to public mergers and acquisitions activity. In addition to his transactional practice, John also advises public companies on their securities law compliance obligations, stock exchange listing requirements, corporate governance and other matters.

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- John represents underwriters, issuers and selling stockholders in a wide range of capital markets transactions, including registered public offerings, private placements, leveraged buyouts, restructurings and liability management transactions.

- His practice also includes assisting clients with their ongoing reporting obligations, corporate governance requirements and other compliance issues arising under the Securities Exchange Act of 1934, the NYSE and NASDAQ, as well as general corporate law matters.

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- Remmelt 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.

- Remmelt's areas of experience also include restructurings (both in and out of bankruptcy), debt and equity workouts, domestic and international mergers, acquisitions, reorganizations and joint ventures.

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