Reopenings: Issuing Additional Debt Securities of an Outstanding Series

A Lexis Practice Advisor® Practice Note by John Berkery and Remmelt Reigersman, Mayer Brown LLP

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This practice note discusses reopenings of debt securities issuances. Companies frequently raise capital by issuing additional debt securities of the same series as debt securities outstanding under an existing indenture, often referred to as "reopening the indenture" or "reopening the series."

In reopenings, the newly issued additional debt securities will have the same terms, and for all purposes under the indenture will be treated as part of the same series, as the outstanding debt securities of such series. The additional debt securities will also be fungible with the outstanding debt securities of such series for secondary market trading. This practice note discusses the reasons why companies raise capital through reopenings, as well as the processes, mechanics, tax considerations, and disclosure issues specific to reopenings.

For information on debt securities generally, see Corporate Debt Securities in U.S. Capital Markets, Debt Finance: Capitalization Options and Parties, and Rule 144A / Regulation S Offerings Resource Kit. For information about specific types of debt securities, see Convertible Debt Securities, Top 10 Practice Tips: Convertible Note Offerings, Top 10 Practice Tips: High Yield Debt Offerings, Top 10 Practice Tips: Investment Grade Debt Offerings, and Medium-Term Note (MTN) Programs.

The Reasons for Reopenings

Reopening an existing debt issue is often more cost-effective than raising capital by issuing a new series of debt securities, particularly if the issuer is raising a relatively small amount of capital.

Better Pricing

An important element affecting the pricing of any debt security is the security's liquidity (i.e., the degree to which the security can be quickly bought or sold in the open market). All other variables being equal, debt securities with greater liquidity will tend to command higher market prices. One of the many factors that can affect a debt security's liquidity is the size of the series or the aggregate outstanding principal amount of the series outstanding. Again, all else being equal, the larger the aggregate principal amount outstanding the more liquid the security will be because it will typically be held by more investors resulting in more trading and market interest in the security.

Series sizes of less than $100 million are generally viewed as having an adverse impact on both liquidity and pricing, with the adverse impact increasing as the size of the series decreases. As a result, companies that have a series of debt securities outstanding and want to issue a relatively small amount of debt in the capital markets (e.g., $25–$50 million), will very often "reopen the series" to receive better pricing (because of the increased liquidity in the existing series) than they would otherwise receive from issuing a completely new and separate series of debt securities.

Decreased Time and Expense

Reopenings are also cost-effective because the time and expense involved in a reopening are less than for an offering of a new series of debt securities. Because the terms of the additional securities being offered have already been established there is no need to negotiate a covenant package or any other terms of the securities. The indenture and the form of debt securities have previously been drafted and finalized, which obviates the time and expense associated with preparing those documents. Even the marketing efforts for a reopening are reduced because the market is familiar with the securities being offered and the underwriters (for a registered offering) or initial purchasers (for a Rule 144A (17 CFR 230.144A) offering) often market the additional debt securities primarily to existing holders of the outstanding debt securities of the same series.

It is also not unusual for a reopening to occur as a result of a reverse inquiry, which is when existing holders or investors familiar with and seeking to acquire the outstanding debt securities contact the issuer or a financial intermediary. If the inquiry is made directly to the issuer (rather than to a financial intermediary) and after the expiration of any issuer lock-up period set forth in the underwriting or purchase agreement for the initial offering, the issuer can sell the additional debt securities directly to the investors and avoid paying any underwriting or initial purchaser discount.

Processes and Mechanics Specific to Reopenings

Initial issuances and reopenings of outstanding series of debt securities both constitute offers and sales of securities by the issuer. Therefore, whether the offering is made publicly pursuant to a registration statement filed under the Securities Act of 1933, as amended (Securities Act), with the Securities and Exchange Commission (SEC) or pursuant to a transaction exempt from registration under the Securities Act, the process to effectuate a reopening, albeit often streamlined, will be very similar to that involved in the initial offering. This will include, but not be limited to, diligence efforts, disclosure obligations, document preparation, and compliance with the rules and regulations of federal and state securities laws. The following is a discussion of the processes, mechanisms, and practical considerations that are specific to effectuating a reopening.

Does the Indenture Permit Issuance of Additional Debt Securities?

The first step in any reopening is to check if the indenture permits issuing additional debt securities after the initial issuance of debt securities of the same series. In this respect there are three types of indentures: (1) indentures that provide for the issuance of an unlimited amount of debt securities of the same series to be issued, (2) indentures that only provide for the issuance of the debt securities in the initial offering, and (3) indentures that provide for the issuance of additional debt securities up to a specified principal amount. The provisions addressing the ability to issue additional debt securities of the same series are typically found in Article II of most indentures.

You must also check to make sure that the incurrence of indebtedness represented by the additional debt securities to be issued in the reopening will not violate any other indenture covenants (as well as any other material contracts of the issuer), including the Limitation on Indebtedness covenant and, for debt securities that are secured, the Limitation on Liens covenant. If the debt securities are secured, the issuance of additional debt securities of the same series will dilute the collateral pool securing the outstanding debt securities, which may be permitted up to a specified dollar amount or a specified financial ratio, such as a secured leverage ratio. Alternatively, the issuer may be required to "top-up" the collateral pool by pledging additional assets to support the incurrence of the additional debt securities. In either case, counsel for the issuer should flag any covenant compliance issues early on in the process to ensure they are addressed promptly.

The Additional Debt Securities Must Be Fungible with the Outstanding Debt Securities

The most important aspect of a reopening is to issue the additional debt securities in such a manner so that they will be (1) treated as part of the same series as the outstanding debt securities from a contractual standpoint under the indenture and (2) fungible with the outstanding debt securities for trading purposes.

Compliance with Indenture Formalities

The first part is relatively straightforward. An indenture that provides for the issuance of additional debt securities will expressly state that any additional debt securities validly issued thereunder will be treated as part of the same series as the securities initially issued under the indenture for all purposes, including, but not limited to, determinations as to whether the requisite number of holders have consented to any amendments or granted any waivers under the indenture.

The issuer must abide by the formalities prescribed by the indenture to validly issue additional debt securities. These formalities are essentially the same as those followed for the initial issuance of the outstanding debt securities, including (1) delivery to the trustee of an officers' certificate, an authentication order, and a resolution of the issuer's board of directors authorizing the issuance of the additional debt securities; (2) execution and authentication of a note (generally in the form of a global note where the debt securities are held in book-entry form through The Depository Trust Company (DTC)) representing the additional debt securities; and (3) delivery to the trustee of an opinion of counsel addressing such matters as due authorization, execution, delivery, and enforceability of the additional debt securities, and that the issuance of the securities is permitted under the indenture.

For an example of an authentication order, see Issuer Authentication Order (Rule 144A and/or Regulation S Debt Offering). For an example of an officer's certificate, see Officer's Certificate (Indenture; Rule 144A and/or Regulation S Debt Offering). For an example of issuer's counsel's opinion letter, see Legal Opinion (Rule 144A and/or Regulation S Debt Offering) (Issuer's Counsel).

Trading

The second part—ensuring that the additional debt securities are fungible from a trading perspective with the outstanding debt securities—has more to do with the mechanics of issuing the additional securities.

The additional debt securities will be issued in the form of a global note that can be accomplished by either of the following two methods:

- Increasing the principal amount of the existing global note held by the trustee as custodian for DTC in an amount equal to the principal amount of the additional debt securities to be issued
- Issuing the additional debt securities under a new global note, which will be almost identical to the form of global note representing the outstanding debt securities (except for the original date of issuance and, possibly, the first interest payment date and CUSIP Number)

The first method can only be used in situations where the additional debt securities are eligible to bear the same CUSIP number as the outstanding debt securities (e.g., securities issued in a registered offering and are freely tradeable can bear an unrestricted CUSIP number; securities that have been issued in an offering exempt from registration pursuant to Rule 144A or outside the United States pursuant to Regulation S under the Securities Act (17 CFR 230.901–230.905) can bear a Rule 144A CUSIP number or Reg S CUSIP number, respectively).

For information about Rule 144A and Regulation S offerings, see Rule 144A and Regulation S Requirements, Medium-Term Note (MTN) Programs, and Indenture Drafting for a Rule 144A / Regulation S Issuance.

For information about CUSIP numbers, see Closings in Securitization Transactions. For information about the role of DTC in debt offerings, see Parties in a Rule 144A / Regulation S Debt Offering.

For a form of global note, see Global Note (Rule 144A/ Regulation S).

Purchase Price Includes Accrued Interest

The terms of most debt securities provide that interest on the debt securities accrues from the most recent date on which interest has been paid or, if no interest has been paid, then from the date of original issuance. Since the additional debt securities issued in a reopening are almost never issued on an interest payment date for such class of debt securities, the purchase price for the additional debt securities issued in reopenings includes interest that would have accrued on the additional debt securities had they been issued on the original issue date of the outstanding debt securities. To illustrate this point, consider the following hypothetical:

Company X issued $100 million aggregate principal amount of 7.5% Senior Notes due 2025 (Notes) on June 10, 2018. The Notes have semi-annual interest payment dates on June 1st and December 1st of each year. On February 19, 2019, Company X issued an additional $25 million principal amount of Notes. Since the additional Notes were issued in global form and trade interchangeably with the outstanding Notes, neither Company X nor the trustee for the Notes can distinguish between the additional Notes issued on February 19, 2019, and the Notes initially issued on June 10, 2018. As a result, on June 1, 2019, Company X will be required to pay the full six months of accrued interest from December 1, 2018, to all holders of outstanding Notes, including the additional Notes, even though the additional Notes were not issued until February 19, 2019.

To avoid a windfall to the purchasers of the additional Notes of receiving a full six months of accrued interest on their Notes on June 1, 2019, even though they acquired their Notes on February 19, 2019, the purchase price for the additional Notes issued in the reopening will include an additional amount equal to the interest that has accrued from December 1, 2018, to, but excluding, February 19, 2019. The purchasers of the additional Notes will receive this amount back when Company X pays the full six months of accrued interest on the Notes on June 1, 2019. In fact, the adjustment of the purchase price in reopenings for interest that has accrued prior to the purchase date works the same way as for bonds bought and sold in the secondary trading markets. Counsel for the issuers and the underwriters should ensure that the underwriting agreement (for a registered offering) or purchase agreement (for an exempt offering), as well as the disclosure document for the offering, accurately describe this component of the purchase price. See Disclosure in Offering Documents Specific to Reopenings.

Shelf Registration

Most, if not all, registered reopenings are conducted using a shelf registration. Shelf registration allows an issuer to act quickly to take advantage of favorable market conditions because the offering can be conducted without further SEC review and much of the required disclosure about the issuer will be provided in the base prospectus included in the registration statement or incorporated by reference into the prospectus from the issuer's current and periodic reports and other documents filed with the SEC. Additionally, the prospectus supplement (and, if desired, a preliminary prospectus supplement) describing the specifics of the offering can be prepared quickly, resulting in time and cost savings for the issuer.

For more information about shelf registration and offerings, see Shelf Registration, Top 10 Practice Tips: Shelf Registration Statements and Takedowns, Form S-3 Registration Statements, and Follow-On Offerings Resource Kit.

U.S. Federal Income Tax Considerations

Many indentures provide that additional debt securities cannot be issued unless they are fungible with the outstanding debt securities for purposes of U.S. federal income tax. This is to prevent the additional debt securities from having different tax characteristics than the original debt securities. In particular, there would be an issue if the additional debt securities are issued with "original issue discount" (OID) while the original debt securities were not.

OID generally arises when a note is originally issued at a discount to its face amount or, more technically, its "stated redemption price at maturity." OID equals the amount of the discount. For federal income tax purposes, issuers generally accrue and deduct OID from, and holders generally accrue and include OID in, income on a current, constant yield basis, subject to an exception for instruments issued with a de minimis amount of OID. De minimis OID is generally equal to 0.25% of the instrument's stated redemption price at maturity times the number of complete years to maturity.

OID is an attribute of a debt security itself (in other words, OID travels with the security and does not vary depending on whether an original purchaser or a secondary market purchaser holds the security). Debt securities issued in the initial offering of a series often are not issued with OID. However, the additional securities issued in a reopening may be priced at a non-de minimis discount because, for example, interest rates have risen after original issuance. Holders generally prefer that both original securities and additional securities be fungible from a tax standpoint to ensure that the additional securities are treated as being acquired with market discount rather than having been issued with OID. Market discount, in contrast to OID, generally arises when an investor purchases a debt instrument in the market at a discount after original issue (again, typically because interest rates have risen). Unless the holder elects otherwise, market discount, unlike OID, is not currently taxable as it accrues but is taxable on retirement or disposition of the security.

The reopening rules discussed below police the boundaries within which additional debt securities may be treated as fungible with original securities for U.S. federal income tax purposes. If original and additional securities do not meet the requirements described below, the tax law treats additional securities issued at a discount as a new issuance issued with OID and thus not fungible with the outstanding securities. In that case, the additional securities should be issued under a CUSIP number different from the one for the outstanding debt securities.

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

First test. Under the first test, the original securities and the additional securities must be issued within 13 calendar days of each other, beginning on the day on which the original securities are issued.

Second test. Under the second test, a reopening of debt instruments will be a qualified reopening and will result in fungible securities if:

- The original securities are "publicly traded" within the meaning of applicable Treasury regulations

- The issue date of the additional securities is not more than six months after the issue date of the original securities –and–
- On the pricing date of the reopening (or, if earlier, the announcement date of the offering of the additional debt securities (announcement date)), the yield of the original securities (based on their fair market value) is not more than 110% of the yield of the original securities on their issue date (or, if the original securities were issued with no more than a de minimis amount of OID, 110% of their coupon rate)

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

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

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

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

Fifth test. The fifth test allows for qualified reopenings more than six months after the original securities were issued if both:

- The additional securities are either publicly traded or are issued for cash to persons unrelated to the issuer
- On the pricing date of the reopening (or, if earlier, the announcement date), the yield of the additional securities (based on their fair market value or cash purchase price, whichever is applicable) is more than 100% of the yield of the original securities on their issue date (or, if the original securities were issued with no more than a de minimis amount of OID, 110% of their coupon rate)

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

If original and additional securities are not fungible under the foregoing rules but are, nonetheless, issued as indistinguishable (issued with the same terms and CUSIP number), neither secondary market purchasers nor the Internal Revenue Service could determine whether a particular security was an original issuance (without OID) or additional issuance (with OID). As a result, the additional, non-fungible securities may taint original notes, with the Internal Revenue Service treating both the original and additional securities as having been issued with OID.

Finally, you should be aware that the U.S. Treasury regulations define the circumstances under which debt securities are treated as publicly traded, a discussion of which is outside the scope of this practice note. One noteworthy rule, however, is that any debt instrument will not be treated as publicly traded if at the time the determination is made, the outstanding principal amount of the debt instrument does not exceed $100 million.

For more information about the U.S. federal income tax considerations regarding investing in debt securities, see Federal Tax Consequences for U.S. Holders of Equity or Debt Securities.

Disclosure in Offering Documents Specific to Reopenings

The offering document for the reopening (i.e., the prospectus, prospectus supplement, or offering memorandum) should include certain disclosures that are specific to reopenings. First, the cover page, the "Summary of the Offering" section, and the "Description of Debt Securities" section should clearly state that the debt securities being offered are an additional issuance of, and are fungible with, debt securities that were originally issued on a prior date. The following is an example of typical disclosure for a reopening that was taken from a preliminary offering memorandum, dated December 4, 2019, for the offering of an additional $120 million of 6.25% Senior Notes due 2027, where the company had previously issued $330 million of the same Notes on October 4, 2017:

> ABC Company (the "Company") is offering $120,000,000 aggregate principal amount of its 6.25% Senior Notes due 2027 (the "Notes"). The

> Notes offered hereby are an additional issuance of the Company's 6.250% Senior Notes due 2027 and will be treated as a single class with the $330,000,000 million aggregate principal amount of such Notes that were originally issued on October 4, 2017 under the Indenture dated as of October 4, 2017 (the "Indenture"), among the Company, the Subsidiary Guarantors party thereto and Citibank, N.A., as trustee (the "Trustee"). Except as set forth in "Description of the Notes," the Notes offered hereby will have the same CUSIP and ISIN as, and will be fungible with, the outstanding Notes. Unless the context otherwise requires, references in this offering memorandum to the "Notes" refers to the Notes offered hereby and the outstanding Notes, collectively. Interest on the Notes offered hereby will accrue from October 4, 2019 (the most recent interest payment date on the outstanding Notes) at a rate of 6.250% per year and will payable in arrears on April 4 and October 4 of each year, commencing on April 4, 2020.

In addition, the cover page, the "Summary of the Offering" section, and the "Underwriting" or "Plan of Distribution" section of the offering document should clearly state that purchase price for the debt securities to be paid by investors includes the payment of accrued interest from the most recent interest payment date (or, if no interest has been paid, from the original date of issuance of the outstanding Notes) to, but excluding the date of settlement. The following is an example of the disclosure on the cover page of the same offering memorandum described above:

> **Issue Price: 100.500%, plus accrued interest, from October 4, 2019**
>
> Purchasers of Notes offered hereby will be required to pay accrued interest totaling U.S.$[•], or U.S.$[•] per U.S.$1,000 principal amount of the Notes, which represents interest, from (and including) October 4, 2019 up to (but excluding) December , 2019, the date we expect to deliver the Notes offered hereby.

The extent of the additional disclosure provided for a reopening will depend on the disclosure included in the offering document used for the initial offering of the debt securities. For example, when a prospectus supplement is used for a reopening conducted under a shelf registration, most of the disclosure regarding the issuer will likely have been provided in (or incorporated by reference into) the prospectus included in the registration statement originally filed for the offering and thus would not have to be included in the prospectus supplement.

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John Berkery is a partner in Mayer Brown's Corporate & Securities practice. He represents underwriters, issuers and selling stockholders in a wide range of capital markets transactions, including registered public offerings (IPOs, follow-on offerings, continuous offering programs), private placements (including Rule 144A/Reg S offerings and PIPE (private investment in public equity) transactions), leveraged buyouts, restructurings and liability management transactions (exchange offers, tender offers and consent solicitations). He is experienced in a broad spectrum of securities products, ranging from high-yield to investment-grade debt securities and from simple common equity to complicated convertible debt and other hybrid and equity-linked securities. 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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