

PERSPECTIVES

Liability Management

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Overview

- What Is Liability Management?
- When Are Liability Management Transactions Conducted?
- Objectives of Liability Management Transactions
- Players and Rules
- Sample Transaction Types
 - Open Market Repurchase
 - Tender Offer
 - Exchange Offer
 - Consent Solicitation

What is liability management?

The strategic, out-of-court restructuring of a company's balance sheet.

When are liability management transactions conducted?

Under either distressed or opportunistic circumstances.

Objectives of Liability Management Transactions

- Reduce exposure to near-term debt maturities
- Refinance debt at lower interest rates
- Avoid or delay Chapter 11 bankruptcy
- Reduce principal on outstanding debt
- Extend debt maturities
- Eliminate or modify onerous covenants
- Decrease leverage
- Manage existing investor perceptions or other stakeholder concerns (e.g., regulators)
- Avoid contract default
- Deduct interest expense (by repurchasing debt at premium)

Players

INDUSTRY PARTICIPANTS

- Issuer/affiliate or third party (e.g., acquirer)
- Dealer manager or placement agent
- Tender agent
- Bond trustee (debt transactions)
- Stock transfer agent (equity transactions)
- The Depository Trust Company
- NYSE or Nasdaq

Rules

U.S. LEGAL FRAMEWORK

- Equity and debt securities:
 - Rule 14E
 - Rule 14e-1
 - Rule 14e-3
- Equity securities only:
 - Rule 14D
 - Rule 13e-4
 - Rule 14e-5
- No-action letters – limited requirements:
 - Tender offer-specific issues
 - Abbreviated tender offer rules
 - Section 3(a)(9)

Sample Transaction Types

Open Market Repurchase

Direct purchase of securities on the secondary market

- Effective if seeking to repurchase small percentage of securities or if securities are not widely held
- Financial advisor often engaged to direct a process or negotiate and affect a purchase from a small group of securityholders
- If material nonpublic information will be disclosed to market professionals or securityholders, such information must be made public prior to the repurchase
- Relatively little preparation, limited documentation, and lower transaction costs than tender offers
- Must be careful to avoid a “creeping tender offer”

Tender Offer

Repurchase offer made to all securityholders

THE *WELLMAN* TEST

Eight factors to determine whether a transaction constitutes a tender offer

- Active and widespread solicitation of public securityholders
- Solicitation to purchase a substantial percentage of the securities
- Offer to purchase the securities at a premium over prevailing market prices
- Terms of the offer are firm and not negotiable
- Offer is contingent on the tender of a fixed minimum number of securities (often subject to a fixed maximum number for purchase)
- Offer is open for only a limited period of time
- Securityholder pressured to sell
- Public announcement of the purchasing program precedes or accompanies a rapid accumulation of securities

Tender Offer CONTINUED

Repurchase offer made to all securityholders

- Best-price Rule (14d-10) requires all securityholders be paid the highest consideration paid for any security tendered in the tender offer
- Must remain open for at least 20 business days and 10 additional business days after material changes
- SEC no-action letter permits tenders for non-convertible debt as short as five business days (opportunistic only)
- Must complete Schedule TO filing requirements
- No securities registration requirements for cash-only offers because no new securities issued
- Can use fixed or real-time pricing

Exchange Offer

Exchange of existing securities
for new securities

- Effective if cash is constrained or unavailable
- Requires compliance with both Exchange Act tender-offer rules and Securities Act registration requirements
- Can be structured as debt for equity, debt for debt, or equity for equity exchange

Exchange Offer

CONTINUED

Exchange of existing securities
for new securities

- Registered
 - Via Form S-4 registration statement
 - Most practical when securities are held by a large, diverse group of investors and/or some retail investors
 - Generally higher transaction costs and longer process (SEC review and registration fees, due diligence process)
- Private – Section 4(a)(2)
 - Not subject to registration or review by the SEC
 - Limited to small group of sophisticated investors
- Existing securityholder – Section 3(a)(9)
 - Made to existing securityholders and in exchange for nothing more than their existing securities
 - Compensation to solicitors prohibited

Consent Solicitation

Request to amend terms of a security agreement

- Effected on a standalone basis or in conjunction with a tender or exchange offer
- Not required to be filed with the SEC
- Most covenant modifications require a simple majority (issuer/affiliate-held bonds may not vote)
- Certain modifications (e.g., interest rate, maturity date, currency, or form of payment) unenforceable on non-consenting securityholders, but can leave non-consenting bonds behind



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Justin is a corporate partner based in the Houston and New York offices. He regularly represents public and private companies, underwriters, and investors in the energy, technology, financial services, and consumer products sectors on public and private capital markets and M&A transactions, special situations, and restructuring matters. He has extensive experience advising energy companies in connection with securities offerings and acquisition financings, particularly in the upstream, midstream, and oilfield services sectors, as well as coal mining and renewables. Justin also has significant experience in high yield debt securities, having led billions of dollars of bond transactions for both issuers and underwriters.

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Keerthika has extensive experience representing private and public companies, private equity firms and investment banks in equity and debt offerings, deSPAC transactions, PIPEs, liability management transactions and restructurings. She also advises boards and senior management on corporate governance issues, disclosure matters, and capital raising solutions in crisis management situations.

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