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Strategies for Exiting the TARP Capital Purchase Program

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Overview

- Capital Purchase Program Recap
- Exiting the Capital Purchase Program
  - Contractual Provisions
  - Statutory Provisions
  - Treasury Announcements
  - Impact of the “Stress Tests”
- Recent Transactions
- Transaction Structuring Considerations
  - Capital-Raising Alternatives
  - Restructuring Alternatives
- Conclusion

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Capital Purchase Program Recap

- Launched October 14, 2008 by Treasury
- Authorized by the Emergency Economic Stabilization Act of 2008
- Part of TARP – Troubled Assets Relief Program
- Stated policy objective of encouraging U.S. financial institutions to build capital to increase the flow of financing to U.S. businesses and consumers and to support the U.S. economy
- $250 billion reserved for the program on October 14th, ultimately $199 billion was used

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Capital Purchase Program Recap

- Treasury made capital investments by purchasing Senior Preferred Stock
- Treasury also received Warrants for common stock
- Only certain FDIC-insured institutions were eligible (U.S. insured depository institutions and certain U.S. holding companies of insured depository institutions)
- Amounts were a minimum of one percent of risk-weighted assets to a maximum of the lesser of $25 billion or 3% of risk-weighted assets

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Capital Purchase Program Recap

Senior Preferred Shares

- Tier 1 capital
- *Pari passu* with the institution's existing preferred stock
- Transferable by Treasury (registration rights and piggyback rights where necessary)
- Quarterly dividend (5% for first 5 years and 9% thereafter)
- Callable after three years

Warrants to purchase common stock

- 10 year term
- Exercisable immediately
- Number of underlying shares based on 15% of the aggregate proceeds from the issuance of the senior preferred divided by 20-day average market price of common stock

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Capital Purchase Program: Why the rush to the exit?

- Executive Compensation Limits
- Governance Limitations
- Rating Agency Treatment
- Regulatory and Legislative Uncertainty
- Negative Perception
- Cost

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Rush to Exit: Executive Compensation

- Emergency Economic Stabilization Act imposed restrictions where Treasury took significant equity positions
- Capital Purchase Program was the first program to impose these rules
- February 2009: Treasury announced harsher measures for institutions receiving special assistance
- American Recovery and Reinvestment Act retroactively amends the executive compensation and corporate governance restrictions
- Treasury recently issued new guidance interpreting the Recovery Act

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Rush to Exit: Executive Compensation

- TARP (old) rules:
  - Applies to top 5 executive officers
  - Compensation committee must review plans and certify that there is no incentive structure for excessive risk taking
  - No golden parachute payment for involuntary termination, bankruptcy or receivership
  - Clawback of incentive compensation later found to be received based on statements that were materially inaccurate
  - No tax deduction for compensation in excess of $500,000
- Recovery Act (new) changes include:
  - Apply whenever TARP funds are received
  - Extends beyond CEO, CFO and top 3
  - New “Say-on-Pay” non-binding shareholder vote on compensation plan
  - No bonus rules – limits bonuses to restricted stock with long-term vesting for top employees (no longer limited to executives)
  - Expands limits on golden parachutes
  - Extends reporting requirements to CFO
  - Requires creation of compensation committee for publicly-held institutions
  - Board must approve a “luxury” expenses program

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Rush to Exit: Governance Limitations

- Treasury consent required for:
  - Equity repurchases (with limited ordinary course exceptions) until 3rd anniversary of investment
  - Increases in dividends until after 3rd anniversary
- If payment of Treasury's dividends stops:
  - Equity and *pari passu* instruments cannot receive dividends
  - No equity repurchases
- Participants required to file a resale registration statement for Treasury
- Upon failure to pay dividends, Treasury can appoint two directors to the Board

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Rush to Exit: Rating Agencies

- Preferred stock issued to Treasury
  - Tier 1 capital for regulatory purposes
  - Not given “full” equity credit by Rating Agencies
  - Seen as temporary based on built-in features to encourage early redemption:
    - Step-up in interest rate
    - Limitations on repurchases
    - Executive compensation and corporate governance requirements

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Rush to Exit: Uncertainty

- Recovery Act included retroactive executive compensation requirements changing the terms of the contract with Treasury
- Congress indicated a desire to further limit executive compensation
- Congress, SIG-TARP and Congressional Oversight Panel strongly encouraged:
  - Requiring Capital Purchase Program funds to disclose use of funds
  - Requiring specific lending requirements
- As a result, increased reporting requirements were retroactively imposed upon Capital Purchase Program participants

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Rush to Exit: Uncertainty

- Case in Point: "Joint Warrant Probe Planned"
  - On June 10 special examination of warrants
  - Coordinated effort by:
    - SIG-TARP (Special Inspector General-TARP)
    - Congressional Oversight Panel
  - Policy consideration:
    - "pricing of the warrants held by Treasury . . . will be critical to ensuring an appropriate return on investment for the government and . . . American taxpayers"
  - Panel is independently estimating reasonable ranges of values for Capital Purchase Program investments – results to be released in July
  - SIG-TARP will audit the warrant repurchase/sale process evaluating the process and level of objectivity

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Rush to Exit: Perception

- Capital Purchase Program was announced and designed for “healthy” banking institutions
- Numerous applicants were denied participation in the program
- Market information indicates that institutions with lower CAMELs were not permitted to receive Treasury capital
- Notwithstanding this information, participants began to be seen as “needing” the additional capital
- Capital Purchase Program funds came from same pool as the AIG and auto company bail-outs, which tainted some other uses of the funds
- Statements by Congress grouped all “TARP recipients” together

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Rush to Exit: Cost

- Dividends were expensive, without the corresponding benefit
- Not treated as “equity” by the rating agencies
- Inability to retain or hire desired employees
- Negative perceptions distracted management

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Exiting the Capital Purchase Program

- Exiting the Capital Purchase Program
  - Contractual Provisions
  - Statutory Provisions
  - Treasury Announcements
  - Impact of the “Stress Tests”

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Contractual Provisions

- Within first 3 years:
  - Consent of primary federal banking regulator
  - Only using proceeds of Qualified Equity Offering
  - Qualified Equity Offering:
    - Tier 1 capital from common or preferred stock
    - Each transaction size must be at least 25% of senior preferred investment amount
- After 3 years:
  - Consent of primary federal banking regulator
- Warrants:
  - Amount of underlying common stock halved if qualified equity offerings equal 100% of issue price of senior preferred by December 31, 2009
  - Can be repurchased upon repurchase of 100% of Senior Preferred

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Contractual Provisions

- Warrant Repurchase
  - After repurchase in full of the Senior Preferred, warrants may be repurchased for "Fair Market Value"
  - FMV determined in good faith by Board of participant based on an opinion of an independent investment bank (not an affiliate)
  - If there is a disagreement on valuation, parties must meet to agree upon FMV within 10 days of Treasury receiving the Board proposal
  - If not agreement – appraisal procedure is implemented
- Appraisal Procedure
  - Two independent appraisers (one chosen by each party) agree on fair market value
  - If unable to agree in 10 days, a third appraiser is chosen with mutual consent of two original appraisers
  - Average of three will be binding (any far outlier value will be excluded)
  - Issuer pays for all appraisers

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Statutory Provision

- American Recovery and Reinvestment Act
  - Modified the Contractual Provisions
  - NO IMPEDIMENT TO WITHDRAWAL BY TARP RECIPIENTS: Subject to consultation with the appropriate Federal banking agency, if any, the Secretary shall permit a TARP recipient to repay any assistance previously provided under the TARP to such financial institution, without regard to whether the financial institution has replaced such funds from any other source or to any waiting period, and when such assistance is repaid, the Secretary shall liquidate warrants associated with such assistance at the current market price.

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Treasury Announcement

- Treasury issued FAQs shortly after the passage of the Recovery Act (February 26th):
  - Capital Purchase Program participants can redeem their senior preferred
  - "Treasury is working with the four federal banking agencies to determine what factors are involved in the consultation"
  - Required redemption be at least 25% of the issuance
  - Treasury announced that any warrants not repurchased at the time the Senior Preferred was repurchased would be liquidated by Treasury as soon as possible

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Impact of the Stress Tests: Introduction

- February 10: Treasury announced that "stress tests" would be performed on the 19 largest banking institutions
  - Policy goal to ensure financial institutions have the capital required to weather a continued decline in the economy have caused both a dramatic slowdown in lending and a decline in the confidence required for the private sector to make much needed equity investments in our major financial institutions
- February 25: Federal Reserve begins "economic assessments" and releases outline of base case and more adverse scenarios that will be used
- May 7: Results of "Supervisory Capital Assessment Program" announced – 10 of the top 19 institutions need aggregate additional capital of $75 billion ($185 billion year end 2008, less 1Q 09 performance)
- June 1: Federal Reserve issues considerations for approving redemption of Capital Purchase Program securities
- June 8: The 10 institutions submitted capital plans

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Impact of Stress Test: Federal Reserve Guidelines

- 19 Stress Test institutions' post-redemption capital levels cannot be lower than the "SCAP buffer" – the capital required to withstand the more adverse scenario
- Demonstrate an ability to access the long-term debt markets without using the TLGP
- Successfully demonstrate access to public equity markets
- Factors to be considered in reviewing requests include a post-redemption ability to:
  - Continue to fulfill its role as an intermediary that facilitates lending to creditworthy households and businesses
  - Maintain capital levels consistent with supervisory expectations (see above)
  - Serve as a source of financial and managerial support for its subsidiary banks
  - Meet ongoing funding requirements and obligations to counterparties while reducing reliance on government capital and TLGP (BHC and subsidiaries)
- Robust longer-term capital assessment and management process geared toward achieving and maintaining a prudent level and composition of capital commensurate with the BHC's business activities and firm-wide risk profile

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Recent and Planned Transactions

Institution	SCAP Required Additional Capital	Transactions and Announced Plans
Bank of America	$33.9 billion	• At-the-market offering of $13.5 billion • Sale of holdings in China Construction Bank for $1.8 billion • Tender offer of preferred to common stock exchange offers ($5.9 billion) • $9.4 billion additional equity from exchange of preferred into common stock
Citigroup	$5.5 billion	• $1 billion notes • Exchange of preferred and trust preferred into common stock
Fifth Third	$1.1 billion	• At-the-market offering of $1 billion of common stock • Exchange of $1.1 billion of convertible preferred for common stock
KeyCorp	$1.8 billion	• At-the-market offering of up to $1 billion of common stock • Convertible preferred to common exchange ($113m) • $1 billion exchange offer of trust preferred into common • Preferred to common exchange

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Recent and Planned Transactions

Institution	SCAP Required Additional Capital	Transactions and Announced Plans
Morgan Stanley	$1.8 billion	• $3.5 billion common stock • $4 billion senior notes (non TLGP) • Sale of MSCI shares ($600 mm)
PNC Financial	$0.6 billion	• At-the-market offering $600 mm common stock • $1 billion notes
Regions Financial	$2.5 billion	• $1.6 billion common stock • $250 mm mandatory convertible preferred offering • Offer to exchange common stock for $345mm trust preferred • Under consideration: exchange subordinated debt and additional trust preferred securities; review non-core subsidiary sales
SunTrust Banks	$2.2 billion	• $258 million at-the-market offering • $1.56 billion common stock issuance • Asset dispositions ($70 million) • Exchange of up to $1 billion trust preferred and preferred for common • $250mm tender offer for preferred and hybrid securities
Wells Fargo	$13.7 billion	• $8.6 billion common stock • Internal capital generation for remainder

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Structuring Considerations

- Dual-focus
  - Regulators focusing on capital levels
  - Market and investors focusing on Tangible Common Equity
  - Transactions must address both concerns
- Capital-Raising Alternatives
  - At-the-market offerings
  - Traditional registered equity offerings (largely executed on a pre-marketed or "wall-crossed" basis)
- Restructuring Alternatives
  - Cash tender offers
  - Private exchange offers
  - Section 3(a)(9) exchange offers
  - Registered exchange offers (using Form S-4)

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Capital-Raising Alternatives

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At-the-Market Offerings

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At-the-Market Offering: Introduction

- An offering of securities into an existing trading market at the publicly available bid price, rather than at a fixed or negotiated price
- Commonly referred to as “equity distribution” or “equity dribble out” programs
- Shares are “dribbled out” to the market over a period of time at prices based on the market price of the securities
- The number of shares sold in any single offering is not considered significant relative to the public float or daily trading volume
- Do not involve any special selling efforts

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At-the-Market Offering: Compared to traditional follow-on

At-the-Market Offering	Follow-on Offering
• A continuous offering	• A "bullet" or single offering
• Shares are dribbled out	• Shares are sold all at once
• Sold on an agency basis through one or more placement agents, or on a principal basis	• Sold as principal through a syndicate of underwriters
• Issuer determines timing, amount, floor price and duration of any issuance	• The timing and size of issuance is based on demand
• Quiet sales eliminate "front running"	• Investors can "front run" the offering

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At-the-Market Offerings: Current Market Practice

- EDPs have become more common
- In 2008 and 2009, a number of large, WKSI issuers conducted successful at-the-market offerings:
  - Carnival Corporation;
  - Ford Motor Company;
  - Freeport-McMoRan; and
  - Financial institutions, including Bank of America, KeyCorp and SunTrust

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At-the-Market Offerings: Attractive to BHCs

Ideal for issuers responding to SCAP results:

- These institutions must raise equity to address SCAP requirements and to bolster Tangible Common Equity ratio
  - Tangible Common Equity has become a widely used measure of financial institution health, supplanting capital
- Market conditions:
  - Market volatility, lack of active issuance market generally and lack of financial institutions in the market raising equity
  - Financial institutions concerned about entering into a traditional firm commitment offering of significant size
- ATMs permit the issuer to control the distribution and the market cannot front run the issuer's offering since the market cannot anticipate with any precision the days on which the issuer will use the ATM to issue securities
- The issuer can time its offerings so that it minimizes dilution (by offering securities when its stock price is more attractive)

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Pre-Marketed Offerings

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Pre-Marketed Offerings: Background

- Given extreme market volatility, focus on speed of execution has intensified
- It has become more important than ever for issuers to be able to avoid shorting activity or other aberrational trading that may result from a "launch" announcement or a broad based marketing effort
- As a result, recent ECM offerings have been marketed over an overnight or one-day period to shorten exposure to price/market risk
- Additionally, issuers and underwriters have confidentially pre-marketed their offerings prior to the public announcement
- Of the seven equity offerings in excess of $250 million priced from Sept. 15 (Lehman bankruptcy filing) to the end of 2008, five confidentially pre-marketed the offering

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Pre-Marketed Offerings: Methodology

- A proposed offering is confidentially marketed prior to the public announcement to a select group of institutions, including:
  - Mutual funds and hedge funds that are among the issuer's largest shareholders
  - Private equity investors
  - Sovereign wealth funds
- For SEC-registered offerings, confidential pre-marketing should *not* be done without an effective shelf registration statement in place

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Pre-Marketed Offerings: Managing Non-public Information

Process: Investors are brought "over the wall"

- Investors will be provided material, non-public information ("MNPI") regarding the issuer/offering:
  - Wall-crossed investors must agree to keep the MNPI confidential
  - Wall-crossed investors must agree not to trade while in possession of the MNPI
- Prior to speaking with the portfolio manager, may want to contact the investor's internal compliance officer or internal counsel first
- Initial approach by the issuer's CEO or CFO to a potential investor (instead of the underwriter) could be deemed, in itself, conveyance of MNPI

Form of Non-disclosure Agreement ("NDA")

- The NDA need not be a formal written agreement; however, it may be prudent to create an some sort of "audit trail" showing the formation of a binding contractual confidentiality agreement between the offeror and the offeree (Avoid the "*he said, she said*" scenario)
- E-mail approach – two alternative methods:
  - a one-way e-mail to the potential offeree setting forth the confidentiality obligation
  - a two-way e-mail that asks for confirmation of acceptance of the confidentiality obligation by the potential offeree

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Pre-Marketed Offerings: Considerations

- Potential Considerations:
  - Will the eventual offering be a public or a private offering?
  - Is the issuer's disclosure grid current?
  - Is it necessary to file updated risk factors?
  - Is it necessary to provide guidance on the current quarter, on write-downs, on anticipated ratings actions, etc.?
    - What is the best approach for doing so (if needed)?
  - The need to plan ahead all of the required (or desired) filings (e.g., these may include: 8-K, preliminary prospectus supplement or FWP, term sheet, press release, final prospectus supplement)
  - Issuer's internal policies and procedures:
    - Consider communications/Regulation FD policy
    - Trading windows
    - Insider participation

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Restructuring Alternatives

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Repurchases for Cash

- Individual or widespread offers to repurchase outstanding debt, preferred stock or common stock for cash
- Applicability of the tender offer rules:
  - Active and widespread solicitation of security holders?
  - Is solicitation made for a substantial percentage of issuer's securities?
  - Is offer made at a premium over prevailing market price?
  - Are terms of the offer firm rather than negotiable?
  - Is the offer contingent upon a fixed minimum or maximum?
  - Is offer only open for limited period of time?
  - Are those receiving the offer subjected to pressure to sell?
  - Do public announcements precede or accompany rapid accumulation of large amounts of the issuer's securities?

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Repurchases for Cash: Debt Tender Offers

- Tender offers for *debt securities* subject to SEC **Regulation 14E**
- **Offer Period** – Generally held open for at least 20 business days
  - Must also stay open for at least ten business days from the date of a notice is first published or sent of an increase or decrease in:
    - the percentage of securities to be acquired pursuant to the tender (if the change exceeds two percent of the original amount);
    - the consideration offered, without any *de minimis* exception; or
    - any dealer-manager's solicitation fee
  - A tender offer subject only to Regulation 14E must remain open for a minimum of five business days for any other material change to the offer or waiver of a material condition

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Repurchases for Cash: Debt Tender Offers

- **Extension of Offering Period** – Rule 14e-1 provides that any extension of the offer period must be made by a press release or other public announcement by 9:00 a.m. Eastern time, on the next business day after the scheduled expiration date of the offer, and the press release or other announcement must disclose the approximate number of securities tendered to date
- **Prompt Payment** – The offeror must either pay the consideration offered or return the securities tendered promptly after termination or withdrawal, respectively, of the offer
- **No SEC Filing** – Under Regulation 14E, an issuer is not required to file tender offer documents with the SEC and the rules do not prescribe any form requirements
- **Antifraud** – Any offer to purchase, and other tender offer documentation, is subject to the general antifraud provisions of the Exchange Act, notably Rule 10b-5 and Section 14(e), and, therefore, may not contain any material misstatement or omission

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Repurchases for Cash: Debt Tender Offers

- **Withdrawal Rights:** Rule 14e-1 does not specifically require withdrawal rights
  - It is standard practice to provide holders with withdrawal rights for tender offers for straight debt securities
  - These withdrawal rights typically expire after an initial period, often after the first ten business days
  - Limited withdrawal rights often reinstated following the occurrence of any material change in the terms of the tender offer or the waiver of a material condition
- The SEC Staff has applied different standards in the case of tender offers for investment grade debt

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Repurchases for Cash: Equity Tender Offers

- Tender offers for *equity securities* (including preferred securities and convertible debt) are subject to Exchange Act Rule 13e-4
- **Filing with the SEC** – Rule 13e-4 requires that an issuer file a Schedule TO for a self tender for convertible or exchangeable debt securities on the day that such tender offer commences
  - Schedule TO has a number of specific disclosure requirements; disclosures must be made either in the Schedule TO itself or in the documentation sent to security holders
  - Schedule TOs are subject to review by the SEC
  - Material changes in the information provided in the Schedule TO must be included in an amendment filed with the SEC
  - Rule 13e-4 also requires that all written communications regarding the tender offer be filed with the SEC
  - By reason of the Schedule TO filing obligation, the tender offer then becomes subject to the requirements of Regulation 14D, which governs the form and content of the Schedule TO

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Repurchases for Cash: Equity Tender Offers

- **Offers to all holders** – Under Rule 14e-4, generally, tender offers must be made to all holders of the relevant securities
- **Best price** – The consideration paid to any securityholder for securities tendered in the tender offer must be the highest consideration paid to any other securityholder for securities tendered in the tender offer
  - This does not prevent an issuer from offering holders different types of consideration as long as the holders are given an equal right to elect among each type of consideration, and the highest consideration of each type paid to any securityholder is paid to any other securityholder receiving that type of consideration
- **Dissemination** – Rule 13e-4 provides alternative methods for disseminating information regarding an issuer tender offer. The most common method of dissemination is to publish a "tombstone" advertisement in *The Wall Street Journal* or other daily newspaper with national circulation

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Repurchases for Cash: Equity Tender Offers

- **Withdrawal rights** – Rule 13e-4 requires that the tender offer permit tendered securities to be withdrawn at any time during the period that the tender offer remains open.
  - Rule 13e-4 specifically permits withdrawal after 40 business days from the commencement of the tender offer if the securities have not yet been accepted for payment.
- **Purchases outside the tender offer** – Rule 13e-4(f)(6) provides that until the expiration of at least ten business days after the date of termination of the issuer tender offer, neither the issuer nor any affiliate shall make any purchases, otherwise than pursuant to the tender offer, of:
  - any security that is the subject of the issuer tender offer, or any security of the same class and series, or any right to purchase any such securities; and
  - in the case of an issuer tender offer that is an exchange offer, any security being offered pursuant to such exchange offer, or any security of the same class and series, or any right to purchase any such security

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Exchange Offers

- If an issuer does not have, or is unable to use, available cash, it may be prudent to effect an exchange offer
  - Means of reducing interest payments, reducing principal amount of outstanding debt securities and managing maturities
  - Must comply with both the Exchange Act (tender offer rules) and Securities Act (registration) requirements
  - Any exchange offer must either be registered with the SEC or be exempt from registration:
    - Exempt exchange offers rely on Section 4(2) or Section 3(a)(9)

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Private Exchange Offers: Overview

- Private exchange offers conducted pursuant to Section 4(2) are subject to limitations:
  - May not constitute a "general solicitation" and must be made only to "sophisticated investors," usually qualified institutional buyers (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)

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Private Exchange Offers: Process

- A private exchange offer may be conducted on an abbreviated timeline
  - Identify and pre-certify (QIB, accredited investor status) investors;
  - Announce exchange offer;
  - Distribute exchange information (not required to be filed with SEC, not subject to SEC review);
  - Solicit exchanges and/or consents;
    - May engage a dealer-manager to assist
  - Offer period expires; and
  - Close and announce results of exchange offer

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Section 3(a)(9) Exchange Offers: Overview

- 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"

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Section 3(a)(9) Exchange Offers: Requirements

- 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
  - 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
  - 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

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Section 3(a)(9) Exchange Offers: Requirements (cont'd)

- Section 3(a)(9) exchange has five requirements (cont'd):
  - 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

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Section 3(a)(9) Exchange Offers: Considerations

- 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

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Section 3(a)(9) Exchange Offers: Financial Advisers

- A financial adviser may not earn a "success" fee.
  - Should be paid a fixed advisory fee
- A financial adviser can:
  - Engage in pre-launch negotiations with bondholder committees;
  - Provide a fairness opinion; and
  - Provide debtholders with information that was included in information sent by the issuer
- A financial adviser cannot:
  - Solicit, directly or indirectly, consents or exchanges; and
  - Make recommendations

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Registered Exchange Offers

- Registered on Form S-4
- Subject to SEC Staff review
- Securities Act Rule 162 provides some flexibility by allowing issuers to elect “early commencement” before the registration statement is declared effective
  - Available for exchange offers subject to Rule 13e-4 and Regulation 14D
  - In December 2008, the SEC amended Rule 162 so that it may be available for straight debt exchange offers subjected to heightened procedural requirements

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Restructuring: Other Considerations

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Other considerations

- Private transactions with creditors/debtholders can trigger disclosure obligations under Regulation FD
  - When an issuer discloses any material nonpublic information to market professionals or holders of its securities who may trade on the basis of such information, the issuer must make public disclosure of that information
- An issuer "testing the waters" may trigger this obligation
  - May be avoided if the recipients of the information are subject to confidentiality undertakings
  - At what point should an issuer disclose its restructuring activities?
    - If an issuer is engaged in an ongoing repurchase program over an extended time, disclosure of each repurchase may not be appropriate until the process ends

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Other considerations (cont'd)

- Repurchases may trigger Regulation M concerns.
  - Rule 102 makes it unlawful for an issuer to "bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period"
  - Repurchases of convertible debt may be deemed a "forced conversion" and thus a distribution of the underlying equity security under Regulation M

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Questions?

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