

Insight

Capital Markets

High yield debt repurchases

Is now the right time to buy back your outstanding high yield debt securities?

Under current market conditions, the outstanding high yield debt securities of many international issuers are trading below par in the secondary markets, thus creating an opportunity for these issuers to buy back these debt securities at a discount.

We have been asked by a number of our issuer clients (or by financial institutions advising their issuer clients in connection with potential bond repurchases) for advice on the legal issues associated with the repurchase of outstanding high yield debt securities, either on the open market or through privately negotiated transactions.

Issuer repurchases of debt securities are typically structured either under an open market repurchase programme, through which an issuer provides a broker or other financial institution with purchasing instructions (for example, amount to be repurchased, maximum purchase price, timing of repurchases), or through privately negotiated transactions with one or more holders of the issuer's debt securities. Similarly, shareholders may desire to purchase debt securities of their portfolio companies and, as affiliates of the issuer, would generally be subject to similar considerations.

The legal issues summarised below are generally applicable, although the facts and circumstances of any issuer repurchase will be unique, and counsel should be consulted before commencing any type of repurchase plan or programme.

Existing financing arrangements

Typically, senior credit facilities, intercreditor agreements governing the relationship between an issuer's creditors and similar agreements will limit an issuer's ability to repurchase its debt securities. Similarly, while the indenture or trust deed governing the debt securities to be repurchased typically will allow such repurchase, other debt or equity-linked securities of an issuer may be subject to covenants limiting the ability to repurchase these debt securities. These agreements need to be reviewed carefully and, to the extent that they limit an issuer's ability to affect a debt repurchase, the cost and timing of a waiver or consent would need to be evaluated.

Tender offer rules

There are no precise rules to determine when a debt repurchase plan or programme might constitute a "creeping tender offer" or a "tender offer" under US securities laws (which issuers typically try to comply with to provide maximum flexibility and sound liability management) or the securities laws of other applicable jurisdictions. While many debt repurchases will be deemed not to constitute a tender offer, the applicable



Few other firms have the expertise, global reach, deep securities knowledge and first-hand experience of complex, high profile restructurings to help anticipate and advise on the full range of liability management issues. We can add significant value to transactions through our practical, commercial approach, coupled with our integrated English, US and local law, tax and regulatory capability. We offer cross jurisdictional advice and a genuine understanding of how the securities markets work in all of the primary markets and the emerging markets as a whole.

In the securities arena, we have worked across the board in terms of deal size, product, region, complexity and profile, covering a number of market-firsts and highly structured, innovative deals, as well as smaller, more tailored solutions. We have an in-depth understanding of the legal, practical and regulatory issues involved in securities transactions and have a thorough understanding of all types of securities products that may be the subject of any exchange or tender offer, modification or swap. Our experience, adaptability, far-reaching geographical coverage and primary market capability means we are able to deal quickly and efficiently with liability management issues whenever and wherever they arise.

tests (for example, in the US, an eight factor "Wellman" test) are often based on the specific facts and circumstances of a particular transaction. To the extent a debt repurchase plan or programme were to constitute a tender offer, failure to comply with a strict set of procedural tender offer rules could lead to money and reputational damages.

Use of material non-public information/ market abuse directive

An issuer repurchasing its debt securities while in possession of "material non-public information" could be found to be in violation of applicable US securities laws, the EU Market Abuse Directive, the regulatory protections of other relevant jurisdictions and the rules of the relevant securities exchange. To mitigate these risks, issuers often seek to commence a repurchase plan or programme shortly after an earnings announcement, and sometimes structure a plan in a non-discretionary manner (i.e., the repurchase criteria are set and can not be changed once the plan is initiated), even if the issuer subsequently becomes aware of material non-public information, the plan or programme would not need to be terminated.

Public disclosure

Similarly, the manner and extent to which a debt repurchase plan or programme would need to be publicly disclosed depends on, among other things, the extent to which the underlying facts and circumstances could be considered material in a holder's decision to sell (for example, the size of the planned repurchase, the source of funds or the effect of the repurchase on the financial position of the issuer). In addition, the laws of certain jurisdictions mandate public disclosure of the plan or programme to the extent it has been disclosed to investors on a selective basis, and certain indentures and trust deeds require disclosure of the buy-back of the securities they govern.

Impact on financial statements

While the repurchase at a discount of outstanding debt securities would typically reduce balance sheet indebtedness and thus appear to improve an issuer's financial position, the issuer should evaluate the tax and other financial implications of any repurchase. For example, the subsequent cancellation of repurchased debt (cancellation is required by many high yield indentures and trust deeds) could result in income that may partially or fully offset the balance sheet benefit of any repurchase.

Exchange restrictions/local restrictions

While the rules and regulations of the securities exchanges on which high yield debt securities are typically listed generally provide flexibility for repurchases, these rules, and any other applicable local rules, should be reviewed for compliance. For example, a limited number of jurisdictions require regulatory notice of any debt repurchases.

Other considerations

As discussed above, any contemplated plan or programme to repurchase outstanding high yield debt securities will likely have issues unique to it, and legal counsel should be consulted prior to the commencement of any such repurchase. In addition, issuers (and their advisors) may also want to consider other alternatives, such as a tender offer and consent solicitation, under which all or a majority of the outstanding principal amount of a series of debt securities is repurchased by an issuer at a pre-determined price, and to the extent any securities remain untendered, the exiting holders agree to amendments to remove substantially all of the applicable restrictive covenants.

If you would like further advice on this subject, please do not hesitate to contact the following:



Gabor Molnar

Tel: +44 (0)20 7532 1405

Mobile: +44 (0)7770 690 822

Email: gmolnar@whitecase.com



Rob Mathews

Tel: +44 (0)20 7532 1429

Email: rmathews@whitecase.com



Colin Chang

Tel: +44 (0)20 7532 1481

Email: cchang@whitecase.com

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ABU DHABI ALMATY ANKARA BANGKOK BEIJING BERLIN BRATISLAVA BRUSSELS BUCHAREST BUDAPEST DRESDEN DÜSSELDORF
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