The Future of Registration Rights in Private Offerings of Debt Securities

In private offerings of high yield and convertible debt securities, issuers customarily provide purchasers with registration rights to enhance the post-closing liquidity of the securities sold in the offering and, in the case of private company issuers, agree to become reporting companies under the Securities Exchange Act of 1934. On December 6, 2007, the US Securities and Exchange Commission (SEC) issued a final Release (Release) amending Rule 144 under the Securities Act of 1933, with the general goal of increasing the liquidity of privately sold securities and decreasing the cost of capital to issuers. The amendments will take effect on February 15, 2008. We believe these recent rule revisions will materially change the requirements for registration rights in private offerings. In particular, issuers that are already reporting companies under the Exchange Act will no longer have to engage in costly exchange offers and resale shelf registration requirements will become much less onerous.

In this Client Alert, we will:

• review the current market for registration rights and the reasons investors want registration rights;
• summarize the changes to Rule 144 contained in the Release that affect registration rights; and
• discuss the implications of the Release for the future of registration rights in debt offerings.

The Market For Registration Rights Prior to the Release

All offers and sales of securities must be registered under the Securities Act unless an exemption from the registration requirement is available. The most common exemption for high yield and convertible debt offerings is provided by a combination of Section 4(2) of the Securities Act and Rule 144A under the Securities Act. Section 4(2) provides an exemption for the initial sale of the notes by the issuer to a broker-dealer acting as the initial purchaser. Rule 144A, in turn, exempts the resale of the notes by the initial purchaser to “qualified institutional buyers,” such as most mutual funds and hedge funds. However, notes purchased under Rule 144A are restricted securities for purposes of the Securities Act. These notes may well be actively traded among institutional investors in the Rule 144A market, but they must be carried by their holders as restricted and they remain subject to resale restrictions imposed by the Securities Act. Many institutional investors have self-imposed limitations on their ability to invest in restricted securities. For example, an investment fund might only be...
allowed to hold up to 10 percent of its portfolio’s market value in “restricted” or “unregistered” securities at any one time.\(^3\)

In order to eliminate these transfer restrictions, and for the other reasons discussed below, notes sold in Rule 144A offerings by US issuers are typically entitled to post-closing registration rights.\(^4\) These rights are memorialized in a registration rights agreement between the issuer and the initial purchaser at the closing of the private offering.

**The High Yield Market.**\(^5\) In the case of non-convertible debt securities, a typical registration rights agreement requires the issuer to conduct a registered exchange offer (known as an “Exxon Capital exchange offer”\(^6\) or an “A/B exchange offer”\(^7\)) pursuant to which the issuer registers an exchange offering of new registered notes with terms identical to the original notes to the holders of the original restricted notes. The effect of the A/B exchange offer is to provide investors that participate in the exchange offer with freely tradable notes.

Under current SEC Staff policy, affiliates of the issuer and broker-dealers are not permitted to participate in A/B exchange offers. If the A/B exchange offer is unavailable due to a change in law or SEC Staff policy or if an affiliate of the issuer or a broker-dealer owns some or all of the original restricted notes, the registration rights agreement requires the issuer to provide a shelf registration statement to permit registered resales of the notes by those investors that did not participate in the A/B exchange offer.

The specific timing requirements for A/B exchange offers are the subject of negotiation, but a typical timeline might provide as follows:

- 90 days after the original issuance of the notes, the issuer agrees to file a registration statement to effect the A/B exchange offer;
- 180 days after the original issuance of the notes, the issuer agrees to cause the registration statement to be declared effective; and
- 210 days after the original issuance of the notes, the issuer agrees to consummate the A/B exchange offer (the A/B exchange offer must remain open for at least 20 business days pursuant to Exchange Act Rule 14e-1).

After negotiation, these time periods can be much longer. A failure to comply with these covenants triggers an issuer obligation to pay liquidated damages until the failure is cured.

**The Convertible Debt Market.**

Registration rights are simpler in the convertible debt market. The SEC no-action letters that permit A/B exchange offers do not apply to equity securities or to notes convertible into equity securities. In a convertible bond offering, the registration rights agreement requires the issuer to file a resale shelf registration statement to permit public resales of the privately placed notes and the stock
issuable upon conversion of the notes and to maintain the shelf’s effectiveness until the securities are freely tradable by non-affiliates under Rule 144—prior to the Release, two years after the closing of the offering. In other words, these registration rights agreements are similar to the shelf registration option used in high yield offerings, except that they do not include the A/B exchange offer because it is not available for convertible securities under current SEC Staff policy. Convertible notes actually sold pursuant to a resale shelf are no longer considered to be restricted under the securities laws and, therefore, do not count against self-imposed basket limitations on investments in restricted securities.

The specific timing requirements for resale shelf registrations are also subject to negotiation, but a typical timeline provides as follows:

- 90 days after the original issuance of the notes, the issuer agrees to file a resale shelf registration statement;
- 180 days after the original issuance of the notes, the issuer agrees to cause the resale shelf registration statement to be declared effective, at which point resales thereunder can commence; and
- until all privately placed notes are eligible for public resale by non-affiliates under Rule 144 without restriction (i.e. two years—prior to the Release—after the closing of the private offering, assuming no intervening affiliate ownership), the issuer agrees to cause the resale shelf to remain effective and available to investors’ electing to sell notes publicly.

The time periods to file and obtain SEC effectiveness can be longer after negotiation. A failure to comply with these covenents triggers an issuer obligation to pay liquidated damages until the failure is cured.

As is the case in high yield offerings, these registration rights provide convertible note investors with the ability to empty out their internal baskets for investments in restricted securities. In the vast majority of convertible bond offerings, the issuer is already an Exchange Act reporting company, but in the rare situation where that is not the case, these registration requirements will also require the issuer to become an Exchange Act reporting company.

The Importance of Being a Reporting Company. Investors place a high value on knowing that their issuers will become—if they are not already—Exchange Act reporting companies, and that they will continue to be public reporting companies during the life of the notes. The enhanced liquidity created by registration rights and the benefit that registration rights provide to investors with limited baskets to invest in restricted securities are also important to investors. However, the requirement to become and remain a public reporting company is arguably the most important benefit of registration rights. Following an A/B exchange offer or shelf registration, a formerly private company will be required to file periodic reports with the SEC, will be subject to many provisions of the Sarbanes-Oxley Act of 2002 (including, if applicable, Section 404 and its requirement that management assess, and auditors attest to management’s assessment of, internal controls) and will be subject to the SEC’s liability regime and oversight process. The reporting covenant in most high yield indentures contains a promise that the issuer will continue to file periodic reports with the SEC whether or not it is required to do so by the SEC’s rules. This covenant has the effect of creating a category of issuers known to the SEC as “voluntary filers” and subjects these filers to most of the strictures of life as a public reporting company. Investors value the added disciplines that come along with being a public reporting company.
How Does Rule 144 Fit in Here?

The SEC originally adopted Rule 144 in 1972 to establish a safe harbor under which certain persons, including investors in private placements, will not be deemed to be statutory underwriters when they resell the privately placed securities. As configured prior to the Release, Rule 144 authorizes resales of restricted securities into the public markets if a number of conditions are met, including:

- there is adequate current public information available about the issuer;
- the security holder has held the security for a specified holding period;
- certain volume limitations are satisfied;
- certain manner of sale requirements are met; and
- a Form 144 is filed with the SEC.

Under the current Rule, none of these conditions applies to sales by non-affiliates (who were not affiliates during the preceding three months) commencing two years after the closing of the offering (assuming there were no affiliates of the issuer in the chain of ownership).

Rule 144 is directly relevant to the negotiation of registration rights agreements because the need for an issuer to provide freely tradable securities is satisfied if Rule 144 already provides for free tradability. By shortening the holding periods and eliminating most of the other requirements in the current Rule, the Release dramatically alters the legal backdrop against which registration rights will be negotiated.

The Key Changes to Rule 144 that Impact Registration Rights

As amended by the Release, Rule 144 will, among other things:

- shorten from one year to six months the minimum holding period for sales of restricted securities by non-affiliates of issuers that have been subject to the reporting requirements of the Exchange Act for at least 90 days (Reporting Issuers)⁰;
- impose an adequacy of information requirement for sales of restricted securities during the six months following the completion of the minimum holding period (in other words, during months seven to twelve following the closing of the offering), the essence of which is to require that the issuer has filed all required reports under Section 13 and 15(d) of the Exchange Act during the 12 months preceding such sale, other than current reports on Form 8-K; and
- reduce from two years to one year the holding period after which restricted securities of Reporting Issuers and all other companies (Non-Reporting Issuers) may be freely sold into the public markets without complying with any other conditions.

The traditional conditions of Rule 144 will remain applicable to resales by affiliates, though the manner of sale condition will be eliminated entirely for all sales of debt securities (including sales by affiliates). In summary, amended Rule 144 will be significantly less restrictive than Rule 144 prior to the Release. The chart on the following page summarizes the amended Rule.

Implications of the Release for the Future of Registration Rights

Reporting Issuers. For Reporting Issuers, the new shortened minimum holding period means that debt securities sold in a private placement will become freely tradable six months after the closing of the offering, assuming there were no affiliates of the issuer in the chain of ownership, if the issuer continues to be current in its filings. One year after the closing, even the current public reporting requirement falls away. Accordingly, the new Rule
144 regime applicable to Reporting Issuers arguably will provide adequate liquidity for typical bond investors without the need for a cumbersome and expensive exchange offer or resale shelf registration.

Non-Reporting Issuers. For Non-Reporting Issuers, the analysis is more complicated. As discussed above, liquidity is not the sole purpose of registration rights. Investors will not settle for freedom to trade their privately purchased securities—they are also expecting their issuers to become Exchange Act reporting companies. Currently, filing a registration statement is the only practical way into the SEC’s reporting regime for privately held companies seeking to register their debt securities. As a result, the Rule 144 amendments will have less impact on the need for Non-Reporting Issuers to grant registration rights to the purchasers of their privately placed securities.

Special Issues for Affiliates and Broker-Dealers. Affiliates of the issuer will continue to need registration rights in order to be able to sell their privately acquired securities into the public markets without condition. In addition, the six-month and one-year holding periods in amended Rule 144 will cease to run for so long as the securities are held by an affiliate of the issuer. Broker-dealers acting as initial purchasers in Rule 144A offerings will also continue to need resale registration rights under amended Rule 144. Unsold allotments held by broker-dealers acting as initial purchasers will generally need to be registered in order to be sold on an unrestricted basis. Although current SEC Staff policy provides broker-dealers with some ability to rely on Rule 144 for resales of unsold allotments in “sticky” deals, the current policy only provides limited relief. Registration of public resales by broker-dealers will still be required where existing SEC Staff policy is inapplicable.

What Does the Future Look Like?
The future of registration rights looks very different for Reporting Issuers but only somewhat different for Non-Reporting Issuers.

Reporting Issuers. For offerings by Reporting Issuers, we think A/B exchange offers for high yield offerings can be entirely eliminated and resale shelf registrations for both high yield and convertible bond offerings can be significantly streamlined.

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### Conditions to Resale of Restricted Securities Under Newly Revised Rule 144*

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* This chart does not address the complications surrounding “control” securities held by affiliates of the issuer.
Issuers are already Exchange Act reporting companies and, in the case of high yield issuers, the reporting covenants in their indentures will insure that they will continue to file their public reports even if the SEC does not require it. The only remaining institutional investor requirements to be satisfied in the case of a Reporting Issuer are enhanced liquidity and the ability to manage internal basket limitations on ownership of restricted securities. We anticipate that these limited remaining requirements will be satisfied via one of two approaches discussed below (or on a spectrum in between the two approaches), depending on a number of factors, including the type of security and the state of the market.

**One Possible Approach.** One approach, which is relatively more favorable to investors and we think will be common for offerings of convertible notes, is for Reporting Issuers to promise to deliver (or offer to deliver) freely tradable notes to private placement purchasers as early as six months after the closing of the offering. Absent an affiliate of the issuer in the chain of ownership during the six-month period following the closing of a private offering, Reporting Issuers that are current (as defined in the Release) in their SEC filings no longer need to go through the cumbersome process of filing a resale shelf registration statement or, in the case of a straight debt offering, effecting an A/B exchange offer in order to cause privately placed debt securities to be freely tradable by typical bond investors six months after the closing. Reporting Issuers can simply lift the trading restrictions on the privately placed securities six months after the closing.

To be sure, issuers who agree to this approach will be signing up for remaining current in their filings for a full year after the private offering. However, many issuers may not see this as an unreasonable burden in light of the savings afforded by avoiding a registration. Reporting Issuers that are not current in their SEC filings six months after the private offering closes can either effect an A/B exchange offer or resale registration statement or suffer the modest cost of liquidated damages until the first anniversary of the closing of the offering, at which point the privately placed securities will become freely tradable by typical bond investors without any qualification.

**Another Possible Approach.** Another approach, which is relatively more favorable to issuers and we think will be more common for high yield offerings, is for Reporting Issuers to promise to deliver freely tradable notes to private placement purchasers commencing one year after the closing of the offering. Just as in the first approach, no A/B exchange offer or resale shelf registration statement will be required. Reporting Issuers will simply lift the trading restrictions on the privately placed securities on the first anniversary of the closing. This approach permits issuers to wait to lift the trading restrictions on their privately placed bonds until the requirement to remain current in their SEC filings no longer applies. By postponing the promise of free tradability to one year after the closing, issuers avoid the risk that a late filing of a periodic report will give rise to a claim for liquidated damages. We think this approach will likely become the standard in the high yield market since high yield investors have become accustomed to waiting for nearly a year for the A/B exchange offer to be completed and because the indentures governing high yield bonds issued by Reporting Issuers contain a reporting covenant that requires those issuers to remain current in their SEC filings (subject to negotiated grace periods). We do not expect convertible bond investors to acquiesce as readily to a one-year wait for free tradability, as those investors are more accustomed to resale shelf rights that commence around six months after the closing of the offering, absent unusual circumstances.
Under either of these approaches, issuers will need to manage their affiliates to insure that either (1) there are no affiliates in the chain of ownership or (2) if affiliates do purchase bonds in the offering or in the after market, those bonds are segregated appropriately so as not to taint the remaining bonds for Rule 144 purposes. Issuers that are unable to eliminate the possibility of affiliates in the chain of ownership may continue to use the A/B exchange offer or resale registration technologies.

We anticipate that the date on which unlegended notes are promised to investors by Reporting Issuers will be negotiated, as is the case with registration rights today, with issuers pressing for a deadline of up to a year (when the current public information requirement will fall away entirely) and investors wanting freely tradable securities as early as six months after the offering closes. In the case of Reporting Issuers, where the only issue is free tradability, liquidated damages payable between the date free transferability was promised and the date it is ultimately delivered are damages substantially analogous to those payable for a registration default in the market prior to the amendments contained in the Release and, we believe, should be acceptable to investors.

**Affiliates and Broker-Dealers Will Still Need Shelf Rights.** Registration rights agreements for both high yield and convertible debt offerings by Reporting Issuers will need to continue to provide for a resale shelf registration statement if necessary to cover resales by affiliates or broker-dealers acting as initial purchasers for at least the first year following the offering. However, as a practical matter, the circumstances in which such a registration statement will actually be called upon will be rare, just as they are under the current regime. We think it is likely that these resale shelf requirements will take the form of “demand” rights as opposed to an automatic requirement to file a resale shelf registration statement, since they will only be needed by noteholders in unusual circumstances.

**Non-Reporting Issuers.** For offerings by Non-Reporting Issuers (and here we refer almost exclusively to offerings of straight debt, since almost all convertible notes are issued by public companies), we think A/B exchange offers will continue to be required in order to satisfy the objective of causing the issuer to become an Exchange Act reporting company. In order for this objective to be realized, careful drafting of the registration rights agreement and in particular the definition of “Registrable Securities” will be necessary to insure that the changes effected by the Release do not inadvertently render the registration rights agreement a nullity.

Prior to the Release, negotiated registration rights agreements frequently provided that the agreements would terminate or that liquidated damages would cease to apply if “the securities are saleable pursuant to [old] Rule 144(k) under the Securities Act or any similar provision then in force” or “are saleable pursuant to Rule 144 under the Securities Act or any similar provision then in force without regard to volume restrictions.” Under revised Rule 144, privately placed securities may sometimes become freely tradable in advance of the completion of the A/B exchange offer. In the new regime, registration rights agreements for Non-Reporting Issuers will need to be crafted to survive long enough to require the issuer to complete the A/B exchange offer—so that the issuer becomes a reporting company—even if that occurs after the notes become freely tradable under revised Rule 144.

We expect that Non-Reporting Issuers will continue to be required to provide resale shelf registration rights for noteholders that cannot tender into the A/B exchange offer (affiliates of the issuer and initial purchasers in “sticky” deals), or if the A/B exchange offer is
unavailable for any reason. In other words, the existing regime relating to resale shelf registration rights for Non-Reporting Issuers should not be affected by the Release.

For Non-Reporting Issuers, liquidated damages will be triggered by either a failure to become an Exchange Act reporting company on the agreed timetable or a failure to deliver unrestricted securities by the agreed upon date.

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In conclusion, we believe that the Release will result in a significant decrease in costly exchange offer and resale registrations by issuers of high yield and convertible debt securities, particularly for issuers that are already public reporting companies. Companies that are not already public reporting companies will see some changes in the registration rights agreements required of them in private offerings, but the changes will be less dramatic.

Endnotes


2 Rule 144A provides an exemption for secondary market trading among “qualified institutional buyers,” or “QIBs,” a category of investors that includes most investment funds with more than $100 million under management.

3 These restrictions, designed to insure that an overall portfolio remains prudently liquid, are typically found in the formation or governing documents of the funds themselves. Accordingly, the exact parameters of the restrictions (and the relative ease or difficulty of changing them) are individualized, opaque and not easily subject to generalization. We believe that the correct distinction should be between restricted securities on the one hand, and “unrestricted” or “freely tradable” securities on the other. However, some investor fund documents speak of “registered” versus “unregistered” securities (misnomers under the transactional registration framework of the Securities Act). Although each fund document must be judged in context, particularly those that expressly reference registration statements or A/B exchange offers, we feel these basket limitations should be interpreted wherever possible as limiting investment in securities that are not freely tradable. A security that can be freely sold to the public under Rule 144 without regard to volume or other limitations should not from a theoretical perspective be considered to be subject to a basket limitation on “unregistered” securities even though that security may never have been issued or resold as part of a registered offering. However, the short-term impact of these self-imposed limitations is difficult to predict. We expect the drafting of these limitations to be clarified in future investment fund agreements.

4 There are exceptions, e.g. in the “144A-for-life” market, the “private private” market and in other transaction-specific cases, but the investing market generally charges a premium for the absence of customary registration rights.

5 Although we focus on one category of non-convertible debt in this Client Alert—namely high yield securities—the discussion of high yield securities is in most cases applicable to investment grade securities sold privately pursuant to Rule 144A.

6 The Exxon Capital Holdings Corp. (May 13, 1988) no-action letter was the first SEC no-action letter approving the exchange procedure. Other interpretive letters followed. These letters set forth a number of conditions, including limitations that preclude affiliates of the issuer and broker-dealers from participating in the exchange.

7 The completion of an A/B exchange offer or a resale shelf registration causes the issuer to become a reporting company pursuant to Section 15(d) of the Exchange Act. A Section 15(d) reporting company is subject to many of the requirements of the Exchange Act valued by investors (e.g., the periodic and other reporting obligations under the Exchange Act and many provisions, including Section 404, of the Sarbanes-Oxley Act of 2002), but is not subject to many of the Exchange Act requirements applicable to issuers with publicly traded equity securities (e.g., certain tender offer and proxy rules and Section 16 of the Exchange Act). Another way to voluntarily become a reporting company is to file a Form 10 and become a Section 12 filer. However, this method would not preserve this crucial distinction and would, therefore, be overly burdensome for issuers.
This covenant is necessary because, under Section 15(d) of the Exchange Act, an issuer that has completed an A/B exchange offer would otherwise be permitted to suspend reporting in any fiscal year other than the fiscal year in which the registration statement became effective if the securities registered are held of record by fewer than 300 persons. This will be the case for most high yield offerings. A similar reporting covenant is not typical for convertible offerings, but convertible bond issuers generally have a class of equity securities registered pursuant to Section 12 of the Exchange Act and a convertible bond indenture will typically provide for an investor put right in the event of a delisting.

In hot offering markets, some private issuers have succeeded in raising capital pursuant to so-called “144A-for-life” offerings (Rule 144A transactions with no registration rights), but these offerings have always been the exception, not the rule, and have typically required higher interest rates to compensate investors for the resultant loss of liquidity and SEC oversight.

For purposes of this alert, we have assumed that all voluntary filers are Reporting Issuers. However, it may be argued that a voluntary filer is not “subject to the reporting requirements of the Exchange Act.” If this is the case, the securities of such voluntary filers would not be entitled to the six-month holding period.

In the telephone interpretation manual for Rule 144 (available July 1997) the SEC Staff stated: “An underwriter may resell the unsold portion of a sticky public offering as if it were compensation (wait one year from close of offering, follow Rule 144 except for filing form), provided that one year has elapsed since the last sale under the registration statement.” This telephone interpretation is not mentioned in the Release.

An added benefit is that the Trust Indenture Act of 1939 will not apply to the related indentures for the securities, allowing for greater flexibility in drafting those documents.

In order to be “current,” an issuer must have filed all required reports under Section 13 or 15(d) of the Exchange Act, as applicable, during the 12 months preceding the applicable sale (or such shorter period that the issuer was required to file such reports), other than reports on Form 8-K.

We expect that this mechanic will generally be accomplished by effecting sales of the securities by book-entry transfer from the restricted global note into an unrestricted global note through the facilities of The Depository Trust Company. The mechanic should also provide for the ability to stop these transfers in the event the issuer ceases to be current in its periodic report filings during months seven to twelve.

In this case, the restricted legend can be removed from the existing global note without requiring a transfer. This position is supported by footnote 65 of the Release.

In addition, high yield investors are not accustomed to having to sell their securities in order to receive unrestricted securities and we believe are unlikely to do so (See endnote 15 above).

In addition, since convertible notes are not eligible for A/B exchange offers, convertible note investors are accustomed to having to sell their notes in order to receive unrestricted securities (See endnote 14 above).

Issuers may elect to place a legend on their privately placed securities prohibiting purchases of those securities by affiliates of the issuer.

For example, we expect the A/B exchange offer and resale registration technology will continue to be attractive to issuers with a broker-dealer affiliate. New Rule 144 will not alter the need for a “market-maker” prospectus for these issuers.
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