PAUL, WEISS, RIFKIND, WHARTON & GARRISON

OFFERING HIGH-YIELD DEBT SECURITIES: A GUIDE FOR NON-U.S. COMPANIES

MARK S. BERGMAN

FEBRUARY 2000

In recent years, a growing number of non-U.S. companies have entered the U.S. capital markets, taking advantage of both the liquidity and sophistication of these markets and the continuing interest among U.S. investors in the securities of non-U.S. issuers.

Non-U.S. companies wishing to access the U.S. capital markets generally have a variety of options. Such companies may wish to facilitate trading in their equity securities by establishing a "sponsored" Level I American Depositary Receipt ("ADR") program, or they may wish to further enhance the visibility and liquidity of their equity securities by listing such securities—or, more typically, ADRs representing such securities—on a national securities exchange or automated quotation system (such as Nasdaq). Non-U.S. companies wishing to raise capital from U.S. investors may do so through the issuance of securities (whether debt, common equity (in the form of ordinary shares or ADRs representing ordinary shares) or other types of securities) in the United States through a registered public offering or through a "private placement." A private placement involves an unregistered offering to sophisticated institutional investors in the form of a traditional private placement or in a so-called "Rule 144A offering."

This memorandum has been prepared to assist non-U.S. companies in understanding the opportunities available to them in one particular market—the market in the United States for high-yield debt securities, the procedures that must be followed to access such market and the consequences of doing so. While, prior to the introduction of the euro, the principal market for high yield securities was in the United States, since the beginning of 1999, there has been a marked increase in the appetite among European investors for high yield instruments. Thus, non-U.S. companies have the choice of having their securities marketed only in the United States or principally in Europe with a possible U.S. tranche. Because of the advantage of retaining the option in a Europe-targeted offering of accessing U.S. investors, the familiarity among accounts in London with the U.S. covenant structure and the increasing acceptance across Europe of the high yield product, the concepts discussed in this memorandum, particularly in Section C, will apply well beyond the traditional offering of high yield debt solely to U.S. accounts.

A. Overview of the U.S. Securities Laws.

1. Securities Act (governing the offering of securities)

Any security (whether equity or debt) to be offered and sold in the United States must be registered under the U.S. Securities Act of 1933 (the "Securities Act"), unless the security or the transaction in which the security is offered is exempt from registration.[1] Registration is accomplished by the filing with the U.S. Securities and Exchange Commission (the "SEC") of a

[1] The SEC follows a territorial approach to the registration requirements of the Securities Act. This approach was expressly confirmed in April 1990 in connection with the adoption of Regulation S, which provides generally that offers and sales of securities that occur outside the United States are not subject to the registration requirements of the Securities Act and which established two safe harbors for specified "offshore transactions." Offers and sales meeting all of the conditions of the applicable safe harbor are deemed to be outside the United States and, therefore, not subject to the registration requirements.

registration statement and is deemed to have occurred when the registration statement is declared "effective" by the SEC. In addition, a prospectus complying with the requirements of the Securities Act must be provided to each purchaser with respect to any security being publicly offered.

The principal means by which securities can be offered without registration in the United States is the private placement. There are various private placement exemptions available, including traditional private placements under Regulation D (which are generally made on an agency basis to so-called "accredited investors") and offerings of securities that are sold to financial intermediaries (known as "Initial Purchasers") on a principal basis, which then resell such securities to "qualified institutional buyers" ("QIBs") pursuant to Rule 144A under the Securities Act.

Offerings by non-U.S. issuers in the United States may involve a combination of Rule 144A and Regulation D, in which issuers sell the securities pursuant to a purchase agreement to financial intermediaries, who then resell the securities to QIBs, and possibly a limited number of institutional "accredited investors." Such offerings can also have a non-U.S. component (a so-called "Regulation S tranche").

The U.S. regulatory regime governs both initial issuances and resales. Technically, every transaction in securities must either be registered or be exempt from registration. Securities that are sold in a registered public offering pursuant to a registration statement generally can be resold pursuant to a general market resale exemption, unless the seller is an underwriter or an affiliate of the issuer. Securities that are sold initially pursuant to an exemption from registration remain restricted, and can only be resold if they are subsequently registered; they are resold in an exempt transaction such as a private placement; they are resold pursuant to the general market resale exemption (which becomes available, in the case of unregistered securities, after two years) or they are resold in an offshore transaction. For this reason, consideration must be given to the impact on liquidity of securities sold initially on a private placement basis.

2. Exchange Act (governing reporting companies)

Classes of securities that are listed and traded on a securities exchange or that are widely held must be registered under the U.S. Securities Exchange Act of 1934 (the "Exchange Act"). In addition, issuers that make a public offering of securities in the United States (including a registered exchange offer, discussed below) will also subject themselves to the provisions of the Exchange Act. The principal consequence of being subject to the Exchange Act is the requirement to provide public disclosure that will be available to investors and other interested persons. A non-U.S. company with a reporting obligation under the Exchange Act must prepare and file with the SEC an annual report on Form 20-F and submit, under cover of a Form 6-K, reports or documents that are required to be made public by the issuer in its home country, filed with and made public by any non-U.S. securities exchange on which the issuer's securities are listed or otherwise distributed publicly to securityholders.

3. Liabilities

The Securities Act establishes civil liabilities for certain practices by non-U.S. or domestic persons in connection with the sale of securities. Section 11 imposes liability for untrue statements or omissions of material facts in a registration statement (i.e., the exchange offer registration statement). Section 12(2) establishes liability for misstatements or omissions contained in any offering document (i.e., the Offering Memorandum) or any oral communication made in connection with any offer or sale of securities, whether or not registered under the Securities Act. Section 17 makes it unlawful to engage in fraudulent or deceitful practices in connection with any offer or sale of securities, whether or not registered under the Securities Act.

Section 18 of the Exchange Act imposes liability on any person who makes a false or misleading statement in any registration statement filed pursuant to the Exchange Act (*e.g.*, a Form 20–F) or in any document or report filed with respect to such registration statement. In addition, documents furnished to the SEC may give rise to liability under Section 10(b) of the Exchange Act and Rule 10b–5 promulgated thereunder. The documents included with a Form 6–K are not deemed to be "filed" for the purposes of Section 18 of the Exchange Act or otherwise subject to the liabilities of that Section, but may give rise to liability under Section 10(b) and Rule 10b–5. Section 10(b) of the Exchange Act and Rule 10b–5 prohibit manipulation and fraud in connection with the purchase or sale of any security. A non-U.S. issuer may violate these provisions by intentionally creating an artificial demand for securities to inflate its market price, by knowingly or recklessly making false or misleading statements (or omissions) that could reasonably be expected to influence the purchase or sale of securities, or by engaging in other types of deceptive practices. Lawsuits may be brought under these provisions either by U.S. governmental authorities or by private parties who claim to have been injured as a result of alleged misstatements or other manipulative or deceptive practices.

B. Application of the Securities Laws to High-Yield Transactions.

1. The Initial Offering

The majority of high-yield offerings by non-U.S. issuers into the United States are in the form of a Rule 144A offering. The process involves the preparation of an Offering Memorandum (as opposed to a registration statement and prospectus), which when completed (other than the pricing information) is distributed in preliminary form to investors. At the completion of the offering process, a final Offering Memorandum (with the pricing information) is sent to the investors, and the Initial Purchasers then purchase the securities and immediately resell them to the investors at the "closing." Form timetables for a Rule 144 offering and for an SEC-registered offering are included as annexes hereto.

The most time-consuming aspect of the process is the preparation of the Offering Memorandum. Although the offering is being made pursuant to an exemption from registration and, accordingly, there are no specific guidelines for most of the disclosure, market practice in this area is to provide investors with the same type of information that they would receive in a registered public offering. This is generally true even where the issuer is not considering a subsequent registered exchange offer (see below). Although the preparation of the textual disclosure in the Offering Memorandum may take only six to eight weeks, the preparation of the financial statements can require longer periods of time, particularly where statements will be presented in the form required for registered offerings (*i.e.,* in accordance with U.S. generally accepted accounting principles ("GAAP") or reconciled to U.S. GAAP).

While the Offering Memorandum is being finalized, the issuer will move to phase two of the process, which is the rating agency presentation. The Initial Purchasers will assist the issuer's senior management in preparing for the rating agency presentation, and will have prepared a formal submission to be presented to the rating agencies. To accommodate non-U.S. issuers, meetings can be set up with Standard & Poor's and Moody's (the principal U.S. rating agencies) outside of New York, in London or Frankfurt, for example.

Phase three of the offering is the road show, during which the senior members of management, together with the Initial Purchasers, will meet with investors in selected cities. At the end of the road show, the offering will be priced and will close three or four business days later.

2. The Registered Exchange Offer

Issuers (both U.S. and non-U.S.) that wish to access the markets without having to wait for SEC clearance have the option of offering securities under Rule 144A that will ultimately have the same benefits of registration as would be the case if the initial offering were registered. This can be accomplished through a combination of a Rule 144A offering followed by a registered exchange offer. Investors have come to expect registered exchange offers for various reasons. Some institutional investors in the United States have limitations on the amount of restricted (i.e, non-registered) securities that they can hold, and once the high yield notes are registered, these institutions can remove the securities from their restricted accounts. In addition, investors view disclosure prepared with a view to a registered exchange offer as being on par with disclosure that would appear in a prospectus for a registered offering in the United States.

Issuers following this approach will conduct their Rule 144A offering in the customary fashion, but they will have agreed with the Initial Purchasers (for the benefit of the investors) to file a registration statement to effect a registered exchange offer. Shortly after the Rule 144A offering closes, company counsel will prepare the exchange offer registration statement, a substantial portion of which will be taken directly from the Offering Memorandum. This registration statement will be submitted for SEC review and comment, and following effectiveness of the exchange offer registration statement, the issuer conducts an exchange offer.[2] The actual mechanics of the exchange offer are handled by an exchange agent (generally the Trustee for the high-yield securities) and at the end of the process, the restricted securities will be exchanged for freely tradable securities that are in all other respects identical to the initial securities.

Non-U.S. issuers that commit to a registered exchange offer will be preparing an Offering Memorandum that will contain disclosure and financial statements identical to that which would be contained in a prospectus. The reasons for this are twofold. First, the exchange offer

2 A registration fee based on the principal amount of the securities must be paid to the SEC.

obligations will impose liquidated damages on the issuer (in the form of penalty interest—generally up to 1.5 to 2.0%) if the exchange offer registration statement is not declared effective within a certain period of time (which can range from 120 days to 180 days) after the closing. Accordingly, the issuer does not want to find itself in the position of having to rewrite the disclosure to comply with SEC regulations. Secondly, inconsistencies between the Offering Memorandum and the exchange offer registration statement could give rise to claims by the initial investors that they did not receive all material disclosures at the time of their initial purchase. Thus, for example, while the Offering Memorandum could contain local GAAP financial statements for Rule 144A purposes, an offering that will have exchange rights will need US GAAP statements or reconciliations.

As a result of the effectiveness of the exchange offer registration statement, the issuer will become a reporting company under the Exchange Act. As a reporting company, the issuer's principal obligations will be to file an annual report on Form 20-F after the end of the fiscal year, and to advise investors of material developments regarding it, its business and its operations as they occur. The annual report on Form 20-F will contain much of the information that is set forth in the Offering Memorandum (and the registration statement to be filed in connection with the exchange offer). The preparation of the 20-F will require updating the description of the business and the other disclosures, as well as providing audited year-end financial statements and an MD&A comparison of the fiscal year then ended to the prior fiscal year.

Although as a technical matter, the obligation to file reports under the Exchange Act will remain in place for the fiscal year in which the exchange offer registration statement is declared effective, after which the issuer can suspend its formal filing obligations provided it has fewer than 300 securityholders, the high-yield market generally will require the issuer to agree by contract to continue to provide investors with annual reports throughout the term of the securities. In addition, where the issuer is not itself a public company in its home jurisdiction (and, therefore, is not obligated to provide investors with any form of disclosure), the high-yield market will generally also require the issuer to agree to provide investors with quarterly disclosure. (See Section E below).

C. Terms of the High-Yield Securities.

Generally, the high-yield securities will take the form of notes (the "Notes"), which will be issued under an Indenture. The Indenture, which sets forth all of the terms and conditions of the Notes, is a document executed at the closing by the issuer and a financial institution (selected by the issuer) acting as trustee (the "Trustee"). Notes may be senior or senior subordinated obligations. Notes are usually current cash-pay, though there may be situations where a pay-in kind interest payment feature is appropriate for the first few years. Discount notes are obligations sold at a substantial discount to their principal amount, which accrete interest at the stated coupon rate for half the term, after which they pay cash interest. Notes may be issued with warrants to purchase equity securities of the issuer in order to facilitate the marketing of the credit.

The Notes are generally unsecured, and can have a maturity ranging from seven to ten years. Notes are generally redeemable at the option of the issuer commencing, for example, in the case of a ten-year instrument, in year five. The optional redemption premium is often one half the coupon for the first year, declining ratably to par in the final year. Notes often have a change of control "put" feature, pursuant to which the issuer is obligated to make an offer to repurchase all of the outstanding Notes (often at a redemption price of 101%) upon a change of control. Issuers are also often obligated to offer to purchase Notes at par (*i.e.*, without any premium) with the net cash proceeds of certain sales or other dispositions of assets. Issuers may have the option of redeeming a portion of the Notes with the proceeds of equity offerings at a premium equal to the annual interest rate.

It is customary for payments with respect to Notes to be made without withholding or deduction for local taxes. Imposition of such withholding or deductions would require the issuer to pay additional amounts so that the net amount received by investors after withholding or deduction is not less than the amount that would have been received in the absence of such withholding or deduction. This requirement is generally accompanied by the right on the part of the issuer to redeem the Notes at par if the issuer is obligated to pay such additional amounts.

The Indenture will contain a series of covenants. Although the list of covenants is standard, the issuer and the Initial Purchasers will negotiate certain aspects of the covenants. Because of the difficulty in obtaining waivers from the noteholders, attention must be paid to the impact of the covenants on the ability of the issuer to conduct its business and achieve its strategic objectives within the constraints of the covenants during the term of the Notes. High yield covenants are structured on the basis of a few key concepts, an understanding of which will be crucial to negotiation of the covenant package:

- **subsidiary** - an entity the majority of the stock or voting control of which is controlled by the issuer or another subsidiary. A few of the covenants will apply to all subsidiaries, but generally the principal covenants will apply only to restricted subsidiaries.

- **restricted subsidiaries** - subsidiaries of the issuer that are subject to all of the covenants. Generally all subsidiaries will be restricted unless the board designates a subsidiary as unrestricted. Note that because transactions between the issuer and its restricted subsidiaries are generally not restricted by the covenants, if the issuer wishes to designate a restricted subsidiary as unrestricted (and thus move the entity out of the covenant package), the issuer will have to comply with the restricted payments covenant as if it had made an investment at the time of such designation equal to the value of the capital stock of, and other investments in, the subsidiary. If it would not have room in its restricted payments basket, or if it could not incur any additional indebtedness under the debt incurrence covenant, the designation cannot be made.

- **unrestricted subsidiaries** - subsidiaries that are designated as unrestricted and therefore are not subject to most of the covenants. Unrestricted subsidiaries may not have debt guaranteed by, or recourse to, the issuer or its restricted subsidiaries. The issuer and its restricted subsidiaries may not provide credit support to the unrestricted subsidiary or have any obligation to subscribe for capital stock of the unrestricted subsidiary or to maintain its financial condition. There are various consequences to the issuer of designating a subsidiary as unrestricted or otherwise having investee companies (such as joint ventures, which are not subsidiaries if less than majority owned) that are outside the covenant package. For example, the income of such an entity may not be counted at all, or may be counted only to the extent actually received by the issuer, in the calculation of consolidated net income (regardless of the accounting treatment), which will limit the ability of the issuer to make restricted payments to the extent the test is based on consolidated net income. On the other hand, these entities can operate without being subject to the more significant restrictions of the covenants. Generally, noteholders will not wish to see any operating entities outside the covenant package, though where the issuer does not control an investment, subjecting that investee company to the covenants exposes the issuer to potential default as it will be unable to ensure that the investee company complies with the covenants.

- **baskets** - not a defined term, but a term that refers to a specific exception to a covenant which generally has a cap on the amount available. For example, the ability to make an investment of up to $10 million for any purpose will be referred to as a "$10 million investment basket."

- **restricted payments -** payments of dividends and other distributions; acquisition or retirement by the issuer of its capital stock; repayment prior to maturity of subordinated debt and investments (other than permitted investments). To make a restricted payment, the issuer will have to use one of the available restricted payments or permitted investments baskets. For example, the acquisition of a wholly owned subsidiary is likely to be a permitted investment, which the issuer can undertake even if it has no net income and has no available room under any other basket, while the acquisition of a minority interest is likely to require availability under a specific basket (*e.g.*, an investment with a value of less than $10 million could be made in reliance on a $10 million basket, if it is otherwise unused). Particular attention needs to be paid to this covenant if the issuer has, or is in a business that will grow through, joint ventures. This will often be the case in the telecommunications and high tech sectors.

- **investments** - loans, advances or capital or asset contributions; purchases of capital stock and all other items that would constitute an investment on a balance sheet. Permitted investments are specified investments that may be made without having to use up one of the restricted payments baskets.

- **fairness opinions** - the Indenture may call for a opinion or appraisal as to fair market value above a specified threshold. This opinion will be delivered by an independent accounting firm, appraisal firm or investment bank.

- **guarantees -** where the Notes are issued by a parent company, in order to avoid structural subordination of the Notes to the creditors of the issuer's subsidiaries, it is common practice to obtain guarantees from the issuer's restricted subsidiaries, unless the guarantee would be unenforceable under the law (as is often the case in Europe, for example) of the subsidiary's jurisdiction of organization. If the offering provides for exchange rights, each guarantor will be deemed an issuer for SEC registration purposes, which could trigger either separate financial statements for the guarantor or separate disclosure in the financial statements of the results of guarantor subsidiaries and non-guarantor subsidiaries. A parent guarantee will often be required where the Notes are issued by a subsidiary.

- **change of control** - as noted above, the noteholders will have the right, but not the obligation, to cause the issuer to repurchase their Notes at a 1% premium in the event of a change of control of the issuer. The definition of a change of control will be negotiated where there are concentrated blocks of shares (for example, where the issuer is controlled by one or a group of founders).

- **asset sales -** any non-ordinary course disposition of assets or rights, as well as the issue or sale by the issuer or any restricted subsidiary of equity interests in any subsidiary.

Below, for illustrative purposes, are descriptions of the standard high yield covenants. Obviously, each covenant package will be tailored to the business, the legal structure, cash flow projections and other aspects of the issuer.

1. Limitation on additional indebtedness

This covenant restricts the ability of the issuer and its subsidiaries to incur additional indebtedness. In contrast to traditional bank covenants, high yield indebtedness covenants are incurrence based. The test is measured at the date of incurrence, and there are no on-going maintenance requirements. New subordinated debt generally cannot be incurred unless the debt is also subordinated to the Notes, and new secured debt generally cannot be incurred unless the Notes are ratably secured. The indebtedness covenant will permit the issuer to incur any amount (referred to as "ratio debt") of indebtedness provided a coverage ratio (*e.g.*, a multiple (for example 2.0x or 2.5x) of earnings before interest, taxes, depreciation and amortization (EBITDA) to interest expense) is met, or a leverage ratio (*e.g.*, a multiple (for example 5x or 7x) of debt to cash flow) is met. In addition, the covenant will permit unrestricted subsidiaries to incur debt that is non-recourse to the issuer and its restricted subsidiaries, and will permit the issuer and its restricted subsidiaries to incur "permitted indebtedness," which could include:

- indebtedness up to a specified amount under bank credit facilities;

- indebtedness up to a specified amount in connection with capitalized lease obligations;

- indebtedness up to a specified amount incurred in the normal course of business to finance the purchase price of property or equipment (known as "purchase money indebtedness");

- indebtedness under hedging obligations;

- indebtedness between the issuer and its restricted subsidiaries, provided that debt incurred by the issuer is subordinated to the Notes;

- indebtedness up to specified amount for any purpose; and

- permitted refinancing indebtedness, which would include refinancing of most permitted indebtedness and ratio debt, provided the refinanced principal amount is no greater than the original principal amounts and the final maturity is later (with a weighted average life to maturity greater) than the original debt.

The ability to incur debt can impact activities covered by other covenants. For example, the ability to incur ratio debt will be a pre-condition to certain other activities including mergers and the making of certain restricted payments. Also, the definition of permitted liens will often be tied to categories of permitted indebtedness.

2. Limitation on restricted payments

This covenant restricts the ability of the issuer or a restricted subsidiary to make restricted payments and investments. The test is measured at the time the restricted payment or investment is to be made. Non-cash restricted payments are deemed to equal the fair market value of assets or securities transferred or issued by the issuer or restricted subsidiary, as determined by the board, and in the case of values in excess of a specified amount, as evidenced by a fairness opinion. The restricted payments covenant and the definition of permitted investments could permit the following:

- cumulative restricted payments equal to a percentage (usually 50%) of cumulative consolidated net income (net of 100% of deficits) or cash flow less a multiple of fixed charges, in either case, plus aggregate net proceeds received by the issuer as capital contributions (or, perhaps in the case of issuers that will be making significant acquisitions, non-cash proceeds from the issuance of their equity);

- unlimited investments by the issuer or a restricted subsidiary in an entity that is, or an entity that will become as a result of such investment, a restricted subsidiary (which may have to be a wholly owned restricted subsidiary);

- a cumulative basket up to a specified threshold (which could be used, for example, to invest in non-majority owned entities or to invest in non-wholly owned restricted subsidiaries, if the permitted investment referred to in the preceding clause can only be made in wholly owned restricted subsidiaries);

- investments in cash;

- investments resulting from the receipt of non-cash consideration from an asset sale made in compliance with the asset sale covenant;

- limited loans to employees;

- inter-company indebtedness permitted by the debt incurrence covenant;

- investments in securitization vehicles; and

- limited investments in joint ventures and other minority participations to accommodate a growth strategy that relies on these types of investments.

3. Limitation on liens

The issuer and its restricted subsidiaries will be subject to restrictions on their ability to incur or permit to exist mortgages, deeds of trust, pledges, charges, security interests or other encumbrances (generally referred to as "liens") on their assets, unless the Notes get the benefit of a similar lien. The Indenture will provide a list of permitted liens.

4. Limitation on sale-leaseback transactions

The issuer and its restricted subsidiaries will be subject to restrictions on their ability to lease assets or property that has been transferred or sold by the issuer or restricted subsidiary in return for financing secured by such assets or property. Such sale-leasebacks will be permitted where the issuer or subsidiary receives fair market value for the asset or property, the issuer could incur indebtedness under the debt incurrence test equal to the attributable value of the lease (greater of fair market value and present value of the obligations under the lease) and the proceeds are treated as proceeds of an asset sale under the asset sale covenant.

5. Limitation on dividends and other payment restrictions affecting subsidiaries

The noteholders will be concerned about the ability of the issuer to receive cash flow from its operating subsidiaries. Therefore, the Indenture will prohibit the creation of restrictions on the ability of any restricted subsidiary to become subject to consensual restrictions on the payment of dividends and other distribution or the payment in respect of any obligation to its shareholder, or its ability to make loans to its shareholder, guarantee the obligations of its shareholder or transfer assets to the shareholder.

6. Limitation on business activities

The issuer and its restricted subsidiaries generally will not be permitted to operate outside their core business. Issuers in a growth mode will need to ensure that the definition of permitted business contained in the Indenture is sufficiently broad to pick up complementary activities.

7. Limitation on transactions with affiliates

Affiliates are generally defined as entities in which the issuer or a restricted subsidiary has an interest above a nominal threshold (*e.g.*, 10%). Transactions with such affiliates above a first threshold amount will require disinterested board approval, and transactions above a higher threshold amount will require a fairness opinion. An issuer that operates through non-wholly owned entities will need to consider the impact of this covenant on all of its ongoing relationships with such entities, and in particular, the cost of obtaining such an opinion every time a transaction or series of transactions triggers the need for the opinion.

8. Limitation on mergers and certain other transactions

Like bank credit agreements, high yield indentures permit issuers to merge or consolidate provided the survivor assumes the debt, the survivor would have been able to incur additional debt, there is no default and various opinions of counsel are delivered. There are limitations on the jurisdictions in which the survivor, if other than the issuer, can be incorporated (often limited to the existing jurisdiction and the United States) to protect the noteholders from adverse tax consequences and from uncertain legal consequences.

9. Limitation on equity interests in restricted subsidiaries

The issuer and its restricted subsidiaries will be precluded from disposing of the stock of other restricted subsidiaries unless it constitutes a transfer of the entire share capital of the subsidiary and the net cash proceeds are applied to repay the Notes (as an asset sale). Restricted subsidiaries may issue capital stock only to the issuer or other restricted subsidiaries.

10. Limitations on guarantees by restricted subsidiaries

Restricted subsidiaries may not issue guarantees or pledge their assets unless the Notes are also guaranteed.

11. Limitation on non-ordinary course asset sales

If the issuer or any restricted subsidiary sells assets (other than in the ordinary course) above a relatively low threshold, it will have to comply with certain requirements. Often, the consideration must be principally in cash (unless the covenant contemplates asset swaps) and must represent the fair market value of the assets. The proceeds of the asset sale must be used in the business (to acquire assets or stock of another entity in the same line of business, make capital expenditures or acquire other assets used in the business) or must be applied to pay off senior debt or the Notes.

The definition of asset sales will exclude transfer of assets between the issuer and wholly owned restricted subsidiaries, the issuance of equity interests by wholly owned restricted subsidiaries to the issuer or other wholly owned restricted subsidiaries, restricted payments permitted by the restricted payments covenant and dispositions of obsolete assets or businesses.

D. Settlement Procedures; Listing.

Notes sold in 144A transactions often are issued in the form of global certificates. Global certificates for dollar-denominated obligations are deposited with, or on behalf of, The Depository Trust Company ("DTC"). Notes initially sold by the Initial Purchasers to accredited investors may be in the form of certificated securities. DTC is a limited purpose trust company created to hold securities for its participants and facilitate the clearance and settlement of securities transactions between participants through electronic book-entry changes in accounts of its participants, thus eliminating the need for physical movement of certificates. Participants include securities brokers and dealers, banks, trust companies and clearing corporations and certain other organizations. Transfers between participants in DTC are effected in the ordinary way in accordance with the DTC rules and are settled in same-day funds. Holders requiring physical delivery of certificated securities transfer their interests in the global security in accordance with the normal procedures of DTC. Counsel to the issuer handles the arrangements with DTC prior to the closing of the Notes offering.

Notes sold in Rule 144A transactions generally are eligible for trading in the Portal Market operated by the National Association of Securities Dealers, which permits purchases and sales of Rule 144A-eligible instruments among QIBs. The Initial Purchasers arrange for Portal eligibility prior to the closing of the Notes offering.

Notes issued by European companies often are listed on a European exchange, such as the Luxembourg Stock Exchange. These Notes will also clear through the facilities of Euroclear and Clearstream (formed by merger of Cedelbank and Deutsche Börse Clearing). Generally, euro-denominated securities will not clear through DTC, as it is a dollar-based clearance system. Counsel to the issuer will handle, through a Luxembourg-based listing agent, the arrangements for the Luxembourg listing, and the Initial Purchasers will obtain the necessary codes for Euroclear and Clearstream.

E. Documentation.

During the course of the preparation of the Offering Memorandum, the issuer and the Initial Purchasers will, through their respective counsel, negotiate the terms of the Indenture, the Purchase Agreement and, if the offering involves exchange rights, the Registration Rights Agreement. As noted above, the Indenture is the document pursuant to which the Notes are issued. It contains, among other things, the form of the Notes, the provisions regarding payment and redemption, the events of default, the covenants, the rights and duties of the Trustee and related matters. The Purchase Agreement is the agreement between the issuer and the Initial Purchasers, pursuant to which the issuer agrees to issue the Notes and the Initial Purchasers agree to purchase the Notes. The Purchase Agreement contains, among other things, representations and warranties by the issuer concerning it, its business and its operations, covenants of the issuer and indemnification provisions. The Registration Rights Agreement sets forth the obligations of the issuer to file the necessary registration statement or statements with the SEC to permit free resale of the Notes, and provides time periods during which such filings need to be made and declared effective and a liquidated damages provision in the event such filings are not timely made or declared effective.

F. Consequences of an Offering.

1. Disclosure Obligations

As noted above, investors generally will want periodic disclosure by the issuer. This is accomplished by having the issuer agree to provide quarterly and annual disclosure as if it were a U.S. reporting company, whether or not it actually has a reporting obligation in the United States. (Such a reporting obligation would arise where the issuer conducts a public offering or where it conducts a registered exchange offer, at least for the fiscal year during which the offering is effected.) As a result, the issuer generally will be required to file (or provide the Trustee) within 45 days after the end of each of the first three of its fiscal quarters quarterly reports containing unaudited financial statements (prepared in accordance with, or reconciled to, U.S. GAAP) for the quarter then ended as well as the year to date, with comparisons to the comparable periods in the prior year. Each such quarterly report will also contain a Management’s Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”). These reports would be submitted to the SEC on Form 6-K, so as to be available to investors.

The balance sheet included in such reports will have two columns—one for the balance sheet items at the end of the preceding fiscal year and the second for the balance sheet items at quarter-end. The statement of operations will include the results for the quarter then ended and the year to date, as well as the comparable periods in the preceding year. The report should also contain a statement of cash flows for the year to date, and for the comparable period in the prior year. The interim balance sheets and statements of operations need only include major captions. Similarly, the statement of cash flows may be abbreviated, starting with a single figure of net cash flows from operating activities and showing cash changes from investing and financing activities individually only when they exceed 10% of the average of net cash flows from operating activities for the most recent three years.

Interim financial information is to include disclosures either on the face of the financial statements or in accompanying footnotes sufficient so as to make the interim information presented not misleading. Issuers may presume that users of the interim financial statements have read or have access to the audited financial statements for the preceding fiscal year (i.e., through the exchange offer registration statement or the annual report on Form 20-F). Footnote disclosure that would be duplicative of information contained in prior filings (such as the statement of significant accounting policies and practices or details of accounts that have not changed significantly) may be omitted. The footnotes should disclose events subsequent to the end of the most recent fiscal year that have had a material impact on the issuer.

The MD&A will follow the format of the MD&A included in the Offering Memorandum.

Within 90 days (or possibly 120 days) after the fiscal year-end, the issuer generally will be required by the Indenture to prepare and file with the SEC its annual report on Form 20-F. The starting point will be the disclosures in the Offering Memorandum, updated to reflect developments during the fiscal year. The issuer will need to work closely with its auditors to finish the audit in sufficient time so that the audited financial statements can be included in the Form 20-F.

2. Dealing with Financial Analysts

The guiding principle of the U.S. securities laws is full and fair disclosure. The filing obligations discussed above are intended to ensure that the investing public is fully apprised of developments relating to the issuers. Material developments should be reflected in press releases, and consideration should be given on a case-by-case basis as to whether any such announcement warrants a Form 6-K submission.

A corollary to the need for full disclosure is the importance of avoiding selective disclosure of material, non-public information to certain persons and not others. Accordingly, care must be taken in discussions with investors and financial analysts. It is in the best interests of an issuer for financial analysts to prepare research reports concerning the issuer and, in connection therewith, the issuer should expect the analysts to pose questions to management on a regular basis. Analysts may ask corporate officers to review or correct research reports that they are preparing. An issuer should not become so involved in reviewing and correcting draft research reports that it assumes a duty to correct such reports if they contain misleading information when released.

Although a reporting company is under an obligation not to disseminate false or misleading information into the marketplace, it has no duty to correct an inaccurate research report issued by a financial analyst unless the company has become "entangled" with the preparation of the research report. In that case, the company can become liable for material misrepresentations or misleading omissions. There is no bright line test to determine what constitutes sufficient entanglement such that a company can be held responsible for the analyst's research report. To avoid this, corporate officers should not make an implied representation that the information they have reviewed is true or in accordance with the issuer's views. To the extent that the issuer reviews analysts reports, its review should be limited to factual information and should not address the accuracy of any earnings projections. Analysts reports should not quote any corporate officer and should not directly attribute information to the issuer. A report should not state that it is based on information provided by the issuer.

Material developments should be disclosed via press release or appropriate filings with the SEC. Analysts should not be used as a vehicle to announce material developments.

The most efficient way of dealing with analyst and investor inquiries is to refer all such inquiries to one member of senior management.

* * *

For further information concerning the subject matter of this memorandum, please contact any member of the Paul Weiss Securities Group. including:

Office	**Name**	**Telephone**	**E-Mail Address**
New York	Andrew J. Foley	1-212-373-3078	afoley@paulweiss.com
	Edwin S. Maynard	1-212-373-3024	emaynard@paulweiss.com
London	Mark S. Bergman	44-20-7367-1601	mbergman@paulweiss.com
	David K. Lakhdhir	44-20-7367-1602	dlakhdhir@paulweiss.com
Paris	Steven L. Wolfram	33-1-5343-1400	swolfram@paulweiss.com
Hong Kong	John E. Lange	852-2846-0888	jlange@paulweiss.com

Tokyo	Russell Colwell	81-3-3597-6301	rcolwell@paulweiss.com

Additional publications on related topics are available under "Securities Group Publications" on our website: www.paulweiss.com.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

ANNEX A

TIMETABLE FOR OFFERING OF DEBT SECURITIES BY FOREIGN ISSUER UNDER RULE 144A

KEY

Issuer ("I")
Global Coordinator ("UW")
Co-Manager(s) ("CM")
Counsel to Initial Purchasers ("UC")
Issuer's Counsel (U.S. securities and home jurisdiction) ("IC")
Issuer's Accountants ("IA")
Trustee ("T")
Rating Agency ("RA")

DATE	TASK	RESPONSIBILITY
Pre-Launch Preparations	Begin preparation of financials for internal review and for inclusion in the Offering Memorandum; discuss accounting issues with Accountants; and confirm whether US GAAP statements or reconciliations will be required for marketing	I, IA
	Begin preparation of description of Issuer's business, properties, etc.; discuss required disclosure with Counsel	I, IC
Week One	Working Group meetings	
	• Review timetable in detail	All Hands
	• Assign responsibilities/documentation	All Hands
	• Review structure and size of offering	All Hands
	• Negotiate covenants	All Hands
	• Review progress on financials and discuss significant accounting issues	All Hands
	• Initiate/schedule subsequent due diligence sessions	All Hands
	• Determine necessary corporate approvals	All Hands
	• Identify third-party consents such as lenders	I, IC
	Collect business and financial information for Offering Memorandum	I, IC, IA
	Outline Offering Memorandum	IC
	Start preparation of underwriting documentation	UC

DATE	TASK	RESPONSIBILITY
	Start preparation of Indenture and Exchange and Registration Rights Agreement (if applicable) (“ERRA”)	UC
Week Two and Week Three	Independent work on assigned responsibilities	
	• Complete and circulate first draft of Offering Memorandum	IC
	• Complete and circulate draft of audited financials and related financial information	IA
	• Complete and circulate draft Indenture and ERRA	UC
	• Prepare omnibus resolutions (per Indenture)	IC
	• Complete and circulate underwriting documentation	IC, UC
	• Select and notify financial printer	I, IC
	• Initiate rating review	I, U, RA
	• Advise Accountants of Comfort Letter requirements	IA, UW, UC
	Continue due diligence	All Hands
Week Four	Working Group meetings	
	• Complete document gathering and due diligence	All Hands
	• Site visits to Issuer’s facilities	UW, CM, UC
	• Finalize underwriting documentation	I, UW, IC, UC
	• Continue to discuss Comfort Letter	IA, UW, UC
	• Obtain necessary consents	I, IC
	Revise draft Offering Memorandum	IC
Week Five	Completion of Assigned Responsibilities	
	• Confirm all aspects of Issuer’s business	All Hands
	• Finalize details of offering	All Hands
	• Complete financials	IA
	• Prepare final draft of Offering Memorandum	IC
	• Finalize Indenture and ERRA	I, T, IC, UC
	• Prepare global and individual (if necessary) forms of notes	IC
	• Coordinate with financial printer	IC
	• Preparation of submission to SEC for Rule 12g3-2(b) exemption	IC
	• Contact DTC to begin process of qualifying securities for DTC’s book-entry settlement system	IC
	• Contact Clearstream for approval of securities for book-entry settlement system, and obtain common code reference number, if applicable	UW
	• Contact Euroclear for approval of securities for Euroclear’s book-entry settlement system, and obtain common code reference number, if applicable	UW
	• Contact CUSIP Service Bureau for CUSIP identification number and ISIN number	UC
	• Begin process of obtaining designation for Rule 144A securities as a PORTAL security	UC

DATE	TASK	RESPONSIBILITY
	Issuer Board of Directors review of documents and approve actions to be taken	I, IC
	Distribute draft Comfort Letter	IA
Week Six through Week Eight	Commencement of Road Show preparations	UW, I
	• Draft road show presentation materials (video, slides, speeches)	UW, I
	• Finalize road show schedule	UW, I
	Completion of Assigned Responsibilities	
	• Print Offering Memorandum and distribute	UW
	• Obtain necessary local governmental approvals	I, IC
	• Distribute revised draft of Comfort Letter	IA
	• Obtain Rating	I, RA, UW
	Rehearsal of Road Show presentations	UW, CM, I
Week Nine and Week Ten	Road Show marketing trip	I, UW, CM
		I, UW, CM
	• Confirm DTC approval	IC, UC
	• Confirm Cedel approval	IC, UC
	• Confirm Euroclear approval	IC, UC
	• Confirm receipt of all identification numbers	IC, UC
	• Confirm PORTAL approval	IC, UC
Week Eleven	Pricing of Offering	I, UW, CM
	• Execute underwriting documentation	I, UW
	• Distribute draft closing documents	UC
Week Twelve	Preparation for Closing	All Hands
	• Initial Purchasers notify Trustee of names and denominations of notes to be issued	UW, T
	• Trustee prepares certificates for delivery at Closing	UW, T
Pricing + 2 Business Days	Pre-Closing	All Hands
		All Hands
	• Review all Documentation	
Pricing + 3 Business Days	Closing—Debt securities delivered against payment of purchase price by Initial Purchasers	All Hands
	• Execute Indenture and ERRA	I, T
	• Complete and execute all other necessary documentation	All Hands
	• Tombstone advertisement appears announcing offering	UW

DATE	TASK	RESPONSIBILITY
Following Closing	If applicable	
	• Prepare registration statement on Form F-1 or F-4	IC
	• Assemble (and translate if necessary) exhibits to F-1 or F-4	IC, I
	• Obtain signatures for F-1 or F-4	I
	• Appoint Exchange Agent	I
	• Prepare Exchange Agency Agreement	IC
	• Prepare Letter of Transmittal and related documents (Notice of Guarantee Delivery; Instructions)	IC
	• File F-1 or F-4 and undertakings with SEC	IC
	• File Amendment No. 1 to F-1 or F-4	IC
	• Board action to set record and other dates	I
	• Obtain new CUSIP numbers	IC

ANNEX B

**TIMETABLE FOR U.S. PUBLIC OFFERING
OF DEBT SECURITIES
BY FOREIGN ISSUER**

KEY

Issuer ("I")
Global Lead Managing Underwriter ("UW")
Co-Manager(s) ("CM")
Underwriters' Counsel ("UC")
Issuer's Counsel ("IC")
Issuer's Accountants ("IA")
Trustee ("T")
Rating Agency ("RA")

DATE	TASK	RESPONSIBILITY
Pre-Launch Preparations	Begin preparation of financials for internal review and for inclusion in the Registration Statement; discuss accounting issues with Accountants	I, IA
	Begin preparation of description of Issuer's business, properties, etc.; discuss required disclosure with Counsel	I, IC
Week One	Working Group meetings	
	• Review timetable in detail	All Hands
	• Assign responsibilities/documentation	All Hands
	• Review structure and size of offering	All Hands
	• Review progress on financials and discuss significant accounting issues	All Hands
	• Initiate/schedule subsequent due diligence sessions	All Hands
	• Identify necessary governmental approvals and schedule meetings with relevant regulatory authorities	All Hands
	• Consider confidential review by SEC	All Hands
	• Determine necessary corporate approvals	All Hands
	Collect business and financial information for Form F-1	I, IC, IA
	Outline Form F-1 (Preliminary Prospectus and Part II)	IC
	Start preparation of underwriting documentation	UC

DATE	TASK	RESPONSIBILITY
	Select Trustee	I
Week Two	Independent work on assigned responsibilities	
	• Complete and circulate first draft of Preliminary Prospectus	IC
	• Complete and circulate draft of audited financials and related financial information	IA
	• Complete and circulate draft Indenture	UC
	• Prepare Form T-1	T
	• Complete and circulate underwriting documentation	IC, UC
	• Select and notify financial printer	I, IC
	• Initiate rating review	I, U, RA
	• Advise Accountants of Comfort Letter requirements	IA, UW, UC
	Continue due diligence	All Hands
Week Three	Working Group meetings	
	• Complete document gathering and due diligence	All Hands
	• Conduct final meetings with home country regulatory authorities, if required	I, UW
	• Site visits to Issuer's facilities	UW, CM, UC
	• Review final financials	All Hands
	• Notify SEC of intention to file on a confidential basis/arrange for pre-filing conference to discuss particular accounting or disclosure problems, if necessary	UW, IC, UC
	• Finalize underwriting documentation	I, UW, IC, UC
	• Continue to discuss Comfort Letter	IA, UW, UC
	Revise draft Preliminary Prospectus	IC
	Contact U.S. exchange (if any) on which the debt securities are to be listed	I, UW
Week Four	Completion of Assigned Responsibilities	
	• Confirm all aspects of Issuer's business	All Hands
	• Finalize details of global offering	All Hands
	• Complete financials	IA
	• Prepare final draft of Preliminary Prospectus	IC
	• Finalize Indenture	I, T, IC, UC
	• Begin assembling (and translating if necessary) documents to be filed as Exhibits to Form F-1	IC, UC
	• Coordinate with financial printer	UW
	Issuer Board of Directors and Shareholders review of documents and approve actions to be taken	I, IC
	Submit Form F-1 Registration Statement and Exhibits with SEC	IC, UC

DATE	TASK	RESPONSIBILITY
	for confidential review	
	Distribute draft Comfort Letter	IA
Week Five through Week Eight	SEC review of Form F-1 (approximately 4 weeks) • Working Group answers SEC questions, resolves outstanding issues	 All Hands
	Commencement of Road Show preparations • Draft road show presentation materials (video, slides, speeches) • Finalize road show schedule	UW, I UW, I UW, I
	Completion of Assigned Responsibilities	
	• Review SEC comments and incorporate changes to Form F-1 • Officially file and clear Form F-1 with SEC • Finalize and file Form 8-A • File appropriate documents with NASD • Finalize syndication strategy and extend invitations • Print Preliminary Prospectus and distribute • Confirm timing of effectiveness • Obtain necessary local governmental approvals • Obtain CUSIP number • Receive clearance of underwriting arrangement from NASD • Distribute revised draft of Comfort Letter • Finalize and file listing applications • Review all final documentation • Obtain Rating	All Hands IC IC IC UW UW I, IC, UC I, IC IC UC IA IC, UC All Hands I, RA, UW
	Issue Press Release regarding filing	I, IC
	Blue Sky Applications and Notifications filed with U.S. state securities authorities	UC, IC
	Rehearsal of Road Show presentations	UW, CM, I
Week Nine and Week Ten	Road Show marketing trip • Bookbuilding by underwriters	I, UW, CM I, UW, CM
Week Eleven	Pricing of Global Offering	I, UW, CM
	• SEC declares Form F-1 and Form 8-A effective • Execute Underwriting Agreements • Notify underwriters as to allotments • Distribute draft closing documents	 I, UW UW UC
Day After	Commencement of trading	UW, CM

DATE	TASK	RESPONSIBILITY
Pricing		
	• File Pricing Amendment with SEC	IC, UC
	• Print Final Prospectus and distribute	UW
	• Issue Press Release regarding completion of offering	I, UW
Week Twelve	Preparation for Closing	All Hands
	• File 10 copies of Final Prospectus with the SEC	IC
	• Underwriters notify Trustee of names and denominations of notes to be issued	UW, T
	• Trustee prepares certificates for delivery at Closing	UW, T
Pricing + 2 Business Days	Pre-Closing	All Hands All Hands
	• Review all Documentation	
Pricing + 3 Business Days	Closing—Debt securities delivered against payment of purchase price by Underwriters	All Hands
	• Execute Indenture	I, T
	• Complete and execute all other necessary documentation	All Hands
	• Tombstone advertisement appears announcing offering	UW