

# CAPITAL MARKETS ALERT

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## Securities Law and Practical Implications of Issuing Secured Bonds

This *Capital Markets Alert* is based on [an article](#) that appeared in the December 2010 issue of *Insights: The Corporate and Securities Law Advisor*.

*The number of secured high yield debt issuances dramatically increased during the second half of 2009 and into 2010 as investors have sought the higher yields offered in the bond markets and issuers have sought access to capital in the face of continued tightness in the bank credit markets. The securities laws raise complications for companies registering secured debt and complying with indentures governing secured debt.*

In the 12 months ending June 30, 2010, issuers completed more than 150 secured debt offerings, representing an estimated 30-35 percent of the U.S. high yield issuances during this period. The proceeds from the vast majority of these offerings were used to refinance existing secured debt, in most cases secured bank facilities. The rise in the popularity of secured bonds has been driven largely by companies seeking to refinance existing debt, including secured bank loans, with high yield bonds. High yield investors have in turn sought security in the assets previously securing the refinanced debt in order to mitigate credit risk in the face of continuing economic instability. Issuers of secured bonds, particularly bonds registered with the Securities and Exchange Commission (SEC) face additional complexities in issuing these securities and complying with the terms of their indentures due to the application of the Trust Indenture Act of 1939, as amended (TIA), which provides for procedural requirements in connection with the release of collateral, and the application of Regulation S-X, which can impose additional financial statement requirements.

### TIA Provisions Governing the Release of Collateral

Pursuant to the TIA it is unlawful for any person to sell notes, bonds, or debentures in interstate commerce unless the security has been issued under an indenture and qualified under the TIA. This rule is of course subject to exceptions, the largest being that debt securities issued in private placements exempt from registration under Section 4(2) of the Securities Act of 1933 are not subject to the TIA. A wide variety of securities are, however, covered by the TIA, including securities issued in registered offerings, whether initially or in registered "A/B exchange offers" in reliance on the *Exxon Capital* line of no-action letters, securities issued in reliance on Section 1145 of the U.S. Bankruptcy Code and securities issued in reliance on the exemption provided in Section 3(a)(9) of the Securities Act for securities issued in exchange for securities of the same issuer.

The TIA was adopted in 1939 in the wake of the Great Depression with the stated purpose of requiring issuers to provide for a trustee to protect and enforce the rights of investors. The TIA, among other things, provides requirements applicable to trustees, requires issuers to provide specified information to trustees, including certificates of officers of the company and opinions of counsel regarding compliance with the indenture, and in the case of secured indentures,<sup>1</sup> certificates and opinions in connection with the release of collateral. Specifically, TIA Section 314(d) sets forth the delivery requirements for certificates and opinions as to the fair value of the collateral being released. The trustee in turn is required under TIA Section 313(b) to deliver specified reports to holders with respect to the release of collateral.<sup>2</sup> These provisions were aimed at perceived abuses by issuers substituting collateral of lesser value for the original collateral, thereby impairing the collateral securing the issuer's securities.

While this over 70-year-old statute is regarded by many as archaic, bondholders have shown an increased will-

ingness to assert claims against issuers and trustees based upon alleged violations of the TIA.<sup>3</sup> Issuers should therefore familiarize themselves with the obligations under this statute not only to ensure compliance when qualifying an indenture under the TIA, but also to avoid a potential claim alleging that an event of default has occurred under the indenture due to the failure to comply with the TIA.<sup>4</sup>

### **TIA Section 314(d)**

TIA Section 314(d) requires that a certificate or opinion be provided to the trustee setting forth the fair value of the property being released from the lien. The certificate or opinion must state that, in the opinion of the person delivering the certificate or opinion, the proposed release will not impair the security under the indenture in contravention of the provisions of the indenture. Interestingly, most indentures specifically state that the release of any collateral will not be deemed to impair the lien on the collateral in contravention of the provisions of the indenture to the extent the collateral is released pursuant to the applicable security documents and the indenture. Some indentures specifically state that any person that is required to deliver an officer's certificate or opinion of counsel pursuant to Section 314(d) is entitled to conclusively rely upon this statement in the indenture as a basis for delivery of the required certificate or opinion. Unfortunately, the fact that the sale is authorized by the indenture does not remove the collateral from the purview of Section 314(d) and parties are not free to contract around the TIA.<sup>5</sup> Moreover, issuers must comply with Section 314(d)'s certificate and opinion delivery requirements notwithstanding these statements in the indenture.

Section 314(d) provides that if the fair value of the property being released since the beginning of the current calendar year exceeds 10 percent or more of the aggregate principal amount of the securities outstanding under the indenture, the opinion must be of an independent engineer, appraiser, or other expert selected or approved by the indenture trustee. Until this threshold is reached, the certificate or opinion may be delivered by an officer or employee of the issuer.

While Section 314(d) does contain a *de minimis* threshold of \$25,000 or 1 percent of the principal amount of the outstanding securities, this threshold is

of little practical value due to the small dollar amount. Many secured notes are secured by virtually all of the issuer's assets. As a result, collateral releases occur continuously, including every time an issuer uses cash or sells inventory in the ordinary course. Fortunately, the SEC has provided relief from the requirements of Section 314(d) if certain conditions are satisfied. As discussed below, the SEC has provided relief with respect to releases of collateral securing bonds with a second-priority lien, subject to certain conditions, and releases of collateral made in the ordinary course of business.

### **SEC Relief with Respect to Section 314(d)**

As discussed above, the stated purpose of the TIA is to provide trustees with information needed to protect the rights of holders by requiring that adequate information be provided as to the performance of the issuer's obligations under the indenture. But, what if the indenture and security agreements provide that the trustee and the holders have no rights or powers with respect to the collateral prior to a default under the indenture? Requiring issuers to provide information to the trustee in situations in which noteholders have no enforcement rights is arguably unnecessary. For example, this is typically the case with debt securities secured by a second-priority lien.

The rights of noteholders with a second-priority lien on the collateral (and the rights of the trustee on their behalf) are generally constrained by the terms of an intercreditor agreement with the holders of indebtedness secured by a first-priority lien on the same collateral. The intercreditor agreement governs the rights of holders of different classes of debt securities with respect to enforcement of their respective obligations. Typically, the intercreditor agreement will provide that until all first-lien obligations are discharged, the holders of the first-lien obligations have the exclusive right to authorize and direct the collateral trustee with respect to the collateral. The holders of the first-lien obligations generally have the exclusive right to authorize or direct the collateral trustee to enforce, collect, or realize on any collateral or exercise any other right or remedy with respect to the collateral. Neither the representative of the junior lien holder nor any holder of obligations secured by a junior lien can authorize or direct the collateral trustee with respect to such matters. For this reason, these liens are often referred to as "silent second" liens.

In recognition of the limited role the trustee plays in the context of an indenture for second-lien securities, the SEC has granted no-action relief with respect to compliance with Section 314(d), subject to certain conditions being satisfied.<sup>6</sup> In 2007, the SEC issued a no-action letter to Pregis Corporation, whose securities were secured by a second-priority lien on its assets. The documents creating the security interest in *Pregis*' case provided that all decisions regarding whether the collateral is maintained or released were made exclusively by the administrative agent for the lenders under its credit agreement. The SEC stated in the *Pregis* no-action letter: "So long as no default has occurred or is continuing under the Indenture, *the provisions of Section 314(d) of the Trust Indenture Act of 1939 are inapplicable to the Indenture governing the Second-priority Secured Floating Rate Notes ...*" (emphasis added). In the *Pregis* no-action letter, the SEC enumerated four conditions as the basis for its no-action relief:

- the notes issued under the indenture are secured by agreements that are external to the Indenture;
- decisions regarding whether the collateral is maintained or released are made by a party other than the indenture trustee;
- neither the indenture trustee nor the holders of the indenture securities have any control over these decisions; and
- the collateral securing the indenture securities also secures other debt.

The SEC has issued few, if any, no-action letters or exemptive orders subsequent to the *Pregis* no-action letter, notwithstanding the large number of secured bonds issued under indentures qualified under the TIA since December 2007. At least informally, the SEC has taken the position that issuers who meet the enumerated requirements in the *Pregis* no-action letter may rely upon the guidance in that no-action letter rather than requiring that issuers seek their own no-action relief.

Secured indentures that are or will be qualified under the TIA generally contain an express provision requiring the issuer to comply with Section 314(d) after such time as the indenture is qualified. However, in

recognition of the SEC's interpretation of Section 314(d) in the *Pregis* line of no-action letters and in other no-action letters and orders for exemptive relief discussed below, many secured indentures contain an explicit statement that the issuer will not be required to comply with all or any portion of Section 314(d) if it determines, in good faith, that under the terms of Section 314(d) and/or any interpretation or guidance as to the meaning thereof of the SEC and its staff, including "no-action" letters or exemptive orders (whether issued to the issuer or any other person), all or any portion of Section 314(d) is inapplicable to the released collateral. Accordingly, if an indenture contains this statement, it is clear that an issuer is not in breach of its contractual obligations to comply with Section 314(d) in relying upon these Staff interpretations.

### First-Lien Indentures — No Easy Fix

Over the course of the last 12 months, the market has seen an increasing number of first-priority secured debt issuances as a number of issuers have refinanced secured credit facilities in whole or in part with high yield debt securities. In many cases, the noteholders have received a first-priority lien on some or all of the collateral released from the bank lenders' lien. Indenture securities secured by a first-priority lien would not be subject to Section 314(d) to the extent the criteria in the *Pregis* no-action letter are met. For example, this would be the case if the indenture securities were secured as the result of an "equal and ratable" clause whereby the indenture securities would be secured to the extent and only for so long as other indebtedness of the issuer was secured and, to the extent the holders of such other indebtedness released their liens, the liens securing the indenture securities would be released automatically.<sup>7</sup> However, to the extent the criteria in the *Pregis* no-action letter are not met, these indentures may remain subject to Section 314(d).

The SEC has provided partial relief to issuers that find themselves within the TIA's reach in these circumstances. As discussed above, collateral is constantly being released from the security interest under the indenture. Every time inventory is sold or cash is disbursed, those assets, to the extent they constitute collateral, are automatically released from the security interest under the indenture and transferred to a third

party free and clear of any lien under the indenture. In recognition of the tremendous burdens Section 314(d) could create, the SEC has granted exemptive relief and no-action relief from the certificate or delivery requirements of Section 314(d) for releases of collateral in the ordinary course of business,<sup>8</sup> including the disposition and collection of accounts receivable, sales of worn-out, defective or obsolete equipment or equipment not used or useful in the conduct of the business, and the making of cash payments.

The SEC has recognized that complying with the certificate and opinion delivery requirements in these circumstances would unduly interfere with the operation of an issuer's business. However, it has not given issuers a complete free pass. The exemptive relief for ordinary course releases of collateral has been conditioned upon the issuer delivering to the trustee annual audited financial statements and a semi-annual certificate stating that all dispositions of collateral during the relevant six-month period occurred in the ordinary course of business and that all proceeds were used as permitted by the indenture. All dispositions outside the ordinary course will require delivery of a certificate or opinion unless the property falls below the *de minimis* threshold discussed above.

Based upon a review of publicly available material, while there are surprisingly few exemptive orders filed, the more conservative course is for issuers to seek their own exemptive relief. Issuers seeking to register debt securities under an indenture subject to Section 314(d) should allow sufficient time to obtain exemptive relief from the SEC, particularly if the issuer is party to a registration rights agreement that imposes deadlines on going effective on the registration statement.

Issuers of securities issued under an indenture that is not subject to Section 314(d) presumably do not need the relief provided with respect to ordinary-course releases of collateral and do not need to provide the semi-annual certifications discussed above. However, indentures sometimes provide (even those not qualified under the TIA) that the issuer will cause a semi-annual certification to be delivered and/or that the issuer will cause TIA Section 313(b) to be complied with. Section 313(b) provides that the trustee will provide notice to holders within 90 days if the property released is 10 percent or more of the principal

amount of the outstanding indenture securities. It is not clear what duty this imposes on the issuer with respect to the trustee's obligation under TIA Section 313(b). This is especially unclear in the case of indentures governing securities not subject to Section 314(d). Because the SEC has stated that the provisions of Section 314(d) are inapplicable to the extent the conditions in the *Pregis* no-action letter are satisfied, an indenture trustee would not have a basis on which to deliver such report.

## Notes Secured by a Pledge of Stock

Additional issues are raised by debt securities secured by a pledge of stock — not only under the TIA but also under Regulation S-X. Regulation S-X sets forth the form and content of financial statements required to be filed as part of registration statements under the Securities Act, as well as filings under Sections 13 and 15(d) of the Securities Exchange Act of 1934.

## Financial Statement Requirements

The collateral securing high yield bonds often includes a pledge of the stock of the issuer's subsidiaries. Rule 3-16 of Regulation S-X requires that if the stock of an affiliate of a registrant (commonly this is a subsidiary) constitutes a "substantial" portion of the collateral for any class of securities that is registered or being registered under the Securities Act, the issuer must file the financial statements of the subsidiary that would be required if the subsidiary were itself the issuer. In most cases, this would mean three years of audited financial statements in a registration statement, as well as annual audited financial statements in the issuer's Annual Report on Form 10-K. Rule 3-16 provides that the pledged stock constitutes a "substantial" portion of the collateral "if the aggregate principal amount, par value, or book value of the securities as carried by the registrant, or the market value of such securities, whichever is the greatest, equal 20 percent or more of the principal amount of the secured class of securities." It is notable that this test does not take into account the percentage of the value of the overall collateral represented by the pledged stock.

This can impose a large additional burden on issuers because they do not generally separately audit the financial statements of their subsidiaries. In contrast to Rule 3-16, the SEC does not require separate financial

statements of a guarantor of a parent company's securities. Instead, the SEC rules generally permit an issuer to file consolidated financial statements of the issuer and its subsidiaries in lieu of filing financial statements for the issuer and each subsidiary that guarantees the issuer's securities. The SEC requires only that the issuer include a footnote in its financial statements containing condensed consolidating financial information for the issuer, the guarantors and any non-guarantors separately.

Rule 3-16 does not become applicable until the debt securities are registered with the SEC. Because the majority of high yield debt securities are issued in private placements to initial purchasers and resold to investors in reliance on Rule 144A under the Securities Act, Rule 3-16 is often not applicable at the time of the offering. However, a significant portion of these offerings provide for registration rights in which the issuer agrees to commence an exchange offer within a specified number of days to allow investors to exchange the privately placed notes for identical notes that have been registered under the Securities Act. Issuers have in some cases omitted the financial statements from the offering memorandum for the securities with the understanding that they will need to have the audited financial statements available for inclusion in the exchange offer registration statement. Issuers in effect assume the risk of completing the required audit by the deadline imposed for filing the registration statement under the terms of the registration rights agreement. Issuers that do not take into account these requirements in negotiating their registration rights agreements can find themselves paying "additional interest" under the terms of the registration rights agreement for failure to meet the required deadlines for filing and going effective on the registration statement.

### **"Collateral Cut-Back" Provision**

Due to the difficulty in complying with the requirements of Rule 3-16, many issuers negotiate to exclude from the collateral that portion of the securities that would cause additional financial statements to be required to be filed with the SEC. This is often referred to as a "collateral cut-back" provision. A typical collateral cut-back provision provides:

The capital stock and other securities of any subsidiary of issuer will constitute collateral

securing the notes and the related guarantees only to the extent that such capital stock and securities can secure such notes and note guarantees without Rule 3-16 of Regulation S-X under the Securities Act (or any other law, rule or regulation) requiring separate financial statements of such subsidiary to be filed with the SEC (or any other governmental agency).

The concept is that the securities are never part of the collateral package by definition. While the issuer is able at the time the securities are issued to ascertain the value of the pledged stock and make a determination whether this provision results in the exclusion from collateral of any portion of the stock, the value of the pledged stock will fluctuate over time. The collateral cut-back provision is designed to operate automatically, deeming such stock to be pledged as collateral only to the extent it would not cause the issuer to be required to provide additional financial statements. This provision is considered by practitioners as effective in preventing the application of Rule 3-16.

The SEC in comment letters to issuers has not endorsed the concept that the collateral cut-back does not involve a release of collateral. In other words, the SEC has viewed the pledged securities as collateral that is released to the extent necessary to prevent Rule 3-16 from being applicable. This is in contrast to the position taken by several issuers in correspondence with the SEC that the cut-back provision is not a release of collateral because the pledged stock was expressly excluded from the grant of the security interest in such issuer's assets in the first place.

The distinction seems at first blush to be a metaphysical one. However, as discussed above, "releases" of collateral implicate TIA Section 314(d). Because the SEC views the cut-back as a release, the Staff of the Division of Corporation Finance has asked issuers in connection with its review of registration statements to explain how the issuers intend to comply with Section 314(d) in connection with the pledge of stock. To the extent the criteria set forth in the *Pregis* no-action letter are met, the issuer would not be required to provide the certificates and opinions required by Section 314(d). However, it appears that issuers of securities under indentures that do not otherwise meet the crite-

ria in the *Pregis* no-action letter would be required, in the SEC's view, to provide the certificates and opinions required by TIA Section 314(d).

As a practical matter, the value of securities fluctuates on a daily basis. However, SEC comment letters and responses suggest that a quarterly valuation may be acceptable, as issuers have stated an intention to review the value of pledged stock quarterly in such letters and the SEC has not indicated this would be inappropriate. The stock of most subsidiaries does not have a readily ascertainable market value. Accordingly, the determination of whether the value of the stock is below the 20 percent threshold in S-X 3-16 requires an issuer to make a valuation of the entity, creating additional administrative burdens.

Even in cases in which the trust indenture securities are not subject to section 314(d), the SEC has in some cases required issuers to provide additional disclosure in periodic reports relating to the application of the collateral cut-back provision. These requested disclosures are not required by the TIA but have instead been requested by the Staff of the Division of Corporation Finance on the basis that the information is material to investors. Additional requested disclosures have included a list of each company that constitutes collateral under the indenture, a list of each company that does not constitute collateral under the indenture, how the issuer determined book and market value for each company, the book and market value of each and the amount of changes in value for each company that could result in that company moving into, or out of the collateral pool.

Because there is no bright line as to what is material, some issuers have successfully argued that detailed information on the value of the pledged stock and amount of stock pledged is in fact not material. For example, in cases in which the underlying assets of the subsidiary are also pledged and the market value and book value of the subsidiary are approximately equal to the value of the underlying assets, the pledge does not add materially to the collateral and detailed disclosures of the type described above are not material. The foregoing would not be the case, however, in cases in which the subsidiary's stock, but not all of the underlying assets, were pledged as collateral.

## **Additional Indenture and TIA Requirements**

In connection with the initial issuance of secured debt securities, an issuer will be required to deliver documentation similar to that required for a secured bank facility, which can include, among other things: security agreements, pledge agreements, mortgages, surveys, local counsel opinions, and affidavits from title companies with respect to real property, consents from landlords with respect to leased property, insurance policies in favor of the collateral agent, account control agreements and certificates of title with respect to vehicles. Issuers should therefore take these requirements into account when planning an offering and allow sufficient time for the work required to document the security interest in the collateral. Sometimes, issuers are able to negotiate to make certain of these deliveries within a specified number of days post-closing. In any case, issuers should ensure that the indenture provides for adequate time to meet these requirements. Unlike a credit agreement, which may give discretion to the agent to extend deadlines, an indenture trustee does not have authority to exercise such discretion.

Indentures and the related security documentation governing secured debt securities also generally require a variety of ongoing deliveries by the issuer in addition to those required by a typical high yield indenture. This is the case in most secured indentures, regardless of whether the issuer is required to register the securities. The requirements typically can include: (1) ongoing requirements to take steps to ensure the creation, perfection, priority and maintenance of the liens in collateral, including after-acquired property; (2) delivering an annual "perfection certificate" setting forth changes to the information originally provided in connection with entering into the security documentation; (3) a report of an insurance broker on an annual basis; and (4) notifications of a variety of items, including changes in corporate structure or names of entities. In addition, some indentures require that proceeds of asset sales be placed in a cash collateral account, requiring further monitoring by the issuer. While many of the ongoing deliveries in a typical secured indenture resemble those required by a secured credit facility, issuers must carefully monitor and comply with these requirements to avoid creating potential defaults under the indentures.

In addition to the requirements of TIA Section 314(d) discussed above, an issuer is required under TIA Section 314(b) to deliver to the trustee an annual opinion of counsel. The opinion must state that, in the opinion of such counsel, such action has been taken with respect to the recording, filing, re-recording, and re-filing of the indenture as necessary to maintain the lien of such indenture. The opinion must recite the details of the actions taken, or state that, in the opinion of counsel, no action is necessary.

### To Register or Not to Register Secured Debt Securities?

Prior to agreeing to register secured debt securities that will be issued under an indenture, an issuer should give careful consideration to the requirements of the TIA, particularly in the case of securities secured by a first-priority lien, and the requirements of Rule 3-16 of Regulation S-X. It has become increasingly acceptable to investors for high yield debt to be issued without registration rights, thereby avoiding application of these SEC requirements.

In the case of an offering of privately placed debt securities without registration rights, holders generally will rely upon Rule 144A or Rule 144 under the Securities Act to resell the securities. Given the shortening of the holding period under Rule 144 under the Securities Act, non-affiliate holders of debt securities are often able to resell their securities freely under Rule 144<sup>3</sup> prior to the time the holder is required to register the

securities, making registration arguably unnecessary. It is not unusual for registration rights agreements to provide that an issuer has a year or more to complete a registered exchange offer for the securities.

In some cases, investors have required non-reporting issuers to register debt securities notwithstanding the availability of Rule 144 for resale because they want to force the issuer to file periodic reports with the SEC. The argument for conducting a registered exchange offer is less compelling in cases in which the issuer is already a reporting company. In any event, the additional time and expense to be incurred by an issuer in complying with the TIA and providing additional financial statements required by Rule 3-16 of Regulation S-X are factors that should be considered by both the issuer and investors.

### Conclusion

Secured high yield bonds have become increasingly popular. Careful planning should be done in advance of issuing secured debt securities that will be registered under the Securities Act to identify any additional financial statements that will be required and to determine the extent to which TIA Section 314(d) will be applicable to the securities. For those issuers who have issued secured debt securities pursuant to a registration statement or who have issued secured debt securities pursuant to Section 1145 of the Bankruptcy Code, care must be taken to comply with Section 314(d), the other provisions of the TIA and the indenture relating to releases of collateral.

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- <sup>1</sup> This article refers to indentures governing secured bonds as “secured indentures” for ease of reference, notwithstanding that the bonds, rather than the indentures themselves, are secured.
  - <sup>2</sup> See Trust Indenture Act § 313(a)(6) (requiring the indenture trustee to transmit to security holders at stated intervals of no more than 12 months, a brief report with respect to any release or release and substitution of collateral occurring during the prior 12 months which has not been previously reported); TIA § 313(b) (requiring trustee to provide within 90 days a report with respect to the release of collateral constituting 10% of the principal amount of the indenture securities outstanding).
  - <sup>3</sup> See *Affiliated Computer Servs. Inc. v. Wilmington Trust Co.*, 565 F.3d 924 (5th Cir. 2009). In *Affiliated Computer Services*, the 5th Circuit resolved a split of authority with respect to the reach of Section 314(a) of the TIA, holding that Section 314(a) requires issuers to deliver to the trustee only those reports that it files with the SEC and does not create an independent obligation on issuers to file reports with the SEC. This case resolved the split in authority created by the New York state court in *Bank of N.Y. v. Bearings Point, Inc.*, 13 Misc. 3d 1209(A) (N.Y. Sup. Ct. 2006), which held that the failure to file reports with the SEC violates § 314(a).

Bondholders have also brought suits against trustees alleging various violations of the TIA, including TIA § 313 which provides for delivery by the trustee of certain reports to bondholders. *See, e.g., Zeffiro v. First Penn. Banking and Trust Co. v. First Penn. Bank, N.A.*, 623 F.2d 290 (3d Cir. 1980).

- <sup>4</sup> Once an indenture is qualified, the SEC has no enforcement authority over the terms of the indenture and cannot issue a stop order for violations of the indenture provisions. *See Zeffiro*, 623 F.2d at 293-94. However, the TIA provides for criminal liability for willful violations and for material misrepresentations or omissions in any application, report or document required to be filed under the TIA, as well as express civil liability for material misstatements or omissions. *See* Trust Indenture Act §§ 323, 325. As a practical matter, enforcement of the TIA is left to bondholders through suits to enforce compliance with the terms of the indenture. *See Zeffiro*, 623 F.2d at 297 (citing legislative history of the TIA).
- <sup>5</sup> *See* Trust Indenture Act § 318(c) (provides that “the provisions of sections 310 to and including 317 that impose duties on any person . . . are part of and govern every qualified indenture, whether or not physically contained therein . . .”); *see also* Trust Indenture Act § 327 (“Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.”).
- <sup>6</sup> *See, e.g.,* Pregis Corp., SEC No-Action Letter, 2007 WL 4328651 (Dec. 7, 2007).
- <sup>7</sup> *See* Allied Waste North America, Inc., SEC Release No. 2392, Trust Indenture Act of 1939, 2001 WL 892786 (August 8, 2001); International Harvester, 1983 SEC No-Act. LEXIS 2263 (April 25, 1983).
- <sup>8</sup> *See* Order Granting Application for Exemption; Grupo Iusacell Celular, S.A. de C.V., SEC Release No. 2450, Trust Indenture Act of 1939, 2007 WL 4180382 (Nov. 26, 2007); Order Granting Application for Exemption; Mrs. Fields Famous Brands, LLC, Mrs. Fields Financing Company, Inc., and Certain Guarantors, SEC Release No.22-28772 (March 24, 2005); Algoma Steel Inc., SEC No-Action Letter, 2002 WL 32349410 (Dec. 23, 2002).
- <sup>9</sup> Rule 144 under the Securities Act was amended effective February 15, 2008, to shorten to one year the period after which non-affiliates could resell securities without restriction, as compared to prior Rule 144(k), which provided for a period of two years before securities could be resold by non-affiliates without restriction.

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If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland author or your regular Kirkland contact.

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