# RIGHTS OFFERINGS AS A MEANS OF FINANCING EXITS FROM CHAPTER 11

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## INTRODUCTION

Rights offerings are the dominant form of equity capital raising in Europe.[1] Surprisingly, through the 1950s, rights offerings with standby underwriters were also the preferred form of equity capital raising for U.S. companies.[2] For example, of the $3 billion of common stock issues registered with the SEC for cash sales in primary offerings in 1951, 1953 and 1955, and offered through investment bankers, 59% were rights offerings.[3] This percentage dropped rapidly from the 1970s onwards.[4]

Today, the difference between equity capital-raising in the United States and Europe is driven by the existence of mandatory preemptive rights for most European public companies, forcing companies to look to their existing shareholders for capital infusions. The existence of mandatory preemptive rights for shareholders of public companies in Europe and the lack thereof for U.S. public companies might reflect a perceived philosophical distinction between European shareholders as "owners" and U.S. shareholders as "investors." Arguably, owners of a public company seek to resist dilution when a company seeks to raise new capital and expect to be offered the first opportunity to invest as an incident of ownership. Conversely, investors seek a return and are less concerned with maintaining their ownership percentage.

Despite these trends, recent capital raising by companies exiting chapter 11 proceedings has reinvigorated the rights offering as a large-scale and flexible means of raising capital in the United States, on a rapid and, increasingly, unregistered basis. This is largely based on the reality that pre-petition debtholders of a debtor are its new "owners" and such debtholders often wish to maintain or increase their

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[1] *See* Xueping Wu & Zheng Wang, *Why Do Firms Choose Value-Destroying Rights Offerings? Theory and Evidence from Hong Kong* 10 (City University of Hong Kong—Dep't of Econ. and Fin., Working Paper, February 2002), *available at* http://ssrn.com/abstract=302618 ("Rights issues are almost the exclusive choice of SEOs in continental Europe and Scandinavia.").

[2] *See* 1 B. ESPEN ECKBO ET AL., HANDBOOK OF CORPORATE FINANCE, EMPIRICAL CORPORATE FINANCE 286 (B. Espen Eckbo ed., 1st ed. 2007) (noting decline of rights offerings since 1950s).

[3] 1 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 323 (Aspen Law & Business 3rd ed. 1989) (citing SEC, COST OF FLOTATION OF CORPORATE SECURITIES 1951-1955, 21 (1957)).

[4] *See* CHARLES W. CALOMIRIS, U.S. BANK DEREGULATION IN HISTORICAL PERSPECTIVE 323 (2000) ("In particular, as the cost of going public declined, many issuers chose public offerings rather than rights offerings. In 1950, 21 percent of underwritten common stock issues were rights offerings; by 1971, only 5 percent were offered as standbys.").

equity position in the company. The result has been significant growth in recent years in the number of rights offerings conducted by companies exiting chapter 11.[5]

## I. TRADITIONAL STRUCTURE OF RIGHTS OFFERINGS IN CHAPTER 11

Rights offering structures in chapter 11 generally provide the holders of pre-petition debt and, less frequently, equity, the opportunity to subscribe for new equity in exchange for their pre-petition securities and a cash payment.[6]

The basic securities law principal that the offer and sale of a security requires registration under the Securities Act of 1933, as amended, or an exemption therefrom continues to apply notwithstanding Bankruptcy Court approval of a plan of reorganization and related disclosure statement.[7] As a result, rights offerings have traditionally fallen into two categories: those that benefit from the exemption from registration provided by section 1145 of the Bankruptcy Code, and those that do not and accordingly require registration under the Securities Act.

Section 1145 of the Bankruptcy Code most frequently provides an exemption from registration in connection with the direct exchange of a pre-petition claim (in the form of a security) for a security issued by a company emerging from chapter 11.[8] The provision provides considerable flexibility, aided by purposeful interpretation by the courts and the Securities and Exchange Commission, allowing the inclusion of securities issued by affiliates and successors to a debtor or its affiliates.[9] The provision also permits the issuance of a new security principally in exchange for a claim and partly in exchange for cash.[10] Put differently, if the value of the claim being exchanged exceeds the value of the cash being invested, the issuance of a security in exchange for such claim and cash will be exempt from registration under the Securities Act pursuant to section 1145(a). Moreover, section 1145(c) deems such issuance to be a public offering with the result that the

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[5] *See* Thomas C. Carlson, *Rights Offerings Provide "New" Solution to Classic Leverage Problem*, J. CORP. RENEWAL 1, 3 (2007) ("Rights offerings have increased as a direct response to the challenges of restructuring increasingly complex capital structures with multiple layers of secured debt and present a potential source of considerable income to certain players.").

[6] *See* SEC v. Universal Express, Inc., 475 F. Supp. 2d 412, 425 (S.D.N.Y. 2007) (quoting 8 COLLIER ON BANKRUPTCY, ¶ 1145.02[1][a], at 1145-21 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009)) (describing offerings exchanged, at least in part, for claims against debtor under section 1145).

[7] *See* R. Scott Falk & Jody S. Gale, *Chapter 11 and Securities Laws*, 25 AM. BANKR. INST. J. 36, 94 (2007) (explaining section 5 of Securities Act of 1933 offer or sale of securities registration requirement in United States unless applicable exemption exists).

[8] 11 U.S.C. § 1145(a)(1) (2006) (exempting sale of securities under chapter 11 reorganization from registration and prospectus delivery required by Securities Act of 1933).

[9] *See* 8 COLLIER ON BANKRUPTCY, ¶ 1145.02[1][a], at 1145-16 to -17 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009) (discussing broad interpretation of section 1145 by courts and SEC to allow flexibility in reorganization plans by exempting registration of sale of securities); *see also* 11 U.S.C § 1145(a)(1) (providing flexibility in exempting securities from registration by lacking guidance of term "successor to the debtor").

[10] 11 U.S.C. § 1145(a)(1).

securities may be transferred freely by their holders pursuant to the exemption provided under section 4(1) of the Securities Act unless any such holder is an "issuer, underwriter or dealer."[11] Section 1145(b) contains a modified definition of "underwriter" to further facilitate the free tradability of securities issued in a chapter 11 proceeding to persons who might be considered statutory underwriters in non-bankruptcy situations.[12]

The "partly for cash" mechanism of section 1145 can permit significant amounts of new capital to be raised. For example, in 2006, Owens Corning raised $2.2 billion in rights offering to its unsecured creditors conducted pursuant to section 1145.[13]

Section 1145, however, presents a significant challenge by limiting the amount of capital that can be raised to the value of the security being exchanged.[14] The lower the value of that security, the lower the amount that can be raised in a rights offering.[15] As a result, in the past, debtors were frequently forced to resort to registration of the security proposed to be issued in the rights offering in order to achieve the goal that they sought. In most cases, such registration was required to be effected on a Form S-1 due to defaults on the payment of principal or interest since the end of the debtor's last fiscal year.[16] Irrespective of whether a registration statement is on Form S-1 or Form S-3, it and the documents that it incorporated by reference are potentially subject to SEC review prior to being declared effective. Furthermore, there is no way to ascertain in advance whether a particular filing will be reviewed by the SEC. The difference between review and no review can mean a difference of weeks or months before a rights offering is completed. For example, in 2006, USG Corporation conducted a rights offering to holders of its common stock registered on a Form S-1 and was subject to an SEC review that resulted in the addition of many weeks to its rights offering timetable.[17]

Despite these drawbacks, it should be noted that registration of a rights offering does offer some fringe benefits. Principal among them is the free transferability of

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[11] *Id.* § 1145(c) (allowing section 4(1) of Securities Act of 1933 to be applied in chapter 11 reorganization context); Securities Act of 1933, § 4(1), 15 U.S.C. § 77d(1) (2006) (exempting securities transactions by persons other than issuers, underwriters, or dealers from registration with SEC).

[12] 11 U.S.C. § 1145(b)(1) (including additional buyers and sellers in definition of "underwriter").

[13] *See* Shanon D. Murray, *Judge Will Give OK to Owens Plan*, DAILY DEAL, July 11, 2006.

[14] *See* Colin Diamond & Katherine Spenner, *Rights Offerings – An Alternative to Traditional Financing Options*, 3 BLOOMBERG LAW REP., SEC. LAW, Mar. 2009, at 5 ("[C]ash or other property paid in the transaction must not equal or exceed the value of the claim being traded as consideration for the securities.").

[15] *See* Falk & Gale, *supra* note 7, at 95 (stating SEC determined whether proposed offering is principally in exchange for claim depends on relative value of claim compared to cash or property exchanged by holder of claim).

[16] *See* Registration Statement Under the Securities Act of 1933 (Form S-3), at 2–3, *available at* http://www.sec.gov/about/forms/forms-3.pdf (requiring neither registrant nor subsidiaries to have defaulted on any loans in last fiscal year in order to use Form S-3).

[17] *See* Falk & Gale, *supra* note 7, at 94–95 (stating filing of registration statement subject to potentially lengthy SEC review process).

the rights to purchase.[18] The rights are generally distributed as a dividend and are considered a "no sale" transaction.[19] In the context of the section 1145 exemption, it is difficult to facilitate the free transferability of the rights because the section 1145 exemption, by its very nature, requires that the holder of the right also be the holder of a claim exchanging that claim and cash for a new security. No such limitation applies in the case of a registered rights offering.

## II. BACKSTOP PURCHASERS

Backstop purchasers are a key component of a plan of reorganization that contemplates a rights offering. Whether in connection with a rights offering conducted pursuant to section 1145 or pursuant to a registration statement, backstop purchasers commit to purchase any securities that are not taken up by the rights class through the exercise of rights.[20] Backstop purchasers may be new investors, but are frequently a group of pre-petition debtholders seeking to support or propose a plan of reorganization.

Because such debtholders are potentially investing a significant amount of money, even if section 1145 is available to members of the rights offering class, it is generally unavailable for the issuance of securities to the backstop purchasers. Instead, these purchasers generally purchase pursuant to the exemption from registration provided by section 4(2) under the Securities Act.[21]

The use of section 4(2) in connection with a registered rights offering presents similar challenges to those that arise in any other registered offering. Specifically, in order to avoid integration of the private placement with the registered offering, the backstop purchasers must be limited to qualified institutional buyers ("QIBs") and two or three large institutional accredited investors. This practice finds its roots in the SEC's policy position articulated in the *Black Box*[22] and *Squadron Ellenoff*[23] no-action letters.

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[18] *See* Shai Y. Waisman, *Rights Offerings: A Practitioner's Guide*, BANKR. BULL. (Weil, Gotshal, & Manges, LLP, New York, N.Y.), Sept./Oct. 2007, at 14–15, http://www.weil.com/wgm/cwgmhomep.nsf/Files/BBOct07/$file/BBOct07.pdf (stating if rights offering not exempt under section 1145, securities not freely transferable absent formal registration or other exemption).

[19] The rights themselves are traditionally included in the registration statement both as a prophylactic and also to facilitate resales by affiliates who would not otherwise be able to transfer the rights freely. *See* Dennis J. Connolly, Stephen Opler, David Lowance & Dana Siragusa, *The Use of the Section 1145 Exemption to Reorganize or Acquire a Chapter 11 Debtor*, 2002 ANN. SURV. BANKR. L. 1, 19 (2002) (stating section 1145 enhances value of securities by affording exemptions from registration for resale transactions to creditors who receive securities).

[20] *See In re* Spansion, Inc., 426 B.R. 114, 122–23 (Bankr. D. Del. 2010) (discussing proposed reorganization plan where backstop agreements could be entered into after claim holders in classes 5A, 5B, and 5C had been offered common stock).

[21] Securities Act § 4(2), 15 U.S.C. § 77d(2) (2006).

[22] Black Box Inc., SEC No-Action Letter, [1990 Transfer Binder] Fed. Sec. L. Rep. ¶ 79,510, at 77,582–83 (June 26, 1990).

[23] Squadron, Ellenoff, Pleasant, & Lehrer, SEC No-Action Letter, 1992 WL 55818 at *1 (Feb. 28, 1992).

A further challenge of the section 4(2) exemption used for the issuance of securities to the backstop purchasers relates to liquidity in their securities. Participants in the rights offering who are not affiliates of the debtor are generally free to trade in their securities following emergence.[24] Backstop purchasers receive "restricted securities" in the backstop purchase, which generally have a six-month holding period before sales into the public market are permitted.[25] The solution to this problem is found in the form of resale registration rights; however, the structure of a plan or reorganization makes it virtually impossible to file the resale registration statement until after emergence. The reason for such limitation is that, in order for the registration statement to be filed, the private placement of the backstop shares must have closed. The term "closed" includes a commitment to purchase that is subject to conditions outside of the control of the purchaser. The conditions contained in the backstop purchase commitments in most chapter 11 cases offer the backstop purchasers approval and other rights that essentially leave the investment decision in their hands. For example, a right to approve a pension plan or the post-emergence organizational documents would create such a right. Following emergence, SEC review of the resale registration statement can result in significant delays to the effectiveness of the registration statement and the related tradability of the securities purchased by the backstop purchasers.

## III. THE NEW RIGHTS OFFERING

As noted, section 1145 is only available under limited circumstances and the filing of a registration statement presents significant risks of delay due to potential SEC review.[26] These two factors have limited the usefulness of the rights offerings on the one hand and have discouraged backstop purchasers from committing their capital for what can be an unacceptable length of time on the other hand. As a result, within the last 24 months, a series of rights offerings have been conducted on a private placement basis pursuant to the exemption from registration provided by section 4(2).

These offerings have, to date, exclusively been open to a rights class consisting of pre-petition debtholders generally holding tradable notes of the debtor. The overwhelming majority of the holders of such notes, which were generally issued in a Rule 144A offering, are accredited investors within the meaning of Rule 501 under the Securities Act. Rights are distributed solely to holders that confirm their accredited investor status. In contrast to rights offerings conducted pursuant to

[24] *See* Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, 64 Fed. Reg. 61,382, 61,390 (Nov. 10, 1999) (to be codified at 17 C.F.R. pts. 200, 230, 239, 240, 249, & 260) (asserting securities in rights offering are freely tradable by non-affiliate security holders, as long as non-affiliates are not statutory underwriters).

[25] *See* Securities Act of 1933 Rule 144(b)(1)(i), 17 C.F.R. § 230.144(b)(1)(i) (2010).

[26] *See* 8 COLLIER ON BANKRUPTCY, ¶ 1145.02, at 1145-15 to-16 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009) (setting forth requirements of exemption).

section 1145, some limited transferability of rights (only to other accredited investors) can also be built into this structure without registration. Members of the rights class who exercise their rights will receive restricted securities. Consistent with traditional rights offerings conducted pursuant to section 1145 or on a registered basis, the backstop purchasers will also receive restricted securities.

The net result of such structures can be challenging from an equity capital markets perspective: outside of the rights offering itself, a small amount of the debtor's equity will generally be distributed to specified stakeholders upon emergence pursuant to section 1145 and will, accordingly, be freely tradable in the hands of shareholders. Such equity could, however, represent as little as 5% of the outstanding shares of the company with the balance—as much as 95%—held by rights offering participants and backstop purchasers and constituting restricted stock. Once again, the solution to the lack of liquidity in such stock comes in the form of a resale registration statement. Since that 95% may be held by hundreds of holders who participated in the rights offering, only a small number of whom are backstop purchasers, the practice has developed to limit the holders who are entitled to registration rights (*i.e.*, backstop purchasers and certain other significant holders), leaving the other stockholders to hold for a period of six months (assuming the issuer is a reporting company) until they are eligible to sell under Rule 144.

The most recent development in providing liquidity to the holders of restricted stock pursuant to a rights offering conducted pursuant to section 4(2) came in the emergence from chapter 11 proceedings of Visteon Corporation.[27] In that case, the privately-placed common stock was made eligible for trading and settlement through the facilities of the Depositary Trust Company ("DTC").[28] As a result, for the first time in a chapter 11 proceeding, restricted securities could change hands among QIBs without the need for opinions or the movement of stock through the transfer agent, whether certificated or in book-entry form. Rather, the restricted stock is held through the brokerage accounts of the shareholders segregated from other stock of the same class of the issuer by means of a different Committee on Uniform Securities Identification Procedures ("CUSIP") number. In the future, in addition to trading and settlement through the DTC, there would be nothing to prevent a broker-dealer from quoting the restricted securities on an appropriate platform that is limited to QIBs (*e.g.*, PORTAL). Such quotations may further enhance the liquidity of the restricted stock. Ultimately, after the effectiveness of a resale registration statement or the passing of the required holding period under

[27] *See* Debtor's Fourth Amended Disclosure Statement For the Fourth Amended Joint Plan of Reorganization of Visteon Corp. & its Debtor Affiliates Pursuant to Chapter 11 of the U.S. Bankruptcy Code, *In re* Visteon Corp., 2010 WL 2905463 (Bankr. D. Del. 2010) (No. 09-11786), 2010 WL 2937658 (explaining overview of plan).

[28] *See* Findings of Fact, Conclusions of Law, & Order Confirming Fifth Amended Joint Plan of Reorganization of Visteon Corp. & its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, Exhibit B, at sections 3–6, *available at* http://www.kccllc.net/documents/0911786/0911786100831000000000018.pdf.

Rule 144, holders can resell their securities directly into the public markets and the need for a separate trading platform for QIBs would be obviated. Nevertheless, the existence of a means of settling trades electronically among QIBs bridges an important gap between the issuance of restricted stock upon emergence and the free tradability of that stock in the future.

## CONCLUSION

The development of techniques for rights offerings in chapter 11 proceedings parallels the development of capital raising techniques for solvent companies. Specifically, there has been an effort by those seeking to raise capital in chapter 11 proceedings to take advantage of the speed and flexibility afforded by private offerings, yet to seek a liquid market for resale of the resulting restricted stock. In the past, the SEC has adopted regulatory measures that have helped close the gap between public and private offerings in other contexts, notably A/B Exchange Offers following Rule 144A offerings, and policy positions that allow private placements to take place concurrently with registered offerings. The technique of conducting a rights offering limited to accredited investors pursuant to section 4(2) followed by the creation of a trading and settlement mechanism for restricted stock is a further creative financing technique to bridge this gap that is likely to be adopted on a more widespread basis in the future.

Recent Rights Offerings in Chapter 11 Proceedings

| | Charter Communi-cations | Cooper-Standard | Dayton Superior | Foamex | GSI Group | Intermet |
|---|---|---|---|---|---|---|
| Amount | $1.62 billion | $355 million[(d)] | $100 million | $150 million | $85 million | $75 million |
| Security offered | New class A common stock of the reorganized company | New common stock of the reorganized company, 7% convertible preferred stock of the reorganized company | New common stock of the reorganized company | Existing common stock of the reorganized company | New common stock of the reorganized company | New common stock of the reorganized company |
| Rights class | Existing holders of senior notes of CCH I Capital Corp. that are accredited investors or qualified institutional buyers | Holders of senior subordinated notes | Holders of 13% senior subordinated notes due 2009 | Existing preferred and common equity | Holders of existing common stock | Unsecured debt and "key employees" |
| Percent offered to each class / within each class (as applicable) | On a pro rata basis | On a pro rata basis | On a pro rata basis | On a pro rata basis[(h)] | On a pro rata basis | On a pro rata basis |
| Offer price per share | $18.75 | $21.54[(e)] | We do not have access to this information | $2.25 | $1.80 | $10.00 |
| Discount to plan value[(a)] | 25%[(c)] | Not available | None[(g)] | 39%[(i)] (DtM) | Not available | 41%[(l)] |
| Use of proceeds | Repay 10.25% senior notes of CCH II Capital Corp. Repay certain swap agreement claims General corporate purposes | Pay claims under the pre-petition credit agreement and the senior notes and improve the recovery to the holders of senior subordinated notes | Pay required plan payments Pay transaction expenses General corporate purposes | Repay pre-petition debt | Partial payment of senior notes | Repay pre-petition debt General corporate purposes |

| | **Charter Communi-cations** | **Cooper-Standard** | **Dayton Superior** | **Foamex** | **GSI Group** | **Intermet** |
|---|---|---|---|---|---|---|
| Backstop fee | 3.00% | 3.50% | 3.00% | 5.00%[j] | 5.00% | 4.00% |
| Date of: (i) Equity Commitment Agreement (ii) Rights Offering expiration (iii) Emergence | (i) 2/10/09 (ii) 6/11/09 (iii) 11/30/09 | (i) 3/19/10 (ii) 5/5/10 (iii) 5/27/10 | (i) 7/23/09 (amended 8/25/09) (iii) 10/26/09 | (i) 10/13/06 (ii)1/31/07 (iii) 2/12/07 | (i) 5/14/10 (ii) 7/7/10 (iii) 7/23/10 | (ii) 9/20/05 (iii) 11/9/05 |
| Time between Commitment and Execution | 4 months | 1.5 months | 2 months | 3 months | 2 months | 4 months |
| Registered / Unregistered | Unregistered (Section 4(2) / Rule 144A) | Unregistered (Section 4(2) / Regulation D) | Unregistered (exempt under Section 1145 of the Bankruptcy Code) | Registered | Unregistered (exempt under Section 1145 of the Bankruptcy Code / Section 4(2)) | Unregistered (exempt under Section 1145 of the Bankruptcy Code) |
| Transferability | Transferable to accredited investors and qualified institutional buyers | No | No | No | No | No |
| Oversubscrip-tion[b] | No | Yes | No | No | No | Only for "key employees" and not for the unsecured holders of debt |
| MAE | We do not have access to this information | Yes | No | Yes | No | We do not have access to this information |

| | Charter Communi-cations | Cooper-Standard | Dayton Superior | Foamex | GSI Group | Intermet |
|---|---|---|---|---|---|---|
| Backstop purchasers | Apollo, Crestview, Franklin, MFC Global Investment, Oaktree, WAMCO | Group of investors listed in footnote (f) | OCM Principal Opportunities Fund IV Delaware, SOLA | DE Shaw Par IV Value Fund, Sunrise Partners, Sigma Capital, Goldman Sachs | Group of investors listed in footnote (k) | R2 Investments, LDC, Stanfield Capital Partners |

(a) If marked "DtM," percentage indicates discount to market value.

(b) Secondary subscription right to subscribe for additional securities out of the pool of any unsubscribed securities following the primary subscription.

(c) Discount to plan value per the disclosure statement.

(d) Includes (i) a $255 million offering of new common stock to the holders of senior subordinated notes and backstop purchasers and (ii) a $100 million offering of 7% convertible preferred stock to the backstop purchasers.

(e) Offer price for the shares of new common stock in the rights offering. Offer price of 7% convertible preferred stock $100 per share.

(f) Silver Point Capital, L.P., Barclays Bank PLC, Oak Hill Advisors, L.P., Lord, Abbett & Co. LLC, Capital Research and Management Company, TCW Asset Management Company, TD Asset Management Inc.

(g) Based on available information, it appears that the rights offering was offered with no discount to plan value. The plan of reorganization implies that shares to rights offering will be the pro rata amount of the rights offering versus the plan value. Specifically, rights offering shares are defined as the rights offering amount over the subscription price. The subscription price is the post-money equity value divided by new stock issued (all new shares issued). This implies that the rights offering shares are defined as a $100 million rights offering, divided by post-money equity value of $146.5 million, multiplied by new stock issued (*i.e.*, that the rights offering shares are receiving a pro rata allocation of investment without a discount).

(h) One right to purchase 2.506 shares of common stock at $2.25 per share for each share of common stock and one right to purchase 250.6 shares of common stock at $2.25 per share for each share of series B preferred stock convertible into 100 shares of common stock.

(i) Discount to market value is calculated by comparing Foamex's equity price (although in Chapter 11) to the price in the rights offering. Bloomberg reports Foamex's equity price on October 23, 2006, last trading day prior to announcement of the rights offering, at $14.68 per share. Adjusting for Bloomberg's historical reporting requires adjusting for splits and implies a price of $3.67 per share at the time of the transaction. Given the rights offering was done at $2.25 per share, this implies a 39% discount to market value. Discount to plan value cannot be calculated as it does not appear that the plan valuation has been disclosed.

(j) Foamex purchased a put option from the backstop purchasers for an aggregate option premium of up to $9.5 million. Under the put option, Foamex could require the backstop purchasers to purchase new preferred stock in reorganized Foamex for an aggregate purchase price of $150 million minus the gross amount of proceeds received by Foamex as a result of the rights offering ("rights offering shortfall"). Foamex also sold a call option to the backstop purchasers for $2 million for the purchase of new common stock on the effective date at a per share price equal to the exercise price for the rights offering for each right that is not exercised under the rights offering, up to a maximum aggregate purchase price equal to the rights offering shortfall.

(k) Liberty Harbor, LLC, Tennenbaum Capital Partners, LLC, Highbridge Capital Management, LLC, Hale Capital Partners, LP and Tinicum, Inc. and/or their affiliated or managed funds.

(l) The subscription price for rights is $10.00 per share versus plan value per share of $16.91 per share, implying a 41% discount.

Recent Rights Offerings in Chaper 11 Proceedings (continued)

| | JL French | LandSource | Lyondell | NWA | Owens Corning | Six Flags |
|---|---|---|---|---|---|---|
| Amount | $130 million | $140 million | $2.8 billion[i] | $750 million | $2.2 billion | $450 million |
| Security offered | New common stock of the reorganized company | Units in holdco that holds equity interest in the reorganized company | New common stock of New Topco N.V. | New common stock of the reorganized company | New common stock of the reorganized company | New common stock of the reorganized company |
| Rights class | Second lien noteholders | Holders of first lien claims, second lien claims and allowed unsecured claims | Eligible holders[j] | Unsecured debt holders in Class 1D | Unsecured creditors[o] | Holders of allowed unsecured claims that are accredited investors |
| Percent offered to each class / within each class (as applicable) | On a pro rata basis | On a pro rata basis within each class[e] | On a pro rata basis[k] | On a pro rata basis | On a pro rata basis[p] | On a pro rata basis |
| Offer price per share | $20.00 | Not available[f] | $10.61 | $27.00 | $30.00 | $29.42 |
| Discount to plan value[a] | 25%[c] | 17%[g] | Not available | 5%[m] | None[q] | Not available |
| Use of proceeds | Repay pre-petition debt | Fund the plan of reorganization Working capital | Fund emergence Provide necessary post-emergence liquidity | General corporate purposes | Repay pre-petition debt Fund asbestos trust obligations | Repay pre-petition debt |
| Backstop fee | 2.00% | 5.00% | 2.70% | 2.75% | 4.57% | 2.5% breakup fee |
| Date of: (i) Equity Commitment Agreement (ii) Rights Offering expiration (iii) Emergence | (i) 5/5/06 (ii) 6/12/06 (iii) 6/30/06 | (ii) 7/6/09 (iii) 7/21/09 | (i) 12/23/09 (iii) 4/30/10 | (i) 2/12/07 (iii) 5/31/07 | (i) 5/10/06 (iii) 10/31/06 | (i) 11/6/09 (amended 12/16/09) (iii) 5/3/10 |
| Time between Commitment and Execution | 1.5 months | We do not have access to this information | 4 months | 2.5 months | 5 months | 6 months |

| | JL French | LandSource | Lyondell | NWA | Owens Corning | Six Flags |
|---|---|---|---|---|---|---|
| Registered / Unregistered | Unregistered (exempt under Section 1145 of the Bankruptcy Code) | Unregistered (exempt under Section 1145 of the Bankruptcy Code / Section 4(2) / Regulation D) | Unregistered (exempt under Section 1145 of the Bankruptcy Code) | Unregistered (exempt under Section 1145 of the Bankruptcy Code) | Unregistered (exempt under Section 1145 of the Bankruptcy Code) | Unregistered (Section 4(2) / Regulation D) |
| Transferability | No | No | No | May not be transferred except with the express written consent of NWA | No | No |
| Oversubscription[(b)] | Yes | No | No | Yes[(n)] | No | No |
| MAE | Yes | No | No | Yes | Yes | No |
| Backstop purchasers | Group of investors listed in footnote (d) | Group of investors listed in footnote (h) | Group of investors listed in footnote (l) | JPMorgan | JPMorgan, DE Shaw, Plainfield Special Situations Fund | Group of investors listed in footnote (r) |

(a) If marked "DtM," percentage indicates discount to market value.

(b) Secondary subscription right to subscribe for additional securities out of the pool of any unsubscribed securities following the primary subscription.

(c) Plan enterprise value is defined as $405 million, but no equity value is defined. A $188.4 million equity value can be calculated by backing out $226.6 million of debt and assuming that $10 million of the current assets per projections represents cash (*e.g.*, we assume $216.6 million net debt). The terms of the rights offering imply a $141 million equity valuation (disclosure statement indicates that a $130 million rights offering will result in 92% equity ownership), which implies a 25% discount to plan value (which would be higher/lower depending on actual cash balances upon emergence).

(d) Bank of America, Credit Opportunities Funding, Deephaven Distressed Opportunities, Deephaven Event Trading, GE Corporate Financial Services, Goldman Sachs, Man Mac 3 Limited, Mellon HBV, QVT Fund LP, Strategic Value Master Fund, Turnberry Master Ltd, Wayzata Investment Partners.

(e) Of the rights offering units, 92.5% are allocated to first lien claims, 5.1% to second lien claims and 2.4% to allowed unsecured claims.

(f) Discount to plan value is based on implied equity valuation.

(g) Midpoint of plan value (equity) is $300 million. The rights offering appears to create equity at a $250 million valuation, or a 17% discount to plan value. $250 million is implied by the disclosure statement, where a $103.3 million subscription is for 41.3% of equity. An approximate valuation of $250 million is also implied by the plan of reorganization definition of "rights offering units." However, the backstop agreement suggests that a $140 million rights offering would be for 54.23% of fully-diluted equity, implying a $258 million equity valuation for the subscription, which would give a 14% discount to plan value (this latter amount is likely adjusted for dilution by management options, etc.).

(h) Anchorage Capital Master Offshore, Marathon Special Opportunity Master Fund, OZ Master Fund, Third Avenue Real Estate Value Fund Third Avenue Opportunity Management, three TPG funds.

(i) Includes (i) a $2.55 billion offering of new common stock to eligible holders and (ii) a direct $250 million offering of new common stock to the backstop purchasers.

(j) Holders of Class 4 (senior secured claims) and Class 5 (bridge loan claims) claims (and to the, extent applicable, Class 3 (DIP roll-up claims) claims if converted to Class 4).

(k) Calculated as the proportion that the amount of each eligible holder's allowed claim for purposes of participating in the rights offering bears to the total amount of all allowed claims for purposes of participating in the rights offering.

(l) LeverageSource (Delaware) LLC (an affiliate of Apollo Management VII), AI LBI Investment LLC (an affiliate of Access Industries), Ares Corporate Opportunities Fund III.

(m) The mid-point equity valuation (pre-rights) in the plan of reorganization is $7 billion for 244.2 million shares, implying an equity price of $28.49 per share. The rights are being sold at a $750 million valuation for 27.8 million shares, or $27 per share, implying a 5% discount to plan value.

(n) Up to 200% of an eligible holder's initial rights offering common share allotment.

(o) Holders of Class A5 claims, Class A6-A claims and Class A6-B claims.

(p) Exact pro rata shares are calculated pursuant to the terms of the subscription acceptance forms that have not been made publicly available.

(q) The rights offering was done with no discount to plan value. Plan equity value per share was disclosed as $30 per share versus the rights offering subscription price of $30 per share.

(r) Avenue Capital Management, Fidelity funds, Hayman Advisors, JP Morgan Investment Management, Notheast Investors TrustThird Point LLC, Whitebox Advisors.

Recent Rights Offerings (continued)

| | Solutia | USG | Visteon |
|---|---|---|---|
| Amount | $250 million | $1.8 billion | $1.25 billion[(f)] |
| Security offered | New common stock of the reorganized company | Existing common stock of the reorganized company | New common stock of the reorganized company |
| Rights class | General unsecured claims, noteholders claims, Monsanto | Holders of common stock | Holders of 12.25%, 7.00% and 8.25% senior notes |
| Percent offered to each class / within each class (as applicable) | On a pro rata basis | On a pro rata basis | On a pro rata basis |
| Offer price per share | $13.33 | $40.00 | $27.69 |
| Discount to plan value[(a)] | 33%[(c)] | 35%[(e)] (DtM) | Not available |
| Use of proceeds | Fund retiree liabilities<br>Fund environmental liabilities | Fund plan payments<br>General corporate purposes | Repay pre-petition debt |
| Backstop fee | 2.50% | 3.72% | 4.60% |
| Date of: (i) Equity Commitment Agreement (ii) Rights Offering expiration (iii) Emergence | (i) 10/15/07<br>(ii) 12/13/08<br>(iii) 2/28/08 | (i) 2/23/06<br>(ii) 7/27/06<br>(iii) 6/20/06 | (i) 5/6/10 (3rd amendment 8/9/10)<br>(ii) 7/30/10<br>(iii) 10/1/10 |
| Time between Commitment and Execution | 2 months | 5 months | 5 months |
| Registered / Unregistered | Registered | Registered | Unregistered (exempt under Section 1145 of the Bankruptcy Code) |
| Transferability | Yes | Yes, until rights offering expiry | No |
| Oversubscription[(b)] | Yes | No | Yes |
| MAE | Yes | No | Yes |
| Backstop purchasers | Group of investors listed in footnote (d) | Berkshire Hathaway, DE Shaw, Fidelity | Group of investors listed in footnote (g) |
| Debtor advisor | Rothschild | Chilmark | Rothschild |

(a) If marked "DtM," percentage indicates discount to market value.

(b) Secondary subscription right to subscribe for additional securities out of the pool of any unsubscribed securities following the primary subscription.

(c) Per the fifth amended plan of reorganization, the rights offering was offered to certain creditors at $13.33 per share, representing a 33% discount to plan value of $20 per share. Additionally, a second rights offering was made to certain equity holders at $17.23 per share, representing a discount of 14% to plan value.

(d) Highland Capital Management, Longacre Fund Management, Southpaw Asset Management, Merrill Lynch Credit Products, Murray Capital Management, UBS Global Distressed Debt and Special Situations.

(e) Discount to market value is calculated by comparing USG's equity price (although in Chapter 11) to the price in the rights offering. USG's prospectus dated June 30, 2006 states the price of $40 per share was not an assessment of value of USG and incorporated: (i) historical trading prices between January 1, 2004–January 27, 2006 (low of $12.30 per share – high of $83 per share), (ii) discounts to other rights offerings, and (iii) negotiations with the backstop parties. Bloomberg reports that the stock closed at $61.82 per share on January 27, 2006 (last date before backstop commitment entered into), versus a $40 per share rights offering price, implying a 35% discount. Average trailing 90-day price of $50.44 implies a 21% discount. Discount to plan value cannot be calculated as it does not appear that the plan valuation has been disclosed.

(f) Includes (a) a $950 million offering of new common stock to holders of senior notes and (ii) a direct $300 million offering of new common stock to the backstop purchasers.

(g) Alden Global Distressed Opportunities Fund, Allen Arbitrage, Allen Arbitrage Offshore, Armony Master Fund, Capital Ventures International, Caspian Capital Partners, Caspian Select Credit Master Fund, Citadel Securities, CQS Convertible and Quantitative Strategies Master Fund, CQS Directional Opportunities Master Fund, Crescent 1, CRS Fund, CSS, Cumber International, Cumberland Benchmarked Partners, Cumberland Partners, Cyrus Europe Master Fund, Cyrus Opportunities Master Fund II, Cyrus Select Opportunities Master Fund, Deutsche Bank Securities (Solely with respect to the Distressed Products Group), Elliot International, Goldman Sachs (Solely with respect to the High Yield Distressed Investing Group), Halbis Distressed Opportunities Master Fund, Kivu Investment Fund, LongView Partners B, Mariner LDC (Caspian), Mariner LDC (Riva Ridge), Merced Partners II, Merced Partners Limited Partnership, Monarch Master Funding, NewFinance Alden SPV, Oak Hill Advisors, Quintessence Fund, QVT Fund, Riva Ridge Master Fund, Seneca Capital, Silver Point Capital, SIPI Master, Solus Alternative Asset Management, Spectrum Investment Partners, Stark Criterion Master Fund, Stark Master Fund, The Liverpool Limited Partnership, The Seaport Group LLC Profit Sharing Plan, UBS Securities, Venor Capital Master Fund, Whitebox Combined Partners, Whitebox Hedged High Yield Partners.