

Manual of Publicly Available Telephone Interpretations

T. TRUST INDENTURE ACT OF 1939

1. 1939 Act

An obligor may qualify an indenture under which it issues securities subject to the Trust Indenture Act even though another obligor issues securities under the indenture that are exempt from the Trust Indenture Act.

2. 1939 Act

If the only change to outstanding convertible debt securities is an increase in the interest rate to discourage conversions, there is not deemed to be an offering of new securities requiring any Securities or Trust Indenture Act filing. Any additional changes to the debt securities may raise questions under the Securities or Trust Indenture Act.

3. 1939 Act

A supplemental indenture providing for the substitution of a new obligor need not be filed under the Securities or Trust Indenture Acts if the substitution takes place pursuant to a provision of the old indenture and is not subject to the approval or consent of security holders. If approval by debt holders must be solicited, the sale of a new security is deemed to occur and therefore a Securities Act registration statement should be filed and the indenture under which the new security is to be issued must be qualified.

4. 1939 Act

The Trust Indenture Act does not apply to traditional preferred stock, as such stock is not considered to be a debt security for purposes of that Act. The Act generally would apply, however, to preferred securities issued by a trust that represent an interest in debt issued by a single obligor.

5. 1939 Act

A foreign corporation doing business in the United States proposed to sell bonds abroad to persons other than citizens of the United States in reliance on Regulation S. Under these circumstances, the Division staff confirmed that sales may be made without qualification of an indenture under the Trust Indenture Act as stated by the Commission in Release No. 33-6863 (adopting Regulation S).

6. 1939 Act; Securities Act Rule 415

After a shelf registration statement for Trust Indenture Act debt securities has been declared effective and the related indenture has been qualified, a post-effective amendment may not be used for the purpose of qualifying a new indenture for another class of securities deemed to be previously registered. Note that this position supersedes a previous telephone interpretation.

7. 1939 Act, Model Indenture

An open-ended form of trust indenture may be used in shelf offerings. The indenture permits series of unsecured debt securities to be offered from time to time as notes, debentures or other types of debt. The different characteristics of each series, e.g., term, interest rate, form of note or debenture, can be furnished in a supplemental indenture filed as an exhibit to Form 8-K and disclosed in a sticker to the prospectus. The indenture is unique in that it permits each series of debt security holders to vote separately to direct the trustee to act or to waive defaults. In this respect it is more restrictive than Section 316(a) of the Trust Indenture Act, which provides only that holders of a majority of the securities outstanding under the indenture may direct the trustee to act. The conflict of interest provision of the open-ended indenture, required by Section 310(b) of the Trust Indenture Act, was drafted to include conflicts between the various series as well as those arising under other indentures with the same trustee. The trustee is permitted to resign as to a series if a conflict of interest arises between series, and a successor trustee will be appointed.

8. 1939 Act; Rule 415

The following approach has been taken with respect to shelf registration statements that contemplate a series of debt offerings under Rule 415 requiring a Trust Indenture Act indenture.

1. The indenture that is filed with, and qualified upon the effectiveness of, the registration statement may be "open-ended" (i.e., it may provide a generic, non-specific description of the securities, such as "unsecured debentures, notes or other evidences of indebtedness" which are to be issued in series").
2. The details of the securities to be offered in each series under the indenture (i.e., type of securities [notes, debentures, or other], interest rates and maturities) must be disclosed both in the prospectus and in a supplemental indenture at the time such series is to be offered. However, in order to avoid the delays attendant to post-effective amendments, in the case of the Form S-3 registration statement a Rule 424 sticker may be used to make the requisite prospectus disclosures, and the supplemental indenture may be filed as an exhibit to an 8-K (in the same manner as specified for underwriting agreements).

9. ** 1939 Act **

A proxy solicitation will be made respecting amendments to an indenture covering bonds registered pursuant to Section 12(b) of the Exchange Act. Inasmuch as the proposed changes affect the collateral securing the bonds and accelerate the due date, a new security may be created necessitating the qualification of a new indenture on Form T-3, pursuant to Section 306 of the Trust Indenture Act. Since the offering materials are required to be filed as an exhibit to the Form T-3, they may be filed in definitive form when acceleration of the Form T-3 is requested. The offering to exchange the new "changed" bonds for the old bonds may be exempt from registration under Securities Act pursuant to Section 3(a)(9).

10. Section 304(a)(2); Section 304(a)(7)

Certificates representing a beneficial ownership interest in a trust are offered to the public pursuant to a registration statement under the Securities Act. The assets of the trust include a pool of mortgage loans with multiple obligors administered pursuant to a "pooling and servicing agreement". Partial payment of the Certificates is guaranteed by a third party. The Certificates are treated as exempt from the Trust Indenture Act under Section 304(a)(2) thereof. The guarantee of the certificates is exempt under Section 304(a)(7).

11. Section 304(a)(7); Section 304(a)(2)

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12. Section 304(a)(8)

When a debt security is issued with equity securities in a unit, the determination as to whether the exemption from qualification provided by Section 304(a)(8) of the Trust Indenture Act is available is based solely on the aggregate principal amount of the debt security and not the dollar amount of the equity security. If the aggregate amount of the debt security is less than \$5 million, the offering is exempt. See Rule 4a-1 under the Trust Indenture Act.

13. Section 304(a)(9)

The limit on the amount of securities to be issued under an indenture may not exceed \$10 million under Section 304(a)(9) and Rule 4a-3, and the aggregate amount under all indentures for which this exemption is claimed may not exceed \$10 million during a 36-month period. Thus, only one \$10 million indenture could be used in a 3-year period if the exemption is claimed -- even if the securities had been redeemed and the indenture terminated. Another indenture relating to a different offering of securities could not claim the same exemption during the same 3-year period if the first indenture was for \$10 million.

14. Section 304(a)(9); Rule 4a-3

Rule 4a-3 under the Trust Indenture Act provides an exemption from the qualification provisions of the Act for debt securities issued under an indenture which limits the aggregate principal amount outstanding at any one time to \$10 million or less during a 36-month period. The 36-month period is a "rolling period," commencing with the initial offering under the indenture.

15. Section 305

Supplemental indentures modifying terms of securities outstanding under previously qualified indentures need not be requalified unless the changes are so significant that they are deemed to involve the offering of a new security requiring Securities Act registration. If the offering is ongoing, they must be filed as an exhibit (by post-effective amendment to the Securities Act registration statement or by 8-K if the offering is an S-3). If the offering has terminated, the amended indenture should be filed as Exhibit 4 to the applicable Exchange Act report.

16. Section 306

Section 306 of Trust Indenture Act does not apply to exchange offers exempt from Securities Act registration statements pursuant to Section 3(a)(9) where the offering does not exceed \$5 million and Section 304(a)(8) of the Trust Indenture Act otherwise is available.

17. Section 310(a)

Section 310(a) of the Trust Indenture Act requires the use of an institutional trustee which is organized and doing business under the laws of the U.S. or any state (absent a rule or order to allow a foreign trustee). A U.S. subsidiary of a foreign company may serve as trustee, if it is organized and doing business under the laws of the U.S. or any state (absent a rule or order to allow a foreign trustee).

18. Section 310(b)

A trustee possessing a security interest in the indenture securities arising from a loan by the trustee to the owner of the securities would not be disqualified as trustee under Section 310(b) of the Trust Indenture Act unless the indenture securities were in default, there was a default on the loan and the trustee acquired the securities through foreclosure in amounts exceeding those specified Sections 310(b)(6), (7) and (8) of the Act.

19. Section 310(b)

Applications filed under Section 310(b) of the Trust Indenture Act for a Commission order that a proposed trusteeship would not involve a conflict of interest should be filed in the manner specified in Rule 7a-3 under the Trust Indenture Act for Form T-3 filings, since there are no procedures set forth in the rules specifically applicable to Section 310(b) applications.

20. Section 310(b)

The 90-day period during which the trustee is required to resign or to resolve a conflict of interest is not tolled by the filing of an application under Section 310(b) of the Trust Indenture Act.

21. Section 310(b); Form T-1

A subsidiary may use the same trustee used by its parent for an offering of debt securities without giving rise to a conflict of interest, since the parent and the subsidiary are deemed to be different issuers. Moreover, Item 4 of Form T-1 filed by the subsidiary's trustee need not disclose the parent's indenture.

22. Section 310(b)(6); Section 310(b)(9)

A trustee for the profit sharing plan of an obligor is not disqualified from serving as trustee under a proposed indenture in the event of default simply because it holds more than 5% of the obligor's voting stock as trustee, assuming it does not have the power to vote the shares. Ownership in a representative capacity, i.e., as executor, trustee or in a similar capacity, is given separate and more liberal treatment in paragraph (9) than paragraph (6) of Section 310(b), on the theory that such ownership does not involve as direct a conflict as beneficial ownership.

23. Section 310(b)(7)

An obligor upon indenture securities issued debentures convertible, at the option of the holder upon the occurrence of certain events, into the common stock of a subsidiary of the obligor. Pursuant to the indenture, sufficient shares of the subsidiary's stock to satisfy any conversion obligation were pledged to the indenture trustee. While the obligor and subsidiary had a common board of directors, the trustee would still not be disqualified under Section 310(b)(7), ab initio or

upon a default upon the indenture securities. Even if the subsidiary's shares constituted "collateral security" (which the Division staff did not address), the trustee is deemed not to be the "holder" of a security held as collateral security under the indenture to be qualified, irrespective of any default thereunder. This provision is contained in the definitional subsection of Section 310(b).

24. Section 310(b)(9); Section 310(b)(6)

A trustee for the profit sharing plan of an obligor is not disqualified from serving as trustee under a proposed indenture in the event of default simply because it holds more than 5% of the obligor's voting stock as trustee, assuming it does not have the power to vote the shares. Ownership in a representative capacity, i.e., as executor, trustee or in a similar capacity, is given separate and more liberal treatment in paragraph (9) than paragraph (6) of Section 310(b), on the theory that such ownership does not involve as direct a conflict as beneficial ownership.

25. Section 311(a)

Section 311(a) of the Trust Indenture Act requires a trustee who is also a creditor of the issuer to set aside for the benefit of the security holders any payments or property received in its capacity as creditor within 3-months of the issuer's bankruptcy. This provision is intended to reach preferential transfers occurring after the start of the 3-month period and continue until the funds have been allocated by a court.

26. Section 314(a)

A parent guaranteeing indebtedness of a subsidiary is deemed an "obligor" under the indenture and therefore must file with the trustee the reports required of obligors by Section 314(a) of the Trust Indenture Act.

27. Section 314(a)(1)-(a)(3)

Sections 314(a)(1)-(a)(3) of the Trust Indenture Act do not require an Exchange Act non-reporting company to file information with the trustee, Commission or holders because the Rules described in such Sections have never been adopted.

28. Section 314(d)

The requirement of Section 314(d) of the Trust Indenture Act that indentures provide for the obtaining of "fair value certificates" for additions or substitutions of collateral securing debt, does not apply where the collateral will consist entirely of U.S. Government obligations.

29. Section 315(d)(3); Section 316(a)

The Trust Indenture Act provides a required procedure for calculating votes for proposals permitted by Section 315(d)(3) and Section 316(a). Securities owned by the obligor or an affiliate must be disregarded for purposes of calculating the vote required to approve such proposals. If the vote concerns actions outside of Section 315(d)(3) or Section 316(a), such as a vote to permit the substitution of collateral, the mandatory calculation procedure would not apply. The reason is that these actions by the obligor are not actions prescribed by Section 315(d)(3) or Section 316(a).

30. Section 316(a); Section 315(d)(3)

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31. Rule 4a-3; Section 304(a)(9)

Rule 4a-3 under the Trust Indenture Act provides an exemption from the qualification provisions of the Act for debt securities issued under an indenture which limits the aggregate principal amount outstanding at any one time to \$10 million or less during a 36-month period. The 36-month period is a "rolling period," commencing with the initial offering under the indenture.

32. Form T-1

A successor trustee need not file Form T-1 unless an offering is registered under the Securities Act in connection with the succession.

33. Form T-1

Item 4 of Form T-1 does not require disclosure of another indenture which has been terminated according to its own provisions and a deposit has been made with a trustee to pay off non-tendering bond holders who can not be located.

34. Form T-1

A Form T-1 may not be incorporated by reference from a previous filing because the T-1 requires recent information.

35. Form T-1

Where a single trustee is serving as trustee under two indentures, and both indentures are being qualified with the same registration statement, only one form T-1 need be filed. But reference should be made in appropriate places, (e.g., Item 4) to the fact that there are two indentures.

36. Form T-1

Form T-1 requires a copy of the latest report of financial condition of the trustee published pursuant to law or requirements of the supervising authority to be filed as an exhibit. Where publication of such report is not required by law or the supervising authority, the trustee is not disqualified from serving, but the unpublished report filed with the supervising authority should be filed as an exhibit to the Form T-1.

37. Form T-1; Section 310(b)

A subsidiary may use the same trustee used by its parent for an offering of debt securities without giving rise to a conflict of interest, since the parent and the subsidiary are deemed to be different issuers. Moreover, Item 4 of Form T-1 filed by the subsidiary's trustee need not disclose the parent's indenture.