

Memorandum

New SEC Guidance for Accelerated Issuer Tender Offers and Exchange Offers for Debt Securities

January 26, 2015

Introduction

On January 23, 2015, the staff of the Division of Corporation Finance (the “Staff”) of the U.S. Securities and Exchange Commission (“SEC”) issued a letter granting no-action relief from Rules 14e-1(a) and (b) under the Securities and Exchange Act of 1934, as amended (the “Exchange Act”), for “Five Business Day Tender Offers.”¹ Subject to compliance with a variety of conditions discussed below, the exemptive relief permits an issuer (or its parent company or a wholly owned subsidiary) to conduct tender offers for non-convertible debt securities² over a minimum period of five business days, regardless of the credit rating applicable to the subject securities. The exemptive relief also permits Five Business Day Tender Offers to be made for consideration that includes “Qualified Debt Securities” (as discussed below), subject to the satisfaction of the conditions applicable thereto.

The SEC no-action position is effective immediately and supersedes the Staff’s prior no-action relief applicable to accelerated tender offers for investment grade debt securities.³ Therefore, accelerated tender offers commencing after January 23, 2015 must be conducted in accordance with the new protocols.

Background

Since its amendment in 1986, Rule 14e-1 of the Exchange Act has required, among other things, that any tender offer be held open for not less than 20 business days from the date that such offer is first published or sent to holders and, in the event of an increase or decrease in the percentage of securities being sought or the

¹ The no-action letter is available at: <http://www.sec.gov/divisions/corpfin/cf-noaction/2015/abbreviated-offers-debt-securities012315-sec14.pdf>. The no-action letter was issued in response to a request for exemptive relief jointly submitted by a number of major law firms, including Simpson Thacher & Bartlett LLP.

² The exemptive relief discussed in this memo is applicable only to debt securities that are not convertible or exchangeable for equity securities and, accordingly, references herein to “debt securities” exclude securities convertible or exchangeable for equity securities.

³ See *e.g.*, SEC No-Action Letter, *Goldman, Sachs & Co.* (March 26, 1986); SEC No-Action Letter, *Salomon Brothers Inc.* (March 12, 1986); and SEC No-Action Letter, *Salomon Brothers Inc.* (October 1, 1990).

consideration offered, that such offer remain open for at least ten business days from when notice of such change is first published or sent to holders.⁴

Over the years, the Staff has issued several no-action letters⁵ granting relief from the 20-business day requirement for issuer tender offers in which the subject debt securities have investment grade ratings. Under those letters, it was permissible to conduct a cash tender offer for debt securities and hold the offer open for a period of seven to ten calendar days provided that the offer was made for any and all securities of the series, it was open to all record and beneficial holders, it was disseminated on an expedited basis and it was not made in response to other offers.

The January 23, 2015 no-action letter (the “new no-action letter”) permits qualifying offers to be made for debt securities regardless of the credit ratings assigned to them and permits the offered consideration to include “Qualified Debt Securities,” but the exemptive relief is subject to number of limitations and conditions, including a host of new administrative requirements.⁶

“Five Business Day Tender Offers”

The new no-action letter provides exemptive relief permitting offerors to conduct tender offers for debt securities that are open for a minimum of five business days from and including the date the tender offer is first published or sent to holders, subject to a variety of requirements.

To qualify for the exemptive relief applicable to “Five Business Day Tender Offers,” an offer must:

- be made for non-convertible debt securities (regardless of the credit ratings assigned to such securities) of a class or series;⁷
- be made by the issuer, a direct or indirect wholly-owned subsidiary or a parent company that directly or indirectly owns 100% of the capital stock (other than directors’ qualifying shares) of such issuer;
- be made for any and all securities of the targeted class or series;
- have consideration consisting solely of cash and/or “Qualified Debt Securities” (discussed below);
- be open to all record and beneficial holders of the subject debt securities, subject to the special requirements applicable to exchange offers where “Qualified Debt Securities” are included in the offered consideration, which requirements are discussed below;
- not be made in connection with a solicitation of consents to amend the indenture, form of security or note or other agreement governing the subject debt securities (collectively, the “Indenture”);
- not be made if a default or event of default exists under the Indenture or any other indenture or material credit agreement to which the issuer is a party;

⁴ Acceptance for payment of an additional amount not exceeding 2% of the class of securities subject to the offer is not deemed an increase subject to the ten-business day notice requirement.

⁵ See *supra* note 3.

⁶ The new no-action letter does not mandate any changes in practices associated with tender offers conducted over offer periods of 20 business days or more. However, the new no-action letter may foreshadow other harmonizing and clarifying guidance by the SEC Staff that would impact tender offers for debt securities that are not conducted on an accelerated basis.

⁷ Separate offers may be made for more than one class or series of debt securities as part of the same offer to purchase document.

- not be made if the issuer is then the subject of bankruptcy or insolvency proceedings or has commenced a solicitation of consents for a “pre-packaged” bankruptcy proceeding or if its board of directors has authorized discussions with creditors for a consensual restructuring of its outstanding indebtedness;
- not be financed with the proceeds of any Senior Indebtedness;⁸
- permit tenders to be made through a guaranteed delivery procedure by means of a certification by or on behalf of a holder that it is tendering securities beneficially owned by it and that the delivery of such securities will be made no later than the close of business on the second business day after the expiration of the offer;
- be announced by press release through “Immediate Widespread Dissemination” (discussed below) at or prior to 10:00 a.m., Eastern time, on the first business day of the five-business day offer period, and provide for Immediate Widespread Dissemination of changes to the offer, as discussed below;
- provide for withdrawal rights exercisable (i) until the earlier of (x) the expiration date of the offer and (y) in the event that the offer is extended, the tenth business day after commencement of the offer, and (ii) at any time after the 60th business day after commencement of the offer if for any reason the offer has not been consummated within 60 business days after commencement;
- provide that the offeror will not pay the offer consideration until promptly after expiration of the offer in conformity with the requirements of Rule 14e-1(c) of the Exchange Act; and
- not be (i) made in anticipation of or in response to, or concurrently with, a change of control or other type of extraordinary transaction involving the issuer,⁹ (ii) made in anticipation of or in response to other tender offers for the issuer’s securities, (iii) made concurrently with a tender offer for any other series of the issuer’s securities made by the issuer (or any subsidiary or parent of the issuer) if the effect of such offer, if consummated (by way of amendment, exchange or otherwise), would be to add obligors, guarantors or collateral (or increase the priority of liens securing such other series) or shorten the weighted average life to maturity of such other series; or (iv) commenced within ten business days after the first public announcement or the consummation of the purchase, sale or transfer by the issuer or any of its subsidiaries of a material business or amount of assets that would require the furnishing of pro forma financial information with respect to such transaction pursuant to Article 11 of Regulation S-X (whether or not the issuer is a registrant under the Exchange Act).

Immediate Widespread Dissemination and Modifications to an Offer

As noted above, the new no-action relief is conditioned upon the Immediate Widespread Dissemination of offer materials. As prescribed by the new no-action letter, Immediate Widespread Dissemination requires that Five Business Day Tender Offers be announced via press release through a widely disseminated news or wire service disclosing the basic terms of the offer (including offeror’s identity, class of securities sought to

⁸ “Senior Indebtedness” means indebtedness incurred to finance all or portion of the consideration offered in a Five Business Day Tender Offer (excluding indebtedness or borrowings under a credit or debt facility existing prior to the commencement of the offer), if such indebtedness (i) has obligors, guarantors or collateral (or a higher priority with respect to collateral) that the subject debt securities do not have; (ii) has a weighted average life to maturity less than that of the subject debt securities; or (iii) is otherwise senior in right of payment to the subject debt securities.

⁹ Examples of extraordinary transactions involving the issuer include a merger or similar business combination, reorganization or liquidation or a sale of all or substantially all of its consolidated assets.

be purchased in the offer, type and amount of consideration offered and expiration date of the offer), and that such announcement contain an active hyperlink to, or specify an internet address at which a record or beneficial holder could then obtain, copies of the offer to purchase and letter of transmittal (if any) and other instructions or documents (including a form of guaranteed delivery instructions) relating to the offer. The announcement must be made at or prior to 10:00 a.m., Eastern time, in order for such day to count as the first day in the five business day offer period.

In addition to the foregoing “Immediate Widespread Dissemination” requirements, the new no-action letter requires that if the issuer or offeror is a reporting company under the Exchange Act (including a “voluntary filer”), the press release announcing the offer must also be furnished in a Current Report on Form 8-K filed with the SEC prior to 12:00 p.m., Eastern time, on the commencement date for such day to count as the first business day of the offer. The offeror must also (i) use commercially reasonable efforts to send the press release by email or other form of electronic communication to investors subscribing to corporate action e-mail or similar lists, (ii) use other customary methods in order to expedite the dissemination of information concerning the tender offer to beneficial holders of the subject securities, and (iii) issue a press release promptly after consummation of the offer with the results thereof.

Any change in the consideration being offered in the offer must be announced by Immediate Widespread Dissemination at least five business days prior to the expiration and, if the issuer or offeror is a reporting company under the Exchange Act (including a “voluntary filer”), it must describe any such change in a Current Report on Form 8-K filed with the SEC prior to 12:00 p.m., Eastern time, on the first day of the five-business day period. Any other material change to the offer must be announced by Immediate Widespread Dissemination at least three business days prior to the expiration. In each case, the announcement must be made at or prior to 10:00 a.m., Eastern Time, in order to count the day as the first day of the applicable period.

Exchange Offer Alternative

The new no-action letter permits Five Business Day Tender Offers that include offers of “Qualified Debt Securities” to “Eligible Exchange Offer Participants” in a transaction that would be exempt from the registration requirements of the Securities Act of 1933, as amended (the “Securities Act”).¹⁰ This alternative will enable issuers to use Five Business Day Tender Offers to refinance debt directly with new debt, which will thereby allow investors to match tenders with new investments and eliminate the timing lag and “negative carry” that may arise in connection with a traditional 20 business day tender offer and a related new issuance.

“Qualified Debt Securities” are non-convertible debt securities that are identical in all material respects (including, but not limited to, the issuer(s), guarantor(s), collateral, lien priority, covenants and other terms) to the debt securities that are the subject of the offer except for the maturity date, interest payment and record dates, redemption provisions and interest rate; provided that Qualified Debt Securities must have (i) all interest payable only in cash and (ii) a weighted average life to maturity that is longer than the debt securities that are the subject of the offer.

¹⁰ The consideration offered in such an exchange offer may include cash as well as Qualified Debt Securities.

“Eligible Exchange Offer Participants” are “qualified institutional buyers,” as defined in Rule 144A under the Securities Act, and/or non-“U.S. persons,” within the meaning of Regulation S under the Securities Act. The new no-action letter requires that if there are holders of the targeted debt securities who are not Eligible Exchange Offer Participants (or an affiliate thereof), the exchange offer must be made in conjunction with a concurrent cash offer (which can be part of the same offer to purchase document) to such non-Eligible Exchange Offer Participants, offering to acquire any such holder’s debt securities for a fixed cash amount (from either the offeror or a dealer manager) determined by the offeror, in its reasonable judgment, to approximate the value of the Qualified Debt Securities being offered to the Eligible Exchange Offer Participants and such an amount is set forth at the commencement of the offer.¹¹

The new no-action letter mandates that exchange offers be conducted as private offerings while at the same time requiring that offer documents be available through hyperlinks or postings on the internet, which could constitute a “general solicitation” for the purpose of the Securities Act. To the extent that the distribution of documentation related to an exchange offer constituted a “general solicitation,” then the offer would need to be made either in compliance with the safe harbor for private placements conducted with general solicitations set forth in Rule 506(c) of the Securities Act or in compliance with Rule 144A under the Securities Act, which would require a party to intermediate the issuance of the new Qualified Debt Securities (e.g., exchange offer might be conducted by a subsidiary of the issuer and the debt securities first issued to a subsidiary of the issuer which then exchanges them with investors).

Consideration in the Offer

As noted above, the consideration offered in a Five Business Day Tender Offer may include cash and/or Qualified Debt Securities. Such consideration may be a fixed amount of cash (and/or Qualified Debt Securities) or an amount of cash (and/or Qualified Debt Securities) based on a fixed spread to a benchmark and, in the case of Qualified Debt Securities, the coupon may be based on a spread to a benchmark. Permissible benchmarks include U.S. Treasury rates, LIBOR, swap rates and, in the case of securities denominated in currencies other than U.S. dollars, sovereign securities or swap rates denominated in the same currency as the subject securities, in each case, that are readily available on Bloomberg or a similar trading screen or quotation service. The spread used for determining the amount of consideration offered must be announced at the commencement of the offer.

The terms of the Qualified Debt Securities need not be fixed at the commencement of the offer. The interest rate or the spread used for determining the interest rate for Qualified Debt Securities may be announced at the commencement of the offer as a range of not more than 50 basis points, with the final interest rate or spread to be announced by 9:00 a.m., Eastern time, on the business day prior to the expiration of the offer. The exact amount of consideration and interest rate (in the case of amounts or interest rate based on a fixed spread to a benchmark) on any Qualified Debt Securities must be fixed no later than 2:00 p.m., Eastern time,

¹¹ The offeror may include a condition in the offers to the effect that the cash payable in the cash offer will not exceed a specified amount. Such a condition would enable the offeror to terminate the transaction in circumstances where the level of participation would exceed the specified threshold, which may help an offeror avoid liquidity issues that might otherwise arise from the offers.

on the last business day of the offer and a minimum acceptance amount must be announced at the commencement of any offer where the offered consideration includes Qualified Debt Securities.

Observations

The elimination of the investment grade condition for accelerated offers and the addition of an exchange offer alternative should provide issuers with significant new flexibility. However, the prohibition on Five Business Day Tender Offers being conducted with concurrent consent solicitations may limit the practical benefit of the exemptive relief for high yield issuers as tender offers for high yield securities are frequently coupled with consent solicitations.

For accelerated cash issuer tender offers for investment grade rated securities, the new protocols will introduce a variety of new structural limitations and administrative requirements. The requirement that Five Business Day Tender Offers include provisions permitting tenders to be made by guaranteed delivery will prevent the final settlement of offers in which such procedures are used by investors until the eighth business day after commencement, as compared with the eighth calendar day as permitted under the prior regime.

We believe that the thesis behind many of the criteria applicable to Five Business Day Tender Offers is to confine such offers to those that present holders with a purely financial decision that can be made on an expedited basis in much the same way as trading and new issuance investment decisions are commonly made. However, certain of the conditions introduced in the context of Five Business Day Tender Offers may ultimately have wider application as the SEC Staff continues to update its guidance applicable to tender offers for debt securities.

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Annex

The table below summarizes certain of the old and new protocols applicable to accelerated debt tender offers

Prior No-Action Letters	New No-Action Letter
Applicable only to non-convertible debt securities	Still applicable only to non-convertible debt securities
Relief limited to investment grade rated debt securities	Eliminates the regulatory distinction between investment grade and non-investment grade debt securities
Minimum duration of seven to ten calendar days	Minimum duration reduced to five business days
The offered consideration is in cash	The offered consideration is cash and/or consideration consisting of “Qualified Debt Securities” ¹²
Offer made for any and all securities of the series	Still requires offer made for any and all securities of the series
Offer open to all record and beneficial owners	Offer still required to be open to all record and beneficial owners , provided that (i) exchange offers of Qualified Debt Securities are restricted to Qualified Institutional Buyers and non-U.S. persons in a transaction exempt from registration, and (ii) non-eligible holders receive an option to receive cash in a fixed amount set forth by the offeror at the commencement of the offer
Requires dissemination on an expedited basis	Requires Immediate Widespread Dissemination ¹³
The offer may not be made in response to other tender offers	The offer may not be (i) made in anticipation of or in response to an extraordinary transaction involving the issuer, (ii) made in anticipation of or in response to other tender offers for the issuer’s securities, (iii) made concurrently with an issuer tender offer for other series of its securities if the effect would add obligors, guarantors or collateral or shorten the weighted average life to maturity of such other series , or (iv) commenced within ten business days after the first announcement or consummation of certain transactions ¹⁴
No additional requirements	Includes significant new procedural requirements and requires inclusion of guaranteed delivery procedures ¹⁵

¹² See *supra* “Exchange Offer Alternative.”

¹³ See *supra* “Immediate Widespread Dissemination and Modifications to an Offer.”

¹⁴ See *supra* “Five Business Day Tender Offers.”

¹⁵ See *supra* “Five Business Day Tender Offers” and “Immediate Widespread Dissemination and Modifications to an Offer.”



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