

Client Alert

February 2015

SEC Permits Five Business Day “Any and All” Debt Tender and Exchange Offers

Background

On January 23, 2015, the Staff of the Division of Corporation Finance of the Securities and Exchange Commission (the “SEC”) issued a no-action letter providing that it would not recommend enforcement action with respect to a five business day timeline for tender or exchange offers for non-convertible debt securities meeting specified criteria.¹ This no-action letter supersedes the prior no-action letters of the SEC for abbreviated offering periods in non-convertible debt tender offers.² As a result, debt tender offers will no longer be eligible for the previous seven to 10 calendar day tender offer relief, and must either comply with the requirements for the five business day tender offer under the January 23 no-action letter or else be conducted as a 20 business day tender offer.

Criteria

There are very specific criteria that must be satisfied for a tender or exchange offer to be eligible to be conducted as a five business day offer. A summary of certain of the criteria³ include that the offer:

(1) be made by the issuer, its direct or indirect wholly owned subsidiary or a parent company that owns 100% of the issuer;

¹ SEC No-Action Letter, *Cahill Gordon & Reindel LLP* (January 23, 2015).

² See footnote 1. See also *Goldman, Sachs & Co.* (March 26, 1986); *Salomon Brothers Inc.* (March 12, 1986); *Salomon Brothers Inc.* (October 1, 1990).

³ Note also that the five-day period is not available for offers if:

(1) the targeted securities are in default or the issuer is in default under any other indenture or material credit agreement; or

(2) the issuer is in bankruptcy or insolvency proceedings, has commenced soliciting consents for a “pre-packaged” bankruptcy proceeding or if its board of directors has authorized restructuring discussions; or

(3) (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, such as a merger, reorganization or liquidation or sale of all or substantially all of its consolidated assets, (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 a subsidiary or parent company) if the effect of such offer would be to add obligors, guarantors or collateral or shorten the weighted average life to maturity of such other series or (iv) commenced within 10 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 *pro forma* financials pursuant to Article 11 of Regulation S-X.

(2) must be for “any and all” debt securities of a class or series;

(3) not be made in connection with a consent solicitation;

(4) be announced via a widely disseminated press release disclosing the basic terms of the offer and containing a hyperlink or website address allowing holders to obtain copies of the offering documents (“Immediate Widespread Dissemination”) prior to 10:00 a.m., Eastern time, on the first business day of the offer and, if the issuer is a reporting company, including “voluntary filers,” under the 1934 Act, the press release announcing the offer must be furnished in a Current Report on Form 8-K;

(5) provide for communication by Immediate Widespread Dissemination at least five business days prior to the expiration of the offer of any change in the consideration being offered in the offer and at least three business days prior to expiration of any other material change to the offer, in each case at or prior to 10:00 a.m., Eastern time, on the first day of such five or three business day period, as applicable; and, if the issuer or offeror is a reporting company under the 1934 Act, including a “voluntary filer,” describe any change in the consideration being offered in a Current Report on Form 8-K filed with the SEC prior to 12:00 noon, Eastern time, on the first day of the aforementioned five business day period;

(6) not be financed with the proceeds of any indebtedness incurred to finance all or a portion of the consideration in the offer if such indebtedness (i) has obligors, guarantors or collateral that the targeted 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 targeted securities;

(7) provide for withdrawal rights that are exercisable (i) at least until the earlier of the expiration of the offer and if the offer is extended, the 10th business day after commencement and (ii) at any time after the 60th day after commencement if the offer has not yet been consummated;

(8) must be for cash and/or “Qualified Debt Securities” (defined to be identical securities to those sought in the tender, other than maturity, interest rate, interest payment/record dates and redemption provisions, and that have interest payable only in cash and a longer weighted average life to maturity); and

(9) must be open to all record and beneficial holders of such debt securities; *provided*, to the extent made with Qualified Debt Securities, must be restricted to Qualified Institutional Buyers (as defined in Rule 144A of the 1933 Act) and/or non-US persons (within the meaning of Regulation S under the 1933 Act) and must include an option for non-QIBs to receive cash for their securities approximating the value of the Qualified Debt Securities being offered.

Implications

- **Five business days versus seven to 10 calendar days**

The five *business day* requirement of the new no-action letter is not, in effect, much shorter than the seven to 10 *calendar day* period under the prior no-action relief. As noted in the January 23 no-action letter, five business days in many cases will require a seven calendar day period.⁴ While much of the focus of the January 23 no-action letter has been the shortened period, it is arguably not the most significant change of the new no-action letter.

⁴ For purposes of the January 23 no-action letter, a business day for a five business day tender offer would be any day, other than Saturday, Sunday or a federal holiday, and a five business day tender offer would be treated as having commenced on the first business day on which the tender offer is made if the “Immediate Widespread Dissemination” occurs at or prior to 10:00 a.m., Eastern time, on such business day. The last day of the tender offer would be treated as a business day if expiration occurs on or after 5:00 p.m., Eastern time, on such business day.

- **No investment grade limitation**

The new no-action position applies regardless of the rating of the target debt securities. This is a departure from the no-action letters by the Staff of the SEC providing for seven to 10 calendar day tender offers only with respect to investment grade debt.⁵ According to the January 23 no-action letter, the decision to eliminate this distinction was based in part on the fact that in many cases, the holders of non-investment grade securities are more likely to be sophisticated institutional investors.

- **No waterfalls or Dutch auction tenders/exchanges**

To qualify, the offer must be made for any and all of the targeted securities. Because “waterfall” tender offers are by their nature contingent offers – based on the priority level of targeted series and the amount of consideration remaining in the waterfall – waterfall tenders would not qualify for the five day tender offer period. Similarly, because the Dutch auction tender or exchange always is an offer for less than all of the outstanding series, tenders and exchanges structured as a Dutch auction would not qualify.

- **Counsel’s preliminary review**

The criteria to qualify for the five business day timeline are lengthy. Further, even if the tender or exchange offer at hand does qualify under the January 23 no-action letter, the requirements for the offer are extensive. Issuers and dealer managers would be well advised to involve counsel early on to determine whether this new guidance applies to a potential transaction and to advise on the applicable requirements.

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⁵ See Footnote 2.