

New Procedures for Shortened Debt Tender Offers; Relief Extended to High-Yield Debt

January 23, 2015

A new no-action letter from the SEC staff substantially revises the framework applicable to shortened debt tender offers and expands its utility. The new framework may also portend changes in practice for other types of tender offers.

On January 23, 2015, the staff of the SEC issued a no-action letter^{*} addressing the circumstances under which an issuer (or parent or subsidiary) may conduct a tender offer for any and all of a class of its non-convertible debt securities in 5 business days, instead of the 20 business days prescribed by Rule 14e-1 under the Exchange Act. Significantly, the no-action letter extends this flexibility to high-yield debt securities – previously, the ability to conduct a tender offer in less than 20 business days was reserved to tender offers involving investment-grade debt only (i.e., debt rated BBB- or higher). The relief will also permit certain exchange offers that could facilitate debt refinancings. However, the new no-action letter, which supersedes several previously-issued no-action letters, will also restrict some current market practices in shortened tender offers for investment-grade debt.

The new no-action letter is the product of discussions among a group of liability management executives at several investment banks active in the field, the Credit Roundtable (a group of large fixed-income investors), law firms (including Davis Polk) who regularly advise on these matters, and the staff of the SEC.

The new letter, *Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities* (avail. Jan. 23, 2015), is effective for tender offers commencing after January 23, 2015.

5 Business Day Tender Offers

Eligible Transactions

To be eligible to conduct a 5 business day tender offer as opposed to a 20 business day tender offer, a transaction must meet the following criteria –

- **Non-convertible debt securities, regardless of rating:** The offer must be made for a class of non-convertible debt securities, but there is no ratings criteria and therefore high-yield debt securities are now eligible for shortened tender offers.
- **No third-party tenders:** The offer must be made by the issuer, or a direct or indirect wholly owned subsidiary of the issuer or a parent company that directly or indirectly owns 100% of the capital stock (other than directors' qualifying shares) of the issuer.
- **Any and all:** The offer must be for any and all securities of the subject class.

^{*} An SEC no-action letter expresses the informal position of the SEC staff on enforcement action only – i.e., the staff's position on whether it would refer the matter described in the letter over to the SEC's Division of Enforcement for action. While no-action letters are not SEC rules or formal SEC rule interpretations (both of which require action by the SEC Commissioners), the practice of issuing no-action letters is a welcome and critical tool for keeping the federal securities laws flexible and adaptable to new developments and unforeseen circumstances, and market participants have relied upon them for decades.

- **Limitation on offering consideration:** Consideration for the offer may consist only of (i) cash, (ii) “qualified debt securities” or (iii) a combination of cash and qualified debt securities.
 - Qualified debt securities are non-convertible debt securities that (i) 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 tender offer, except for the maturity date, interest payment and record dates, redemption provisions and interest rate, (ii) have interest payable only in cash and (iii) have a weighted average life to maturity that is longer than the debt securities that are the subject of the offer.
- **No financing with debt that is senior to the debt being tendered for:** “Senior” debt may not be used to finance the tender offer. Debt that is incurred to finance the offer (excluding debt under a facility existing prior to the commencement of the offer) would be considered senior if it (i) has obligors, guarantors or collateral (or a higher priority with respect to collateral) that the subject class does not have, (ii) has a weighted average life to maturity less than that of the subject class or (iii) is otherwise senior in right of payment to the subject class.
- **No consent solicitation:** The offer may not be made in connection with an “exit consent” or other solicitation of consents to amend the indenture, form of security or note or other agreement governing the subject class.
- **No disqualifying facts and circumstances:** There are several facts and circumstances where the SEC staff believes a 5 business day tender offer is not appropriate, and a 20 business day tender offer would thus be required. These include –
 - **Debt defaults:** The offer may not be made if a default or event of default exists under any indenture or material credit agreement to which the issuer is a party.
 - **Insolvency proceedings:** The offer may not be made if the issuer is the subject of bankruptcy or insolvency proceedings or has commenced a solicitation of consents for a “pre-packaged” bankruptcy, or if the board of directors has authorized discussions with creditors to effect a consensual restructuring of the issuer’s outstanding debt.
 - **Change of control or other extraordinary transactions:** The offer may not be made in connection with certain other extraordinary events, including –
 - **Change of control:** The offer may not be 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 (or similar business combination), reorganization or liquidation or a sale of substantially all of its consolidated assets.
 - **Competing tenders:** The offer may not be made in anticipation of or in response to other tender offers for the issuer’s securities.
 - **Changes to the capital structure:** The offer may not be made concurrently with a tender offer for any other series of the issuer’s securities made by the issuer (or any subsidiary or parent company 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.
 - **Material acquisitions and dispositions:** The offer may not be 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 the furnishing of pro forma financial information with respect to such transaction under SEC rules (whether or not the issuer is a registrant under the Exchange Act).

Framework

The framework for conducting a 5 business day tender offer includes –

- **Immediate widespread dissemination of the offer:** The offer must be announced via a press release, before 10:00 a.m., Eastern time, on the first business day of the 5 business day period (in contrast to the prior practice of simply mailing the offer documents before midnight), through a widely disseminated news or wire service –
 - disclosing the basic terms of the offer (including the identity of the offeror, the class of securities sought to be purchased, the type and amount of consideration being offered and the expiration date of the offer) and
 - containing an active hyperlink to, or 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 tender.

In addition to immediate widespread dissemination, the offeror would be obligated to –

- use commercially reasonable efforts to email the launch press release to all investors subscribing to one or more corporate action email or similar lists,
 - use other customary methods in order to expedite the dissemination of information concerning the tender offer to beneficial holders and
 - issue a press release promptly after the consummation of the offer setting forth the results of the offer.
- **Form 8-K filing:** If the issuer is a reporting company under the Exchange Act (including “voluntary filers”), it must furnish the press release announcing the offer in a Form 8-K filed with the SEC before 12:00 noon, Eastern time, on the first business day of the offer.
 - **Open to all holders:** The offer must be open to all record and beneficial holders of the subject class.
 - Exchange offers in which qualified debt securities are offered would be restricted to qualified institutional buyers (as defined in Rule 144A) and/or non-U.S. persons (within the meaning of Regulation S) in a transaction exempt from the registration requirements of the Securities Act. Any holders who do not meet these criteria would be given an option (which can be part of the same offer to purchase document) to receive cash for their debt securities in a fixed amount determined by the offeror, in its reasonable judgment, to approximate the value of the qualified debt securities being offered.
 - Because the making of such an offer would likely entail a “general solicitation,” the SEC staff contemplates that any such tender offer would be carried out in accordance with Rule 506(c) of Regulation D (subject to compliance with any applicable disclosure and disqualification provisions of that rule).
 - **Benchmark pricing.** The consideration offered may be fixed, or may be 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, including 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 securities subject to the offer, in each case that are readily available on a Bloomberg or similar trading screen or quotation service.

- The spread used for determining the amount of consideration offered would be announced at the commencement of the tender offer.
- In the case of an offer of qualified debt securities, if the interest rate or the spread used for determining the interest rate for such securities is not fixed and announced at the commencement of the offer, it would 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 the interest rate on any qualified debt securities would be fixed no later than 2:00 p.m., Eastern time, on the last business day of the offer.
- In the case of an offer of qualified debt securities, a minimum acceptance amount would be announced at the commencement of the offer.
- **Changes to the offer:** The offer must be extended, if applicable –
 - for at least 5 business days from and including the announcement of any change in the consideration offered, and
 - for at least 3 business days from and including the announcement of any other material change in the offer.
 - Notice of these changes by “immediate widespread dissemination” is required (i) at least 5 business days prior to expiration, of any change in the consideration being offered, and (ii) at least 3 business days prior to expiration, of any other material change, in each case before 10:00 a.m., Eastern time, on the first day of such 5 or 3 business day period, and reporting issuers must file a Form 8-K comparable to the one described above.
- **Guaranteed delivery procedures:** The offer must permit tenders prior to expiration through guaranteed delivery procedures, by means of a certification by or on behalf of a holder that such holder 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 expiration.
- **Withdrawal rights:** The offer must provide for withdrawal rights that are exercisable (i) at least until the earlier of (x) the expiration date of the offer and (y) in the event that the offer is extended, the 10th business day after commencement, and (ii) at any time after the 60th business day after commencement if for any reason the offer has not been consummated by then.
- **No early settlement:** The offer must provide that consideration will not be paid until promptly after expiration of the offer.

Changes from Current Market Practice: Investment-Grade Debt

Compared to current market practice (which is now superseded), qualifying tender offers for investment-grade debt securities will differ in the following significant ways –

- **Standardized length.** Under previous no-action letters, investment-grade tender offers could be held open for 7-to-10 calendar days, even if one or more of those days fell on a weekend or market holiday. The 5 business day standard is intended to ensure that investors have a standard minimum period of time to make a decision.
- **Launch timing.** Offerors could previously launch a shortened tender offer for investment-grade debt by delivering documents to DTC, as registered holder, a few minutes before midnight on the launch day. This resulted in investors’ effectively having one less day to consider the offer. Now, shortened tender offers will be required to launch before 10:00 a.m., Eastern time, in order to count the launch day as the first day in the 5 business day period.

- **No exit consents.** The inability to seek exit consents in connection with a shortened tender offer may not have much of a practical effect for investment-grade securities, which typically have few restrictive covenants to begin with.
- **Withdrawal rights and early settlement.** Offerors were not previously required to offer withdrawal rights in a shortened tender offer for investment-grade debt and could do early settlement as holders tendered.
- **Notice of guaranteed delivery.** Offerors were not previously required to provide the ability for holders to guarantee delivery and instead often required delivery of securities before expiration of the tender offer.
- **Form 8-K.** Previously, no Form 8-K filing was required and companies only infrequently filed Form 8-K's in connection with debt tender offers.
- **Exchange offer.** Previously, 7-to-10 day offers were only permitted for cash. As a result, issuers who wanted to refinance debt by issuing new debt had to issue new debt and then tender for the old debt; now such issuers can do an exchange offer and save one step.
- **Additional disqualifying facts and circumstances.** While previously, offerors were limited in their ability to launch a shortened tender offer in anticipation of or in response to another tender offer, the list of disqualifying facts and circumstances has been substantially expanded.

Changes from Current Market Practice: High-Yield Debt

Compared to current market practice, qualifying tender offers for high-yield debt securities will differ primarily in terms of the flexibility for shortened length. Under previous no-action letters, high-yield tender offers were required to be held open for 20 business days (and could not use spread-based pricing unless the spread was fixed on the 10th business day), so the 5 business day flexibility will be quite useful for qualifying transactions. However, since issuers will not be able to solicit exit consents in connection with a 5 business day tender offer, their utility may be somewhat limited.

Implications for Other Debt Tender Offers

The SEC's rule governing debt tender offers, Rule 14e-1, was first adopted in the late 1970's, well before the advances in communication speed and capability that now prevail in the debt markets. Over the years the SEC staff has taken informal steps which effectively grant more flexibility to market participants than would be permitted by the express terms of the rule itself. While the staff's efforts have been welcomed by the market, they have at times resulted in a degree of opaqueness about the current status of legal requirements surrounding debt tender offers. The January 23, 2015 no-action letter is, in this respect, a positive development towards transparency.

We expect the SEC to continue its effort to modernize the debt tender offer rules. This process may well yield a loss of some flexibility currently permitted, including in 20 business day tender offers. For example, we may see the SEC propose timing requirements akin to the "immediate widespread dissemination" concept discussed above, and we may see proposals for a tightening up of an offeror's ability to exclude withdrawal rights, to offer early settlement or to limit the offer to certain categories of holders.

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