

SEC Staff Provides New Guidance for Accelerated Debt Tender Offers

The staff of the SEC's Division of Corporation Finance issued new guidance on the requirements and conditions for conducting accelerated tender offers for non-convertible debt regardless of its rating. In addition to expanding the availability of a shortened process to non-investment grade debt, the new guidance permits an accelerated timeline for certain debt-for-debt exchange offers, but imposes new requirements and conditions on offerors seeking to make an accelerated tender offer. The SEC Staff began this process back in April 2014, when they created a working group that included issuers, bankers and large institutional fixed-income investors to help update staff guidance on the conduct of accelerated debt tender offers that had been largely unchanged since the mid 1980's. The guidance comes in the form of a No-Action Letter¹ in response to the official request of certain representatives of the working group.

The SEC staff would permit a debt tender offer to be held open for only 5 business days (a "5 Day Tender Offer") if certain requirements and conditions are met as discussed below.

Background

Rule 14e-1 of the Securities Exchange Act of 1934 (the "Exchange Act") requires that any tender offer be held open for not less than 20 business days from the date the offer is first sent to holders and then held open for an additional 10 business day period from the date any change in the consideration to be paid or the percentage of securities being sought is sent to holders. Recognizing that investors in debt securities are often sophisticated investors and that the decision as to whether to participate in certain basic kinds of debt tender offers is different from those for equity securities, the SEC staff in 1986 began granting No-Action relief from the 20 day requirement for cash tender offers on investment grade debt.

¹ The SEC No-Action Letter can found here: <http://www.sec.gov/divisions/corpfin/cf-noaction/2015/abbreviated-offers-debt-securities012315-sec14.pdf>

The New 5 Day Tender Offer

The new No-Action Letter, which supersedes all previous SEC Staff guidance on accelerated tender offers, creates a category of tender offer for non-convertible debt securities that can be held open for as short as 5 business days under the following conditions:

Type of Security

- The offer may be made on any class or series of non-convertible debt securities regardless of their rating, including high yield debt securities
- The offer must be made for any and all of such class or series of debt securities

Who Makes the Offer

- The offer must be made by the issuer of the debt securities, a wholly-owned subsidiary of the issuer or a parent company that owns 100% of the issuer

Tender Offer Consideration

- The consideration for the offer can be cash or an exchange for certain "Qualified Debt Securities" which are defined as non-convertible debt securities that are identical in all material respects (including the lien priority, issuer/guarantors, collateral, covenants and other terms) to the subject debt securities except for the changes to the maturity date (which cannot be earlier than the maturity date of the outstanding debt securities), interest payment and record dates, redemption provisions and interest rate (which must be payable only in cash)
- 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 US 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 consideration cannot be financed with the proceeds of any "Senior Indebtedness" which is defined to mean indebtedness that (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; provided that this does not restrict using proceeds from indebtedness or borrowings under any credit or debt facility existing prior to the commencement of the tender offer

Mechanics of the Offer

- The offer must be open to all record and beneficial holders of such class or series of debt securities
- When Qualified Debt Securities are offered as consideration, the exchange offer must be restricted to Qualified Institutional Buyers ("QIBs," as defined in Rule 144A) and/or non-U.S. persons (within the meaning of Regulation S, and collectively with QIBs, "Eligible Exchange Offer Participants") in a transaction exempt from the registration requirements of the Securities Act of 1933.
- When Qualified Debt Securities are offered as consideration, any holders who are not Eligible Exchange Offer Participants must be given a cash option for such holders' 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
- The offer cannot be made in connection with the solicitation of exit consents or consent solicitations of any kind
- The offer must be announced via a press release through a widely disseminated news or wire service disclosing the basic terms of the offer and containing an active hyperlink to, or an Internet address at which a record or beneficial holder can

obtain, copies of the offer to purchase and all other instructions or documents relating to the tender of such debt securities. Such “Immediate Widespread Dissemination” must be made at or prior to 10:00 a.m., Eastern time, on the first business day of the 5 business day period

- If the issuer or the offeror 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 prior to 12:00 noon, Eastern time, on the first business day of the offer
- The offeror must communicate any change in the consideration being offered through Immediate Widespread Dissemination and extend the offer for 5 business days counting the date of such Immediate Widespread Communication as the first business day of the 5 business day extension; and, if the issuer or offeror is a reporting company, furnish a Form 8-K describing any change in the consideration being offered prior to 12:00 noon, Eastern time, on the first day of the five business day extension period
- Any other material change to the offer must be communicated through Immediate Widespread Dissemination with the tender offer extended for 3 business days, counting the date of such Immediate Widespread Communication as the first business day of the 3 business day extension;
- 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 of the offer
- 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 such day
- The offer cannot include any early payment mechanics but must provide that consideration will not be paid until promptly after expiration of the offer

Additional Conditions

- No 5 Day Tender Offer can be made if a default or event of default exists under the terms of the subject debt securities or any other indenture or material credit agreement to which the issuer is a party
- No 5 Day Tender Offer can be made if at the time of the offer the issuer (i) is the subject of bankruptcy or insolvency proceedings (ii) has commenced a solicitation of consents for a “pre-packaged” bankruptcy proceeding, or (iii) if the board of directors of the issuer has authorized discussions with creditors of the issuer to effect a consensual restructuring of the issuer’s outstanding indebtedness
- No 5 Day Tender Offer can 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 all or substantially all of its consolidated assets
- No 5 Day Tender Offer can be made in anticipation of or in response to other tender offers for the issuer’s securities;
- No 5 Day Tender Offer can be made concurrently with a tender offer for any other series of the issuer’s securities made by 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
- No 5 Day Tender Offer can 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 pursuant to Article 11 of Regulation S-X (whether or not the issuer is a registrant under the Exchange Act)

What These Changes Mean

Attached in an appendix is a table that summarizes the new guidance and compares it to the market practice that had developed under the original SEC No-Action relief which is now superseded, as well as the requirements of tender offers under Rule 14e-1. The new guidance standardizes the time period for accelerated debt tender offer to 5 business days from the varied 7-10 calendar day period under the old guidance, and opens up the accelerated debt tender offer process to all types of non-convertible debt including high yield and other non-investment grade debt. The new guidance allows for exchange offers in addition to cash offers if the new debt is issued under the same terms of the existing debt other than price and maturity (which must be longer than the existing debt).

However, the guidance imposes requirements and conditions designed to prevent market practices that investors may deem "coercive." Exit consents are not permitted in connection with a 5 Day Tender Offer, and other conditions are designed to allow investors flexibility by mandating withdrawal rights and prohibiting early settlement mechanisms. The new guidance should be very useful for investment grade issuers. For any high yield debt that includes restrictive covenants, the inability to include exit consents as part of the tender offer may leave a stub of the existing debt with holders able to fully enforce their restrictive covenants. While this may work for high yield issuers in pure refinancing transactions, it may also limit the ability of high yield issuers to use the accelerated debt tender offer process for other types of transactions.

This may be the first of a number of steps the SEC staff will be undertaking to review and modernize the tender offer process. Once they can gauge the market reaction to the new guidance, we may see the SEC expand the use of multi-interest working groups and informal staff guidance as an alternative to the official rule-making process with all of its inflexible procedures and requirements. We may also see the SEC imposing some of the requirements and conditions set out in the new guidance, in any future guidance or formal rulemaking as they work to modernize the tender offer process. This may include the mandatory withdrawal rights, prohibitions on early settlement and other procedural requirements described above.

Appendix: Tender Offers

	New SEC No-Action Relief	Prior SEC No-Action Relief	Regulation 14E
Scope	<ul style="list-style-type: none"> Issuer tender offers and exchange offers for <u>any and all</u> securities of a particular class or series of non-convertible debt securities 	<ul style="list-style-type: none"> Issuer tender offers for <u>any and all</u> securities of a particular class or series of investment-grade rated, non-convertible debt securities 	<ul style="list-style-type: none"> Third-party & issuer cash tender offers Third-party & issuer exchange offers
Consideration	<ul style="list-style-type: none"> Can be cash or Qualified Debt Securities with similar terms other than price and maturity (consideration must have longer maturity) Can be fixed or spread to benchmark Cannot be financed with new Senior Debt 	<ul style="list-style-type: none"> Cash Can be fixed or spread to benchmark 	<ul style="list-style-type: none"> Cash or other securities Can be fixed or spread to benchmark
Minimum Offer Period	<ul style="list-style-type: none"> Must remain open for at least 5 business days Must remain open for at least 5 business days following a change in the consideration offered Must remain open for at least 3 business days following any other material change 	<ul style="list-style-type: none"> Must remain open for at least 10 calendar days (or 7 calendar days if the offer materials are furnished to security holders by expedited methods) May remain open for fewer than 10 business days following a change in number of securities sought or consideration offered 	<ul style="list-style-type: none"> Must remain open for at least 20 business days Must remain open for at least 10 business days following a change in consideration offered or a material change in number of securities sought
Exemption Conditions	<ul style="list-style-type: none"> No consent solicitations Must be open to all record and beneficial holders of that class or series, subject to certain exceptions for unregistered exchange offers Must be announced by "Immediate Widespread Dissemination" Must provide for withdrawal rights that are exercisable at least until the expiration date No early settlement mechanics 	<ul style="list-style-type: none"> Must be open to all record and beneficial holders of that class or series Must be conducted in a manner designed to afford all record and beneficial holders a reasonable opportunity to participate in the offer 	<i>not applicable</i>
Exemption Exclusions	<ul style="list-style-type: none"> Not made in anticipation of, or response to, any other tender offers for the issuer's securities Not made in anticipation of, or in response to, or concurrently with a change of control or other similar extraordinary transaction Not made if a default exists 	<ul style="list-style-type: none"> Not made in anticipation of, or response to, any other tender offers for the issuer's securities 	<i>not applicable</i>

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