

February 5, 2015

Flexibility for Debt Refinancings – New SEC No-Action Letter

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The SEC staff issued a no-action letter recently that will allow some companies to refinance their debt using tender and exchange offers shorter than the 20 business days required in the tender offer rules. The letter extends to high yield debt tender offers and to exchange offers pre-existing guidance that allowed shorter tender offers for investment grade debt. The letter also imposes a number of new limitations on and requirements for shorter tender offers.

The no-action letter—[Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities](#), January 23, 2015—supersedes prior no-action letters for tender offers launched after its date.

Summary

What this means for debt refinancings:

- **Many Deals, No Change:** The no-action letter gives limited relief from the 20-business day requirement for “any and all” self-tenders for non-convertible debt, but partial tenders do not benefit. Tendere as part of restructurings and tendere with exit consents will also not benefit.
- **Investment Grade Debt, New Limits:** Previous no-action letters allowed 7 – 10 calendar day issuer self-tenders for any and all non-convertible investment grade debt securities. The new no-action letter uses 5 business days instead, but adds a number of new requirements and limitations.
- **High Yield Debt, New Flexibility:** The no-action letter allows 5 business day self-tenders for any and all non-convertible debt securities subject to the same restrictions as investment grade debt. However, high yield debt issuers that want to use the shorter tender period will not be able to strip covenants with a concurrent consent solicitation.

- **Exchange Offers, New Possibilities:** Five business day exchange offers are now possible for a pure refinancing where the type and features of the debt do not change.

Background

Debt tender offers are regulated by the SEC by Regulation 14E and Rules 14e-1 – 8. Those rules are much less stringent than the tender offer rules for equity securities. The key rules are that the offer must be held open for 20 business days and that it must remain open for 10 business days after a change in the percentage of the securities being sought or a change in the compensation to be paid and 5 business days after any other material change. The lack of detailed rules has allowed a fair amount of innovation in debt tender offers.

The new no-action letter is part of an effort by the SEC Division of Corporation Finance, Office of Mergers and Acquisitions to update and make more transparent their guidance on debt tender offers. It also fits with the Commission and Congressional push to reduce reliance on credit ratings in the SEC's rules. The SEC staff worked with members of the Credit Roundtable (an organization of investors), as well as investment bankers and lawyers who advise on tender offers (including Shearman & Sterling).

Scope of the No-Action Letter

The no-action letter applies only to a defined subset of self-tenders for debt securities. There are many types of debt tender offers and many situations in which companies may find themselves where the no-action letter will not be available. For example, companies often use tender offers when restructuring their business or amending the covenants in their debt securities. Often, tender offers are a tool for rescuing a company facing financial difficulties. In most of these cases, the no-action letter will not apply, and the offer will need to stay open for 20 business days.

Companies routinely use self-tenders for debt securities as part of the ongoing financing of their business. As maturities of existing debt approach, companies evaluate the market for new issues and, when a good window in the market is available, they refinance. If that time happens before the maturity of the old debt, the company faces negative arbitrage (raising the money in the market before it needs to spend it). Frequently, in that situation, the company will tender for the maturing debt securities. The no-action letter will help many companies to refinance their debt in efficient ways, subject to less market risk and delay than they would experience with a 20 business day tender offer.

Investment Grade Debt

Pre-existing No-Action Letters

The SEC staff issued a number of no-action letters permitting 7 – 10 calendar day tender offers for investment grade debt securities starting in 1986. The new no-action letter supersedes those prior letters.

New Flexibility

The new no-action letter adds some flexibility that did not exist in the old letters. It makes clear that the offer can be made by the issuer of the debt securities, a wholly owned subsidiary or a parent company that owns 100% of the capital stock (excluding director's qualifying shares). The new no-action letter also specifies that the consideration offered may be a fixed amount of cash or an amount of cash based on a spread to a benchmark. The new no-action letter defines "benchmark" to include US Treasury rates, LIBOR, swap rates and, in the case of non-US dollar denominated currencies, sovereign securities or swap rates in the same currency as the debt securities being tendered for, provided that in each case the rates are readily available on trading screens or quotation services.

5 Business Day Tender Offer Requirements and Limitations

The new no-action letter also imposes new requirements for and limitations on shorter tender offers. To conduct a 5 business day tender offer, the no-action letter requires the following procedures to be followed:

- The offeror must issue a press release announcing the transaction through a widely disseminated news or wire service at or prior to 10:00 a.m. Eastern time, on the first business day of the offer, which compares to mailing by the end of the day under the earlier no-action letters;
- The press release must include the basic terms of the offer (including the identity of the offeror, the class of securities sought, the type and amount of consideration being offered and the expiration date) and contain an active hyperlink to, or an Internet address with, copies of the offer to purchase and letter of transmittal (if any) and other instructions or documents (including a form of guaranteed delivery instructions);
- The offeror must use commercially reasonable efforts to email or otherwise electronically send the press release to investors that subscribe to corporate action emails or similar lists and use other customary methods to expedite dissemination or information about the tender offer to beneficial owners of the debt securities;
- If the offeror or the issuer files Exchange Act reports with the SEC, it must furnish the press release on a Form 8-K prior to 12:00 noon, Eastern time, on the first business day of the offer;
- If the consideration offered changes, the offer must remain open for five business days following any announced change and it must remain open for three business days following any other announced material change; any such announcement needs to be disseminated using the same manner and timing as the launch press release; and
- The offeror must issue a press release promptly after the consummation of the offer setting forth the results of the offer.

Structure and Financing Requirements

No Consents. The tender offer may not involve exit consents or any other solicitation of consents to amend the indenture, the securities or other agreements governing the debt securities.

Guaranteed Delivery Required. The tender offer must permit tenders through a guaranteed delivery procedure that allows for delivery up until the close of business on the second business day after the expiration of the offer. The procedure will involve a certificate by or on behalf of the holder that the holder beneficially owns the securities and that the securities will be delivered by the deadline.

Withdrawal Rights Required. Holders must be entitled to withdrawal rights until the earlier of the expiration date and, if the offer is extended, the 10th business day after launch. The holders must also be allowed to withdraw tenders after the 60th business day after launch if the tender offer has not been consummated within 60 business days after launch.

No Early Settlement. The offeror may not pay the tender offer consideration until promptly after the offer expires.

No Senior Debt Financing. The tender offer may not be financed with “senior” debt to the debt securities being purchased (except for debt or borrowings under a credit or debt facility existing prior to the launch of the offer). Senior debt for this purpose includes debt that has obligors, guarantors or collateral (or a higher priority with respect to collateral) that the tendered for debt does not have, debt that has a weighted average life shorter than the tendered for debt or that is otherwise senior in right of payment to the tendered for debt.

Limitations on the Use of 5 Business Day Tender Offers

The new no-action letter restricts the use of 5 business day tender offers by barring their use (1) if a default exists under any indenture or material credit agreement of the issuer, (2) 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 of the issuer has authorized discussions with creditors to effect a consensual restructuring and (3) in anticipation of, in response to, or concurrently with, various extraordinary transactions. Those extraordinary transactions include a change of control, merger or similar business combination, reorganization or liquidation or a sale of all or substantially all of its consolidated assets, other tender offers for the issuer's securities, other concurrent self-tenders by the issuer, a subsidiary or parent for other securities if the effect would be to add obligors, guarantors or collateral or increased priority of collateral to those other securities or shorten the weighted average life of those other securities. They also include any pending public announcement or consummation of the purchase, sale or transfer of a material business or amount of assets that would require pro forma financial statements under Article 11 of Regulation S-X, whether or not the issuer is a reporting company.

High Yield Debt

Shorter Offers

The pre-existing no-action letters allowing shorter tender offers were limited to investment grade debt. In part in response to SEC and Congressional concerns about the use of ratings in securities regulations, 5 business day tender offers are permitted under the new no-action letter for non-convertible debt securities regardless of rating. By extending to high yield debt securities, the new no-action letter gives the market a new way to refinance high yield debt securities. The requirements and limitations described above also apply to high yield debt securities, including that covenant strips through consent solicitations are not permitted in a 5 business day tender offer. In circumstances where existing covenants block a new transaction, issuers may still be able to use a 5 business day tender offer with satisfaction and discharge. Otherwise they would need to conduct a traditional 20 business day tender with a 10 business day consent solicitation.

Exchange Offers

The new no-action letter opens up a new type of transaction, a 5 business day debt-for-debt exchange offer. Because an exchange offer involves a tender offer for the existing debt securities as well as an offering of the new debt securities, the tender offer rules have required them to remain open for 20 business days. Along with all of the requirements and limitations described above, the exchange offers contemplated by the new no-action letter have some additional restrictions.

Qualified Debt Securities

An exchange offer under the new no-action letter must offer non-convertible debt securities that are identical in all material respects to the debt securities being exchanged except for the maturity, interest payment and record dates, redemption provisions and interest rate ("Qualified Debt Securities") or a combination of cash and Qualified Debt Securities. Qualified Debt Securities are further limited in that they must be cash-pay only and have a weighted average life to maturity that is longer than the debt securities being exchanged.

QIBs and Non-US persons Only (with Cash Option for Other Investors)

Five business day exchange offers must be exempt from registration under the Securities Act of 1933 and limited to QIBs and/or non-US persons. Because the offer will be done using immediate widespread dissemination, the exchange offer

will likely involve general solicitation. As a result, the usual exemption for QIB—only private placements, Section 4(a)(2), is unlikely to be available, leaving Regulation 506(c), which requires exclusion of bad actors and reasonable verification that all recipients of the new securities are accredited investors, and Regulation S for non-US persons. Because the no-action letter limits eligible participants in the US to QIBs, they will all be accredited investors; what constitutes reasonable verification and how it can be accomplished through the exchange offer mechanics will have to be developed.

Holders of the debt securities being exchanged that are not eligible to receive the debt securities being offered would be given the option concurrently to receive cash (from either the offeror or a dealer manager) in a fixed amount determined by the offeror, in its reasonable judgment, to approximate the value of the debt securities being offered. The offeror can include a limit on the cash spent, which, if exceeded, would allow the exchange offer and cash offer to be terminated.

Pricing Terms of Qualified Debt Securities

The consideration in a 5 business day exchange offer may include a fixed amount of Qualified Debt Securities or an amount of Qualified Debt Securities based on a fixed spread to a benchmark, and the coupon may be based on a spread to a benchmark. If the interest rate or the spread used is not fixed and announced at launch, a range of up to 50 basis points may be announced at launch, with the final interest rate or spread announced by 9:00 a.m. Eastern time on the business day prior to expiration of the exchange offer. The exact amount of consideration, and the interest rate (where a spread is used) on the Qualified Debt Securities, will be fixed by 2:00 p.m. on the last business day of the exchange offer. Also, a minimum acceptance amount would be announced at launch.

Conclusion

The new no-action letter will change the way many any and all tender offers for investment grade debt securities are done. It opens up new flexibility for shorter tender offers for high yield debt (though without exit consents) that did not exist and creates a new, though limited, category of five business day exchange offers.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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