

Securities Alert

SEC Issues No-Action Letter Regarding Specified Issuer Tender or Exchange Offers for Non-Convertible Debt Securities

By letter dated January 23, 2015, in response to a no-action request submitted by a group of nationally recognized law firms and supported by the Credit Roundtable, the staff of the SEC's Division of Corporation Finance (Staff) stated that it will not recommend that the SEC take enforcement action under Rule 14e-1(a) or Rule 14e-1(b) under the Securities Exchange Act of 1934 (Exchange Act)¹ if an offeror conducts a "Five Business Day Tender Offer" on the terms described below. The no-action relief granted represents an expansion of prior relief granted by the Staff in the context of issuer tender offers for specified non-convertible debt securities.

Rule 14e-1(a) of the Exchange Act requires a minimum offer period for all tender offers (debt or equity) of 20 business days, and Rule 14e-1(b) of the Exchange Act requires that a tender offer remain open for at least 10 business days after any change in the consideration is offered. Commencing in 1986, however, the Staff issued a series of no-action letters providing relief from the 20 business day requirement with respect to certain issuer tender offers for non-convertible debt securities (later limited to non-convertible debt securities with an investment grade rating), that are held open for a period of seven to 10 calendar days and meet certain other qualifications, recognizing, among other things, that debt tender offers may present different timing considerations than equity tender offers, and unlike equity tender offers, have tender prices that represent only a modest premium over the prevailing market price or an approximation to the then-applicable redemption price.

¹ Rule 14e-1 applies whether or not the securities being sought are registered under the Exchange Act.

In modification of its prior position, the Staff confirmed that it will not recommend SEC enforcement action if an offeror were to: (i) conduct a tender offer for non-convertible debt securities and hold the tender offer open for at least five business days² from and including the date the tender offer is first published by means of Immediate Widespread Dissemination (defined below), so long as such tender offer satisfies the applicable criteria described below; (ii) hold such tender offer open for at least five business days from and including the date of the announcement of any change in the consideration offered;³ and (iii) hold such tender offer open for at least three business days from and including the date of the announcement of any material change in the offer, other than a change in the consideration offered.

To qualify as a Five Business Day Tender Offer, the offer would (in summary):

- be made for a class or series of non-convertible debt securities, regardless of any particular rating assigned thereto by any nationally recognized statistical rating organization;
- be made by the issuer of the subject debt securities, or a direct or indirect wholly owned subsidiary of such issuer or a parent company that directly or indirectly owns 100% of the capital stock (other than directors' qualifying shares) of such issuer;
- be made solely for cash consideration and/or consideration consisting of Qualified Debt Securities⁴ for any and all of such debt securities;
- be open to all record and beneficial holders of such debt securities (subject to specified limitations applicable to exchange offers);
- 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;

² 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 Immediate Widespread Dissemination occurs at or prior to 10:00 a.m., Eastern time, on such business day. The tender offer may expire on or after 5:00 p.m., Eastern time, on the fifth business day.

³ The Staff stated in the no-action letter that the "consideration offered may be a fixed amount of cash (and/or Qualified Debt Securities, as defined in footnote 4 below) 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. A "benchmark" includes 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 spread used for determining the amount of consideration offered will 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 will 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 (in the case of amounts or interest rate based on fixed spreads to a benchmark) on any Qualified Debt Securities will be fixed no later than 2:00 p.m., Eastern time, on the last business day of the offer."

⁴ Qualified Debt Securities means 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 tender 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.

- not be made if a default or event of default exists under the relevant indenture (or related document) or any other indenture or material credit agreement to which the issuer is a party;
- not be made if at the time of the offer the issuer is the subject of specified bankruptcy, insolvency or indebtedness restructuring events;
- not be financed with the proceeds of specified senior indebtedness;
- permit tenders prior to the expiration of the offer through a guaranteed delivery;
- 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 could then obtain, copies of the offer to purchase and letter of transmittal (if any) and other instructions or documents relating to the tender of such debt securities (collectively, “Immediate Widespread Dissemination”), in each case at or prior to 10:00 a.m., Eastern time, on the first business day of such five business day period;
- if the issuer or the offeror is a reporting company under the Exchange Act (including voluntary filers), furnish the press release announcing the offer in a Current Report on Form 8-K filed prior to 12:00 noon, Eastern time, on the first business day of the offer;
- 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 Exchange Act (including a voluntary filer), describe any change in the consideration being offered in a Current Report on Form 8-K filed prior to 12:00 noon, Eastern time, on the first day of the aforementioned five business day period;
- provide for specified withdrawal rights;
- provide that the offeror will not pay the consideration in the offer until promptly after expiration of the offer pursuant to Rule 14e-1(c) of the Exchange Act; and
- not be in connection with specified transactions, including a change of control or other extraordinary corporate transaction, other specified tender offers, or specified transfers by the issuer or its subsidiaries of a material business or assets.

The no-action request noted that advancements in technology since 1986 enable investors to react efficiently to debt tender offers in a shorter time frame, the decisions in these types of tender offers are often similar to ordinary trading decisions (which are accomplished in a shorter time-frame), holders of investment grade and non-investment grade securities are comprised of similar investor groups, and the requirement of immediate widespread dissemination of the offer (not imposed by current relief) is designed to be a benefit to investors.

SECURITIES ALERT

This no-action position supersedes previous letters issued to Goldman, Sachs & Co. (March 26, 1986); Salomon Brothers Inc. (March 12, 1986); Salomon Brothers Inc. (October 1, 1990); and any similar letters relating to abbreviated offering periods in non-convertible debt tender offers.

The Staff noted that it will continue to monitor developments in tender and exchange offers for non-convertible debt securities and may reconsider the position expressed in this letter in response to those developments.

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