

SEC Permits Five Business Day “Any and All” Tender Offers for Debt Securities Regardless of Credit Rating

On January 23, 2015, the Staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “Commission”) issued a no-action letter (the “2015 Letter”) that superseded a nearly 30-year old position of the Staff with respect to debt tender offers. Rule 14e-1(a) under the Securities Exchange Act of 1934 (the “Exchange Act”) requires a minimum offer period for all tender offers – debt or equity-- of 20 business days. In 1986, the Staff issued a series of no-action letters allowing issuers to conduct tender offers for non-convertible debt securities (later limited to debt securities with an investment grade rating) that reduced the minimum offer period to seven to ten calendar days subject to meeting certain qualifications.¹

In the 2015 Letter, the Staff superseded the 1986 no-action relief and allowed issuers to make tender offers for “any and all” of one or more series of non-convertible debt securities, regardless of credit rating, that are held open for five business days and satisfy certain criteria described below (a “Five Business Day Tender Offer”). In the 2015 Letter, which responded to a request letter principally written by the authors of this memorandum and signed by partners from 17 other major law firms, the Staff also granted no-action relief for exchange offers conducted as Five Business Day Tender Offers subject to meeting certain criteria described below.

The relief granted in the 2015 Letter arose out of a meeting held on April 21, 2014 at the Commission’s offices in Washington, D.C., attended, at the Staff’s invitation, by representatives of the Credit Roundtable (a group of large institutional fixed income managers), partners from major law firms and managing directors from large investment banks actively involved in liability management, as well as the Director of the Division of Corporation Finance and the members of the Office of Mergers and Acquisitions at the Commission.² The meeting brought together parties that had been requesting for a number of years changes and written guidance on how tender offers for debt securities should be conducted. Months of discussions and negotiations followed the meeting among the Staff, members of the Credit Roundtable and their counsel, managing directors from investment banks and a number of law firm partners which ultimately led to the 2015 Letter.³

I. Summary Discussion

One of the biggest changes to current debt tender practice occasioned by the 2015 letter is to require all Five Business Day Tender Offers to be announced in a press release describing the terms of the offer and containing an active hyperlink to or an Internet address where copies of all relevant tender documents can be obtained at the time of announcement (defined as “Immediate Widespread Dissemination”). Currently, there is no requirement that tender documents for non-convertible debt securities be made publicly available.

There are a number of other specific criteria which must be satisfied for an issuer tender offer for non-convertible debt securities to be eligible as a Five Business Day Offer. The complete wording of all of criteria is set forth in Annex A to this memorandum but a summary of the principal criteria are that the offer:

¹ SEC No-Action Letter, *Goldman, Sachs & Co.* (March 26, 1986); SEC No-Action Letter, *Salomon Brothers Inc.* (March 11, 1986)

² Other issues pertinent to tender offers for non-convertible debt securities that would not qualify as Five Business Day Tender Offers (e.g., partial tender offers) also were discussed and remain under discussion as of the date hereof. It is possible that additional written guidance from the Staff on these issues could be forthcoming at a later date.

³ The authors of this memorandum were the principal architects of the Five Business Day Tender Offer structure (in consultation with partners from other law firms) and they led the negotiations with the Staff and Credit Roundtable.

- must be for any and all debt securities of a class or series of debt securities;
- must be for cash and/or “Qualified Debt Securities” (defined to be identical securities to those sought in the tender, other than maturity date, interest rate and redemption provisions, and that have interest payable only in cash and a longer weighted average life to maturity);
- to the extent made with Qualified Debt Securities, must be restricted to Qualified Institutional Buyers (QIBs) (as defined in Rule 144A of the Securities Act of 1933) and must include an option for non-QIBs to receive cash for their securities approximating the value of the Qualified Debt Securities being offered;
- not contain any consent solicitation;
- not be made if a default exists under the indenture for the subject debt securities or if the issuer is bankrupt or has commenced a “pre-packaged” bankruptcy or consensual debt restructuring;
- not be financed with the proceeds of Senior Indebtedness (defined to mean debt that is structurally senior to the subject debt securities by reason of obligors, guarantees or collateral or has a shorter weighted average life to maturity), with debt under any credit or debt facility existing prior to the commencement of the offer being excluded from the definition;
- be announced via Immediate Widespread Dissemination prior to 10:00 am, Eastern time, on the first business day of the offer and, if the issuer is a reporting company under the Exchange Act, the press release announcing the offer must be furnished in a Current Report on Form 8-K under the Exchange Act;
- contain withdrawal rights until the earlier of the offer’s expiration or 10 business days from commencement (if the offer is extended); and
- not be made (i) as part of a change of control or other type of extraordinary transaction, (ii) within 10 business days after the first public announcement of a material acquisition or divestiture by an issuer or (iii) in anticipation of or concurrently with certain other types of offers described in Annex A.

The foregoing is only a summary description of certain of the criteria and the full text of all of the criteria is set forth in Annex A to this memorandum.

II. Commentary

As noted above, a principal departure in the relief granted in the 2015 Letter, as compared to the Staff’s historical practice for approximately 30 years, is the elimination of the distinction between high yield and investment grade securities. As a result, both high yield and investment grade debt tender offers can be conducted as a Five Business Day Tender Offer if they meet all applicable criteria. Another important principal feature of the relief is that non-cash exchange offers that meet the applicable criteria will be permitted as Five Business Day Tender Offers. It is possible that the exchange offer feature may be used as an alternative to raising cash from a new debt issue to refinance an existing debt issue.

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In addition, we anticipate the following principal effects on debt tender offers:

High Yield Tender Offers

We believe that most high yield debt tender offers undertaken in connection with refinancing transactions could be accomplished via the Five Business Day Tender Offer structure, so long as the issuer and dealer managers are willing and able to comply with Immediate Widespread Dissemination and other requirements.

Examples of tenders that would not be eligible for Five Business Day Tender Offer treatment include:

- Partial tender offers or “waterfall” tender offers
- Tender offers containing consent solicitations
- Tender offers where the refinancing indebtedness “primes” the existing indebtedness being refinanced
- Third party tender offers

High yield tender offers that do not meet the criteria for Five Business Day Tender Offers can still be done as 20 business day tender offers using the current “10 + 10” structure (i.e., a 20 business day expiration date with a 10 business day “early bird” date). As noted earlier, we anticipate the Staff may provide written guidance on certain aspects of the “10+10” tender offer structure at some future date and we believe that, at a minimum, they will require Immediate Widespread Dissemination and withdrawal rights for the first 10 business days for such offers.

Investment Grade Tender Offers

Investment grade debt tender offers will no longer be eligible for the previous seven to ten calendar day tender offer relief and will need to comply with the requirements for a Five Business Day Tender Offer or be conducted as a 20 business day tender offer. We expect that most investment grade debt tender offers that would have been eligible for seven to ten calendar day treatment also would be eligible for a Five Business Day Tender Offer, so long as the issuer and dealer managers are willing and able to comply with the applicable requirements.

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email James J. Clark at (212) 701-3849 or jclark@cahill.com or Michael J. Ohler at (212) 701-3139 or mohler@cahill.com.

Five Business Day Tender Offer Criteria

The criteria applicable to a Five Business Day Tender Offer are that the offer would:

- be made for a class or series of non-convertible debt securities¹, regardless of any particular rating assigned thereto by any nationally recognized statistical rating organization, as such term is defined in Section 3(a)(62) of the Securities Exchange Act of 1934, as amended, (the “Exchange Act”);
- 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 Securities², for any and all of such debt securities;
- be open to all record and beneficial holders of such debt securities; *provided* that exchange offers in which Qualified Debt Securities are offered would be restricted to Qualified Institutional Buyers (as defined in Rule 144A under the Securities Act of 1933, as amended (the “Securities Act”)) and/or non-U.S. persons (within the meaning of Regulation S under the Securities Act) (collectively, “Eligible Exchange Offer Participants”) in a transaction exempt from the registration requirements of the Securities Act; *provided, further*, that, holders who are not Eligible Exchange Offer Participants (or an affiliate thereof) would be given an option concurrent with such offer (which can be part of the same offer to purchase document) to receive cash (from either the offeror or a dealer manager) for such holders’ debt securities in a fixed amount determined by the offeror, in its reasonable judgment, to

¹ Separate offers may be made for more than one class or series of debt securities as part of the same offer to purchase document.

² The consideration offered may be a fixed amount of cash (and/or Qualified Debt Securities) 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. In addition, in the case of an offer of Qualified Debt Securities, a minimum acceptance amount would be announced at the commencement of the offer. “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.

approximate the value of the Qualified Debt Securities being offered and such an amount is set forth at the commencement of the offer³;

- 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 (collectively, the “Indenture”);
- not be made if a default or event of default exists under the Indenture 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 bankruptcy or insolvency proceedings or has commenced a solicitation of consents for a “pre-packaged” bankruptcy proceeding or 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;
- not be financed with the proceeds of any Senior Indebtedness⁴;
- permit tenders prior to the expiration of the offer through a guaranteed delivery procedure 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 the expiration of the offer;
- be announced via a press release 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 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 period⁵;
- 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

³ In order to limit the amount of cash that an offeror (or a dealer manager) may have to pay to holders who are not Eligible Exchange Offer Participants (or their affiliates), an offeror may decide to include a condition precedent to its offer that no more than a specified maximum amount of cash would be required to be paid in the offer or else both the cash offer and concurrent exchange offer would terminate.

⁴ “Senior Indebtedness” means indebtedness that is incurred to finance all or a portion of the consideration in the Five Business Day Tender Offer (excluding indebtedness or borrowings under any credit or debt facility existing prior to the commencement of the offer) if such indebtedness (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.

⁵ In addition to Immediate Widespread Dissemination, the offeror in any debt tender offer also would (i) use commercially reasonable efforts to send via email (or other form of electronic communication) the press release announcing the offer to all investors subscribing to one or more corporate action e-mails or similar lists; (ii) use other customary methods in order to expedite the dissemination of information concerning the tender offer to beneficial holders of the subject debt securities; and (iii) issue a press release promptly after the consummation of the offer setting forth the results of the offer.

Form 8-K filed with the Commission 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 with the Commission prior to 12:00 noon, Eastern time, on the first day of the aforementioned five business day period;
- 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 tenth business day after commencement of the offer, and (ii) at any time after the 60th business day after commencement of the offer if for any reason the offer has not been consummated within 60 business days after commencement;
- 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); and
- not be (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 (or similar business combination), reorganization or liquidation or a 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 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; or (iv) commenced within ten 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).