

## SEC Shortens Minimum Period for Debt Tenders

MARCH 20, 2015

The SEC recently made it much easier for issuers to conduct tender offers for debt securities. On January 23, 2015, the Staff of the SEC issued a no-action letter<sup>1</sup> that shortens the minimum offer period for tender offers for any debt security, regardless of credit rating, to a uniform period of five business days and allows issuers to offer other debt securities (in addition to cash) as consideration for the tendered debt securities. This Client Briefing explains the terms of the SEC's no-action letter and what issuers must do to take advantage of it.

### Regulatory Background

SEC Rule 14e-1(a), adopted in 1979, requires that tender offerors keep all tender offers, whether for debt or equity securities, open for at least 20 business days, and for at least 10 business days after a change in the consideration offered for the securities. The 20-business-day rule was adopted to afford investors enough time to make an informed decision as to whether or not to sell their securities in the tender offer.

In 1986, the SEC shortened the minimum period for certain debt tender offers when it allowed tender offers for non-convertible debt securities with an investment-grade rating to be held open for only seven to 10 calendar days if certain other qualifications were met. The rationale for the shortened tender offer period was that debt tender offers, in certain circumstances, present significantly different timing considerations than tender offers for equity securities do.

### The SEC's No-Action Letter

The SEC's recent no-action letter applies a uniform minimum period of five business days to any non-convertible debt security regardless of credit rating and requires that a offer remain open for only five business days after a change in the consideration offered. The SEC's rationale is that communications advances have enabled investors to receive and assimilate tender offer materials far more quickly than in the past and that the high level of sophistication of debt investors, regardless of the credit quality of the security, no longer justifies a regulatory distinction between-investment grade and non-investment-grade securities. The SEC notes that applying the minimum uniform five-business-day period will benefit issuers by reducing exposure to interest rate fluctuations that

could render the tender offer uneconomic. In addition, the new minimum period for debt tender offers will improve the ability of issuers to coordinate the closing of the tender offer with the closing of new securities offerings, the proceeds of which are used to finance the tender offer.

## How to Comply with the New Debt Tender Offer Regime

For tender and exchange offers to qualify under the SEC's new relief, the offeror must provide "Immediate Widespread Dissemination" of the offer materials in the manner specified by the SEC and described below. In addition, if the issuer wishes to use other debt securities to pay for the securities purchased in the tender offer, the securities must be "Qualified Debt Securities," which are generally defined as "non-convertible debt securities that are identical in all material respects" 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 and have a weighted average life to maturity that is no shorter than that of the securities that are the subject of the offer. In addition, debt used to finance the cash portion of the tender offer must not be senior (e.g., in terms of right of payment, security or other provisions) to the debt securities that are the subject of the tender offer, unless the debt is incurred pursuant to pre-existing credit facilities.

There are a number of detailed conditions with which an issuer must comply in order to qualify for the relief granted by the SEC, including the following:

- The offer must be made for "any and all" of the debt securities that are the subject of the offer.
- All five-day offers must be announced by press release through a widely disseminated news or wire service disclosing the basic terms of the offer and an active hyperlink to the instructions or documents relating to the tender of securities.
- The press release must be issued no later than 10:00 a.m. (Eastern time) on the first business day of the offer.
- U.S. public reporting companies must furnish the press release in a Form 8-K filed no later than 12:00 p.m. on the first business day of the offer.
- With respect to fixed spread tender offers that are tied to a benchmark rate such as Treasury or LIBOR, as well as exchange offers, the exact consideration offered (including the principal amount and interest rate of any Qualified Debt Securities offered) must be disclosed no later than 2:00 p.m. on the last business day of the offer.

A qualifying offer now may expire as early as 5:00 p.m. on the last business day of the offer, which is significantly earlier than was permitted by prior Staff interpretations, which required an offer to remain open until midnight for that day to count as a full business day.

The SEC has explicitly excluded some offers from the no-action relief, including:

- consent solicitations;
- partial tender offers;
- third-party tender offers;
- waterfall debt tender offers;
- offers made when there is a default or event of default under the indenture or other material credit agreement;
- offers made when the issuer is the subject of a bankruptcy or insolvency proceeding; and
- offers made in anticipation of or in response to a change of control or other extraordinary transaction such as a merger or other tender offer.

With its recent no-action letter the SEC has recognized technological advances and has taken a significant step towards updating the rules as they relate to tender and exchange offers for non-convertible debt securities.

<sup>1</sup>.SEC No-Action Letter Re Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities (available Jan. 23, 2015). The no-action letter is available in its entirety at: <http://www.sec.gov/divisions/corpfin/cfnoaction/2015/abbreviated-offers-debt-securities012315-sec14.pdf>.

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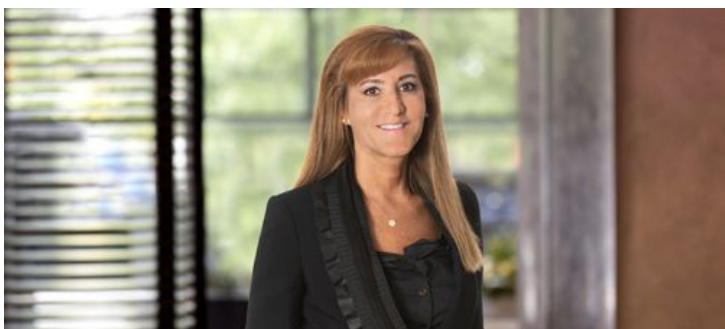
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