

January 24, 2015

SEC Grants No-Action Relief Permitting Five Business Day Debt Tender Offers

On January 23, 2015, the Staff of the Division of Corporation Finance (the “**Staff**”) of the U.S. Securities and Exchange Commission (the “**Commission**”) issued a no-action letter¹ granting the relief requested in a letter submitted by a number of nationally recognized law firms (including Paul, Weiss) and supported by various market participants regarding the conduct of certain debt tender offers. In its letter, the Staff confirmed that it would not recommend any enforcement action to the Commission if an issuer were to conduct a tender offer for non-convertible debt securities (including high-yield debt securities) and hold the tender offer open for at least five business days from and including the date the tender offer is first publicized, so long as such tender offer satisfies certain criteria discussed below (such offer, a “**Five Business Day Debt Tender Offer**”). The tender offer would be required to be held open for an additional period following any change in the consideration offered or the announcement of any other material change in the offer. The new relief was effective immediately and superseded the Staff’s prior no-action in this area, which permitted certain tender offers for investment grade securities to occur in as little as seven calendar days.

This new no-action relief varies from the Staff’s prior no-action relief in the following principal respects:

- *Available for all non-convertible debt securities, whether investment grade or non-investment grade.* A Five Business Day Tender Offer may be made for all types of non-convertible debt securities, whether they are rated investment grade or not. Consistent with principles embodied in the Dodd-Frank Wall Street Reform and Consumer Protection Act (which aims to eliminate reliance on credit ratings as criteria in securities regulation), the relief eliminates the distinction in the prior no-action relief between investment grade and non-investment grade debt securities.
- *Immediate Widespread Dissemination.* The offeror in a Five Business Day Debt Tender Offer must provide “Immediate Widespread Dissemination” (described below) of the offer materials.
- *Five business days vs. seven to ten calendar days.* A Five Business Day Debt Tender Offer must remain open for five business days (instead of the seven to ten calendar day period permitted under the prior no-action relief). Thus, a tender offer that spans a holiday period and/or weekend cannot be open for fewer than five business days.

¹ The Staff’s no-action letter can be found at <http://www.sec.gov/divisions/corpfin/cf-noaction/2015/abbreviated-offers-debt-securities012315-sec14.pdf>.

- *Exchange offer of Qualified Debt Securities.* The relief would allow Five Business Day Debt Tender Offers to be made with “Qualified Debt Securities.”² This mechanism will allow issuers to use a Five Business Day Debt Tender Offer to refinance existing debt securities via the issuance of new debt securities directly to the holders of the existing debt securities instead of raising cash proceeds in an offering of new debt securities to fund a separate cash tender offer.
- *Notice of guaranteed delivery.* The offeror in a Five Business Day Debt Tender Offer must provide a notice of guaranteed delivery procedure, which allows investors to tender their securities until the actual expiration date of the offer, even if custody banks or other nominees might require earlier tenders.

Background

Section 14(e) of the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”) prohibits untrue statements of material fact, omissions of material fact and fraudulent, deceptive and manipulative acts and practices in connection with tender offers. As a means reasonably designed to prevent these acts and practices, the Commission promulgated specific rules (Regulation 14E) that are applicable to all tender offers that use U.S. jurisdictional means.³ To afford holders of the securities sought in a tender offer time to evaluate and respond to such tender offers, Rule 14e-1(a) requires a minimum offer period for all tender offers—whether for debt or equity securities—of 20 business days, in order to afford participants sufficient time to make a decision as to whether or not to tender securities owned by them and Rule 14e-1(b) requires that a tender offer remain open for at least ten business days after any change in the consideration offered.⁴

Commencing in 1986, the Staff issued a series of no-action letters providing relief from the 20 business day requirement in the context of certain debt tender offers. In particular, the Staff granted no-action relief for issuer tender offers for non-convertible debt securities (later limited to only non-convertible debt securities with an investment grade rating) that are held open for a period of seven to ten calendar days

² “Qualified Debt Securities” are 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. 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.

³ Tender offers for debt securities of foreign issuers that exclude U.S. residents are not subject to these rules.

⁴ As described further below, there is existing informal Staff guidance that permits a 20 business day debt tender offer to have an early tender deadline of 10 business days from commencement.

and meet certain other qualifications (the “**Prior Relief**”).⁵ Coupled with the earlier tender deadlines often imposed by custodian banks, this seven to ten calendar day tender period could create situations in which a tender offer over a holiday period was effectively open for as few as one or two business days.

For a number of years, various market participants have sought updated and more formal guidance from the Staff’s with respect to debt tender offers. In April 2014, the Staff hosted representatives of various market participants, including major law firms, dealer-managers and the Credit Roundtable (an association of fixed-income institutional investors and money managers), to discuss possible changes and written guidance. The new relief, which, effective immediately, supersedes the Prior Relief, was the result of months of discussions and negotiations among the parties that followed the April 2014 meeting.⁶

As discussed in the letter in support of the new relief written by the Credit Roundtable in connection with the January 23, 2015 no-action letter, the new relief is intended to facilitate most forms of refinancing transactions by issuers on the theory that transactions in debt securities that involve decisions based almost exclusively on the financial terms of the transaction are able to be evaluated and executed in a shorter time frame than transactions that require investors to evaluate the substantive characteristics of the issuer, its operations and the terms of the subject securities. Therefore, while the criteria for Five Business Day Debt Tender Offers are fairly specific, a good “rule of thumb” for whether a proposed issuer debt tender offer qualifies as a Five Business Day Debt Tender Offer is whether the offer is in substance a straightforward refinancing transaction (as opposed to a debt restructuring transaction).

Practical Observations

The following are some practical observations based on the criteria for Five Business Day Debt Tender Offers:

- *Encouraging Prompt Dissemination of Information and Timely Responses.* The requirement for Immediate Widespread Dissemination reflects a desire to provide investors with tender offer materials in a prompt manner, in order to facilitate a timely response. In order for the first business day of a Five Business Day Debt Tender Offer to qualify as the first business day, Immediate Widespread Dissemination must occur by 10:00 a.m. Eastern Time and Exchange Act reporting companies (including “voluntary filers”) must furnish the launch press release on Form 8-K7 by 12:00 noon Eastern Time. The requirement for a notice of guaranteed delivery is designed

⁵ SEC No-Action Letter, Goldman, Sachs & Co. (March 26, 1986); SEC No-Action Letter, Salomon Brothers Inc. (March 11, 1986); SEC No-Action Letter, Salomon Brothers Inc. (Oct. 1, 1990).

⁶ Paul, Weiss assisted the Credit Roundtable in these meetings, negotiations and discussions.

⁷ The Staff has advised us that foreign private issuers are able to use Form 6-K in lieu of Form 8-K.

to enable investors to use the entire five business day tender period, rather than a truncated period that might be imposed by a custodian bank or other intermediary.⁸

- *Facilitating the Retirement of Debt Securities for Cash.* We expect that issuers (including high-yield debt issuers) will be able to use Five Business Day Debt Tender Offers to retire their debt securities for cash in a shorter time frame than otherwise possible.
- *Facilitating Refinancing Exchange Offers.* We believe that the ability to issue Qualified Debt Securities in Five Business Day Debt Tender Offers is likely to facilitate the ability of issuers to engage in straightforward refinancing exchange offers, where the principal differences between the existing securities and the refinancing securities are the term, redemption provisions, interest rate and interest payment dates.
- *Not Available for Transactions Involving Extraordinary Transactions, Consent Solicitations or Structural Changes.* Five Business Day Debt Tender Offers cannot be made in connection with changes of control or various other extraordinary transactions. In addition, they cannot be used for transactions involving consent solicitations or the issuance of new debt (either in exchange for the subject debt or to fund the tender offer) that is senior (contractually, structurally or as to lien priority) to the subject debt securities.
- *Not Available for Partial Tender Offers.* Five Business Day Debt Tender Offers are required to be for any and all outstanding securities of the series sought and therefore cannot be used for “waterfall” tender offers⁹ or other partial tender offers, such as those for less than the full aggregate principal amount of a debt series.
- *Not Available for Third Party Tender Offers.* Five Business Day Debt Tender Offers must be made by the issuer of the securities or a wholly-owned subsidiary of the issuer.
- *No Early Settlement.* Early settlement or “rolling settlement” is not permitted in a Five Business Day Debt Tender Offer.

⁸ Most investors hold their debt securities through custodians and other intermediaries. These custodians and other intermediaries often impose deadlines on the investors that are earlier than the actual expiration date of the tender offer in order to accumulate and compile responses.

⁹ “Waterfall” tender offers are debt tender offers that seek to purchase more than one series of debt securities for a fixed total amount of consideration. In general, the total amount of consideration would not be sufficient to purchase any and all of the various series of debt securities sought, so a waterfall tender offer would almost certainly involve a partial tender offer.

- *Designed to Provide Clear Guidance.* The criteria for a Five Business Day Debt Tender Offer are designed to be easily ascertainable in order to make it easier for issuers and their counsel to determine whether a tender offer complies with the requirements.
- *Benchmark Pricing for High-Yield Debt Tender Offers.* Benchmark pricing (as described below) can be used for Five Business Day Debt Tender Offers for high-yield debt securities.

While the new relief supersedes the Prior Relief, the separate existing informal Staff guidance with respect to other debt tender offers continues to be in effect. That guidance allows debt tender offers to occur over the required 20 business day period with a 10 business day early tender or consent deadline (and an early tender or consent payment). Under that guidance, most tenders occur during the 10 business day early tender period. We expect that formal written guidance will be issued in the future that will formalize or update this informal guidance. Based on the criteria for Five Business Day Debt Tender Offers, such guidance is likely to require Immediate Widespread Dissemination of tender offer materials and the provision of withdrawal rights.

Five Business Day Debt Tender Offer Criteria

The Five Business Day Debt Tender Offer is intended to streamline the debt tender offer process and take advantage of advancements in technology that enable investors to react efficiently to debt tender offers in a shorter time frame. As described in the requesting letter, a Five Business Day Debt Tender Offer must:

- be made for a class or series of non-convertible debt securities,¹⁰ 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 Securities,¹¹ for any and all of such debt securities;

¹⁰ Separate offers may be made for more than one class or series of debt securities as part of the same offer to purchase document.

¹¹ 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

- 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;¹²
- 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 Indebtedness”;¹³

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.

¹² Holders who are not Eligible Exchange Offer Participants (or an affiliate thereof) are required to 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 approximate the value of the Qualified Debt Securities being offered and such an amount is set forth at the commencement of the offer. 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.

¹³ “Senior Indebtedness” means indebtedness that is incurred to finance all or a portion of the consideration in the Five Business Day Debt Tender Offer (excluding indebtedness or borrowings under any credit or debt facility existing prior to the

- 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 period;¹⁴
- if the issuer or the offeror is a reporting company under the Exchange Act (including a “voluntary filer”), furnish the press release announcing the offer in a Current Report on Form 8-K¹⁵ 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-K¹⁶ filed with the Commission prior to 12:00 noon, Eastern Time, on the first day of the aforementioned five business day period;

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.

¹⁴ In addition to Immediate Widespread Dissemination, the offeror in any debt tender offer also would be required to (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.

¹⁵ The Staff has advised us that foreign private issuers are able to use Form 6-K in lieu of Form 8-K.

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- provide for withdrawal rights that are exercisable (i) at least until the earlier of the expiration date of the offer and, 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).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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