

SEC Issues New No-Action Relief for Short-dated Tenders

On January 23, 2015 the staff of the SEC issued a no-action letter (the “tender offer relief letter”) significantly altering the staff’s position on “short-dated tenders”, a term used to describe tender offers by issuers, and in some cases their affiliates, for the issuer’s non-convertible debt over a shorter time period than the 20 business days specified by Rule 14e-1 under the Securities Exchange Act of 1934.

Previous no-action letters permitted the use of short-dated tenders only when the subject securities were investment grade rated and the offer consideration consisted solely of cash. The tender offer relief letter provides new options for issuers seeking to modify their capital structures in an accelerated manner, including an expansion of the use of short-dated tenders to non-investment grade rated debt and a limited ability to offer new debt securities as consideration, either in lieu of or in addition to cash, in exchange for existing debt securities. These liberalizations will benefit issuers with debt ratings below BBB- or Baa3 and, by permitting short-dated exchange offers, will reduce for all issuers the need to conduct a separate securities offering as a result of a debt tender, if new financing in the capital markets is the desired source of funding.

At the same time, the tender offer relief letter imposes new limitations on short-dated tender offers, including a prohibition on financing the tender with the proceeds of “Senior Indebtedness” (as described below) and on the use of rolling settlement.

The tender offer relief letter supersedes the previous no-action letters, which can no longer be relied upon.

The key features of the tender offer relief letter and differences compared to the previous no-action letters are described in more detail below.

New Relief

- Tender offers for any of the issuer’s non-convertible debt securities regardless of rating are allowed. Previous no-action letters restricted short-dated tender offers to subject securities that were investment grade rated.
- Exchange offers for any of the issuer’s non-convertible debt securities are allowed. Previous no-action letters restricted short-dated tender offers to cash offers only.

- In addition to the issuer, certain affiliates are also allowed to rely on the tender offer relief letter. Previous no-action letters restricted short-dated tender offers to those made by the issuer.
- Tender offers and exchange offers can be kept open for only five business days rather than the minimum of seven calendar days specified by the previous no-action letters. The seven-day standard was viewed as a detriment by issuers who were required to include a weekend within the offer period when launching on a Monday, which resulted in increased market risk, and as flawed by investors who faced a varying number of working days to respond to an offer depending on whether holidays happen to fall within the period.

New Requirements and Limitations

When utilizing the new relief, offerors must satisfy various new conditions. Specifically, the offeror must:

- Announce commencement of the offer and its basic terms using “Immediate Wide Spread Dissemination” by 10:00 a.m., Eastern time, on the first day of the offer period, and the offeror must undertake other specified communications, each as described below.
 - Immediate Widespread Dissemination is accomplished through a news or wire service press release describing basic terms of the offer (identity of the offeror, subject securities, type and amount of consideration offered and expiration date of the offer) and a hyperlink or web address at which holders can obtain the offer documents, including the letter of transmittal and form of guaranteed delivery instructions.
 - In addition, the offeror must (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-mail 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.
- Furnish the press release announcing the offer on a Form 8-K with the SEC prior to noon, Eastern time, on the first business day of the offer. This requirement is applicable only to reporting companies under the Securities Exchange Act, including voluntary filers. Although reporting foreign private issuers are not addressed in the incoming letter to the SEC staff, we believe it is prudent for

those issuers to furnish announcement press releases on Form 6-K within the foregoing time frame.

- Provide withdrawal rights until the earlier of (a) the expiration of the offer and (b) in the event the offer is extended, the tenth business day after commencement. In addition, if the offer is not consummated within 60 business days after commencement, withdrawal rights must be provided.
- Not provide for early or rolling settlement.
- Announce changes to the offer consideration at least five business days prior to the expiration of the offer and announce any other material changes to the offer at least three business days prior to the expiration of the offer. In either case, the announcement must be made by Immediate Widespread Dissemination at or prior to 10:00 a.m., Eastern time, on the first day of such five or three business day period. For issuers that are reporting companies under the Securities Exchange Act, including voluntary filers, changes in the consideration offered must also be reported on a Form 8-K prior to noon, Eastern time, on the first day of the aforementioned five business day period. Although the tender offer relief letter specifies that this Form 8-K must be “filed”, we believe it likely that the staff intended to require a “furnished” Form 8-K, which would be consistent with the treatment by the staff of the launch announcement. As with respect to the launch press release, although the incoming letter does not address reporting foreign private issuers, we believe it is prudent for those issuers to describe changes in offer consideration in a furnished Form 6-K within the foregoing time frames.
- Provide holders a mechanism for “guaranteed delivery”, which allows a certifying holder to deliver a notice during the offer period and deliver the subject securities by the close of business on the second business day after expiration of the offer.
- Not finance the offer with the proceeds of any “Senior Indebtedness”.
 - Senior Indebtedness means indebtedness incurred to finance all or a portion of the consideration in the short-dated 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.
 - An issuer that conducts a debt offering other than under a preexisting debt facility and in close proximity to a tender offer will face various issues of

first impression when seeking to interpret the definition of Senior Indebtedness. For this purpose, we note that it was common many years ago for utility company bonds to contain “restrictive refunding” provisions that limited the source of funds used to repay or repurchase outstanding debt. We believe the related case law interpreting those provisions will again come into focus as the contours of this defined term are explored.

- Not have a default or event of default under any indenture or material credit agreement, be subject to an insolvency proceeding, solicit consents for a pre-packaged bankruptcy or have authorization from the board to discuss a consensual restructuring of the issuer’s debt.
- Not make the offer:
 - 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;
 - concurrently with a tender offer for any other series of the issuer’s securities made by the issuer or certain affiliates, if the effect of such other tender offer 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
 - within 10 business days of the first public announcement or consummation of certain material acquisitions or dispositions.

Requirements From Previous No-Action Letters

- Applicable to both Tender Offers and Exchange Offers:
 - The cash consideration offered (including the cash portion, if any, of the consideration offered in an exchange offer) can be a fixed amount or can be based on a fixed spread announced at commencement of the offer. Fixed spreads can be calculated by reference to any “benchmark”, which includes U.S. Treasuries, LIBOR, swap rates and, in the case of securities denominated other than in U.S. dollars, sovereign securities or swap rates. The benchmark must also be readily available on Bloomberg or a similar trading screen or quotation service. Previous no-action letters had limited the benchmark to U.S. Treasuries, though the staff had occasionally and informally allowed the use of other reference sources.

- A “business day” for purposes of the tender offer relief letter is any day other than Saturday, Sunday or a federal holiday, and a short-dated tender offer under the tender offer relief letter is 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 last day of the tender offer would be treated as a business day if expiration occurred on or after 5:00 p.m., Eastern time, on such business day. This definition varies from the definition of “business day” used elsewhere in the tender offer rules.
- “Third party” offers are still not allowed, but the staff has relaxed its prior position requiring the offeror in a short-dated tender offer to be the issuer of the subject securities. As noted above, the tender offer relief letter may be relied on by certain affiliates—namely, a direct or indirect wholly owned subsidiary of the issuer or a parent that directly or indirectly owns 100% of the stock (other than directors’ qualifying shares) of the issuer.
- Consents may not be solicited. This was not an explicit requirement in the prior no-action letters, but it was implicit.
- As with previous no-action letters, the offer should not be made in anticipation of or in response to other tender offers for the issuer’s securities.
- Applicable to Tender Offers Only:
 - Tenders offers must be made for cash consideration.
 - The offer must be for “any-and-all” of the subject class or series. This requirement is unchanged from the previous no-action letters.
 - Tender offers must be open to all record and beneficial holders of the subject securities. This requirement is unchanged from the previous no-action letters.
- Applicable to Exchange Offers Only:
 - Consideration offered must be cash, “qualified debt securities” (as described below) or a combination thereof.
 - “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 such 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.

- Exchange offers must be made only to “Qualified Institutional Buyers” (as defined in Rule 144A under the Securities Act of 1933) and/or non-U.S. persons (within the meaning of Regulation S under the Securities Act) in a transaction exempt from Securities Act registration, and all other holders must be given a concurrent option to receive cash in a fixed amount determined by the offeror, in its reasonable judgment, to approximate the value of the qualified debt securities offered in the exchange offer. Taken together, these requirements effectively impose a requirement to make an offer of equivalent value to all holders of the subject securities.
- Similar to tender offers, the consideration offered can be cash and/or qualified debt securities in a fixed amount or an amount calculated by reference to a benchmark. In addition, the tender offer relief letter allows flexibility to the issuer in fixing certain terms of the qualified debt securities (as more fully discussed below). Specifically, at the commencement of the exchange offer, the issuer can announce either (a) the actual interest rate or spread for determining the coupon on the qualified debt securities or (b) an interest rate or spread range of up to 50 basis points, with the final interest rate or spread announced by 9:00 a.m., Eastern time, on the business day prior to the expiration of the offer. The ability to give a range of terms for the qualified debt securities should allow issuers the ability to accurately price their new debt based on market forces close to the time of expiration, and would allow the issuer to offer the qualified debt to “new money” investors concurrently with the offer made to holders of the subject debt. The benefits of this approach to the offeror include the potential of increasing the size of the qualified debt issue, enhancing liquidity and facilitating more accurate initial pricing and better secondary market trading for the qualified debt.
- The exact amount of consideration and the interest rate on any qualified debt securities must be fixed no later than 2:00 p.m., Eastern time, on the last business day of the exchange offer.
- At commencement of the exchange offer, a minimum acceptance amount must be announced. This has the effect of setting a floor for liquidity expectations for the qualified debt.

If you have any questions, please feel free to contact [David Lopez](#) or any of your regular contacts at the firm. You may also contact our partners and counsel listed under "[Capital Markets](#)" located in the "Practices" section of our website at <http://www.clearygottlieb.com>.

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