

Five Day Tender Offers: Conditions and Timelines

By James Moloney, Sean Sullivan and Todd Trattner of Gibson, Dunn & Crutcher LLP¹

In January 2015, the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (“SEC”) issued a no-action letter (the “No-Action Letter”) permitting issuers, including their parents or wholly-owned subsidiaries, to conduct five business day tender offers for any and all non-convertible debt securities when certain conditions are met (“Five Day Tender Offers”).² This expands a nearly 30-year old interpretive position pursuant to which the Staff has generally allowed for an abbreviated offering period of seven-to-ten calendar days, but limited that position to tender offers for investment grade debt securities.³ The abbreviated offer period is substantially less than the 20-business day minimum requirement established by Rule 14e-1 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). The No-Action Letter also permits this shortened timeframe to be utilized in exchange offers in which non-convertible debt securities are issued for nearly identical debt securities that are the subject of the tender offer, as long as certain other conditions are met.

Five Day Tender Offer Conditions

In order to be eligible to conduct a Five Day Tender Offer consistent with the framework outlined in the No-Action Letter, a tender offer generally must satisfy the conditions described below. All times noted below are Eastern time.

The Offer

Immediate Widespread Dissemination. The announcement of the offer must be made by “Immediate Widespread Dissemination,” which means that it must be announced in a press release through a widely disseminated news or wire service and disclose:

- the basic terms of the offer (identity of the offeror, class of securities sought, type and amount of consideration, expiration date of the offer); and
- the Internet address where the offer and letter of transmittal (if any) and other instructions and documents (including a form of guaranteed delivery instructions) can be found.

The announcement must be made by 10:00 a.m. in order for such day to count as the first day of the Five Day Tender Offer. In addition to Immediate Widespread Dissemination, under the Five Day Tender Offer framework, an offeror is required to (i) use commercially reasonable efforts to send the press release via electronic mail to all investors subscribing to corporate action emails or similar lists, (ii) use other customary methods to expedite the dissemination of information concerning the offer to beneficial holders of the debt securities and (iii) issue a press release promptly after the closing of the offer setting forth the results.

Current Report on Form 8-K Filing. If an issuer is a reporting company under the Exchange Act (including a voluntary filer), it must provide the press release as an exhibit to a Current Report on Form 8-K filed with the SEC prior to 12:00 noon, in order for such day to count as the first day of the five business day offer period.

¹ © 2015 Gibson, Dunn & Crutcher LLP. James J. Moloney is Co-Chair of the Securities Regulation and Corporate Governance Practice Group and is a Partner in the Corporate Transactions Group in Gibson Dunn’s Orange County office. Sean Sullivan and Todd Trattner are Associates in the Corporate Transactions Group in Gibson Dunn’s San Francisco office.

² SEC No-Action Letter, *Cahill Gordon & Reindel LLP* (January 23, 2015).

³ See SEC No-Action Letter, *Goldman, Sachs & Co.* (March 26, 1986); SEC No-Action Letter, *Salomon Brothers Inc.* (March 12, 1986). “This no-action position supersedes the 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. None of the foregoing letters should be taken to express the Division’s position with respect to tender offers commencing after [January 23, 2015].” SEC No-Action Letter, *Cahill Gordon & Reindel LLP* (January 23, 2015).

Changes to the Offer. Any changes to the offer must be communicated by Immediate Widespread Dissemination by 10:00 a.m.:

- at least *five* business days prior to expiration of the offer for any change in the consideration offered; and
- at least *three* business days prior to expiration of the offer for any other material change to the offer.

If the issuer is a reporting company under the Exchange Act (including a voluntary filer), the issuer must describe any change in the consideration being offered in a Current Report on Form 8-K filed with the SEC prior to 12:00 noon, at least five business days prior to expiration of the offer. The ability to announce a price change with only five business days remaining in the offer is a substantial reduction in time from the ten business days that would otherwise be required under Rule 14e-1(b) of the Exchange Act.

Guaranteed Delivery Procedure. The offer must permit tenders from holders through the expiration of the offer using a guaranteed delivery procedure, in which a certification by or on behalf of a holder guarantees that the holder is tendering securities beneficially owned by it and that the delivery of the securities will be made no later than the close of business on the second business day after expiration.

Withdrawal Rights. The offer must provide for withdrawal rights that are exercisable at least until the *earlier* of (i) the expiration date of the offer and (ii) the tenth business day after commencement of the offer, in the event that the offer is extended. In addition, the offer must provide for withdrawal rights at any time after the 60th business day following commencement if, for any reason, the offer has not been consummated by that time.

Parties and Consideration

Issuer. The offer must be made by the issuer, a direct or indirect wholly-owned subsidiary of the issuer or a parent company that directly or indirectly owns 100% of the capital stock (other than directors' qualifying shares) of the issuer.

Non-Convertible Debt Securities. The offer must be made for a class or series of non-convertible debt securities, and can be made for such securities regardless of the rating of the debt securities. This differs from prior SEC guidance, which limited the shortened tender offer framework to offers associated with investment grade debt securities. The offer must be for any and all securities of the class. The No-Action Letter also allows for separate offers to be made for more than one class or series of debt securities as part of the same offer to purchase document.

Consideration. Consideration for the Five Day Tender Offer must consist of (i) cash, (ii) Qualified Debt Securities, as defined in the No-Action Letter, or (iii) a combination of cash and Qualified Debt Securities.

Benchmark Pricing. The consideration offered may be (i) a fixed amount of cash (and/or Qualified Debt Securities) or (ii) an amount of cash (and/or Qualified Debt Securities) that is determined based on a fixed spread to a particular benchmark, as discussed in the No-Action Letter. In the case of Qualified Debt Securities, the coupon may be based on a spread to a specified benchmark.

No Early Settlement. The offer must provide that the offeror will not pay the consideration offered until promptly after the expiration date, pursuant to Rule 14e-1(c). This condition effectively precludes payment of the consideration offered on a rolling basis as securities are tendered in the offer.

Open to All Holders. The offer must be open to all record and beneficial holders of the debt securities subject to the offer. In the case of an exchange offer in which Qualified Debt Securities are offered, the offer of new debt securities must be restricted to Qualified Institutional Buyers (as defined in Rule 144A

under the Securities Act of 1933, as amended (the Securities Act), QIBs) and/or non-U.S. persons (within the meaning of Regulation S under the Securities Act) (collectively, Eligible Exchange Offer Participants) in a transaction that is exempt from the registration requirements of the Securities Act. Holders that are not Eligible Exchange Offer Participants (or an affiliate thereof) must be given an option concurrent with the offer to receive cash, from either the offeror or a dealer-manager, for such holders' debt securities in a fixed amount (set forth at the commencement of the offer) that approximates the value of the Qualified Debt Securities being offered, as determined by the offeror in its reasonable judgment. The shortened tender offer framework is not available for partial offers.

Exclusions

Senior Debt. The offer may not be financed with debt that: (i) has obligors, guarantors or collateral (or a higher priority with respect to collateral) that differs from the subject debt securities, (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. However, an issuer may use funds from indebtedness or borrowings under any credit or debt facility that exists *prior* to the commencement of the offer. Accordingly, the parent of an issuer of debt securities would be precluded from offering its own debt securities in exchange for the subject debt securities.

Consent Solicitation. The offer may 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.

Default. The offer may 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.

Bankruptcy or Insolvency. The offer may not be made if the issuer is the subject of bankruptcy or insolvency proceedings, 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 debt.

Change of Control or Other Extraordinary Transactions. In addition, the offer may not be:

- 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);
- made in anticipation of or in response to other tender offers for the issuer's securities;
- made concurrently with a tender offer by the issuer (or any subsidiary or parent company of the issuer) for any other series of the issuer's securities if the consummation of such offer would add obligors, guarantors or collateral, increase the priority of liens securing such other series or shorten the weighted average life to maturity of such other series; or
- 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 subject to reporting requirements under the Exchange Act).

Illustrative Timeline: Five Day Tender Offer Framework

The following timeline sets forth an illustrative schedule for conducting an offer consistent with the Five Day Tender Offer framework set forth in the No-Action Letter. Only business days are included in the timeline.

Five Day Tender Offer Framework

Monday	Thursday	Friday	Tuesday (Week 2)	Monday (Week 13)
<p>Commencement of the Offer</p> <p>10:00 a.m.—Deadline for Immediate Widespread Dissemination of the offer.</p> <ul style="list-style-type: none"> Announce the basic terms of the offer and the Internet address in a press release. Announce the spread used, if any, for determining the amount of consideration offered. Announce the fixed amount of the interest rate or the spread used for determining the interest rate for an offer of Qualified Debt Securities. In the case of an offer of Qualified Debt Securities, announce the minimum acceptance amount, if any. Offer holders who are not Eligible Exchange Offer Participants the option to receive cash in a fixed amount that approximates the value of the Qualified Debt Securities being offered. <p>12:00 noon—Deadline for reporting companies to file a Current Report on Form 8-K.</p>	<p>Day Prior to Expiration of the Offer</p> <p>9:00 a.m.—Deadline to announce the final interest rate if a range was used to determine the interest rate or spread at commencement.</p>	<p>Expiration of the Offer</p> <p>2:00 p.m.—Disclose by press release the exact amount of consideration and the interest rate (in the case of amounts or interest rates based on fixed spreads to a benchmark) of any Qualified Debt Securities.</p> <p>—————</p> <p>Prior to Expiration—Tender withdrawals allowed before expiration of the offer.</p> <p>—————</p> <p>Closing—Issue a press release promptly after the closing of the offer setting forth the results.</p>	<p>Delivery of Securities</p> <p>Close of Business—Deadline for holders to deliver securities that were tendered via guaranteed delivery procedures.</p>	<p>If Offer has not been Consummated</p> <p>At Any Time—Permit withdrawals at any time on or after this date if the subject debt securities were not accepted for purchase and paid for.</p>

Other Key Dates When Changing Consideration or Other Material Terms

Monday (Week X)*	Wednesday (Week X)	Friday (Week X)	*Week X refers to the week of the new expiration date of the amended offer
<p>10:00 a.m.—Deadline for Immediate Widespread Dissemination of changes in consideration offered.</p> <p>—————</p> <p>12:00 noon—Deadline for reporting companies to file Form 8-K addressing changes in consideration offered.</p>	<p>10:00 a.m.—Deadline for Immediate Widespread Dissemination of material changes other than changes in the consideration offered.</p>	<p>Expiration of the Changed Offer</p> <p>Prior to Expiration—Tender withdrawals allowed before expiration of the offer.</p>	

Potential Changes in Practice

The following table sets forth some of the key differences between shortened offers conducted prior to the release of the No-Action Letter and offers that can be conducted consistent with the Five Day Tender Offer framework set forth in the No-Action Letter:

	<i>Practice prior to the release of the No-Action Letter</i>	<i>Practice consistent with the Five Day Tender Offer framework set forth in the No-Action Letter</i>
<i>Credit Rating</i>	Shortened tender offers were limited to investment grade non-convertible debt securities.	Shortened tender offers are allowed for both investment grade and non-investment grade non-convertible debt securities
<i>Time Offer Held Open</i>	Shortened offers were held open for as few as seven to ten calendar days.	Shortened offers may be held open for as few as five business days.
<i>Dissemination</i>	Shortened offers were disseminated on an expedited basis.	Shortened offers must be delivered via Immediate Widespread Dissemination (as described above).
<i>Commencement</i>	Shortened offers were often delivered to the DTC a few minutes before midnight on the commencement date.	Shortened offers are required to be announced by 10:00 a.m. (Eastern), on the commencement date.
<i>Current Report on Form 8-K</i>	No Current Report on Form 8-K filing was required for shortened offers and few companies voluntarily filed such 8-Ks.	Reporting companies must provide the press release in a Current Report on Form 8-K filed with the SEC prior to 12:00 noon (Eastern) on the commencement date.
<i>Exchange Offer</i>	Shortened offers were limited to cash-only tender offers. Exchange Offers were not eligible for abbreviated offering period.	The consideration offered in shortened offers may be (i) cash, (ii) Qualified Debt Securities or (iii) a combination thereof.
<i>Guaranteed Delivery</i>	Shortened offers were not required to provide a guaranteed delivery procedure.	Shortened offers are required to provide a guaranteed delivery procedure by means of a certification.
<i>Withdrawal & Settlement</i>	Shortened offers were not required to provide for withdrawal rights and could provide for early settlement, with payment made on a rolling basis as securities were tendered.	Shortened offers must provide for withdrawal rights and an offeror may not pay the consideration offered until promptly after expiration of the offer.
<i>No Exit Consents</i>	Shortened offers could be made in connection with an exit consent that would typically allow for the stripping of covenants in the indenture.	Shortened offers may not be made in connection with an exit consent. The stripping of covenants in the related indenture is not allowed.
<i>Disqualifying Circumstances</i>	Shortened offers were not allowed in connection with other change of control circumstances or tender offers.	Shortened offers may not be made in connection with, among other circumstances, other tender offers, issuances of senior debt, defaults, insolvency proceedings, a change of control transaction, structural changes and material acquisitions and/or dispositions.