

INSIGHTS

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MERGERS AND ACQUISITIONS

Take Five: The SEC Now Allows Certain Issuers to Conduct Their Debt Tender Offers on a Five Day Framework

The SEC historically has required that debt tender offers remain open for a minimum of 20 business days, with certain exceptions for investment grade debt securities. Following the SEC's issuance of a January 2015 no-action letter, issuers now will be able to conduct tender offers for certain of their debt securities in just five business days if certain requirements are met. Issuers and the banks that advise them already have begun contemplating how they can take advantage of this shortened offer framework.

By Sean Sullivan, Vladimir Sentome, Todd Trattner, and Cem Surmeli

On January 23, 2015, the Division of Corporation Finance (Staff) of the Securities and Exchange Commission (SEC) issued a no-action letter (No-Action Letter) permitting issuers or 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).¹ This expands a nearly 30-year old interpretive position pursuant to which the Staff generally has allowed for an abbreviated offering period of seven-to-ten calendar days, but limited that position to tender offers for investment grade² 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 (Exchange Act). The No-Action Letter also permits this shortened timeframe to be used 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.⁴ These changes are expected to boost liquidity in the market, improve the efficiency with which investors manage their portfolios, and allow certain issuers a shorter path to refinance their debt.

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,⁵ a tender offer generally must satisfy the conditions described below.

The Offer

Immediate widespread dissemination. The announcement of the offer must be made by

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Illustrative Timeline of the 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. All times specified are Eastern and 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 style="text-align: center;">-----</p> <p>Prior to Expiration – Tender withdrawals allowed before expiration of the offer.</p> <p style="text-align: center;">-----</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)	
<p>10:00 a.m. – Deadline for Immediate Widespread Dissemination of changes in consideration offered.</p> <p style="text-align: center;">-----</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>	<p><i>*Week X refers to the week of the new expiration date of the amended offer.</i></p>

“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. (Eastern time) 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 (1) use commercially reasonable efforts to send the press release via electronic mail to all investors subscribing to corporate action emails or similar lists, (2) use other customary methods to expedite the dissemination of information concerning the offer to beneficial holders of the debt securities, and (3) 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 Form 8-K filed with the SEC prior to 12:00 noon (Eastern time), in order for such day to count as the first day of the five business day offer period.

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

- 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 Form 8-K filed with the SEC prior to 12:00 noon (Eastern time), 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 (1) the expiration date of the offer or (2) 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.⁶

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 percent of the capital stock (other than directors’ qualifying shares) of the issuer.

Nonconvertible 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 (1) cash, (2) Qualified Debt Securities,⁷ or (3) a combination of cash and Qualified Debt Securities.⁸

Benchmark pricing. The consideration offered may be (1) a fixed amount of cash (and/or Qualified Debt Securities) or (2) an amount of cash (and/or Qualified Debt Securities) that is determined based on a fixed spread to a particular benchmark.⁹ In the case of Qualified Debt Securities, the coupon may be based on a spread to a specified benchmark.¹⁰

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 (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 (1) has obligors, guarantors, or collateral (or a higher priority with respect to collateral) that differs from the subject debt securities, (2) has a weighted average life to maturity less than that of the subject debt securities, or (3) 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 (collectively referred to as the Indenture in the No-Action Letter).

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).

Potential Changes from Prior 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 time), 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 time) 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 (1) cash, (2) Qualified Debt Securities, or (3) 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.

Potential Considerations and Implications

The advent of the Five Day Tender Offer is likely to have significant implications for participants in the debt markets, including issuers, dealer-managers and institutional investors, and potentially signals broader regulatory shifts that may impact tender offers on a larger scale. As the use of the Five Day Tender Offer potentially becomes widespread,¹¹ the following implications and considerations may unfold.

Implications for Issuers

Issuers conducting Five Day Tender Offers will need to reexamine the mechanics for their tender offers, as well as the substantive disclosures contained in their tender offer materials, in order to optimize the results of an offer conducted during the short time period. In particular, issuers may emphasize drafting shorter disclosures that are easier for holders of debt securities to read and comprehend in the short time span available. With respect to mechanics, Five Day Tender Offers will afford issuers significantly less time to communicate with and receive a response from holders, as compared to a 20 business day tender offer period. Issuers will need to work closely with their dealer-managers and legal and financial advisors to ensure that the offering documentation is finalized

prior to 10 a.m. (Eastern time) on the date of commencement, and all eligible holders receive the tender offer materials with sufficient time to consider the offer and decide whether or not to tender their securities. Accordingly, issuers will want to work with their trustees to maintain a complete and accurate list of the email addresses of the holders of their debt securities.

While the initial cost and burden associated with dissemination will be lessened by the elimination of hard copy distributions and mailings, the shift to public and immediate dissemination (e.g., via email, press release, and 8-K filing when the issuer is a public reporting company) will mean that the press, analysts, rating agencies and institutional investor services will have greater access to the tender documents. As a result, issuers can expect to receive increased attention and publicity with respect to their debt tender offers. Some of this attention may be beneficial, resulting in higher tender participation rates. At the same time, it could lead to increased scrutiny from other stakeholders, such as holders of debt securities that are not sought in the tender offer, equity holders, analysts, financial media, and perhaps even regulators like the SEC.

Issuers, working with their legal and financial advisors, will need to consider how best to structure

and time their Five Day Tender Offers given the restriction on simultaneous consent solicitations. The inability to solicit consents likely will prevent many issuers from stripping out covenants present in a related indenture, a practice particularly common in connection with tender offers for high yield debt.¹² This limitation, however, should not pose a significant burden for issuers with debt securities that were investment grade when first issued but have since been downgraded (so-called “fallen agents”) because the related indentures would not contain as many potentially problematic covenants. It is possible, however, that some issuers with covenants in their indentures requiring attention may seek to impose relatively high minimum tender conditions in their offers to minimize the potential for defaults or cross-defaults in any bonds not tendered in the tender offer and that remain outstanding. In doing so, issuers may be able to minimize the number of bonds that remain outstanding following consummation of the offer to the point at which either the remaining stub is immaterial or the bonds can be acquired by means of a redemption pursuant to the relevant indenture terms, open market purchase or other acquisition method or satisfied and discharged and/or defeased under the relevant indenture terms. Furthermore, issuers may strategically choose the timing of their offers to minimize market risks and avoid weekends and federal holidays to maximize participation rates.

An issuer may be viewed as engaging in a “general solicitation” when it sends emails and issues press releases announcing the tender offer.

With respect to exchange offers, there will be other matters for issuers to consider. For example, while the No-Action Letter contemplates the ability to make a “private” offering of Qualified Debt Securities to investors who are QIBs or non-U.S.

persons, it also requires Immediate Widespread Dissemination of the tender offer materials. As a result, an issuer may be viewed as engaging in a “general solicitation” when it sends emails and issues press releases announcing the tender offer, which would necessitate reliance on a private offering exemption that permits general solicitation. However, there may be ways in which an issuer can structure its public disclosures in order to minimize the likelihood that its communications could be deemed a general solicitation. One such approach would be for the initial offering communication to consist solely of a simple notice of the transaction with directions to a secure website established by the issuer where an investor would have to “click through” and certify its QIB or non-U.S. person status in order to receive the full offer materials; any investor unable to certify to such status would be directed to a separate page with information on the cash election option afforded to such holders.

Regardless of whether such communications rise to the level of a general solicitation, issuers contemplating exchange offers will want to carefully consider the available exemptions from registration under the U.S. securities laws. For example:

- Rule 506(c) and/or Rule 144A under the Securities Act may provide an exemption for the offer of Qualified Debt Securities to QIBs.¹³ Both of these rules were recently amended to allow general solicitation.¹⁴ Although Rule 144A (a resale exemption) cannot be used directly by issuers, a wholly-owned subsidiary of the issuer may be able to conduct a Five Day Tender Offer on the issuer’s behalf while relying on Rule 144A.¹⁵
- Section 3(a)(9) of the Securities Act may provide another exemption where general solicitation is permitted. Section 3(a)(9) carries the added benefit that the securities distributed to holders in the exchange may not be deemed “restricted” securities as their restriction would depend on the status of the securities surrendered in exchange. In contrast, all securities distributed while relying on

Rule 144A or Rule 506(c) would be restricted. To the extent an issuer seeks to rely on Section 3(a)(9), it will be important for issuers, and their counsel, to carefully define the nature and scope of any dealer-manager's activities, as well as the compensation paid for such services, to ensure full compliance with the terms and conditions of Section 3(a)(9), particularly in light of the restrictions in Section 3(a)(9) against providing remuneration for soliciting tenders or exchanges.

- Regulation S under the Securities Act should be available with respect to exchange offers made to non-U.S. persons.¹⁶

The foregoing exemptions should be evaluated fully in the context of a Five Day Tender Offer. For example, Rule 506(c) permits offers to be made to accredited investors, which includes a broader range of investors relative to QIBs.¹⁷ However, given that the No-Action Letter limits an issuer's ability to offer Qualified Debt Securities to QIBs and non-U.S. persons under Regulation S, the added category of "accredited investor" offerees under Rule 506(c) may provide little incremental benefit, while giving rise to additional compliance burdens.

Holders of debt securities that are neither QIBs nor non-U.S. persons under Regulation S must be offered an election to receive cash (rather than the Qualified Debt Securities) in an amount that reasonably approximates the value of the subject securities. Without a cap, issuers might have to make significant outlays of cash in such exchange offers, depending on the proportion of ineligible holders that choose to receive cash. In order to limit this risk, issuers likely will condition their exchange offers on not more than a certain percentage of Eligible Exchange Offer Participants electing to receive cash. To the extent that such conditions become commonplace in exchange offers conducted on an abbreviated timetable, it is likely that non-Eligible Exchange Offer Participants will seek to sell or transfer their debt securities to QIBs or non-U.S. persons that are eligible to participate in

the exchange offer. This could create an arbitrage opportunity for some market participants and the guaranteed delivery procedures mandated by the No-Action Letter may facilitate such transfers.

Implications for Dealer-Managers/Financial Advisors

Based on the requirements outlined in the No-Action Letter, the role of dealer-managers is likely to evolve in the context of a Five Day Tender Offer. Whereas dealer-managers previously played a significant role in the tender offer process by ensuring full dissemination of tender offer materials to holders of debt securities at the commencement of the offer, the Immediate Widespread Dissemination requirement will render this function less prominent. Instead, the dealer-managers' role in determining the structure and economic terms of the offer, evaluating appropriate tender conditions, assisting with financing and engaging in follow-up communications with, and providing information to, holders following the initial distribution of tender offer materials will become more critical.

Holders of debt securities that are neither QIBs nor non-U.S. persons under Regulation S must be offered an election to receive cash.

In addition, it may be advantageous for issuers to use dealer-managers to perform some limited "testing the waters" prior to commencing a debt tender offer. Given the relatively short time span involved, existing holders may be open to signing confidentiality agreements with limited duration and may even be willing to sign lock-ups (albeit subject to specified conditions) in advance that would provide issuers with greater certainty on the acceptability of the offer terms to a sufficient number of holders. In doing so,

issuers could disclose in their offer materials that holders with a specified percentage of the subject securities have agreed to tender the securities in the offer. Negotiating such lock-ups in advance should make it more likely that the offer is ultimately successful.

Moreover, given the short time frame for conducting the tender and exchange offers pursuant to the No-Action Letter, any diligence on the issuer and/or guarantors would need to be conducted in advance. It is possible that some issuers will have their financial advisors perform such diligence early on, so that they are in a position to launch a tender or exchange offer on relatively short notice. This new-found flexibility should allow issuers to benefit from any windows of opportunity that may arise when low interest rates or other favorable market conditions prevail, provided they have prepared for the refinancing event in advance.

Implications for Holders of Debt Securities

The most obvious difference for holders of debt securities in a Five Day Tender Offer is that they will have significantly less time to evaluate the terms of an offer relative to a 20 business day tender offer. Combined with the shift to electronic dissemination of the offer materials, a holder may wish to take steps to see that it does not miss a tender offer entirely or learn about it too late in the process to make a fully informed investment decision. In order to reduce this risk, holders should sign up for corporate action lists that issuers will use to electronically distribute press releases related to the offer, and carefully monitor electronic communications coming from issuers where they have an investment in debt securities. Holders also should review press and analyst coverage dedicated to the offer. The Immediate Widespread Dissemination of the offer materials should encourage both the press and analyst community to pay greater attention to Five Day Tender Offers, and their coverage may provide investors with more helpful information and

insight vis-à-vis traditional debt tender offers, in which only the most basic terms are summarized in a press release.

Implications for the Broader Regulatory Scheme

The issuance of the No-Action Letter also raises some important questions regarding the U.S. regulatory scheme applicable to tender offers, both with respect to the nuances of Five Day Tender Offers in practice, as well as the extent to which the policies underlying the Five Day Tender Offer may be extended in other tender offer contexts. For example, the No-Action Letter did not address how financing or funding conditions might operate in a Five Day Tender Offer. Generally, the Staff has taken the position that any financing or funding condition placed on a tender offer must be satisfied or waived at least five business days prior to the expiration of the offer.¹⁸ If an issuer conducting a Five Day Tender Offer must adhere strictly to this interpretive position, then issuers and lenders will likely need to change their procedures to ensure that all financing arrangements are in place on or before the time an offer is commenced (which may be impracticable). In light of the brevity of Five Day Tender Offers, a more reasonable interpretation might be to allow financing or funding conditions to be satisfied or waived on or shortly before the expiration of the offer. Indeed, given that the No-Action Letter permits a change in the consideration being offered as long as the offer remains open for five business days thereafter, it is arguable that a financing condition is significantly less material than a change in price and thus should require an offer to stay open for significantly less time, if at all. In this regard, at several American Bar Association and other securities law conferences, senior members of the Staff have indicated, albeit informally, that a shorter period, such as three business days prior to the expiration, may be acceptable, depending on the circumstances.

Similarly, there also is some uncertainty surrounding whether an “early tender” fee or a

waterfall debt tender structure would be permissible in a Five Day Tender Offer context.¹⁹ The Staff likely would not permit such practices due to the abbreviated nature of the offering period. In addition, at least one senior Staff member has stated at a recent securities law conference that a waterfall structure could not be incorporated into a Five Day Tender Offer.²⁰ While certain innovative market participants may well seek to test the outer boundaries of the No-Action Letter before formal Staff guidance can be published on this and other issues, the mandatory widespread dissemination of offers is likely to attract sufficient regulatory scrutiny to deter aggressive market practices.

The Staff may begin to reevaluate other aspects of the regulatory scheme applicable to traditional 20 business day tender offers.

It also is possible that, in light of the No-Action Letter, the Staff may begin to reevaluate other aspects of the regulatory scheme applicable to traditional 20 business day tender offers and may be willing to apply some of the policy perspectives of, and rationale behind, the No-Action Letter in other tender offer contexts. For example, the No-Action Letter indicates that where offer materials are disseminated in a widespread and immediate fashion, five business days is a sufficient time to conduct an entire tender offer. Similarly, a change in the consideration offered in a Five Day Tender Offer merely requires the offer to remain open for five business days subsequent to the change.²¹ Applying the logic of the No-Action Letter, the Staff may be open to accepting shorter time periods in other situations, such as those in which an early tender premium is initially offered in a traditional 20 business day tender offer and the early tender premium is either increased and/or the early tender period is extended. In such situations, assuming the change

is disseminated broadly by a press release and emailed to the subscribers of corporate action lists, it may be acceptable to hold the offer open for only five business days following the early tender deadline. Likewise, the No-Action Letter takes the position that in certain contexts Immediate Widespread Dissemination of tender offer materials is an acceptable alternative to physical delivery. Depending on the success or failure of this approach in Five Day Tender Offers, the Staff may choose to permit this practice in all debt tender offers, or perhaps even equity tender offers.

Notes

1. SEC No-Action Letter, *Cahill Gordon & Reindel LLP* (January 23, 2015).
2. Rated BBB or higher from credit rating agencies.
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).
4. SEC No-Action Letter, *Cahill Gordon & Reindel LLP* (January 23, 2015).
5. SEC No-Action Letter, *Cahill Gordon & Reindel LLP* (January 23, 2015) (discussing all of the conditions outlined in this section).
6. This right to withdraw securities 60 days after commencement is analogous to the “back-end” withdrawal rights imposed by statute after 60 *calendar* days in registered third-party tender offers (pursuant to Section 14(d)(5) of the Exchange Act) and after 40 *business* days in registered issuer tender offers (Pursuant to Rule 13e-4(f)(2)(ii) of the Exchange Act).
7. “Qualified Debt Securities” means non-convertible debt securities that (i) 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, (ii) have all interest payable only in cash and (iii) have a weighted average life to maturity that is longer than the debt securities that are the subject of the offer. SEC No-Action Letter, *Cahill Gordon & Reindel LLP* (January 23, 2015).

8. For a discussion of refinancing indebtedness using debt tender offers, see generally Junewicz, James J., *Tender Offers for Debt Securities*, Insights (10:1, January 1996).
9. As set forth in the No-Action Letter, a “benchmark” includes U.S. Treasury Rates, LIBOR, swap rates and, in the case of securities denominated in currencies other than U.S. 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 quotation service. The spread used for determining the amount of consideration offered must 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 is not fixed and announced at the commencement of the offer, it must be announced at the commencement of the offer as a range of not more than 50 basis points. Furthermore, on the business day prior to the expiration of the offer, the final interest rate or spread must be announced by 9:00 a.m. (Eastern time). 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 must 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, if there is a minimum acceptance amount associated with the offer, it must be announced at the commencement of the offer.
10. For a discussion of the Staff’s evolving position on formula pricing issues in the exchange offer context from SEC No-Action Letter, *Lazard Freres & Co.* (August 11, 1995) to SEC No-Action Letter, *Thermo Scientific Inc.* (November 13, 2009), see generally Moloney, Jim, *Formula Pricing: “Day 20” Pricing Has finally Arrived for Debt Tender offers!*, Deal Lawyer (4:2, March-April 2010).
11. The first issuer to conduct a Five Day Tender Offer appears to be Waste Management, Inc. See *Waste Management Announces Cash Tender Offer* (Feb 18, 2015), <http://investors.wm.com/phoenix.zhtml?c=119743&p=irol-recentnews.Article&ID=2017702>.
12. See generally Charles T. Haag and Zachary A. Keller, *Honored in the Breach: Issues in the Regulation of Tender Offers for Debt Securities*, 9 N.Y.U. J. L. & Bus. 199, 240-43 (2012) (discussing the use of consent solicitations in conjunction with debt tender offers).
13. See 17 C.F.R. § 230.144A (2013); 17 C.F.R. § 230.506(c) (2013).
14. See Andrew Fabens, Peter Wardle and Stewart McDowell, *SEC Approves Final Rules to Permit Advertising in Rule 506 and rule 144A Offerings; Also Proposes Rules to Add Additional Investor Protections*, Securities Regulation and Corporate Governance Monitor (July 11, 2013), <http://www.securitiesregulationmonitor.com/Lists/Posts/Post.aspx?ID=205>.
15. See SEC Division of Corporation Finance, Compliance & Disclosure Interpretations, Securities Act Rules (Interpretation #138.01) (January 26, 2009), available at <http://www.sec.gov/divisions/corpfin/guidancesecuritiesactrules-interps.htm>.
16. See 17 C.F.R. § 230.901 – 230.905 (2007).
17. See 17 C.F.R. § 230.501(a).
18. See SEC Comment Letter, *Nicole Crafts LLC* (October 21, 2011).
19. In general, the offeror in a waterfall tender offer will seek to purchase securities from across multiple series or classes of debt, but will limit the offer consideration to a fixed dollar amount and/or aggregate amount of securities (in an exchange offer context). The offeror will arrange the classes of securities sought in order of priority, with holders of debt securities with the highest priority having the best opportunity to tender and have such securities accepted for purchase. To the extent tenders from holders of debt with a higher priority do not completely deplete the consideration offered, any remaining amounts will “flow” down from series to series in order of priority until the offer consideration is completely exhausted, thereby creating a “waterfall” structure.
20. Michele Anderson, Chief of the Division of Corporation Finance’s Office of Mergers and Acquisitions, speaking at Northwestern Law School’s 42nd Annual Securities Regulation Institute in San Diego, CA (January 26-28, 2015).
21. In contrast, Rule 14e-1(b) of the Exchange Act requires that tender offers remain open for at least ten business days following any announced increase or decrease in the consideration offered. 17 C.F.R. § 240.14e-1(b) (2008).

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