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SEC Staff Issues New Guidelines for Abbreviated Debt Tender Offers

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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Four Times Square
New York, NY 10036
212.735.3000

On January 23, 2015, the staff of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (SEC) issued revised guidance as to when a debt tender offer may be open for fewer than 20 business days.¹ The guidance modernizes a number of the SEC staff's long-standing positions and changes the terms and conditions previously permitted for abbreviated debt tender offers.

Overview

Rule 14e-1(a) under the Securities Exchange Act of 1934 requires that *all* tender offers must be open for at least 20 business days. Rule 14e-1(b) requires that a tender offer remain open for at least 10 business days after any change in the consideration offered. Notwithstanding these rule requirements, the SEC staff historically took the position that it would not recommend enforcement action to the SEC if certain debt tender offers were conducted over a period of fewer than 20 business days or if the offer did not remain open for the required 10 business-day period following a change in consideration.² The tender offers that were eligible to use these abbreviated periods — generally seven to 10 calendar days — were limited to issuer tender offers to repurchase investment grade, non-convertible debt securities based on a fixed cash offer price or a fixed-spread benchmark formula. These tender offers also were at times accompanied by a consent solicitation seeking to change or eliminate debt covenants.

The SEC staff undertook a study of its positions regarding the rules and regulations that apply to debt tender offers to consider whether its prior positions should be modernized. This study included a number of meetings with market participants, including issuer representatives, investors, investment professionals and corporate finance lawyers. As a consequence of these meetings, an ad hoc group of representatives from a number of law firms, including Skadden, authored a no-action request letter that was submitted to the SEC staff.

The request letter reflected the input that the staff received during its study and requested the staff to agree that, notwithstanding the requirements of Rules 14e-1(a) and (b), it would not recommend that the SEC take enforcement action if an issuer tender offer for non-convertible debt securities:

¹ SEC No-Action Letter, *Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities* (avail. Jan. 23, 2015).

² 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.)

- is open for at least five business days;
- remains open for at least five business days from and including the date of announcement of any change in the consideration offered; and
- remains open for at least three business days from and including the date of announcement of any material change in the offer other than a change in the consideration offered.

Key Differences From Prior Guidance

In addition to the new five-business-day abbreviated offer period, the revised guidance includes a number of key differences from prior staff guidance on debt tenders for abbreviated offer periods, including:

- **The offer may be for non-investment grade debt securities.** The SEC staff's prior guidance limited abbreviated non-convertible debt tender offers to investment-grade debt securities. The revised guidance eliminates the distinction between investment-grade and non-investment-grade debt securities, allowing offers for high-yield debt to be conducted as abbreviated tender offers.
- **Communication about the offer must be made in accordance with specific requirements.** To rely on the revised guidance, communication about the tender offer must be announced via a press release through a widely disseminated news or wire service. The press release must describe the basic terms of the offer (including the identity of the issuer, the class of securities sought to be purchased, the type and amount of consideration, and the expiration date) and contain an active hyperlink to, or an Internet address at which holders of the debt securities can obtain, copies of all tender offer documents. The press release must be published before 10 a.m., EST, on the first business day of the five-business-day period. If the issuer is an SEC reporting company, then the press release must be furnished to the SEC on a Form 8-K no later than 12 noon, EST, on the first business day of the offer. The issuer also is required to use commercially reasonable efforts to send the press release via email (or other form of electronic communication) to all investors subscribing to one or more corporate action emails or similar mailing lists and to use other customary methods to expedite the dissemination of information to holders. Finally, the issuer must issue a press release promptly after the consummation of the tender offer setting forth the results of the tender offer. These new communication methods are referred to in the no-action letter as "Immediate Widespread Dissemination." Prior SEC guidance did not require the public announcement of the offer or other specific communication methods.
- **The offer consideration may include certain qualified debt securities.** The revised guidance allows the consideration in the abbreviated tender offer to be paid in cash and/or non-convertible debt securities. The new non-convertible debt securities, however, must be identical in all material respects to the debt securities that are being tendered except for the maturity date, interest payment and record dates, redemption provisions and interest rates. The new debt securities offered also must have all interest payable in cash and a weighted average life to maturity that is longer than the debt securities being tendered. The debt securities eligible to be offered based on the new guidance are referred to in the no-action letter as "Qualified Debt Securities." Prior SEC guidance required that all consideration paid in connection with abbreviated non-convertible debt tender offers be paid in cash.
- **Withdrawal rights must be provided.** In contrast to prior guidance, which required no obligation to make withdrawal rights available to offerees, the revised guidance requires that all abbreviated nonconvertible debt tender offers must now provide withdrawal rights.
- **The offer may not be made under certain circumstances.** The offer may not be made under certain circumstances, including in connection with, in anticipation of or in response to, or concurrently with a change of control. In addition, the offer may not be made in connection with a solicitation of consents to amend the indenture or other agreements governing the subject debt securities.

A checklist of the requirements necessary to rely on the new SEC staff guidance for abbreviated debt tender offers follows. More detail is available in the SEC no-action letter. A copy of the letter is available [here](#).³

Implications

Investment-grade issuers will no longer be able to rely on previous SEC no-action letters relating to abbreviated non-convertible debt tender offers. As such, any tender offer kept open for fewer than 20 days must meet the requirements of the revised guidance that did not previously apply to investment-grade offers. While most investment-grade issuers should be able to comply with the new procedures, they should assess the impact of the new requirements. High-yield issuers will no longer be required to hold all debt tender offers open for 20 business days and will have more pricing flexibility. However, high-yield issuers may not use the abbreviated format if they also are seeking to change

³ The SEC no-action letter is also available at: <http://www.sec.gov/divisions/corpin/cf-noaction/2015/abbreviated-offers-debt-securities012315-sec14.pdf>.

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or eliminate restrictive covenants, particularly in light of the fact that the new abbreviated non-convertible debt tender offer guidance does not apply if the tender offer is accompanied by a consent solicitation.

The full impact on issuer debt tender offers of the new guidance is unclear at this time. As offers in accordance with the new guidance are conducted, we will monitor developments and provide additional guidance. We also expect the SEC staff to issue further

guidance related to other debt tender offer procedures and practices. The timing of any such additional guidance is unknown. An abbreviated debt tender offer may be conducted based on the

SEC staff's guidance¹ if the following qualifications are met:

- **The offer is made by an issuer or its direct or indirect wholly owned subsidiaries or parent.** The tender offer must be made by the issuer or guarantor of the subject debt securities, a direct or indirect wholly owned subsidiary of such issuer or guarantor, or a parent company that directly or indirectly owns 100 percent of the capital stock (other than directors' qualifying shares) of such issuer or guarantor.
- **The offer is for non-convertible debt securities, regardless of rating.** The tender offer must be made for a class or series of non-convertible debt securities, regardless of whether those debt securities are assigned a rating by a nationally recognized statistical rating organization. Separate offers may be made for more than one class or series of debt securities as part of the same offer to purchase documents. This effectively means that issuers cannot use abbreviated tender offer procedures in connection with waterfall tenders.
- **The consideration offered is either cash or Qualified Debt Securities.** The consideration offered may either be in the form of cash, Qualified Debt Securities (as that term is defined in the SEC no-action letter) or a combination of both.
- **The offer is open to all holders.** The tender offer must be open to all record and beneficial holders of the debt securities being tendered. Any tender offer that includes Qualified Debt Securities may only be made to Qualified Institutional Buyers (QIBs) (as defined in Rule 144A under the Securities Act of 1933, as amended) or to non-U.S. persons in a Regulation S-compliant offering. Any non-QIB U.S. person party to an offer that includes Qualified Debt Securities as part of the consideration must be provided the option to receive cash equal to a fixed amount determined by the offeror that, in the offeror's reasonable judgment, approximates the value of the Qualified Debt Securities being offered. Such amount must be set forth at the commencement of the offer.
- **The offer does not include a consent solicitation.** The tender 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.
- **The consideration is fixed or based on certain formulas.** The consideration offered may either be fixed or based on a spread to a benchmark rate. Such spread must either be fixed and announced at the commencement of the tender offer period, or must otherwise have a range of not more than 50 basis points (which initial range will be announced at the commencement of the tender offer), with the final spread announced at 9 a.m., EST, on the business day prior to the expiration of the tender offer. The exact amount of consideration and the interest rate on any Qualified Debt Securities must be fixed no later than 2 p.m., EST, on the last business day of the offer.
- **The offer provides withdrawal rights.** The tender offer must provide for withdrawal rights that are exercisable (i) at least until the earlier of (x) the expiration date and (y) in the event that the tender offer is extended for more than five business days, 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 the offer has not otherwise been consummated.
- **The offer is not financed with proceeds of senior indebtedness.** The tender offer may not be financed with senior indebtedness. Senior indebtedness means indebtedness that is incurred to finance all or a portion of the consideration in the 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 life to maturity that is shorter than that of the subject debt securities, or (iii) is otherwise senior in right of payment to the subject debt securities.
- **The offer is communicated pursuant to the SEC's Immediate Widespread Dissemination requirements.** The tender offer must be announced via a press release issued before 10 a.m., EST, on the first business day of the five-business-day period, through a widely disseminated news or wire service, disclosing the basic terms of the offer (including the identity of the issuer, the class of securities sought to be purchased, the type and amount of consideration and the expiration date). A business day would be any day, other than Saturday, Sunday or a federal holiday, and a five-business-day period would be treated as having commenced on the first business day on which the tender offer is made if Immediate Widespread Dissemination

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occurs at or prior to 10 a.m., EST, on such business day. The last day of the tender offer would be treated as a business day if expiration occurs on or after 5 p.m., EST, on such business day. The press release must contain an active hyperlink to, or an Internet address at which a holder can obtain copies of, the offer to purchase and a letter of transmittal (if any), as well as other instructions or documents related to the tender offer. An active hyperlink or Internet address directing holders to the issuer's website would satisfy this condition. In addition, the issuer is required to use commercially reasonable efforts to send the press release via email (or other form of electronic communication) to all investors subscribing to one or more corporate action emails or similar mailing lists and to use other customary methods to expedite the dissemination of information to holders. Finally, the issuer must issue a press release promptly after the consummation of the tender offer setting forth the results of the tender offer.

- **A Form 8-K is furnished to the SEC if the offer is made by an SEC reporting company.** If the issuer is a reporting company under the Exchange Act, it must furnish a press release to the SEC announcing the tender offer on a Current Report on a Form 8-K prior to 12 noon, EST, on the first business day of the offer.
- **The offer provides for guaranteed delivery procedures.** The tender offer must permit tenders 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 delivery of such securities will be made no later than the close of business on the second business day after expiration of the offer.
- **Any changes to the terms of the offer are communicated pursuant to certain procedures.** The issuer must communicate via the SEC's Immediate Widespread Dissemination methods (i) any change in the consideration being offered at least five business days prior to the expiration of the offer and (ii) any other material changes to the offer at least three business days prior to the expiration of the offer, in each case, at or prior to 10 a.m., EST, on the first day of such five- or three-business-day period, as applicable. If the issuer is an SEC reporting company, it must describe any changes to the consideration being offered on a Current Report on Form 8-K furnished to the SEC prior to 12 noon, EST, on the first day of the five-business-day period.

- **The consideration is paid after expiration of the offer.** The tender offer must provide that the issuer will not pay the consideration until promptly after expiration of the offer, as required by Exchange Act Rule 14e-1(c). This effectively means that abbreviated tender offers may not provide for consideration to be paid on a rolling basis. The offer may not be made under certain circumstances. The tender offer may 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;
 - the board of directors of the issuer has authorized discussions with creditors to effect consensual restructuring of the issuer's outstanding debt;
 - a default or event of default exists under any indenture or material credit agreement to which the issuer is a party;
 - made in anticipation of or in response to, or concurrently with, a change of control or other type of extraordinary transaction such as a merger (or similar business combination), reorganization, or liquidation or a sale of all or substantially all of the issuer's consolidated assets;
 - made in anticipation or in response to other tender offers for the issuer's securities;
 - 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 other tender offer, if consummated, 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
 - commenced within 10 business days after the first public announcement or 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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Contacts

New York

Ryan J. Dzierniejko

Partner
212.735.3712
ryan.dzierniejko@skadden.com

Gregory A. Fernicola

Partner
212.735.2918
gregory.fernicola@skadden.com

David J. Goldschmidt

Partner
212.735.3574
david.goldschmidt@skadden.com

Laura A. Kaufmann Belkhat

Partner
212.735.2439
laura.kaufmann@skadden.com

Andrea L. Nicolas

Partner
212.735.3416
andrea.nicolas@skadden.com

Michael J. Schwartz

Partner
212.735.3694
michael.schwartz@skadden.com

Yossi Vebman

Partner
212.735.3719
yossi.vebman@skadden.com

Dwight S. Yoo

Partner
212.735.2573
dwight.yoo@skadden.com

Michael J. Zeidel

Partner
212.735.3259
michael.zeidel@skadden.com

Los Angeles

Michelle Gasaway

Partner
213.687.5122
michelle.gasaway@skadden.com

Palo Alto

Thomas J. Ivey

Partner
650.470.4522
thomas.ivey@skadden.com

Gregg A. Noel

Partner
650.470.4540
gregg.noel@skadden.com

Washington, D.C.

Brian V. Breheny

Partner
202.371.7180
brian.breheny@skadden.com

Andrew J. Brady

Of Counsel
202.371.7513
andrew.brady@skadden.com

Frankfurt

Stephan Hutter

Partner
49.69.74220.170
stephan.hutter@skadden.com

Hong Kong

Z. Julie Gao

Partner
852.3740.4863
julie.gao@skadden.com

Jonathan B. Stone

Partner
852.3740.4703
jonathan.stone@skadden.com

London

James A. McDonald

Partner
44.20.7519.7183
james.mcdonald@skadden.com

Danny Tricot

Partner
44.20.7519.7071
danny.tricot@skadden.com

Pranav L. Trivedi

Partner
44.20.7519.7026
pranav.trivedi@skadden.com

Singapore

Rajeev P. Duggal

Partner
65.6434.2980
rajeev.duggal@skadden.com

Sydney

Adrian J. S. Deitz

Partner
61.4294.44311
adrian.deitz@skadden.com

Tokyo

Kenji Taneda

Partner
81.3.3568.2640
kenji.taneda@skadden.com

Toronto

Riccardo A. Leofanti

Partner
416.777.4703
riccardo.leofanti@skadden.com

Associate **Boris Rappoport** assisted in the preparation of this alert.