



SEC ISSUES GUIDANCE ON ABBREVIATED DEBT TENDER OFFERS

In capital markets, **Gregg Noel** and **Jonathan Ko** of *Skadden Arps Slate Meagher & Flom LLP* discuss the new guidance from the US Securities and Exchange Commission regarding abbreviated debt tender offers as well as the implications of the new guidance.

Until recently securities law practitioners had been relying on US Securities and Exchange Commission (SEC) no-action letters dating back more than 20 years for guidance regarding abbreviated debt tender offers. On 23 January 2015, the staff of the Division of Corporation Finance of the SEC issued a no-action letter expanding the prior guidance and modifying the terms and conditions for abbreviated debt tender offers. Although no-action letters are informal interpretative positions of the SEC staff on enforcement actions only and are not binding on the SEC, practitioners have been relying on them for decades.

OVERVIEW

Unlike tender offers for equity securities, debt tender offers are only subject to Section 14(e) and Regulation 14E of the Securities Exchange Act of 1934. Rule 14e-1(a) under the Exchange Act requires that all tender offers 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 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. The tender offers that were eligible to use these abbreviated periods (which were 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.

The 2015 no-action letter is the result of discussions among the SEC staff, the Credit Roundtable (which is an association consisting of fixed-income investors), and several law firms who regularly represent issuers, dealer managers and investors in connection with debt tender offers. The no-action letter request asked the SEC 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: 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.

PRINCIPAL DIFFERENCES FROM PRIOR GUIDANCE

In addition to the new five-business-day abbreviated offer period, there are a number of principal differences from the staff's prior guidance on debt tenders, including the following:

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 subject to the tender offer, 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 10am, Eastern time, 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 12pm, Eastern time, on the first business day of the offer. The issuer also is required to use commercially reasonable efforts to send the press release via e-mail (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 rate. 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 non-convertible debt tender offers must now provide withdrawal rights.

No financing that is senior to the subject debt securities

No portion of any cash consideration in the abbreviated tender offer can be financed with “Senior Indebtedness”, excluding borrowings under any credit facility existing prior to the commencement of the offer. Debt would be considered “Senior Indebtedness” if it: has obligors, guarantors or collateral (or a higher priority with respect collateral) than the subject debt securities; has a weighted average life to maturity less than that of the subject debt securities; or is otherwise senior in right of payment to the subject debt securities.

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 or other extraordinary transaction, such as a competing tender offer or a material acquisition or disposition. The offer may not be made in conjunction with a solicitation of consents to amend the indenture or other agreements governing the subject debt securities. In addition, the offer may not be made if: a default or event of default exists under any indenture or material credit agreement to which the issuer is a party; or the issuer is the subject of bankruptcy or insolvency proceedings or has commenced a solicitation of consents for a “pre-packaged” bankruptcy, or if the issuer’s board of directors has authorized discussions with creditors to effect a consensual restructuring of the issuer’s outstanding debt.

IMPLICATIONS

Issuer considerations

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 (ie, offers must still be made for any and all securities of the subject class and must be made by the issuer or a direct or indirect wholly owned subsidiary of the issuer or the parent company that directly or indirectly owns 100 per cent of the capital stock of the issuer). 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 or eliminate restrictive covenants because the new guidance

does not apply if the tender offer is accompanied by a consent solicitation.

Further, issuers may need to focus on having more concise disclosure in the offer documents so that holders can easily evaluate the information during the abbreviated offering period. Prior to the new guidance, although issuers would customarily issue a press release announcing the commencement of a debt tender offer, the Immediate Widespread Dissemination requirements make these tender offers more accessible due to the Internet availability of the tender offer documents, which could subject the issuer to greater scrutiny from market participants. Moreover, in light of these requirements, if issuers are offering Qualified Debt Securities in exchange for the subject debt securities, issuers will need to be mindful of the registration exemptions available if issuers are viewed as engaging in a general solicitation, such as Rule 506(c) of Regulation D.

Dealer manager considerations

Dealer managers will need to engage with holders early in the process given the abbreviated offering period and the immediate dissemination of the offering materials.

Investor considerations

To allow sufficient time to evaluate the terms of an offer or to avoid missing the offer entirely, holders will need to be more vigilant in terms of monitoring communications from issuers in which they hold debt securities. Holders should sign up for corporate action emails or similar mailing lists so that they receive information timely.

Considerations for other debt tender offers

The full impact on issuer debt tender offers of the new guidance is unclear at this time. As many of the practices that are customarily followed in debt tender offers are more a matter of lore rather than law, some practitioners view the new guidance as an indication of the SEC staff’s willingness to issue guidance related to other debt tender offer procedures and practices.