Abbreviated Tender or Exchange Offer Periods for Non-Convertible Debt Securities

February 4, 2015

On January 23, 2015, the Division of Corporation Finance (the "**Staff**") of the U.S. Securities and Exchange Commission (the "**Commission**") issued a no-action letter that reflects a new position on expedited tender or exchange offers for non-convertible debt securities. The Staff agreed not to recommend an enforcement action to the Commission if an issuer were to conduct a tender offer for non-convertible debt securities and only hold the tender offer open for as short as five business days from and including the date the tender offer is first publicized, so long as such tender offer satisfies certain guidelines discussed below (any such offer being referred to herein as a "**Five Business Day Tender Offer**"). The new time period shortens the 20-business day period required under Rule 14e-1(a) of the Securities Exchange Act of 1934 (the "**Exchange Act**"), but requires potential extensions of five business days following changes in offered consideration or three business days following changes in other material terms. The no-action letter applies to investment grade and non-investment grade debt securities and supersedes the Staff's prior positions in this area, which applied to investment grade debt securities only.

Eligibility Guidelines

To be eligible to conduct a Five Business Day Tender Offer, the offer must:

- be made by the issuer of the securities, a direct or indirect wholly-owned subsidiary of the issuer or a parent company of the issuer;
- be for any and all securities of a class or a series of non-convertible debt;
- involve consideration consisting of only of cash, qualified debt securities[1] or a combination of cash and qualified debt securities;
- be open to all record and beneficial holders of such debt securities (provided, that an exchange offer could be restricted to Qualified Institutional Buyers (as defined in Rule 144A) and/or Non-U.S. Persons (within the meaning of Regulation S) as long as any holders not meeting these criteria have the option to receive cash in an amount approximately equal to the exchange offer consideration);
- be announced via a press release, before 10:00 a.m., Eastern time, on the first business day of the Five Business Day Tender Offer period, through a widely disseminated news or wire service, which in the case of an Exchange Act reporting company (including "voluntary filers") must also be furnished in a Form 8-K filed with the Commission before 12:00 noon, Eastern time, on the first business day of the Five Business Day Tender Offer;

- permit tenders through guaranteed delivery procedures;
- provide for certain withdrawal rights; and
- not include early settlement features.

If there is a material change in the offer, there may be a requirement to extend the Five Business Day Tender Offer period, for at least five business days if the change pertains to the offered consideration or at least three business days for changes to other material terms of the Five Business Day Tender Offer. Issuers must notify investors of these material changes by widely disseminated press release and Exchange Act reporting issuers (including “voluntary filers”) must describe changes in a Form 8-K.

Disqualified Transactions

An issuer cannot take advantage of the shorter time periods if the offer is made:

- in connection with an “exit consent” or other consent solicitation to amend the governing documents of such debt securities;
- financed with the proceeds of any Senior Indebtedness[2];
- when a default or event of default exists under any of the issuer’s material debt agreements;
- at a time when the issuer is the subject of bankruptcy or insolvency proceedings or has commenced a solicitation of consents for a prepackaged bankruptcy, or if the board of directors has authorized discussions with creditors to effect a consensual restructuring of the issuer’s outstanding debt; or
- in connection with certain other extraordinary events, including (i) a change of control, (ii) competing tenders, (iii) changes to the capital structure, or (iv) material acquisitions and dispositions.

Material Changes from Current Market Practice

Under the Staff’s prior no-action letters, investment-grade tender offers could be held open for as short as seven to ten calendar days. One or more of those days could potentially fall on a weekend or market holiday, giving investors less time to make a decision. The five business day requirement ensures that investors have a standard minimum period to consider the investment decision.

Also, issuers previously could launch shortened investment grade tender offers by delivering documents to DTC, as registered holder, a few minutes before midnight on the launch day. This resulted in investors’ effectively having one less day to consider the offer. Now, shortened tender offers will be required to launch before 10:00 a.m., Eastern time, in order to count the launch day as the first day in the five business day period.

Unlike issuers of investment-grade debt securities, issuers of high-yield non-convertible debt were not previously permitted to conduct tender or exchange offers with periods shorter than those required by the Commission’s rules. This new Staff position provides these issuers with a significantly faster way to conduct these offers. However, without the ability to combine the tender or exchange offer with exit consents to strip away restrictive high-yield debt covenants, the ability to conduct a tender or exchange offer in an expedited manner may have limited use for such issuers.

For the complete text of the no-action letter, please see SEC No-Action Letter: Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities.

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[1] Qualified debt securities are non-convertible debt securities that (a) 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 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.

[2] "Senior Indebtedness" means indebtedness that is incurred to finance all or a portion of the consideration in the Five Business Day 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.