

[], 2014

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Mergers and Acquisitions
100 F Street, N.E.
Washington, DC 20549

Attention: Ms. Michele Anderson, Chief
Mr. David Orlic, Special Counsel
Mr. Dan Duchovny, Special Counsel

Dear Ms. Anderson and Messrs. Orlic and Duchovny:

We hereby request¹ that the staff of the Division of Corporation Finance (the “Staff”) of the U.S. Securities and Exchange Commission (the “Commission”) confirm that it will not recommend any enforcement action to the Commission if an offeror were to conduct a tender offer for non-convertible debt securities and hold the tender offer open for at least five business days (as that term is defined in the Commission’s rules and as further described in footnote 10) from the date the tender offer is first published by means of Immediate Widespread Dissemination (as defined below), so long as such tender offer satisfies the applicable criteria described below (any such offer being referred to herein as a “5 Business Day Tender Offer”).

The criteria applicable to a 5 Business Day Tender Offer are that the offer would:

- be made for a class or series (or for more than one class or series) of non-convertible debt securities, regardless of any particular rating assigned thereto by any nationally recognized statistical rating organization, as such term is defined in Section 3(a)(62) of the Securities Exchange Act of 1934, as amended, (the “Exchange Act”);
- be made by the issuer or guarantor of the subject debt securities, or a direct or indirect wholly owned subsidiary of such issuer or guarantor or a parent company that directly or indirectly owns 100% of the capital stock (other than directors’ qualifying shares) of such issuer or guarantor;

¹ The undersigned regularly represent a diverse group of issuers, dealer managers and investors in connection with debt tender offers. We believe the no-action relief requested herein reflects a broad consensus for appropriate relief and enjoys broad support among groups with diverse interests, including significant investors in debt securities.

- 32 • be made solely for cash consideration and/or consideration consisting of Qualified
33 Debt Securities², for any and all of such debt securities;
- 34 • be open to all record and beneficial holders of such debt securities; *provided* that ex-
35 change offers in which Qualified Debt Securities are offered would be restricted to
36 Qualified Institutional Buyers (as defined in Rule 144A under the Securities Act of
37 1933, as amended (the “Securities Act”)) and/or non-U.S. persons (within the mean-
38 ing of Regulation S under the Securities Act) (collectively, “Eligible Exchange Offer
39 Participants”) so long as holders who are not Eligible Exchange Offer Participants (or
40 an affiliate thereof) are given as option in such offer (which can be part of the same
41 offer to purchase document) to receive cash for their debt securities in an amount de-
42 termined by the bidder, in its reasonable judgment, to approximate the value of the
43 Qualified Debt Securities being offered³;
- 44 • not be made in connection with a solicitation of consents to amend the indenture,
45 form of security or note or other agreement governing such debt securities (collec-
46 tively, the “Indenture”);
- 47 • not be made if a default or event of default exists under the Indenture;
- 48 • not be financed with the proceeds of any Senior Indebtedness⁴;

² The consideration offered may be a fixed amount of cash (and/or Qualified Debt Securities) or an amount of cash (and/or Qualified Debt Securities) based on a fixed spread to a benchmark and, in the case of Qualified Debt Securities, the coupon may be based on a spread to a benchmark. A “benchmark” includes U.S. Treasury Rates, LIBOR, swap rates and, in the case of securities denominated in currencies other than US dollars, sovereign securities or swap rates issued in the same currency as the securities subject to the offer, in each case that are readily available on a Bloomberg or similar trading screen or quotation service. The spread used for determining the amount of consideration offered will be announced at the commencement of the tender offer. In the case of an offer of Qualified Debt Securities, the interest rate or the spread used for determining the interest rate for such securities will be announced at the commencement of the offer as a range of not more than 50 basis points, with the final interest rate or spread to be announced by 9:00 a.m., Eastern time, on the business day prior to the expiration of the offer. The exact amount of consideration and the interest rate (in the case of amounts or interest rate based on fixed spreads to a benchmark) on any Qualified Debt Securities will 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, a minimum acceptance amount would be announced at the commencement of the offer. “Qualified Debt Securities” means non-convertible debt securities that are identical in all material respects (including as regards to guarantor(s), collateral, lien priority, covenants and other terms) to the debt securities which are the subject of the tender offer except for the maturity date, interest payment and record dates, redemption provisions and interest rate; provided that Qualified Debt Securities must have all interest payable only in cash and must have a weighted average life to maturity that is longer than the debt securities which are the subject of the offer.

³ In order to limit the amount of cash that a bidder may have to pay to holders who are not Eligible Exchange Offer Participants (or their affiliates), a bidder may decide to include a condition precedent to its offer that no more than a specified maximum amount of cash would be required to be paid in the offer.

⁴ “Senior Indebtedness” means indebtedness that is incurred to finance all or a portion of the consideration offered in the 5 Business Day Tender Offer (excluding indebtedness or borrowings under any credit or debt facility existing prior to the commencement of such 5 Business Day Tender 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 the subject debt securities; or (iii)

- 49 • permit tenders prior to the expiration of the offer through a guaranteed delivery pro-
50 cedure by means of a certification by a holder that it is tendering securities benefi-
51 cially owned by it and that the delivery of such securities will be made no later than
52 the close of business on the second business day after the expiration of the offer;
- 53 • be announced at or prior to 10:00 a.m., Eastern time, on the first business day of such
54 five business day period via a press release through a widely disseminated news or
55 wire service disclosing the basic terms of the offer (including the identity of the bid-
56 der, the class of securities sought to be purchased, the type and amount of considera-
57 tion being offered and the expiration date of the offer), and containing an active hy-
58 perlink to, or an Internet address at which a record or beneficial holder could then ob-
59 tain, copies of the offer to purchase and letter of transmittal (if any) and other instruc-
60 tions or documents (including a form of guaranteed delivery instructions) relating to
61 the tender of such debt securities, (collectively, “Immediate Widespread Dissemina-
62 tion”)⁵;
- 63 • in addition to Immediate Widespread Dissemination, furnish the press release an-
64 nouncing the offer in a Current Report on Form 8-K filed with the Commission prior
65 to 12:00 p.m., Eastern time, on the first business day of the offer, but only if the issu-
66 er or the offeror is a registrant under the Exchange Act;
- 67 • provide for withdrawal rights if for any reason the offer has not been consummated
68 within 60 business days after commencement; and
- 69 • not be made in anticipation of or in response to, or concurrently with, a change of
70 control, merger (or similar business combination), sale of all or substantially all of
71 the assets or liquidation transaction, in each case with respect to the issuer or its as-
72 sets, or another tender offer for the issuer’s equity securities.

73 **Discussion**

74 Section 14(e) of the Exchange Act prohibits untrue statements of material fact, omissions of ma-
75 terial fact, and fraudulent, deceptive and manipulative acts and practices in connection with tender offers.⁶
76 As a means reasonably designed to prevent these acts and practices, the Commission has promulgated
77 specific rules that are applicable to tender offers in Regulation 14E.⁷ Particularly, Rule 14e-1 requires a
78 minimum offer period for all tender offers—debt or equity—of 20 business days, in order to afford partic-
79 ipants sufficient time to make a decision as to whether or not to tender securities owned by them.

is otherwise senior in right of payment to the subject debt securities.

⁵ In addition to Immediate Widespread Dissemination, the offeror in any debt tender offer also would (i) use commercially reasonable efforts to send via email (or other form of electronic communication) the press release announcing the offer to all investors subscribing to corporate action e-mails or similar lists; and (ii) issue a press release promptly after the consummation of the offer setting forth the results of the offer.

⁶ 15 U.S.C. § 78n(e) (2012).

⁷ Regulation 14E and Rules 14e-1 through 14e-8. 17 C.F.R. §§ 240.14e-1 *et seq.*

80 Commencing in 1986, the Staff issued a series of no-action letters providing relief from the 20
 81 business day requirement in the context of certain debt tender offers. In particular, the Staff granted no-
 82 action relief for issuer tender offers for non-convertible debt securities (later limited to only non-
 83 convertible debt securities with an investment grade rating) that are held open for a period of seven to ten
 84 calendar days and meet certain other qualifications.⁸

85 The Staff's existing no-action relief recognizes that debt tender offers may, in certain circum-
 86 stances, present significantly different timing considerations than those involved in tender offers for equi-
 87 ty securities. Debt tender offers frequently involve the refinancing of debt securities with high interest
 88 rates with a new issue of debt securities with a lower interest rate, or the refinancing of debt securities that
 89 will mature within a relatively short time frame with debt securities with a longer maturity being issued
 90 during a period of reasonably favorable market conditions. The ability of an issuer (or guarantor or sub-
 91 sidiary or parent company) to effect such a refinancing in a relatively short period of time is important to
 92 lessen potential exposure to changing market conditions and to avoid having to pay "double interest" or
 93 "negative carry"—i.e., interest on the newly issued debt securities and on the outstanding debt securities
 94 until they can be purchased in the tender offer. A shortened tender period also is advantageous to the
 95 holders of outstanding debt securities who want to reinvest funds received in the tender to purchase a por-
 96 tion of the new issue, thus "rolling over" their investment. Unlike the significant premiums often paid in
 97 an equity tender offer, the tender price in a non-convertible debt tender offer is typically either a modest
 98 premium over the prevailing market price of the debt securities subject to the offer or a close approxima-
 99 tion to the then-applicable redemption price, and the holder does not have to weigh any potential equity
 100 upside the holder is being asked to give up in exchange for the premium.⁹

101 We believe that a number of the factors the Staff has previously recognized and relied on in
 102 granting prior no-action letters are equally applicable today to the requested no-action relief and that ad-
 103 vancements in technology since 1986 enable investors to react efficiently to debt tender offers in a shorter
 104 time frame.

105 In connection with a 5 Business Day Tender Offer, the requested no-action relief would vary
 106 from the Staff's existing no-action relief in the following principal respects:

- 107 • *Immediate Widespread Dissemination.* The relief requested hereby would be conditioned
 108 upon the offeror providing Immediate Widespread Dissemination of offer materials in a man-
 109 ner that we believe has broad investor support. This requirement is designed to be a benefit
 110 to investors not imposed by current relief and would further facilitate the ability of record and
 111 beneficial holders to make a tender decision within the time period contemplated.
- 112 • *5 business days vs. 7 to 10 calendar days.* The five business day requirement is similar to the
 113 seven to ten calendar day period under existing no-action relief. We believe, based on inves-

⁸ SEC No-Action Letter, *Goldman, Sachs & Co.* (March 26, 1986); SEC No-Action Letter, *Salomon Brothers Inc.* (March 11, 1986).

⁹ The Staff has also previously acknowledged that "because of the modest premiums typically offered in an Issuer Debt Tender Offer, it is not clear that participation in the tender offer by individual non-institutional debtholders would be materially increased by requiring that tender offers be held open for twenty business days." *Salomon Brothers Inc.* (March 11, 1986) at 7. We believe this observation remains accurate. In addition, given modern technology and the widespread use of electronic communications, we believe that individual investors will be better able to respond within the applicable time frame, especially in light of the Immediate Widespread Dissemination requirement.

114 tor feedback, that using a business day construct is better than a calendar day construct. For
 115 example, five business days in almost all cases will require a seven calendar day period.¹⁰
 116 However, seven calendar days over a holiday period may result in the offer being held open
 117 for less than five business days. Given the advances in communications technology since
 118 1986, we believe the requested relief, coupled with the requirement of Immediate Widespread
 119 Dissemination, places investors in a superior position to where investors were in 1986 before
 120 widespread public adoption of the Internet, when there was the potential for greater delay in
 121 the distribution of offer materials. Furthermore, in a tender offer that meets the criteria appli-
 122 cable for a 5 Business Day Tender Offer, the holder does not have to evaluate the non-
 123 economic characteristics of an amended or new security (unless it is a Qualified Debt Securi-
 124 ty) that the holder would own in the case of a tender offer accompanied by a consent sollicita-
 125 tion or an exchange offer for new debt securities that are not Qualified Debt Securities. As a
 126 result, holders of debt securities in a 5 Business Day Tender Offer can make the decision to
 127 sell or hold relatively quickly on a purely economic basis—in much the same manner pro-
 128 spective investors in new issues make the decision whether or not to buy in time periods that
 129 are much shorter than five business days.

130 • *Exchange offer of Qualified Debt Securities.* The relief requested would allow for offers to
 131 be made with Qualified Debt Securities. The inclusion of this concept is to allow issuers to
 132 use a 5 Business Day Tender Offer to refinance existing debt securities with either cash pro-
 133 ceeds from the issuance of new securities or the issuance of new debt securities directly to
 134 the holders of the existing debt securities. Since the Qualified Debt Securities must be identi-
 135 cal in all material respects to the existing debt securities sought in the offer, other than ma-
 136 turity, weighted average life to maturity (which may not be less than the debt securities that
 137 are the subject of the tender offer), redemption provisions and interest rate (and related pay-
 138 ment and record dates), the holder's decision is similar to that made in a cash offer—namely
 139 is the value offered by the financial terms of the offer a favorable one or not. It is in essence a
 140 trading decision.¹¹ These types of trading decisions are made by market participants every
 141 day in time periods that are much shorter than the five business days required under a 5 Busi-
 142 ness Day Tender Offer. Investors would be protected because only Eligible Exchange Offer
 143 Participants (*i.e.*, qualified institutional buyers under Rule 144A and non-U.S. persons under
 144 Regulation S) would be able to participate. We have been informed that dealer managers and
 145 banks have lists or databases that would allow them to easily identify holders of debt securi-
 146 ties that are Eligible Exchange Offer Participants in advance of an exchange offer being
 147 commenced. If a holder does not qualify as an Eligible Exchange Offer Participant (or an af-
 148 filiate thereof), the option to receive cash for their debt securities allows them to receive an
 149 economic benefit of the offer if they decide to accept it. In substance, the exchange offer
 150 would be a refinancing transaction and, accordingly, fits within the rationale for the 5 Busi-
 151 ness Day Offer relief requested herein. We also believe that Eligible Exchange Offer Partici-
 152 pants will be benefitted by an exchange offer of Qualified Debt Securities because, in many

¹⁰ For purposes of the requested relief in this letter, a 5 Business Day Offer would be treated as having com-
 menced on the first business day on which the tender offer is made if Immediate Widespread Dissemination
 occurs at or prior to 10:00 a.m., Eastern time, on such business day. The last day of the tender offer would
 be treated as a business day if expiration occurs on or after 5:00 p.m., Eastern time, on such business day.

¹¹ Because the Qualified Debt Securities would be a new issuance of securities, it is expected that the offer
 documents also would contain or incorporate by reference the same types of disclosures with respect to the
 business and finances of the issuer as would be the case in a Rule 144A/Regulation S offering memoran-
 dum for a new issuance of securities.

153 instances, it will enable them to match, on a dollar-for-dollar basis, a purchase of a new secu-
 154 rity of an issuer with the disposition of an old security of that same issuer without the poten-
 155 tial mismatch that occurs in separately subscribing for a new security being issued and ten-
 156 dering the old security in a cash tender offer. Finally, we believe that issuers will be benefit-
 157 ted by the ability to make an exchange offer of Qualified Debt Securities because there will
 158 be no timing lag or risk between the time of funding of the new debt securities and the time of
 159 retirement of the old securities and no “negative carry” associated with having the two debt
 160 securities outstanding at the same time.

161 • *No distinction between investment grade and non-investment grade debt securities.* Our re-
 162 quested relief eliminates the distinction in existing relief between investment grade and non-
 163 investment grade debt securities. We believe eliminating this distinction is appropriate.
 164 First, holders of investment grade and non-investment grade debt securities are comprised of
 165 similar investor groups, and therefore we do not believe there is an investor protection con-
 166 cern that merits the distinction. If anything, our experience is that in many, if not most, cases,
 167 the holders of non-investment grade securities are more likely to be sophisticated institutional
 168 investors compared to holders of investment grade securities. Second, the factors cited in the
 169 1986 no-action letters and the benefits to issuers and investors described above of shorter
 170 time periods apply to both investment grade and non-investment grade securities. Third, we
 171 believe the elimination of this distinction is consistent with Commission and Congressional
 172 policy. Both the Commission, in a series of 2008 proposals,¹² and Congress, when it later
 173 passed Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of
 174 2010, have recognized the undesirability, as a public policy matter, of making regulatory dis-
 175 tinctions on the basis of the credit rating assigned to a particular security by a nationally rec-
 176 ognized statistical rating organization.

177 For these reasons, we respectfully request that the relief sought hereby be granted with respect to
 178 5 Business Day Tender Offers.

179 **Conclusion**

180 The Staff has acknowledged that certain tender offers for non-convertible debt securities subject
 181 to Regulation 14E do not merit enforcement action when held open for less than 20 business days. Ex-
 182 tending the Staff’s no-action position to a 5 Business Day Tender Offer meeting the above criteria would
 183 be consistent with the Staff’s existing no-action positions, the policy underlying Section 14(e), the Com-
 184 mission’s and Congress’s views on the regulatory use of credit ratings, and the interests of all participants
 185 in such transactions. We therefore request the relief sought herein be granted and respectfully suggest
 186 that the Staff consider superseding the no-action letters cited in footnote 8 of this letter with the relief re-
 187 quested herein.

188 If the Staff disagrees with our analysis, we would appreciate the opportunity to discuss this matter
 189 with you. Please do not hesitate to contact any of us if you have any questions or comments.

190 Very truly yours,

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¹² See *References to Ratings of Nationally Recognized Statistical Rating Organizations*, Rel. No. 34-5870 (Jul. 1, 2008); *Security Ratings*, Rel. No. 33-8940 (Jul. 1, 2008); and *References to Ratings of Nationally Recognized Statistical Rating Organizations*, Rel. No. IC-28327 (Jul. 1, 2008).

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