



## Five Business Day Debt Tender Offers

SEC No-Action Letter of January 23, 2015

March 4, 2015

Speakers:

David Knutson (of Legal and General Investment Management America)

and

Lawrence G. Wee (of Paul, Weiss, Rifkind, Wharton & Garrison LLP).

## Summary

---

- On January 23, 2015, the Staff of the Division of Corporation Finance of the SEC issued a no-action letter granting no-action relief requested in a letter submitted by a number of nationally recognized law firms and supported by various market participants.
  - Under the new relief, an issuer can conduct certain tender offers for non-convertible debt securities (including high-yield debt securities) so long as it holds the tender offer open for at least five business days from and including the date the tender offer is first publicized (such offer, a “Five Business Day Debt Tender Offer”).
  - The new relief was effective immediately and superseded the Staff’s prior no-action relief in this area, which permitted certain tender offers for investment grade securities to occur in as little as seven calendar days.
  - The Credit Roundtable was a key participant in the discussions that led to this new no-action relief. Paul, Weiss assisted the Credit Roundtable.
-

## The Prior Regulatory Framework

---

- **The Rules**: Section 14(e) of the Securities Exchange Act of 1934 and Rule 14e-1(a) require a minimum offer period of 20 business days for all tender offers, which can (per informal SEC guidance) be subject to a 10 business day “early tender” or “early consent” period (a “**20/10 Business Day Debt Tender Offer**”).
  - **Prior Relief**: The SEC Staff issued a series of no-action relief letters from 1986 to 1990 that permitted certain issuer **cash** debt tender offers for **investment grade** securities to be held open for as little as **seven to ten calendar days** (the “**Prior Relief**”).
  - **Overall Issue**: While most of the offers using the Prior Relief were straightforward refinancings that only required investors to make quick “trading” decisions to evaluate the financial terms of the securities being offered, in certain situations, the Prior Relief could be used to create situations in which investors would need to make “credit decisions” with respect to the substantive characteristics of the issuer and its securities in a very short time frame.
-

## Issues Faced by Investors under the Prior Relief

- **Calendar Days vs. Business Days**: Offers could remain open for only a few business days if made over a holiday period or weekend.
- **Change of Control or Other Extraordinary Transaction**: Offers could be made in connection with a change of control or other extraordinary transaction.
- **Delays in Dissemination of Information**: Delays in investors receiving offer materials could effectively shorten the tender period.
- **Earlier Deadlines Imposed by Custody Banks and Other Intermediaries**: Earlier response deadlines (often two to three business days prior to the actual deadline) imposed by custody banks and other intermediaries could effectively shorten the tender period even further.
- **Transactions Could Involve Structural Considerations and Consent Solicitations**: Some offers could be coupled with new debt issuances that could contractually, structurally or effectively “prime” the existing debt securities or with consent solicitations that adversely affected covenant protections or other provisions.

## Background

- Beginning in 2010, the Staff of the SEC invited a number of market participants (including the Credit Roundtable) to informal meetings to discuss possible changes to and formalization of guidance on debt tender offers.
- In April 2014, the Staff hosted a meeting of those market participants, including representatives of the Credit Roundtable, certain prominent law firms and certain prominent dealer-managers. The meeting was constructive, and the participants found that there was some common ground for updated and formalized guidance.
- In the months following the April 2014 meeting, the representatives of the market participants negotiated and formulated various proposals for the new no-action relief, interacting with the SEC in order to craft a compromise acceptable to all participants.
- The Credit Roundtable enthusiastically supported the no-action relief request.
- The relief was granted on January 23, 2015 and was effective immediately.
- SEC guidance for the conduct of 20/10 Business Day Debt Tender Offers remains in effect. Additional updated and formalized guidance is in progress. The Credit Roundtable will participate in the process.

## Guiding Principles

- As a guiding principle, the new relief is designed to be available for transactions that require decisions by investors that are based almost exclusively on the financial terms of the transaction (what are often referred to by investors as “trading decisions”) and is not designed to be available for transactions that require investors to evaluate the substantive characteristics of the issuer, its operations and the subject securities (what are often referred to by investors as “credit decisions”).
- Therefore, while the requirements for a Five Business Day Debt Tender Offer are very specific and designed to be “bright-line” tests, there is a good rule of thumb:
  - If it feels like a straightforward refinancing, it is probably OK to be a Five Business Day Debt Tender Offer.
  - If it is something else, especially if the issuer or sponsor is trying to get investors to do something they wouldn’t otherwise want to do, it is probably not OK to be a Five Business Day Debt Tender Offer.

## Criteria for Five Business Day Debt Tender Offers

---

- **Five Business Days**: Offer period of five business days.
  - **Not Just for Investment Grade Securities**: The offer can be for all types of non-convertible debt securities (including high-yield).
  - **Not for Third Party Tenders**: Only available for debt tender offers by the issuer or a wholly-owned subsidiary.
  - **Immediate Widespread Dissemination**: Offer materials are subject to “Immediate Widespread Dissemination” by a press release containing links or a website address with offer materials by 10:00 a.m. Eastern Time on the first business day of the offer. Reporting companies (including “voluntary filers”) must also furnish the press release on Form 8-K (or Form 6-K for foreign private issuers) by noon Eastern Time, on that same business day.
  - **Notice of Guaranteed Delivery**: The offer must provide for a guaranteed delivery procedure, effectively enabling tenders up to the expiration time.
  - **No Consent Solicitations**: The offer cannot be made in connection with a consent solicitation.
-

## Criteria for Five Business Day Debt Tender Offers (cont'd)

- **Consideration Can be Cash or Qualified Debt Securities:** The consideration must be in the form of cash or “Qualified Debt Securities,” which are, broadly, debt securities that have similar non-financial terms to those being tendered for (e.g., issuers, guarantors, covenants, security, priority, etc.) but may have different financial terms (e.g., interest rate, term, redemption dates).
- **Cannot be Financed with Senior Indebtedness:** The offer cannot be financed from the proceeds of new debt (i.e., not debt under an existing facility) that “primes” the subject securities.
- **Any and All:** Must be for any and all of the outstanding securities of a series.
- **Open to All Holders:** Must be open to all holders of the series, although if Qualified Debt Securities are issued, they may be issued on a private placement basis only to eligible holders, with any other holders receiving cash in lieu of Qualified Debt Securities.

## Criteria for Five Business Day Debt Tender Offers (cont'd)

➤ **Cannot be Made under Certain Conditions:**

- Default or event of default under the indenture governing the subject securities or any other indenture or material credit agreement of the issuer;
- Bankruptcy or insolvency or board determination to proceed with a debt restructuring;
- In anticipation of or in response to or concurrently with a change of control or other type of extraordinary transaction;
- In anticipation of or in response to other tender offers for the issuer's securities (a third party tender);
- Concurrently with another issuer tender offer if the effect is to increase the priority or shorten the term of another series of debt securities; or
- Within 10 business days after announcement or consummation of an acquisition or disposition transaction requiring pro forma financial statements under Reg. S-X Article 11.

## Criteria for Five Business Day Debt Tender Offers (cont'd)

- **Withdrawal Rights**: The offer must have withdrawal rights exercisable: (i) at least until the earlier of (x) the expiration date and (y) the tenth business day after commencement and (ii) at any time after the 60th business day after commencement if the offer has not been completed by that time.
- **Timely Notice of Changes**: Immediate Widespread Dissemination at least five business days prior to expiration for any changes in consideration being offered and at least three business days prior to expiration for any other material changes by 10:00 a.m., Eastern Time on the first business day of the relevant period. Reporting companies (including “voluntary filers”) must also furnish the notice of a change in consideration on Form 8-K (or Form 6-K for foreign private issuers) by noon, Eastern Time, on that same business day.
- **No Early Settlement or Rolling Settlement**: The offeror cannot pay the consideration in the offer until promptly after expiration of the offer.
- **Benchmark Pricing**: Benchmark pricing can be used in an offer for all types of debt securities (including high yield) and can be used in connection with a Qualified Debt Securities exchange offer.

## Comparison with the Prior Relief

<b>Prior Relief</b>	<b>New Relief</b>
Investment grade only	Any non-convertible debt security
Seven to ten calendar days	Five business days
Can be made in connection with a change of control or other extraordinary transactions	Cannot be made in connection with a change of control or other extraordinary transactions
No dissemination requirements beyond press release	Immediate Widespread Dissemination with links to offer documents, 8-K/6-K for reporting companies
Earlier deadlines imposed by custody banks and intermediaries	Notice of guaranteed delivery procedure
Allows new debt issuances that “prime” the subject securities, no prohibition on consent solicitations	No new debt issuances that “prime” the subject securities, no consent solicitations
Cash consideration only	Cash or Qualified Debt Securities

## Practical Observations

- *Encouraging Prompt Dissemination of Information and Timely Responses.*
  - The requirements for Immediate Widespread Dissemination and notice of guaranteed delivery reflect a desire to provide investors with tender offer materials in a prompt manner, in order to facilitate a timely response.
- *Facilitating the Retirement of Debt Securities for Cash.*
  - Allows issuers to retire their debt securities for cash in a shorter time frame than otherwise possible.
- *Facilitating Refinancing Exchange Offers.*
  - New relief will facilitate the ability of issuers to engage in straightforward refinancing exchange offers, where the principal differences between the existing securities and the refinancing securities are the term, redemption provisions, interest rate and interest payment dates.
- *Not Available for Transactions Involving Extraordinary Transactions, Consent Solicitations or Structural Changes.*
  - Five Business Day Debt Tender Offers cannot be made in connection with changes of control, various other extraordinary transactions, consent solicitations or the issuance of new debt that is senior to the subject debt securities.

## Practical Observations (cont'd)

---

- *Not Available for Partial Tender Offers.*
    - Tender Offers are required to be for any and all outstanding securities of the series sought and therefore cannot be used for “waterfall” tender offers or other partial tender offers.
  - *Not Available for Third Party Tender Offers.*
    - Tender Offers must be made by the issuer of the securities or a wholly-owned subsidiary of the issuer.
  - *No Early Settlement.*
    - Early settlement or “rolling settlement” is not permitted.
  - *Designed to Provide Clear Guidance.*
    - The criteria of the new relief are designed to make it easier for issuers and their counsel to determine whether a tender offer complies with the requirements.
  - *Benchmark Pricing for High-Yield Debt Tender Offers.*
    - Benchmark pricing can be used for high-yield debt securities.
-