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SEC Staff Revises Guidance on Shortened Debt Tender Offers, Expands Guidance to Cover Tender Offers for High-Yield Debt and Certain Exchange Offers

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*By: **Charles H. Still Jr.** and **Benjamin J. Martin***

The staff of the Securities and Exchange Commission recently issued a no-action letter that substantially revises its long-standing guidance for shortened tender offers for non-convertible debt securities. The letter permits debt tender offers meeting certain conditions to be held open for as short as five business days, instead of the twenty business days required by Rule 14e-1(a) under the Securities Exchange Act of 1934. Notably, the letter extends this relief to tender offers for non-investment grade, or high-yield, debt securities and certain exchange offers. The staff's prior guidance permitted an abbreviated offer period only for cash tender offers for non-convertible investment grade debt securities.

The new letter supersedes all of the staff's prior no-action letters regarding abbreviated tender offers for non-convertible debt securities and will have important implications for market practice in debt tender offers. The letter is effective for tender offers commencing after January 23, 2015.

Eligible Tender Offers

In order to be eligible for a shortened offer period, the tender offer must:

- be for non-convertible debt securities, regardless of whether they are investment grade or high-yield;
- be made by the issuer, a wholly owned subsidiary of the issuer or a parent company that owns, directly or indirectly, 100% of the capital stock of the issuer and not by a third party;
- be for any and all securities of the subject class and not a partial tender offer;
- be made solely for consideration consisting of cash, "Qualified Debt Securities" or a combination of cash and Qualified Debt Securities; and
    - "Qualified Debt Securities" are non-convertible debt securities that 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 subject class of debt

securities except for the maturity date, interest payment and record dates, redemption provisions and interest rate; provided that the Qualified Debt Securities must have (1) all interest payable only in cash and (2) a weighted average life to maturity that is longer than the debt securities that are the subject of the offer.

- be open to all record and beneficial holders of the subject class, except in exchange offers for Qualified Debt Securities.
  - Exchange offers in which Qualified Debt Securities are offered may be restricted to Qualified Institutional Buyers (as defined in Rule 144A under the Securities Act) and/or non-U.S. persons (within the meaning of Regulations S under the Securities Act), but other holders must be given the option to receive cash in exchange for their debt securities in an amount determined by the offeror to approximate the value of the Qualified Debt Securities offered.

The consideration offered in a five-business-day tender offer may be a fixed amount or may be based on a fixed spread to a benchmark, such as Treasury rates, LIBOR or swap rates. The interest rate on Qualified Debt Securities offered also may be fixed or based on a fixed spread to a benchmark.

Disqualifying Circumstances

In addition to the eligibility requirements described above, the no-action letter provides that an abbreviated tender offer may not be made where certain circumstances exist. Specifically, an abbreviated 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 class;

- be made if a default or event of default exists under any material debt agreement to which the issuer is party, including the relevant indenture;

- be made when the issuer is the subject of bankruptcy or insolvency proceedings or has commenced a solicitation of consents for a "pre-packaged" bankruptcy proceeding or if the board of directors of the issuer has authorized discussions with creditors of the issuer to effect a consensual restructuring of the issuer's outstanding indebtedness;

- be financed with the proceeds of any "Senior Indebtedness";
  - Senior Indebtedness means debt that is incurred to finance the tender offer (other than borrowings under a facility existing prior to commencement of the offer) and (1) has obligors, guarantors or collateral (or a higher priority with respect to collateral) that the subject debt securities do not have; (2) has a weighted average life to maturity less than that of the subject debt securities; or (3) is otherwise senior in right of payment to the subject debt securities.

- be made in anticipation of or in response to, or concurrently with, a change of control or other type of extraordinary transaction involving the issuer, such as a merger (or similar business combination), reorganization or liquidation or a sale of all or substantially all of its consolidated assets;

- be made in anticipation of or in response to other tender offers for the issuer's securities;

- be 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 offer, if consummated (by way of amendment, exchange or otherwise), 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

- be commenced within ten 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 (regardless of whether the issuer is a registrant under the Exchange Act).

Procedural Requirements

The no-action letter sets forth specific procedural requirements for abbreviated debt tender offers, including some requirements that did not exist under the SEC staff's prior no-action letters. These procedural requirements include the following:

- The tender offer must be announced via press release through a widely disseminated news or wire service disclosing the basic terms of the offer and containing a link to an Internet address at which a holder may obtain copies of the offering materials (referred to as "Immediate Widespread Dissemination") at or prior to 10:00 a.m., Eastern time, on the first business day of the offer.

- If the issuer or the offeror is a reporting company under the Exchange Act (including "voluntary filers"), it must furnish the press release announcing the offer in a Current Report on Form 8-K filed with the SEC prior to 12:00 noon, Eastern time, on the first business day of the offer.

- The tender offer must provide for communication by Immediate Widespread Dissemination at least five business days prior to the expiration of the offer of any change in the consideration being offered and at least three business days prior to the expiration of the offer of any other material change to the offer at or prior to 10:00 a.m., Eastern time, on the first day of such five or three business day period.

- If the issuer or offeror is a reporting company under the Exchange Act (including a "voluntary filer"), it must describe any change in the consideration being offered in a Current Report on Form 8-K filed with the SEC prior to 12:00 noon, Eastern time, on the first day of the five business day period described above.

- The tender offer must permit tenders prior to the expiration of the offer 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 the delivery of such securities will be made no later than the close of business on the second business day after the expiration of the offer.

- The tender offer must provide for withdrawal rights that are exercisable (1) at least until the earlier of the expiration date of the offer and, if the offer is extended, the tenth business day after commencement, and (2) at any time after the 60th business day after commencement if for any reason the offer has not been consummated by then.

- The tender offer must provide that the consideration will not be paid until promptly after expiration of the offer.

- If the consideration offered is to be determined based on a spread to a benchmark, the spread must be announced at the commencement of the offer.

- In the case of an offer of Qualified Debt Securities, if the interest rate or the spread used for determining the interest rate for such securities is not fixed and announced at the commencement of the offer, it must 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 on any Qualified Debt Securities must be fixed no later than 2:00 p.m., Eastern time, on the last business day of the offer.

- In the case of an offer of Qualified Debt Securities, a minimum acceptance amount would be announced at the commencement of the offer.

Important Changes to Current Practice for Debt Tender Offers

As described above, the new no-action letter affects both the types of tender offers that may be made with a shortened offer period and the procedures for making those tender offers. Significant changes to current practice resulting from the letter include the following:

- *Exchange Offers*. Prior guidance limited consideration in shortened debt tender offers to cash. Permitting exchange offers makes it easier for existing debt holders to roll all or part of their investment into the debt securities issued to refinance the existing debt.

- *Fixed Five Business Day Offer Period*. The SEC staff's prior no-action letters permitted abbreviated offer periods of seven to ten calendar days, without regard to weekends and holidays. The new letter ensures that investors always will have at least five business days to consider an offer.

- *Launch Timing*. The new letter requires commencement of an offer by Immediate Widespread Dissemination prior to 10:00 a.m. Eastern time on the first business day of the offer period. Previously, a day could be counted as the first day of an offer period as long as the offer was commenced before midnight.

- *Form 8-K Filing Requirement*. For the first time, abbreviated debt tender offers carry specific 8-K filing obligations.

- *Withdrawal Rights; Early Settlement*. The new letter requires that tendering holders have withdrawal rights and prohibits early settlement before expiration of the offer, neither of which was a feature of the staff's prior guidance.

- *Disqualifying Circumstances*. The new letter substantially expands the list of circumstances in which abbreviated tender offers may not be used.

- *Tender Offers for High-Yield Debt*. Although the expansion of abbreviated tender offers to high-yield debt securities is a significant change to the SEC staff's prior position, the usefulness of this relief may be limited because the common practice of soliciting consents to eliminate restrictive covenants is not permitted in connection with a shortened tender offer. It remains to be seen whether the flexibility provided for high-yield debt by the new letter will result in any significant change in market practice.