

ClientAlert

Capital Markets

January 2015

New Five Business Day Timeline for Debt Tender or Exchange Offers



On January 23, 2015, the Staff of the US Securities and Exchange Commission issued a no-action letter (the "No-Action Letter") providing that it would not recommend enforcement action with respect to a five business day timeline for tender or exchange offers for non-convertible debt securities meeting certain criteria.¹ This no-action position supersedes the prior no-action letters of the SEC relating to abbreviated offering periods in non-convertible debt tender offers.²

Criteria for the Offer

To qualify, the offer must:

1. be for a class or series of non-convertible debt securities, regardless of rating;
2. be made by the issuer, its direct or indirect wholly owned subsidiary or a parent company that owns 100% of the issuer;
3. be for any and all of the targeted securities;
4. be made for consideration consisting of cash and/or Qualified Debt Securities,³ which consideration may be a fixed price or based on a fixed spread over an interest rate benchmark in the relevant currency such as sovereign securities, LIBOR or swap rates;
5. be open to all record and beneficial holders of the targeted securities; *provided* that exchange offers are restricted to Qualified Institutional Buyers (as defined in Rule 144A under the Securities Act of 1933, as amended) and/or non-US persons (within the meaning of Regulation S under the Securities Act) in a transaction exempt from the registration requirements of the Securities Act and that ineligible holders are given an equivalent cash option;
6. not be made in connection with a consent solicitation with respect to an amendment of the terms of the targeted securities;

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
United States
+ 1 212 819 8200

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom
+ 44 20 7532 1000

Asianajotoimisto
White & Case Oy Eteläranta 14
FI-00130 Helsinki
Finland
+ 358 9 228 641

White & Case LLP
Bockenheimer Landstraße 20
60323 Frankfurt am Main
Germany
+ 49 69 29994 0

White & Case Pte. Ltd.
8 Marina View #27-01
Asia Square Tower 1
Singapore 018960
+ 65 6225 6000

¹ A copy of the No-Action Letter can be found [here](#).

² See Goldman, Sachs & Co. (March 26, 1986); Salomon Brothers Inc. (March 12, 1986); Salomon Brothers Inc. (October 1, 1990).

³ "Qualified Debt Securities" are defined as 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 debt securities that are the subject of the tender offer except for the maturity date, interest payment and record dates, redemption provisions and interest rates; *provided* that Qualified Debt Securities must have (i) all interest payable only in cash and (ii) a weighted average life to maturity that is longer than the debt securities that are the subject of the offer.

New Five Business Day Timeline for Debt Tender or Exchange Offers

7. not be made if the targeted securities are in default or the issuer is in default under any other indenture or material credit agreement;
8. not be made if the issuer is in bankruptcy or insolvency proceedings, has commenced soliciting consents for a “pre-packaged” bankruptcy proceeding or if its board of directors has authorized restructuring discussions;
9. not be financed with the proceeds of any indebtedness incurred to finance all or a portion of the consideration in the offer if such indebtedness (i) has obligors, guarantors or collateral that the targeted 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 targeted securities;
10. permit tenders prior to expiration through a guaranteed delivery procedure allowing certification that delivery will be made by the second business day after expiration;
11. be announced via a widely disseminated press release containing a hyperlink or website address allowing holders to obtain copies of the offer documents, at or prior to 10:00 a.m., Eastern Time, on the first business day of the offer; *provided* that if the issuer or offeror is a reporting company under the Exchange Act, including “voluntary filers,” the press release must be filed in a Form 8-K with the SEC prior to 12:00 noon, Eastern Time, on the first business day of the offer;
12. provide for announcement via a press release at least five business days prior to expiration of a change in consideration and at least three business days prior to expiration of any other material change to the offer, in each case at or prior to 10:00 a.m., Eastern Time, on the first business day of the applicable period, with similar Form 8-K filing requirements for reporting companies and “voluntary filers”;
13. provide for withdrawal rights that are exercisable (i) at least until the earlier of the expiration of the offer and if the offer is extended, the tenth business day after commencement of the offer and (ii) at any time after the 60th business day after commencement of the offer if the offer has not yet been consummated;
14. provide that the offeror will not pay the consideration until promptly after expiration; and
15. not be (i) 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, reorganization or liquidation or sale of all or substantially all

of its consolidated assets, (ii) made in anticipation of or in response to other tender offers for the issuer’s securities, (iii) made concurrently with a tender offer for any other series of the issuer’s securities made by the issuer (or a subsidiary or parent company) if the effect of such offer would be to add obligors, guarantors or collateral or shorten the weighted average life to maturity of such other series or (iv) commenced within ten business days after the first public announcement or the 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 *pro forma* financials pursuant to Article 11 of Regulation S-X.

Practical Implications

Key practical implications of the No-Action Letter for companies are as follows:

- **Ability to Better Align Timing of Tender Offer with New Offering.** Companies conducting a tender offer and concurrently offering new debt securities typically need to launch the tender offer well in advance of the new offering due to the shorter marketing period required for the new offering. Companies conducting a five business day tender offer in reliance upon this no-action position, however, will be able to announce the tender offer at or closer to the time of launching the new offering, thereby allowing additional time to monitor market conditions before commencing the offer.
- **No Investment Grade Debt Limitation.** The no-action position applies regardless of the rating of the debt securities. This is a departure from the traditional requirement of a 20 business day offer under Rule 14e-1(a) of the Exchange Act and the subsequent no-action letters by the Staff of the SEC providing for seven to ten calendar day tender offers with respect to investment grade debt.⁴
- **No Partial Tender or Exchange Offers.** Companies utilizing this no-action position must make their offer for any and all, not just a portion, of the targeted securities.
- **Securities Offered in an Exchange Offer Must Mature After the Targeted Securities.** To conduct a five business day exchange offer, the securities offered must qualify as Qualified Debt Securities.⁵ The requirements for a Qualified Debt Security include that such securities must have “a weighted average life to maturity that is longer than the debt securities that are the subject of this offer.” This limitation will restrict offerors seeking to exchange debt securities for ones with an identical maturity and will require offerors to consider how much longer the maturity must be in order to satisfy this requirement.

⁴ See footnote 2.

⁵ See footnote 3.

New Five Business Day Timeline for Debt Tender or Exchange Offers

- **Exchange Offers Must Include Cash Consideration Option for Ineligible Holders.** Offerors conducting an abbreviated exchange offer must restrict the offer to Qualified Institutional Buyers and/or non-US persons, and any ineligible holders must be given an equivalent cash option. The requirement to provide a cash consideration option to ineligible holders may limit the viability of an abbreviated exchange offer for certain companies.
- **No Concurrent Consent Solicitations.** Many tender offers and exchange offers are conducted in conjunction with a consent solicitation, or an “exit consent,” which serves, among other things, to incentivize holders to participate in the offer. Offerors wishing to conduct a five business day offer, however, will not be permitted to conduct a concurrent consent solicitation.
- **Restrictions on the Type of Indebtedness Incurred to Finance the Offer.** To rely on this no-action position, there are limitations on the characteristics of any indebtedness incurred to finance the offer, as described above, which will prohibit certain offerors from conducting a five business day offer. Notably, however, debt or borrowings under any credit or debt facility existing prior to commencement of the offer are excluded from the definition of Senior Indebtedness. Offerors wishing to rely upon this exception will need to consider how long prior to commencement of the offer the debt or borrowings were incurred.
- **Timing of Announcement and Expiration of Offers.** Five business day offers must be announced by 10:00 a.m., Eastern Time, to count as the first business day of the offer, and can expire on or after 5:00 p.m., Eastern Time, on the final day of the offer. By comparison to current tender offer rules, this requires offerors to announce the offer and distribute documents earlier in the day than the current requirement of midnight, but on the final day allows the offer to expire earlier than the current requirement of midnight.
- **Changes in Consideration Require Five Business Days Prior to Expiration.** If there is a change in the consideration offered during a five business day offer, the change must be announced at least five business days prior to expiration of the offer. This is a departure from the requirement under Rule 14e-1(b) of the Exchange Act, which requires the offer to remain open for at least ten business days after notice of such change is made.
- **Withdrawal Rights Are Required.** In contrast to traditional tender offers and exchange offers wherein offerors sometimes do not provide withdrawal rights (unless required by the terms of the targeted securities, as often occurs when there is a concurrent consent solicitation), withdrawal rights must be provided in a five business day offer, as described above.
- **Abbreviated Offers Cannot be Conducted When Other Material Events Are Occurring.** The prohibition on an abbreviated offer being conducted in conjunction with a change of control, other offers for the issuer’s securities, other offers for other series of the issuer’s securities involving a consent solicitation or a material acquisition, in each case, as described above, will have the effect of limiting abbreviated offers to instances where it is a straightforward decision for the investor, without the distractions of other material events.

Conclusion

We welcome this new development which will greatly aid the ability of companies able to satisfy the criteria for the no-action position to refinance their debt on a significantly shorter timeline than is currently available.

Client Alert

New Five Business Day Timeline for Debt Tender or Exchange Offers

If you have any questions, please contact your usual White & Case contact or one of the attorneys listed below.

Gary Kashar
Partner, New York
+ 1 212 819 8223
gkashar@whitecase.com

Andrew Weisberg
Associate, New York
+ 1 212 819 8980
aweisberg@whitecase.com

Dan Nam
Partner, New York
+ 1 212 819 8542
dnam@whitecase.com

Ken Suh
Partner, New York
+ 1 212 819 8995
ksuh@whitecase.com

Jin Kim
Partner, New York
+ 1 212 819 8994
jin.kim@whitecase.com

John Vetterli
Partner, New York, São Paulo
+ 1 212 819 8816
+ 55 11 3147 5615
jvetterli@whitecase.com

Rob Mathews
Partner, London
+ 44 20 7532 1429
rmathews@whitecase.com

Petri Haussila
Partner, Helsinki
+ 358 9 228 64 320
phaussila@whitecase.com

Michael Immordino
Partner, London, Milan
+ 44 20 7532 1399
+ 39 02 00688 310
michael.immordino@whitecase.com

Gernot Wagner
Partner, Frankfurt
+ 49 69 29994 1430
gernot.wagner@whitecase.com

Kaya Proudian
Partner, Singapore
+ 65 6347 1308
kproudian@whitecase.com

This Client Alert is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons. This Client Alert should not be acted upon in any specific situation without appropriate legal advice and it may include links to websites other than the White & Case website.

White & Case has no responsibility for any websites other than its own and does not endorse the information, content, presentation or accuracy, or make any warranty, express or implied, regarding any other website.

This Client Alert is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.

whitecase.com