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BASELOAD

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Five Business Day Tenders: More and More Popular, If You Qualify

On January 23, 2015, the staff of the SEC issued a no-action letter[1] that permitted, under certain circumstances, an issuer (or parent or subsidiary) to conduct a tender offer for any and all of a class of its nonconvertible debt securities in 5 business days (5-day tender), instead of the 20 business days prescribed by Rule 14e-1 under the 1934 Act. The no-action letter made clear that it superseded any prior letters relating to abbreviated offering periods in non-convertible debt tender offers. Going forward, it would be either a 5-day tender or the full 20 business days prescribed by the 1934 Act.

A recent review of 5-day tenders proves that many issuers are taking advantage of the flexibility provided in the no-action letter. See, for example,

- Waste Management, Inc., February 2015
- Express Scripts Holding Company, June 2016
- Altria Group, Inc., September 2016
- Target Corporation, October 2017
- Intel Corporation, November 2017
- Merck & Co., Inc., November 2017
- Baker Hughes, December 2017
- Snap-On Incorporated, February 2018
- CNX Resources Corporation (f/k/a CONSOL Energy Inc.), March 2018
- United States Steel Corporation, March 2018

5-day tenders in the utility space have been less frequent. But in June 2018, NiSource Inc. launched a 5-day tender for three different series of its notes.

One reason that 5-day tenders have remained somewhat limited in the utility space (and elsewhere) is the number of disqualifying characteristics set out in the no action letter. In order to qualify for the 5-day tender, it must be an "any and all" offer. An offer with a tender cap would not qualify. Nor would a waterfall tender qualify. Further, a coinciding consent solicitation also disqualifies the tender from the 5-day guidance.[2]

The SEC's no action letter for a 5-day tender also requires that tenders be permitted prior to the expiration of the offer through a guaranteed delivery procedure. Pursuant to guaranteed delivery, a holder provides a certification 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. Even in a world where most securities are held through DTC, it is not uncommon for some small principal amount of securities to come into the tender via guaranteed delivery.

This raises the question of when the issuer will settle on any tenders provided through the guaranteed delivery procedures. In the majority of deals we reviewed, the primary settlement occurs one business day after expiration. For any holders who tender via guaranteed delivery, those guaranteed delivery tenders are settled out three business days after expiration. And those who tender via guaranteed delivery do not receive any accrued interest for the two business day delay in their settlement.

There have been, however, some deals wherein the issuer waits until after the guaranteed delivery date to settle—so as to settle out all holders at one time. This "one settlement" approach has the advantage of simplicity, with only one settlement wire for the issuer. But it has the distinct disadvantage of having the company pay accrued interest on all of the tenders for an additional two business days. (With two settlements, all holders, even those who come in via guaranteed delivery, only get accrued interest through the initial settlement date. With one settlement, all holders, even those who come in via guaranteed delivery, get accrued interest through the single settlement date, which typically occurs three business days after expiration).

For tender offers (or exchange offers) which qualify under the new 5-day guidance, there are subtle differences in the mechanics of the offer, including the closing. Issuers and dealer managers are well advised to think through any differences resulting from the new 5-day guidance early on in the process so as to ensure a smooth execution.

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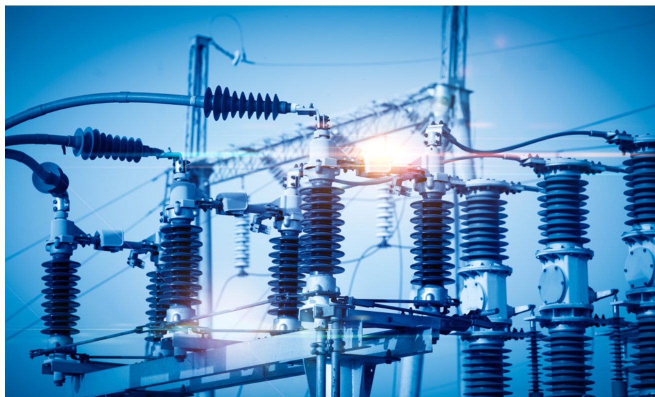
1 The Credit Roundtable, Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities (Jan. 23, 2015), *available at* https://www.sec.gov/divisions/corpfin/cf-noaction/2015/abbreviated-offers-debt-securities012315-sec14.pdf.

2 On November 18, 2016, the SEC's Division of Corporation Finance released seven new Compliance and Disclosure Interpretations (C&DIs) pertaining to debt tender offers. Five of the new C&DIs address rules and schedules within the context of the shortened debt tender relief issued in the January 23, 2015 no-action letter.

Floating Rate Deals Contemplate End of LIBOR



In July 2017, the UK Financial Conduct Authority (FCA) announced that the FCA would begin phasing out the London Interbank Offered Rate (LIBOR) interest rate benchmark by the end of 2021, the benchmark rate which underpins, among other things, mortgages, corporate debt securities and interest rate derivatives contracts.[1] LIBOR is calculated daily by surveying banks on their estimated borrowing costs from one another in five currencies across seven time periods. It was previously overseen by the British Bankers' Association until a rate-rigging scandal uncovered in 2012 led to the ICE Benchmark Administration (ICE), a subsidiary of the Intercontinental Exchange Inc., taking control over the administration of the benchmark in 2014. With ICE as administrator, LIBOR underwent a series of reforms meant to more closely tie submissions and rates to actual transactions in order to ensure that the rate represents market conditions.

In the public debt capital markets, there has been a good deal of consistency in the formulation for setting a rate once LIBOR is gone. In August 2018, NextEra Energy Capital Holdings, Inc. (NextEra) priced $716 million of floating rate debentures due 2020 and $350 million of floating rate debentures due 2021.[2] Similar to past transactions, the floating LIBOR rate going forward is a reference to a particular Bloomberg or Reuters page. To the extent the information is no longer provided on such pages, the calculation agent must seek LIBOR quotes from the London offices of four major banks. However, if the issuer determines that LIBOR has been permanently discontinued, the calculation agent will use an "alternative reference rate selected by a central bank, reserve bank, monetary authority or any similar institution (including any committee or working group thereof) that is consistent with accepted market practice (the "Alternative Rate")."[3]

One aspect of this (possible) move to an "Alternative Rate" is the discretion given to the calculation agent thereby. As part of such substitution, the calculation agent will "as directed by [the issuer], make such adjustments ("Adjustments") to the Alternative Rate or the spread thereon, as well as the business day convention, interest determination dates and related provisions and definitions, in each case that are consistent with accepted market practice for the use of such Alternative Rate for debt obligations."[4] Not only are holders of the floating rate instruments, at the outset, agreeing that an alternative rate may replace the LIBOR rate on their debt securities, they are further agreeing that the calculation agent can alter that new rate with "adjustments" consistent with market practice. The final fallback under the NextEra papers, if an Alternative Rate cannot be obtained, is the last rate available on the relevant Bloomberg or Reuters page.

Another recent example of this approach was AT&T Inc.'s (AT&T) $3.75 billion floating rate notes due 2024, which closed on August 22, 2018.[5] Similar to NextEra, in the case where LIBOR had been discontinued, the AT&T transaction allowed the calculation agent to use an "alternative rate" and to make "adjustments" that are "consistent with accepted market practice for the use of such [a]lternative [r]ate."[6]

Unlike NextEra and AT&T, certain other recent floating rate transactions also contemplate, under certain circumstances, the appointment of an independent financial advisor. On September 10, 2018, General Motors Company closed an offering of $450 million senior notes due 2021,[7] which provided that:

> if we determine there is no clear market consensus as to whether any rate has replaced three-month LIBOR in customary market usage, we may appoint in our sole discretion an independent financial advisor (the "IFA") to determine an appropriate

1 Max Colchester, *Scandal-Hit Libor to Be Phased Out*, THE WALL STREET JOURNAL, July 27, 2017.

2 NextEra Energy Capital Holdings, Inc., Form 424(b)(2), dated August 21, 2018, *available at* https://www.sec.gov/Archives/edgar/data/753308/000114420418045959/tv501450-424b2.htm.

3 *Id.*

4 *Id.*

5 AT&T Inc., Form 424(b)(2), dated August 16, 2018, *available at* https://www.sec.gov/Archives/edgar/data/732717/000119312518253029/d585064d424b2.htm.

6 *Id.*

7 General Motors Company, Form 424(b)(2), dated September 5, 2018, *available at* https://www.sec.gov/Archives/edgar/data/1467858/000119312518268865/d618880d424b2.htm.

> Alternative Rate, and any Adjustments, and the determinations of the IFA will be binding on us, the trustee, the calculation agent, if any, and the holders of the Floating Rate Notes.

For similar language which contemplates an independent financial advisor, see Pfizer Inc.'s $300 million offering of floating rate notes which closed on September 7, 2018.[8]

While there exists some level of variation in recent formulations for longer-tenored floating debt deals, issuers are well advised to visit offering documents, including Risk Factors, early on in an offering process. Also, trustee's counsel will likely require input in the floating rate formulation that is used. It is clear from the deals in the market over the past several months that while some of the mechanics differ from deal to deal, the public debt markets as a whole are contemplating a new era, when LIBOR is no longer the benchmark rate.

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8 Pfizer Inc., Form 424(b)(5), dated September 4, 2018, *available at* https://www.sec.gov/Archives/edgar/data/78003/000119312518268294/d617367d424b5.htm.

FinCEN: The New Customer Due Diligence Requirements

On May 11, 2018, new rules[1] adopted by the Financial Crimes Enforcement Network (FinCEN) within the U.S. Department of the Treasury require financial institutions to identify and verify the identity of beneficial owners who own or control legal entity customers of the financial institutions and to obtain a certification from the legal entity customers as to their beneficial owners.[2] The new rules are intended to assist law enforcement in investigating terrorist financing, money laundering and other financial crimes that may be perpetrated through the use of legal entities.

FinCEN's beneficial ownership definition includes two parts:

(a) the control prong, covering a single individual with significant responsibility to control, manage, or direct a legal entity customer, including an executive officer, a senior manager or any other individual who regularly performs similar functions; and

(b) the ownership prong, covering each individual (if any) who directly or indirectly owns 25% or more of the equity interests of a legal entity customer.

The rules require covered financial institutions to collect and verify the beneficial ownership information of up to five individuals: one person under the control prong and each person who meets the definition under the ownership prong. FinCEN has provided a certification form that financial institutions may use to obtain the required beneficial ownership information, but firms are not required to do so and may choose to obtain the required information through their own forms or any other method that complies with the requirements of the rules.

1 31 C.F.R. 1010.230.

2 See also a related memo from SIFMA with respect to the new rules, *available at* https://www.sifma.org/wp-content/uploads/2018/05/CDD-Beneficial-Ownership-Memo.pdf.

3 Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions (July 19, 2016), *available at* https://www.fincen.gov/sites/default/files/2016-09/FAQs_for_CDD_Final_Rule_%287_15_16%29.pdf.

On July 19, 2016, FinCEN issued guidance[3] summarizing the new requirements and responding to certain frequently asked questions. FinCEN's 2016 guidance summarizes the types of entities excluded from the beneficial ownership requirement (both the control prong and the ownership prong), which include (among others):

- a financial institution regulated by a federal functional regulator or a bank regulated by a state bank regulator;
- a department or agency of the United States, of any state, or of any political subdivision of a state;
- an entity established under the laws of the United States, or any state, or of any political subdivision of any state, or under an interstate compact, that exercises governmental authority;
- an entity (other than a bank) whose common stock or analogous equity interests are listed on the New York, American, or NASDAQ stock exchange;
- a subsidiary, other than a bank, of an entity described in the immediately preceding bullet that is organized under the laws of the United States or of any state and at least 51% of whose common stock or analogous equity interests are held by the listed entity;
- an issuer of securities registered under Section 12 of the 1934 Act or that is required to file reports under Section 15(d) of the 1934 Act;
- an investment company, as defined in Section 3 of the Investment Company Act of 1940, registered with the SEC;

- an SEC-registered investment adviser, as defined in Section 202(a)(11) of the Investment Advisers Act of 1940;
- an exchange, a clearing agency, or any other entity registered with the SEC under the 1934 Act;
- a public accounting firm registered under Section 102 of the Sarbanes-Oxley Act; and
- a bank holding company, as defined in Section 2 of the Bank Holding Company Act of 1956 (12 USC 1841), or a savings and loan holding company, as defined in Section 10(n) of the Home Owners' Loan Act (12 USC 1467a(n)).

FinCEN issued additional frequently asked questions on April 3, 2018.[4] The April guidance included 37 FAQs.

In the context of an underwritten sale of securities, the lead underwriter is often tasked with obtaining the certification of beneficial ownership and copies of identifying documents. In many transactions, as described in the July 2016 guidance, the issuer will have an exemption from both the control prong and the ownership prong. In those instances, a lead underwriter, in some cases, will obtain from the issuer the certification of the exemption upon which the issuer is relying. But specific policies vary somewhat among the major investment banks.[5]

Underwriters and counsel are advised to cover this issue early on in the offering process. This is especially true on deals where the issuer has yet to come to market after the May 11, 2018 effective date.

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4 Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions (Apr. 3, 2018), *available at* https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf.

5 In addition, some investment banks have produced their own FinCEN forms for this purpose to submit to the issuer.

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