Exchange Act Rule 14e-1 Opinions for Debt Tender Offers

By Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee, ABA Business Law Section

I. Introduction

This report addresses legal opinions regarding the application of Rule 14e-1 under the Securities Exchange Act of 1934 (the "Exchange Act") to tender offers for non-convertible debt securities ("debt tender offers"). Rule 14e-1 was adopted by the U.S. Securities and Exchange Commission (the "SEC")[1] pursuant to its authority in section 14(e) of the Exchange Act by "rules and regulations[, to] define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." When debt tender offers are structured to be consistent with the literal requirements of Rule 14e-1, the Rule 14e-1 opinion is straightforward. On the other hand, when debt tender offers are structured in ways that raise questions as to their consistency with those requirements (which is often the case), the Rule 14e-1 opinion raises issues for counsel that typically are not present in other types of opinions. In these circumstances, counsel delivering the opinion may rely on no-action letters, interpretive positions, and other forms of guidance provided by the SEC's Division of Corporation Finance and its staff (the "Staff"), and should consider including appropriate language in the opinion to inform the recipient about counsel's reliance on such guidance.[2] To the extent that relevant Staff guidance is unavailable, counsel delivering the opinion should consider including appropriate language in the opinion to inform the recipient of the absence of relevant guidance.

The Subcommittee has issued this report to assist lawyers in preparing Rule 14e-1 opinions. This report first discusses legal issues that commonly arise regarding compliance of debt tender offers with Rule 14e-1. It then discusses why Rule 14e-1 opinions are requested, the special considerations they present, and the ways those considerations can be addressed when Rule 14e-1 opinions are given. Included in this report are illustrative opinion forms that may be used as a starting point in drafting a Rule 14e-1 opinion.

1. Release No. 34-16384 (Nov. 29, 1979).
2. The guidance is provided sometimes in writing and other times orally. The Subcommittee believes that counsel is entitled to rely on all such guidance.

II. Legal Issues Arising Under Rule 14e-1 in Debt Tender Offers

In Rule 14e-1, the SEC has prescribed—as means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices—several requirements for tender offers, only two of which ordinarily are significant for debt tender offers that are the subject of Rule 14e-1 opinions:

- the tender offer must remain open for at least twenty business days; and
- the tender offer must remain open for at least ten business days after notice of a change in the consideration offered or in the percentage of the class of securities being sought in the offer is first provided to security holders.[3]

While these requirements are easy to understand, they present interpretive questions when applied to a range of debt tender offer features and structures common in the marketplace. For example, provisions for shorter acceptance periods, yield-based formula pricing, modified Dutch auction pricing mechanisms, waterfall priority structures, and capped tender offers with early settlement followed by a step down in pricing, each as described below, are common elements in debt tender offers and may not be consistent with a literal reading of Rule 14e-1.

- A tender offer may be held open for as few as five business days instead of the twenty business days specified in Rule 14e-1.[4]
- A tender offer may use yield-based formula pricing, with the offer price determined on the basis of a fixed spread over a reference rate, such as a Treasury rate or another benchmark rate that is readily available on a Bloomberg or similar trading screen or quotation service. Because the offer price, expressed as a dollar amount per security, is not established until the price determination date (which is likely to be fewer than ten business days prior to the expiration date for the tender offer), such pricing mechanisms raise a question as to compliance with the requirement to keep the tender offer open for ten business days after a change in the offer price.

3. Rule 14e-1 also requires prompt payment or return of tendered securities after termination or withdrawal of the tender offer, and prescribes the manner of announcing extensions of the tender offer. Because these requirements relate to actions to be taken after a tender offer is commenced, they are generally not addressed in a Rule 14e-1 opinion, which typically is delivered at the commencement of a debt tender offer. However, these requirements may be addressed based on an assumption that the tender offer is conducted in accordance with the terms set forth in the tender offer documentation as long as that documentation provides (i) for prompt payment or return of tendered securities after termination or withdrawal of the tender offer as required by Rule 14e-1, and (ii) that any extension of the tender offer (including requisite notice of any such extension) be effected in accordance with Rule 14e-1.

4. See *infra* note 13 for a discussion of the Staff's no-action relief on this practice.

- The tender offer may include a "modified Dutch auction" pricing mechanism, which allows holders who tender their securities to select the minimum price at which their securities may be purchased (or to tender their securities without any specified price, which will be taken to mean at the lowest price in the range specified by the offeror). The offer price may be expressed as a fixed dollar amount, a spread over a benchmark rate, or a premium to the face amount of the security. At the end of the tender offer period, the offeror pays the lowest price that will allow it to purchase the desired amount of securities, with holders who tendered at or below the final price receiving the same price for their securities to the extent accepted for purchase pursuant to the tender offer. Because the offer price is set at the end of the offer period and is based on the tenders received, a modified Dutch auction structure raises a question as to compliance with the requirement to keep the tender offer open for ten business days after a change in the offer price.
- The tender offer may incorporate a "waterfall" priority feature, pursuant to which the issuer offers to purchase multiple series of securities in the priority set forth in the offer to purchase; the offer may set a maximum principal amount of each series (the "cap") that will be accepted pursuant to the tender offer; and all securities in higher priority series validly tendered (up to the cap, if any) are accepted before tenders of securities in lower priority series are accepted. Because the aggregate principal amount of lower priority series of securities to be purchased is determined only at the end of the offer period, based on tenders received of higher priority series, a waterfall priority feature raises a question as to compliance with the requirement to keep the tender offer open for ten business days after a change in the percentage of the securities that are the subject of the offer.
- The tender offer may be for up to a specified maximum amount of debt securities and contain a step down in price after ten business days and early settlement in respect of securities tendered prior to the step down. These features, depending on the particular structure of the offer, could raise a question as to compliance with the literal requirement to keep the tender offer open for at least twenty business days.

Further, because the features and structures of debt tender offers are continually evolving, new interpretive questions under Rule 14e-1 continue to arise.[5]

5. *See* Charles T. Haag & Zachary A. Keller, *Honored in the Breach: Issues in the Regulation of Tender Offers for Debt Securities*, 9 N.Y.U. J.L. & Bus. 199, 233–40, 243–47 (2012) (summarizing developments in structuring debt tender offers).

III. Appropriateness of Requesting a Rule 14e-1 Opinion

The dealer manager for a tender offer typically requests that issuer's counsel deliver a Rule 14e-1 opinion. Notwithstanding this practice, the Subcommittee believes that the parties involved in a debt tender offer could usefully consider, in the circumstances of a particular tender offer, whether a Rule 14e-1 opinion serves a constructive purpose and therefore should be requested or delivered. Factors the parties might consider include the relative experience and background of counsel for the issuer and of the dealer manager and its counsel, their relative involvement in structuring the tender offer, and the relative novelty and complexity of the structure being used. Where counsel for the issuer and the dealer manager work together on structuring—a practice that generally is desirable—the significance of any disparities in experience or involvement in the tender offer may be reduced.[6]

In several respects, the circumstances of Rule 14e-1 opinions differ from those in which issuer's counsel typically gives an opinion in a securities offering. First, the dealer manager is acting as an agent of the issuer, rather than as a principal or counterparty, and does not have any direct financial exposure in connection with the debt tender offer. Second, the dealer manager for a cash tender offer is not subject to express liability provisions under the federal securities laws such as section 11 of the Securities Act of 1933, which imposes liability on underwriters in a registered offering of securities.[7] Although the dealer manager usually assists the issuer in developing the structure of the debt tender offer, typically with the advice and assistance of the dealer manager's counsel as to legal aspects of the structuring, the issuer making the debt tender offer is ultimately responsible for compliance with Rule 14e-1. Why, then, are Rule 14e-1 opinions requested, and why are they addressed to the dealer manager?

One answer may be that Rule 14e-1 opinions, like other opinions, serve as a "building block" in the parties' diligence with respect to the transaction[8] and as tangible evidence that attention was paid to compliance with legal requirements. Whether the opinion should come from issuer's counsel, however, is open to question.[9] As in many other capital markets and financing contexts, dealer managers in debt tender offers typically are sophisticated and are represented by experienced counsel. From a practical perspective, however, dealer managers commonly regard a Rule 14e-1 opinion from issuer's counsel as a procedural check

6. If the tender offer includes features or structural provisions that raise significant interpretive considerations under Rule 14e-1 and dealer manager's counsel has had more dealings with the Staff on point than issuer's counsel, dealer manager's counsel should ensure that issuer's counsel has the opportunity to evaluate the relevant Staff guidance that the dealer manager's counsel has received (to the extent that client confidences are not implicated).

7. The antifraud provisions of the federal securities laws apply to debt tender offers, although these provisions are not addressed by the Rule 14e-1 opinion.

8. Donald W. Glazer, Scott FitzGibbon & Steven O. Weise, Glazer and FitzGibbon on Legal Opinions § 1.3.1 (3d ed. 2008 & Supp. 2016) [hereinafter Glazer]; *see also Honored in the Breach*, *supra* note 5, at 217 (describing the opinion letter as the culmination of the lawyer's role of overseeing the debt tender offer's compliance with the securities laws).

9. *See* Glazer, *supra* note 8, §§ 1.1, 1.3.1 (discussing English practice of counsel addressing opinions to their own clients).

and as a way of increasing the chances that all parties (issuer and dealer manager and their respective counsel) would present a united front should questions later arise about the debt tender offer's compliance with the federal securities laws.

Why the Rule 14e-1 opinion is addressed to the dealer manager is less clear because, as noted above, the opinion may not reduce any legal exposure that the dealer manager might have in connection with a debt tender offer.[10] By requesting a Rule 14e-1 opinion, the dealer manager may be seeking to address reputational concerns or potential exposure to enforcement actions from the SEC or other regulators that could result from improperly structured debt tender offers. However persuasive or unpersuasive these reasons may be, the Subcommittee recognizes the practice of issuer's counsel giving Rule 14e-1 opinions addressed to the dealer manager in these transactions.[11]

IV. Unusual Nature of the Rule 14e-1 Opinion

Unlike a typical third-party legal opinion for which the accepted standard is that the opinion is an expression of "the opinion giver's professional judgment about how the highest court of the jurisdiction whose law is being addressed would appropriately resolve the issues covered by the opinion on the date of the opinion letter,"[12] Rule 14e-1 opinions, when given with respect to debt tender offers that do not comply with the literal requirements of Rule 14e-1, are understood by experienced dealer managers and their counsel to express the opinion giver's judgment that, as a regulatory and administrative matter, the SEC is unlikely to bring an enforcement action for non-compliance with the literal requirements of Rule 14e-1.

Section 14(e) of the Exchange Act provides that it shall be unlawful for any person to engage in any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer. When the Staff issues a no-action letter stating that it will not recommend that the SEC take enforcement action under Rule 14e-1 if the offeror conducts a tender offer as summarized in a no-action request,[13] the Staff is implicitly expressing its view that the proposed tender

10. The Subcommittee is not aware of any civil actions or claims against dealer managers in respect of compliance with the procedural requirements of Rule 14e-1.

11. *See* Glazer, *supra* note 8, § 1.3.1 (noting that "the practice of counsel for one party to a financial transaction in the United States giving the other party an opinion on the enforceability of an agreement drafted by that other party's counsel is well entrenched and has resisted all efforts by lawyers and bar association groups to change it").

12. TriBar Opinion Comm., *Third-Party "Closing" Opinions*, 53 Bus. Law. 592, 595–96 (1998) [hereinafter *1998 TriBar Report*]; Glazer, *supra* note 8, § 3.1 ("an unqualified opinion expresses the opinion preparers' professional judgment that the highest court of the jurisdiction whose law is being addressed would, based on the facts on which the opinion preparers have relied, reach the conclusions stated in the opinion").

13. For example, in a 2015 no-action letter, the Staff permitted a tender offer to be held open for as few as five business days instead of the twenty business days specified in Rule 14e-1. *Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities*, U.S. Sec. & Exch. Commission Division Corp. Fin. (Jan. 23, 2015), https://www.sec.gov/divisions/corpfin/cf-noaction/2015/abbreviated-offers-debt-securities012315-sec14.pdf [hereinafter *2015 Abbreviated Tender Offer No-Action Letter*] ("This no-action position supersedes the letters issued to Goldman, Sachs & Co. (March 26,

offer does not constitute a fraudulent, deceptive, or manipulative act or practice.[14] For this reason, the Subcommittee believes that an opinion giver may properly base a Rule 14e-1 opinion on no-action letters and other Staff guidance and may properly assume that an experienced dealer manager understands the basis for the opinion. Consistent with this understanding, Rule 14e-1 opinions commonly refer to no-action letters, interpretive positions, and other forms of Staff guidance or consultations as the basis for the opinion. Although the Staff's views, as expressed in no-action letters and other Staff guidance, are not binding on the SEC or the courts,[15] the Subcommittee believes that a court reviewing a debt tender offer would likely give considerable weight to that guidance.[16]

The Subcommittee believes that, when counsel is comfortable that the dealer manager, with the advice of its counsel, understands the basis for the opinion it is receiving, counsel may properly rely, without stating that reliance, on Staff guidance in preparing a Rule 14e-1 opinion,[17] even when that guidance contemplates that elements of a tender offer may not comply with a literal requirement of Rule 14e-1.[18] Nevertheless, because of the unusual nature of Rule 14e-1 opin-

1986); Salomon Brothers Inc. (March 12, 1986); Salomon Brothers Inc. (October 1, 1990); and any similar letters relating to abbreviated offering periods in non-convertible debt tender offers[.]"); *see also* CHARLES J. JOHNSON, JR., JOSEPH MCLAUGHLIN & ERIC S. HAUETER, CORPORATE FINANCE AND THE SECURITIES LAWS § 13.03 (5th ed. 2014) (describing debt tender offer structures and related no-action letters).

In addition to the *2015 Abbreviated Tender Offer No-Action Letter*, the Staff has provided guidance from time to time in various forms, including other no-action letters, telephone advice, and statements at bar association meetings, securities law programs, and other public forums. Of course, counsel can always seek guidance directly from the Staff in connection with a specific pending transaction.

14. So, too, when the Staff provides other forms of guidance with respect to one or more aspects of a tender offer or tender offer practice.

15. In its online form for requesting interpretive advice (https://www.sec.gov/cgi-bin/corp_fin_interpretive), the Staff cautions that "[r]esponses to requests for interpretive advice are not rules, regulations, or statements of the Commission, and the Commission has neither approved nor disapproved the Staff's responses or interpretations. Due to their informal nature, these responses are not necessarily binding on the Staff, the Division of Corporation Finance or the Commission. Our responses do not constitute legal advice, for which you should consult with your own attorney. While the Division encourages written requests, the Staff's responses to these requests will be given telephonically."

16. *See* Trinity Wall Street v. Wal-Mart Stores, Inc., 792 F.3d 323, 342–43 n.11 (3d Cir. 2015) (stating that the court gives the body of no-action letters "careful consideration" because they represent the views of those who continuously work with the applicable regulation). This opinion, which involved a no-action letter regarding the excludability of a shareholder proposal under Exchange Act Rule 14a-8, also cites Donna M. Nagy, *Judicial Reliance on Regulatory Interpretation in S.E.C. No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 1002 (1998), as "maintaining that whether 'the staff has consistently maintained a particular regulatory interpretation in no-action letters over a long period of time is relevant' to whether the interpretation should merit some deference, as 'consistent, longstanding staff positions may signal Commission approval of these positions.'" *Id.* at 343.

17. *Cf.* GLAZER, *supra* note 8, § 3.1 (noting that even though an opinion may turn out to be wrong, the standard for liability "requires a failure by the lawyers who prepared the opinion to exercise due care").

18. Counsel must, of course, adhere to the relevant standard of care in connection with its preparation and delivery of a Rule 14e-1 opinion and exercise professional judgment as to the ability to rely on Staff guidance. *Id.* § 1.6.1 (noting that the lawyer must "exercise the competence and diligence normally exercised by lawyers in similar circumstances" when delivering a closing opinion; this duty of care is "one of reasonableness in the circumstances" and "what is reasonable in the case of closing

ions, the Subcommittee recommends that counsel make clear the basis for the professional judgment expressed in the opinion.[19]

When giving a Rule 14e-1 opinion, counsel may also be asked to opine on tender offer structures for which no specific Staff guidance or controlling judicial precedent exists. Under these circumstances, counsel should consider disclosing in the opinion the absence of guidance or judicial precedent so that the dealer manager, with the advice of its counsel, understands the basis for the opinion it is receiving.

V. Forms of Rule 14e-1 Opinions

Form A

If the structure of a debt tender offer complies with the literal requirements of Rule 14e-1, counsel may use the following form as a starting point for the opinion:

> *(X.) The tender offer, if conducted in accordance with the terms and conditions set forth in the Offer to Purchase [and the related Letter of Transmittal], will*[20] *comply in all material respects with*[21] *Rule 14e-1[(a)]*[22] *under the Exchange Act.*
>
> *Except as set forth in the immediately preceding sentence, we express no opinion as to compliance of the Tender Offer with the Exchange Act, any other provision of any rule or regulation promulgated under the Exchange Act, or any other securities laws, or the rules and regulations adopted thereunder.*

Form B

If the structure of a debt tender offer does not comply with the literal requirements of Rule 14e-1 but is in compliance with or satisfies the conditions of spe-

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opinions, unless otherwise agreed, is determined by the customary practice of lawyers who regularly give and who regularly represent recipients of opinions of the kind involved").

19. *Cf. 1998 TriBar Report*, *supra* note 12, at 602–03 (discussing risk of misleading the opinion recipient).

20. The Rule 14e-1 opinion is generally delivered at the commencement of the tender offer, suggesting that the future tense is more appropriate, but the use of the future tense does not change the principle that the opinion speaks only as of its date. If counsel is asked to deliver a Rule 14e-1 opinion after commencement of the tender offer, counsel should consider whether any post-commencement changes to the structure of the tender offer or the conduct of the tender offer in fact suggest that Form C below would serve as a more appropriate form or whether delivery of the opinion is generally appropriate under the circumstances.

21. The use of "comply with" in the opinion should be understood to refer to Rule 14e-1 as it has been interpreted, administered, and enforced by the SEC and the Staff. In addition, some law firms include a materiality qualifier ("in all material respects/in any material respect") in their Rule 14e-1 opinions. The Subcommittee views the inclusion of such a qualifier as unobjectionable.

22. Assuming that the opinion is delivered at the commencement of the tender offer, limiting the opinion to clause (a) of Rule 14e-1 is appropriate because the specific intention to hold the tender offer open for the required twenty business days will be evidenced by the disclosure in the Offer to Purchase. However, if the tender offer documentation specifically states that the issuer will take the actions necessary to ensure that the procedural requirements of Rule 14e-1(b)–(d) are satisfied, the opinion need not be limited to clause (a) of the Rule, and issuer's counsel in such circumstances may assume without so stating in its opinion that the tender offer is conducted in the manner set forth in the tender offer documents.

cific Staff guidance, counsel may use one of the following alternatives as a starting point for the opinion[23]:

(X.) ***Alternative 1**: The tender offer, if conducted in accordance with the terms and conditions set forth in the Offer to Purchase [and the related Letter of Transmittal], will satisfy the conditions specified in the [name of no-action letter or Staff guidance] dated [X]]. The position expressed in [the no-action letter or Staff guidance] is not binding on the Commission or the courts.*

***Alternative 2**: The Division of Corporation Finance of the Commission would not recommend that the Commission take enforcement action under Rule 14e-1[(a)] under the Exchange Act if the tender offer is conducted in accordance with the terms and conditions set forth in the Offer to Purchase [and the related Letter of Transmittal]. In reaching this opinion, we have relied upon [name of no-action letter or Staff guidance] dated [X]].[24] The position expressed in [the no-action letter or Staff guidance] is not binding on the Commission or the courts.*

Except as set forth in the immediately preceding sentence, we express no opinion as to compliance of the Tender Offer with the Exchange Act, any other provision of any rule or regulation promulgated under the Exchange Act, or any other securities laws, or the rules and regulations adopted thereunder.

Form C

If the structure of a debt tender offer raises interpretive issues under Rule 14e-1 not addressed in specific Staff guidance, counsel may use one of the following alternatives as the starting point for the opinion:

(X.) ***Alternative 1**: The tender offer, if conducted in accordance with the terms and conditions set forth in the Offer to Purchase [and the related Letter of Transmittal], will comply in all material respects with Rule 14e-1[(a)] under the Exchange Act, as administered and enforced by the Securities and Exchange Commission and its Staff. [We note that no specific authority exists under Rule 14e-1 that expressly permits [early tender premiums, formula-based pricing, early settlement, different acceptance priority levels or a price determined on a single day by a fixed spread above a reference yield].][25]*

***Alternative 2**: The Division of Corporation Finance of the Commission would not recommend that the Commission take enforcement action under Rule 14e-1[(a)] under the Exchange Act if the tender offer is conducted in accordance with the terms and conditions set forth in the Offer to Purchase [and the related Letter of Transmittal].*

23. Either of these alternatives could be given, for example, on a tender offer that is structured to comply with the *2015 Abbreviated Tender Offer No-Action Letter*.

24. To the extent that a basis for the opinion is guidance that is not publicly available and was provided informally by the Staff to other counsel, then issuer's counsel should consider including appropriate explanatory language in its opinion.

25. Although not necessary, counsel may choose to include the bracketed language to alert the opinion recipient to the specific aspects of the tender offer that raise interpretive issues.

Additional Explanatory Language[26]:

- *[1] We are aware of no controlling judicial precedent or other binding authority that supports the conclusion expressed in this opinion. Accordingly, we can provide no assurance that a court or the Securities and Exchange Commission would reach the same conclusion.*[27]
- *[2] This opinion is based on [no-action letters issued by] [, and] [discussions with,] the Staff of the Division of Corporation Finance of the Commission [between the Staff and our firm][,] [between the Staff and your counsel of which we are aware][,] [as well as discussions we are aware of between the Staff and other firms [, including your counsel]] [, none of which specifically relates to the Tender Offer].*
- *[3] [While we believe the Division would not object to the manner in which the Tender Offer is proposed to be conducted, we also note that the] [The] positions expressed in these [no-action letters] [and] [discussions] are not binding on the Commission or the courts.*

Except as set forth in the immediately preceding sentence, we express no opinion as to compliance of the Tender Offer with the Exchange Act, any other provision of any rule or regulation promulgated under the Exchange Act, or any other securities laws, or the rules and regulations adopted thereunder.

26. Counsel should consider the need to include additional language in the opinion, such as the existence of interpretive issues and the basis for counsel's conclusions and the intended meaning of the opinion.

27. Although not necessary, counsel may choose to include additional explanatory language to alert the opinion recipient that no judicial or regulatory authority has passed upon the appropriateness of those aspects of the tender offer that raise interpretive issues. The inclusion of such language does not render the opinion "qualified" but is intended to inform the recipient and assist in its consideration of relevant regulatory and enforcement risks.