



SEC Staff Issues New Guidance on Debt Tender Offers

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. The first two C&DIs apply to Regulation 14D and Section 14(d) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), clarifying rules about compensation disclosure for financial advisors. Highlights of these C&DIs include the following guidance:

- Item 5 of Schedule 14D-9 and Item 1009(a) of Regulation M-A together require a summary of all material terms of employment, retainer or other arrangement for compensation regarding “all persons...that are directly or indirectly employed, retained, or to be compensated to make solicitations or recommendations in connection with” a transaction subject to the provision. A financial advisor engaged by the issuer’s board or independent committee to provide advice with respect to the tender or exchange offer, and whose analyses or conclusions are discussed in the issuer’s Schedule 14D-9, is “indirectly employed, retained, or to be compensated” to assist the issuer in making its Schedule 14D-9 solicitation or recommendation within the meaning of Item 1009(a) of Regulation M-A.
- Generic disclosure such as that “customary compensation” will be paid to financial advisors engaged to assist the issuer in making its required response to a tender or exchange offer, without any further details, does not satisfy the “summary of all material terms” of employment requirement under Item 5 of Schedule 14D-9 and Item 1009(a) of Regulation M-A. Sufficient disclosure would generally include:
 - the types of fees payable to the financial advisors (e.g., independence fees, sale transaction or “success” fees, periodic advisory fees, or discretionary fees);
 - if multiple types of fees are payable to the financial advisors and there is no quantification of these fees, then sufficiently-detailed narrative disclosure to allow security holders to identify the fees that will provide the primary financial incentives for the financial advisors;
 - any contingencies, milestones, or triggers relating to the payment of the financial advisors’ compensation (e.g., the payment of a fee upon the consummation of a transaction, including with a bidder in an unsolicited tender or exchange offer); and
 - any other information about the compensatory arrangement that would be material to security holders’ assessment of the financial advisors’ analyses or conclusions, including any material incentives or conflicts that should be considered as part of this assessment.

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 [Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities](#) no-action letter (the “no-action letter”). Historically, the staff of the Securities and Exchange Commission (the “Staff”) drew a distinction between tender and exchange offers for investment grade debt securities and those for

non-investment grade debt securities. The no-action letter for the first time provided relief comparable to that available for investment grade securities to offers for non-investment grade securities. The no-action letter permits a tender offer to be held open for as few as five business days, to the extent that the offer is conducted in accordance with certain specified conditions outlined in the letter. The significant conditions set out in the no-action letter include:

- The offer must be made available to all holders of the debt securities and for all of the outstanding securities (in other words, the offer must be structured as an “any and all” offer).
- The offer must be made by the issuer of the debt securities or a parent or a wholly owned subsidiary of the issuer. Consequently, third parties tendering for debt securities of an issuer will not be permitted to avail themselves of the shortened tender period.
- The offer must be open to all record and beneficial holders of the targeted debt securities. It is still possible to restrict an exchange offer to qualified institutional buyers (“QIBs”) or non-U.S. persons, provided that other holders of the targeted debt securities have the option to receive cash in an amount equal to the approximate value of the exchange offer consideration.
- The offer must be made solely for cash or other qualified debt securities, which is defined as securities that are materially identical to the securities that are the subject of the tender offer.
- The consideration offered in the tender offer must be fixed or based on a benchmark spread, which may include U.S. Treasury rates, LIBOR, or swap rates.
- The offer cannot be combined with an exit consent to amend or eliminate covenants or with any other consent solicitation to amend the provisions of the debt securities or the related indenture.
- Holders must be entitled to withdrawal rights until the earlier of the expiration date and, if the offer is extended, the tenth business day following the launch. Holders also must be allowed to withdraw tenders after the 60th business day following the launch if the offer has not been consummated by such time.
- The consideration must consist solely of cash or non-convertible debt securities that are (i) identical in all material respects to the targeted debt securities (including as to obligors, collateral, lien priority, covenants, and other terms) except for payment-related dates, redemption provisions and interest rates; (ii) have interest terms payable only in cash; and (iii) a weighted average life to maturity that is longer than that of the targeted debt securities.

The abbreviated tender process outlined in the no-action letter is not available: (i) at a time when the issuer is the subject of bankruptcy or insolvency proceedings, or otherwise has commenced activity geared toward accomplishing an out-of-court restructuring or pre-packaged bankruptcy; (ii) in anticipation of or in response to, or concurrently with, a change of control or other extraordinary transaction involving the issuer; (iii) in anticipation of or in response to a competing tender offer; (iv) concurrently with a tender offer for any other series of the issuer’s securities made by the issuer or certain affiliates of the issuer if the effect of such offer would result in a change to the capital structure of the issuer (e.g., addition of obligors or collateral, increased priority of liens or shortened weighted average life to maturity of such other series); or (v) in connection with a material acquisition or disposition.

The Staff’s recent C&DIs provide additional guidance that supplements the guidance set forth in the no-action letter, including the following:

- Under the no-action letter, if the issuer is an Exchange Act reporting company, the issuer must furnish a press release announcing the abbreviated offer on a Form 8-K filed prior to 12:00 noon, Eastern time, on the first business day of the abbreviated offer. A foreign private issuer may satisfy this condition by filing a Form 6-K.

- Abbreviated offers may include minimum tender conditions.
- The no-action letter states that abbreviated offers for consideration consisting of Qualified Debt Securities (as defined in the no-action letter) may be made in various circumstances, including for an amount of Qualified Debt Securities calculated with reference to a fixed spread to a benchmark, so long as a fixed amount of cash consideration is concurrently offered to persons other than QIBs and non-U.S. persons to approximate the value of the offered Qualified Debt Securities. The amount of cash consideration offered concurrently to persons other than QIBs and non-U.S. persons can be calculated with reference to a fixed spread to a benchmark, provided that the calculation is the same as the calculation used in determining the amount of Qualified Debt Securities.
- Offerors may issue Qualified Debt Securities under Section 3(a)(9) of the Securities Act of 1933, as amended (the “Securities Act”), rather than Securities Act Section 4(a)(2) or Securities Act Rule 144A, to Eligible Exchange Offer Participants (as defined in the no-action letter) and still conduct an abbreviated offer in reliance on the no-action letter.
- With respect to the no-action letter’s conditions for an abbreviated offer, offerors may announce the abbreviated offer at any time, but they should not commence the abbreviated offer prior to 5:01 p.m. on the tenth business day after the first public announcement of a purchase, sale or transfer of a material business or amount of assets described in the no-action letter. If the abbreviated offer is commenced after 5:01 p.m. on a particular business day, the first day of the five business day period would be the next business day.

The C&DIs are available at <https://www.sec.gov/divisions/corpfin/guidance/cdi-tender-offers-and-schedules.htm>. Additional information on liability management transactions, including debt tender offers and exchange offers, is available in our [Liability Management Handbook](#).

Author

Julianne T. Nguyen
New York
(212) 336-4260
juliannenguyen@mofocom

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