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Securities Developments Medley
Session Two

Teleconference

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11:00 AM – 12:00 PM EST

Presenters:

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1. **Presentation**

2. **Morrison & Foerster Client Alert – "SEC Staff Issues New C&DIs Related to Foreign Issuers"**

3. **Morrison & Foerster Client Alert – "SEC Staff Issues New Guidance on Debt Tender Offers"**

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Securities Developments Medley: Part II

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February 9, 2017

Today's Agenda

- Guidance relating to Rule 144A
- Guidance for Foreign Private Issuers
- Regulation S guidance
- Guidance re Exxon Capital exchange offers
- Abbreviated debt tender offers and exchanges
- Recent decisions relating to the Trust Indenture Act

Guidance Relating to Rule 144A

What Is a QIB?

- Issuer's perspective:
  - Question is key to determining the availability of the Rule 144A exemption, and receiving required legal opinions.
- Investor's perspective:
  - Question frequently arises in giving representations and warranties as to its status under Rule 144A.

What Is a QIB?, cont'd.

- What types of securities may be counted in determining whether an investor satisfies the $100 million requirement?
  - Securities purchased and held on margin may be counted as "owned," *provided that they* are not subject to a repurchase agreement (C&DI *138.05*)
  - An entity may count securities that have been loaned to borrowers (C&DI *138.06, Dec 2016*)
  - Cannot count securities that it has borrowed, since these securities are not "owned" (C&DI 1*38.07*)
  - Cannot count short positions in securities for the same reason—these do not represent an ownership interest (C&DI *138.08*)

What Is a QIB? – Aggregating Fund Families

- For a family funds: funds that are not registered investment companies cannot be aggregated with the investments held by registered investment companies in the fund family (C&DI 138.09)

What is a QIB? – Limited Partnerships

- Rule 144A(a)(v): [a]ny entity, all of the equity owners of which are qualified institutional buyers, acting for its own account or the accounts of other qualified institutional buyers
- How should the general partner of a limited partnership be determined?
  - Analysis: limited partners are the equity owners of a limited partnership
  - Result: the general partner, unless that person is also a limited partner, need not be considered in determining whether a limited partnership is a QIB (C&DI *138.10*)

Foreign Private Issuers, December 2016 C&DIs

Definition of Foreign Private Issuer

- An FPI is any issuer (other than a foreign government) incorporated or organized under the laws of a jurisdiction outside of the U.S., unless more than 50% of the issuer's outstanding voting securities are held directly or indirectly by residents of the U.S., and any of the following applies:
  - The majority of the issuer's executive officers or directors are U.S. citizens or residents;
  - The majority of the issuer's assets are located in the U.S.; or
  - The issuer's business is principally administered in the U.S.
- New guidance is designed to assist in the application of this definition.

Treatment of Multiple Voting Classes

- An issuer with multiple voting classes may now utilize one of two methods to determine whether its voting stock is owned by more than 50% of U.S. residents by assessing:
  - Whether 50 percent of the voting power of those classes on a combined basis is directly or indirectly owned of record by residents of the United States; or
  - The number of its voting securities.
- The SEC noted that an issuer "must apply a determination methodology on a consistent basis."

Evaluating U.S. Residency

- What factors that should be employed to determine whether an individual qualifies as a "U.S. resident" for purposes of evaluating whether an issuer's outstanding voting securities are held of record by U.S. residents?
  - Permanent resident status (i.e., a green card holder) is presumed to be a U.S. resident.
  - Individuals without permanent-resident status may also, but without the benefit of a presumption, be deemed U.S. residents based on several criteria, including:
    - Tax residency;
    - Nationality;
    - Mailing address;
    - Physical presence;
    - The location of a significant portion of the individual's financial and legal relationships; or
    - Immigration status.
  - An issuer must nevertheless "decide what criteria it will use to determine residency and apply them consistently without changing them to achieve a desired result."

Are Executive Officers or Directors U.S. Citizens or Residents?

- To determine whether a majority of an issuer's executive officers or directors are U.S. residents or citizens, the assessment must be made *separately for both directors and executive officers*.
- As a result, four determinations must be made:
  - The citizenship status of its executive officers;
  - The residency status of its executive officers;
  - The citizenship status of its directors; and
  - The residency status of its directors.
- Issuers with two boards of directors: issuer must make the "majority" analysis with respect to the board of directors that performs functions that closely resemble those undertaken by a U.S.-style board of directors.
- If these functions are allocated to both boards, then the issuer may "aggregate the members of both boards for purposes of calculating the majority."

Is the Majority of the Issuer's Assets Located in the U.S.?

- To determine whether more than 50% of an issuer's assets are located in the United States, the Staff has clarified that an issuer may either:
  - Use the geographic segment information determined in the preparation of its financial statements; or
  - Apply on a consistent basis any other reasonable methodology in assessing the location and amount of its assets.

Is the Issuer's Business Administered Principally in the U.S.?

- There is no particular factor that is determinative for evaluating whether an issuer's business is administered principally in the United States.
- An issuer must assess on a consolidated basis the location from which its officers, partners or managers primarily direct, control and coordinate its activities.

Offerings by Foreign Private Issuers and Form 20-F

Offerings with a Non-FPI Subsidiary as Issuer or Guarantor

- The C&DIs clarify that, provided that the relevant provisions of Regulation S-X are satisfied:
  - An FPI can use the F-Forms (and Form 20-F for reporting requirements) where it issues securities that are guaranteed by a subsidiary that is not an FPI.
  - This is also the case where the FPI is the guarantor, and the non-FPI is the issuer.
- The C&DI is of particular use in the case of high-yield securities that have subsidiary guarantees, or in the case of issuances by a finance subsidiary.

Wholly Owned Subsidiary's Omission of Information in Its Form 20-F

- An FPI's wholly owned subsidiary may omit certain information under General Instruction I(2) (to Form 10-K) from its Form 20-F filing.
- The registrant must include a prominent statement on the Form 20-F's cover page:
  - That it satisfies the conditions set forth under General Instruction I(1)(a) and (b) to Form 10-K; and
  - Is filing the Form 20-F with a reduced disclosure format.

Form 20-F Filing Deadline

- General Instruction A(b)(2) to Form 20-F -- Form 20-F must be filed within four months after the end of an issuer's fiscal year.
- If the last day of an issuer's fiscal year is the last day of the month, the Form 20-F will be due four "complete" months after that day.
  - E.g.: Jan 31st fiscal year end – Form 20-F due on May 30th
- If the last day of the issuer's fiscal year falls on any day other than the end of a month, the Form 20-F must be filed on the same day four months ahead.
  - E.g.: Jan 30th fiscal year end – Form 20-F due on May 30th

Incorporation of Information by Reference into Form 20-F

- Under Rule 12b-23 under the Exchange Act, information previously filed with the SEC may be incorporated by reference into any item of Form 20-F, subject to Rule 12b-23's limitation.
- An FPI that incorporates this type of information by reference must "identify with specificity the information that is being incorporated by reference."

Regulation S: U.S. Person

What Is a "Natural Person Resident in the U.S."?

- What factors that should be employed to determine whether an individual qualifies as a "U.S. resident"?
- Similar analysis for determining FPI status, as set forth above.
- Permanent resident status (i.e., a green card holder) is presumed to be a U.S. resident.
- Individuals without permanent-resident status may also, but without the benefit of a presumption, be deemed U.S. residents based on several criteria, including:
  - Tax residency;
  - Nationality;
  - Mailing address;
  - Physical presence;
  - The location of a significant portion of the individual's financial and legal relationships; or
  - Immigration status.
- An issuer must nevertheless "decide what criteria it will use to determine residency and apply them consistently without changing them to achieve a desired result."

Exxon Capital Exchange Offers: July 2016 C&DI

Background of Exchange Offers

- Typically, when an issuer sells non-convertible debt (or certain other securities) to QIBs in a private placement, and then registers the exchange of those securities on Form S-4 or F-4 for substantially similar securities, most holders are then able to resell the new securities without further registration and without delivery of a prospectus
- The premise: participants must not be "underwriters" engaged in a "distribution" of the registered securities
- To support that premise, the SEC has historically requested, as a condition of the no-action relief, issuers must make certain representations about the absence of a distribution of the securities received in the exchange

SEC Clarification as to Required Representations

- The SEC has indicated that these representations may be provided either (a) in the prospectus or (b) in correspondence submitted in connection with the filing
- No specific form requirements for the representations:
- Must address the following "essential matters":
  - The issuer has not entered into any arrangement or understanding with any person who will receive the new securities to distribute them after the exchange
  - The issuer is not aware of any person that will participate in the exchange offer with a view to distribute the new securities

- The issuer will disclose to each person participating in the exchange offer that if that participant acquires the new securities for the purpose of distributing them, such person:
  - Cannot rely on the Staff's interpretive position in the Exxon Capital line of no-action letters, and
  - Must comply with the registration and prospectus delivery requirements of the Securities Act in order to resell the new securities, and be identified as an underwriter in the prospectus

SEC Clarification as to Required Representations, cont'd.

Additional Representations Relating to the Transmittal Letter

- The issuer will include in the transmittal letter an acknowledgement to be executed by each person participating in the exchange that the participant does not intend to engage in a distribution of the new securities.
  - Any person acquiring the new securities with a view to distributing them must be identified as an underwriter in the prospectus and comply with all applicable requirements.
- The issuer will include in the transmittal letter an acknowledgement for each person that is a broker-dealer exchanging securities it acquired for its own account as a result of market-making activities or other trading activities that the broker-dealer will satisfy any prospectus delivery requirements in connection with any resale of new securities received in the exchange offer.
  - The transmittal letter may also include a statement to the effect that by so acknowledging and by delivering a prospectus, the broker-dealer will not be deemed to admit that it is an "underwriter" within the meaning of the Securities Act.

Disclosures that May Be Removed

- In the *Shearman & Sterling* no-action letter (1993), the staff's views were conditioned on the issuer making each person participating in the exchange offer aware that any broker-dealer acquiring the new securities in exchange for securities it acquired for its own account as a result of market-making activities or other trading activities may be a statutory underwriter.
- New: if the representations clearly state the essential matters outlined on the prior page, the Staff does not believe that this additional disclosure is necessary.

Abbreviated Tender Offer Process

Background

- No-action letter was issued on January 23, 2015
- SEC staff will not recommend enforcement action with respect to tender or exchange offers for non-convertible debt securities that are held open for as few as five business days (*as opposed to the 20 business days required by Rule 14e-1(a)*), with potential extensions of as little as five business days following changes in the offered consideration or three business days following changes in other material terms of the offer
- Letter applies to both investment-grade and non-investment grade debt securities
- Supersedes previously issued no-action letters that had allowed similarly expedited tender or exchange offers only for investment-grade debt securities

Conditions

- In order to rely on the relief, offer must:
  - Be made for any and all securities of a class or series of non-convertible debt;
  - Be made by (i) the issuer of the securities, (ii) a wholly owned subsidiary of the issuer or (iii) a parent company of the issuer;
    - Involve consideration consisting solely of cash or qualified debt securities, or a combination of both
    - "Qualified debt securities" are understood to mean 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 the payment-related dates, redemption provisions and interest rate; (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;
    - Not be financed with debt that is senior to the subject securities;

Conditions, cont'd.

- Be open to all record and beneficial holders of the targeted debt securities, although an exchange offer could be restricted to Qualified Institutional Buyers (as defined in Rule 144A) or non-U.S. persons (within the meaning of Regulation S) so long as other holders of the subject securities have the option to receive cash in an amount equal to the approximate value of the exchange offer consideration;
- Be announced no later than 10:00 a.m., Eastern time, on the first business day of the five business day period, through a widely disseminated press release, which in the case of an offer by an SEC reporting company must also be furnished almost immediately under a Current Report on Form 8-K;
- Permit tenders through guaranteed delivery procedures;
- Use benchmark pricing mechanisms;
- Provide for certain withdrawal rights; and
- Not include early settlement features.

Modifications

- Material changes trigger a requirement to extend the offer period
- Offer period must be extended so that at least five business days remain from and including the announcement of any change in the offered consideration, and at least three business days remain from and including the announcement of any other material change in the offer
- An issuer must notify investors of a material change by a widely disseminated press release, and SEC reporting issuers must file a Form 8-K

Disqualifying events

- The abbreviated tender offer process is not available if the offer is made:
  - In connection with a consent solicitation to amend the documents governing the subject securities;
  - If there is a default or event of default under any of the issuer's material debt agreements;
  - If the issuer is the subject of bankruptcy or insolvency proceedings or has commenced an out-of-court restructuring or a pre-packaged bankruptcy process;
  - In anticipation of or in response to, or concurrently with, a change of control, merger or other extraordinary transaction involving the issuer;
  - In anticipation of or in response to a competing tender offer;
  - Concurrently with a tender offer for any other series of the issuer's securities made by the issuer or certain affiliates 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
  - In connection with a material acquisition or disposition.

Important considerations

- For investment grade debt, prior no-action letters permitted:
  - Tender offers for investment grade debt to remain open for as little as seven days (*now, if the conditions are met, new no-action letter provides the period can be as short as 5 business days*)
  - Issuers to include an early settlement feature (*new no-action letter does not allow early settlement*)
  - Issuers to deny withdrawal rights (*new no-action letter requires withdrawal rights*)
  - Consent to be included in conjunction with the tender offer (*abbreviated tender process is not available for an offer that includes an exit consent*)
  - Payment in cash (*new no-action letter permits cash and/or qualified debt securities*)
- In addition, prior no-action letters:
  - Were silent on communication requirements, but the new no-action letter specifically requires filing of an 8-K
  - Did not require guaranteed delivery
  - Did not include disqualifying events

- General solicitation would be required to be used in connection with satisfying the condition under the no-action letter that the offer be open to all holders of the subject securities
- No "waterfall" or "partial" tenders are permitted in reliance on the new no-action letter
- Effectively, for an investment grade tender offer that does not qualify for the new abbreviated tender relief, then, the tender offer will be subject to the more onerous 10- and 20-day period requirements, and, likely also to the new dissemination and related requirements

Important considerations, cont'd.

Abbreviated Tender C&DIs

- In November 2016, the Staff of the SEC issued five C&DIs that address various aspects of the abbreviated tender guidance as follows:
  - For an issuer that is an Exchange Act reporting company, an announcement of the abbreviated offer must be made by press release and on a Form 8-K; the Staff clarified that a foreign private issuer may satisfy the condition by filing a press release under cover of a Form 6-K;
  - Abbreviated offers can have minimum tender conditions;
  - Abbreviated offers for consideration consisting of Qualified Debt Securities may be made to all QIBs and non-U.S. persons for a fixed amount of Qualified Debt Securities or for an amount of Qualified Debt Securities calculated with reference to a fixed spread to a benchmark, so long as concurrently, an offer of cash consideration is made to persons other than QIBs and non-U.S. persons. The amount of cash consideration also can be calculated using the spread to a benchmark, provided that the calculation used for the cash consideration and for the Qualified Debt Securities is the same.

Abbreviated tender C&DIs cont'd

- Offerors may issue Qualified Debt Securities under Section 3(a)(9), rather than Section 4(a)(2) or Rule 144A to Eligible Exchange Offer Participants and still conduct an abbreviated offer in reliance on the no-action letter;
- 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.

Trust Indenture Act Considerations

Legal challenges

- A restructuring may result in legal challenges.
  - Usually from non-participating holders who believe the value of their securities or the protections afforded by the securities has been adversely affected.
  - In addition, because the "all holders" rule does not apply to tender offers for straight debt securities, holders not offered the right to participate (for example, because the offering is limited to QIBs) may also claim that their securities are impaired.
- In recent years, there have been an increasing number of legal challenges based on various Trust Indenture Act claims

Legal challenges, cont'd.

- *Marblegate Asset Management et al. v. Education Management Corp.*
  - The issuer, Education Management, had bank debt as well as secured notes outstanding, which were guaranteed by the issuer's parent
  - Indenture relating to the secured notes provided that the parent guarantee could be released if a majority of the noteholders consented or if the bank creditors released the parent's guarantee of the bank debt
  - In an out-of-court restructuring, the issuer and certain of its creditors consented to a release of the parent's guarantee of the issuer's bank debt, foreclosure on the assets of the issuer and its subsidiaries and the foreclosed upon assets would be conveyed by the secured creditor to a new subsidiary that would then distribute newly issued debt and equity to the creditors.
  - As part of this restructuring, non-consenting creditors would be left with recourse solely against the issuer and would not receive any debt and equity securities in the restructuring.

- Court concluded that the plaintiffs failed to establish a basis for injunctive relief but, *in dicta*, noted that Section 316 of the Trust Indenture Act was likely violated by the out-of-court restructuring arrangement.

- Section 316 provides that:
  - The right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder….
  - The court noted that the section was intended to prevent a holder's core rights from being impaired without that holder's consent. In this case, it was alleged that the restructuring left the noteholders without a source or prospect of recovery

Legal challenges, cont'd.

- Subsequently, the SDNY held that an out-of-court restructuring involving the elimination of a parent guarantee and a significant asset transfer was impermissible under TIA Section 316(b) because it impaired the holders' right to receive payment
- Most recently, the Second Circuit rejected the broad reading of TIA Section 316(b), concluding that the section prohibits only non-consensual amendments to an indenture's core payment terms, rather than protecting the practical ability to receive payment

Legal challenges, cont'd.

- *Meehancombs Global Opportunities Funds, L.P., et al. v. Caesars Entertainment Corp., et al.*
  - Caesars underwent a restructuring as a result of which certain noteholders were bought out, consented to removal of a parent guarantee, and consented to modification of a covenant regarding asset sales
  - Non-consenting noteholders alleged a violation of Section 316(b)
  - The court concluded that an out-of-court restructuring that removed certain parent guarantees of obligations issued under two series of notes was impermissible
  - Trust Indenture Act is intended to provide protection of a noteholder's ability to receive payment

Legal challenges, cont'd.

- *Waxman v. Cliffs Natural Resources Inc.*
  - Cliffs conducted a private exchange offer made to QIBs and non-U.S. persons, without a consent solicitation; as a result of the transaction, exchanging holders received secured notes bearing a higher rate but with a substantially reduced principal amount
  - Retail noteholders who were not eligible to participate claimed that a breach of Section 316(b) resulted because their notes, which remain unchanged, were effectively subordinated to the new secured notes
  - Court dismissed claim:
  - Court considered Marblegate and Caesars, as well as other cases, involving alleged "impairment" under Section 316(b) and dismissed the plaintiffs' claims finding that there was no practical impairment and no breach of an implied covenant of good faith and fair dealing

Legal challenges, cont'd.

Make-wholes

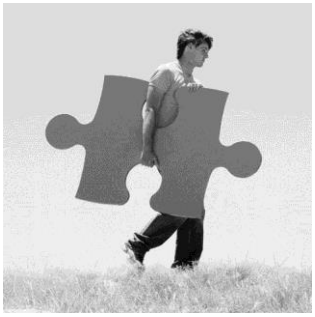
- In a recent cash, the District Court for the SDNY concluded that bond holders had a right to a make whole redemption premium following the issuer's (*Wilmington Savings Fund Society, FSB v. Cash America International, Inc.*) indenture default
  - Generally, under an indenture that provides the issuer with the option to redeem the notes prior to maturity, noteholders expect to be paid a redemption premium (a make whole)
  - Similarly, under the terms of most indentures, noteholders may accelerate the maturity of the notes upon the occurrence of an event of default, and the acceleration triggers immediate payment of principal at par
  - Under NY law, upon a payment acceleration, which usually occurs in the context of a bankruptcy, noteholders have been precluded from claiming payment of a redemption premium
  - However, in this case, the court concluded the noteholders were entitled to the make whole given the issuer's default was voluntary

- The court noted that the indenture provisions could have been drafted differently to avoid this result and that the indenture had both a redemption clause and an acceleration clause and neither was an exclusive remedy
- As a result, in the case of some debt offerings, there may be a discussion regarding the inclusion of a “no premium on default” provision

Questions?

Client Alert

December 12, 2016



SEC Staff Issues New C&DIs Related to Foreign Issuers

On December 8, 2016, the Securities and Exchange Commission's ("**SEC**") Division of Corporation Finance (the "**Staff**") released several new compliance and disclosure interpretations ("**C&DIs**") clarifying the definition of "foreign private issuer" (an "**FPI**") under Rule 405 ("**Rule 405**") under the Securities Act of 1933, as amended (the "**Securities Act**"), and Rule 3b-4(c) ("**Rule 3b-4(c)**") under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"). On the same day, the Staff issued additional C&DIs, which provide explanations on the permitted use of an F-Series registration statement and Form 20-F by an FPI (and its subsidiaries) in certain contexts. This alert provides a brief summary of these C&DIs. A complete list of the C&DIs issued on December 8, 2016 by the Staff is available here: https://media2.mofo.com/documents/fpi.pdf.

I. Definition of FPI

The Staff issued C&DIs to clarify whether an issuer qualifies as an FPI under Rule 405 under the Securities Act and Rule 3b-4(c) under the Exchange Act. Rule 405 and Rule 3b-4(c) each define a "foreign private issuer" as any issuer incorporated or organized under the laws of a foreign country (other than a foreign government), except an issuer that satisfies the following conditions: (1) as of the last business day of the issuer's most recently completed second fiscal quarter, more than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) *any* one of the following conditions are satisfied: (i) the majority of the issuer's executive officers or directors are U.S. citizens or residents, (ii) more than 50 percent of the issuer's assets are located in the United States, or (iii) the issuer's business is administered principally in the United States.

Treatment of Multiple Voting Classes. Pursuant to the C&DIs, an issuer with multiple voting classes may now utilize one of two methods to determine whether its voting stock is owned by more than 50 percent of U.S. residents by assessing: (1) whether 50 percent of the voting power of those classes on a combined basis is directly or indirectly owned of record by residents of the United States; or (2) the number of its voting securities. While the Staff did not convey a preference for either methodology, it did expressly note that an issuer "must apply a determination methodology on a consistent basis."

Evaluating U.S. Residency. The Staff shed light on the factors that should be employed to determine whether an individual qualifies as a "U.S. resident" for purposes of evaluating whether an issuer's outstanding voting securities are held of record by U.S. residents under both Rule 405 and Rule 3b-4(c). While a person who has permanent resident status (i.e., a Green Card holder) is presumed to be a U.S. resident, the Staff explained that individuals without permanent-resident status may also, albeit without the benefit of a presumption, be deemed U.S. residents for purposes of Rule 405 and Rule 3b-4(c) based on several criteria, including: (i) tax residency; (ii) nationality; (iii) mailing address; (iv) physical presence; (v) the location of a significant portion of the individual's financial and legal relationships; or (vi) immigration status. While the Staff did not mandate the use

of any one of these criteria, it asserted that the issuer must nevertheless "decide what criteria it will use to determine residency and apply them consistently without changing them to achieve a desired result."

Determining Whether a Majority of Executive Officers or Directors Are U.S. Citizens or Residents. For purposes of determining whether a majority of an issuer's executive officers or directors are U.S. residents or citizens under Rule 405 and Rule 3b-4(c), the Staff addressed whether the calculation must be made separately for each group of directors or officers or, alternatively, if executive officers and directors are to be treated as a single group. The Staff explained that such an assessment must be made separately for both directors and executive officers. Accordingly, an issuer must make the following four determinations under Rule 405 and Rule 3b-4(c): (i) the citizenship status of its executive officers; (ii) the residency status of its executive officers; (iii) the citizenship status of its directors; and (iv) the residency status of its directors. In the case of an issuer that maintains two boards of directors, the Staff established that the issuer must make the "majority" analysis with respect to the board of directors that performs functions that closely resemble those undertaken by a U.S.-style board of directors. If such functions are allocated to both boards, then the issuer may "aggregate the members of both boards for purposes of calculating the majority."

Assessing Whether the Majority of an Issuer's Assets Are Located in the United States. To determine whether more than 50 percent of an issuer's assets are located in the United States, the Staff has clarified that an issuer may either: (i) use the geographic segment information determined in the preparation of its financial statements; or (ii) apply on a consistent basis any other reasonable methodology in assessing the location and amount of its assets.

Evaluating Whether an Issuer's Business Is Administered Principally in the United States. There is no particular factor that is determinative for evaluating whether an issuer's business is administered principally in the United States under Rule 405 and Rule 3b-4(c). Instead, an issuer must assess on a consolidated basis the location from which its officers, partners or managers primarily direct, control and coordinate its activities.

II. Permitted Use of an F-Series Registration Statement and Form 20-F Annual Report

The Staff provided several interpretations in its C&DIs regarding the circumstances in which an FPI (and its subsidiaries) may utilize an F-Series registration statement and Form 20-F annual report, as well as the type of information that may be omitted from a Form 20-F and the filing deadline for the Form 20-F.

Offerings Involving a Non-FPI Subsidiary as Either Issuer or Guarantor. Where an FPI guarantees securities of its non-FPI subsidiary, the parent FPI (as guarantor) and non-FPI subsidiary (as issuer) may use an F-Series registration statement to register the offering of the securities under the Securities Act, as well as a Form 20-F with respect to any reporting obligations, as long as certain requirements are satisfied. Where the parent-guarantor and subsidiary-issuer are eligible to present condensed consolidated financial information in the parent-guarantor's filings, and the parent qualifies as an FPI, the parent-guarantor and its subsidiaries may use (i) an F-Series registration statement to register an offering of guarantees and guaranteed securities that are issued by a subsidiary (either domestic or foreign) that does not itself qualify as an FPI and (ii) a Form 20-F with respect to any reporting obligations associated with the F-Series registration statement. The subsidiary-issuer would not be required to submit separate financial statements if any of Rules 3-10(b) through 3-10(d) under Regulation S-X apply and all other applicable conditions of the rule(s) are satisfied by the parent-FPI's (as guarantor) filings. The Staff further explained that the same would apply in the case of a parent-guarantor and subsidiary-issuer that were eligible to present narrative disclosures (as opposed to condensed consolidating financial information) under Rule 3-10 under Regulation S-X.

Likewise, where a parent FPI issues securities that are guaranteed (or co-issued) by one or more of its non-FPI subsidiaries, the parent FPI and subsidiary guarantor(s) (or co-issuers) may still use an F-Series registration statement to register the offering under the Securities Act and Form 20-F with respect to reporting obligations. Separate financial statements will not be required to be filed for the parent's subsidiaries if: (i) Rule 3-10(e) or

3-10(f) under Regulation S-X applies; and (ii) all applicable conditions of Rule 3-10 under Regulation S-X relied upon are satisfied in the parent's filings.

Wholly Owned Subsidiary's Omission of Certain Information in Its Form 20-F. An FPI's wholly owned subsidiary may omit certain information under General Instruction I(2) (to Form 10-K) from its Form 20-F filing, as long as the registrant includes a prominent statement on the Form 20-F's cover page: (i) that it satisfies the conditions set forth under General Instruction I(1)(a) and (b) to Form 10-K; and (ii) is therefore filing the Form 20-F with a reduced disclosure format.

Deadline for Filing a Form 20-F. In accordance with General Instruction A(b)(2) to Form 20-F, the Staff stated that the Form 20-F must be filed within four months after the end of an issuer's fiscal year. In the case of an issuer whose last day of its fiscal year is the last day of the month (e.g., February 28), the Form 20-F will be due four "complete" months after that day. If the last day of an issuer's fiscal year falls on any day other than the end of a month, the Form 20-F must be filed on the same day four months ahead.

Incorporation of Information by Reference into Form 20-F. An FPI may, pursuant to Rule 12b-23 under the Exchange Act ("**Rule 12b-23**"), incorporate by reference information previously filed with the SEC into any item of Form 20-F, subject to certain limitations set forth under Rule 12b-23. An FPI that incorporates such information by reference must, however, "identify with specificity the information that is being incorporated by reference."

III. Summary Chart

C&DIS ISSUED ON DECEMBER 8, 2016		
C&DI Question	***Applicable SEC Rule or Form***	***Key Takeaways***
• Question 203.17 (*Securities Act Rules*) • Question 110.02 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• An issuer with multiple voting classes may utilize one of two methods to evaluate whether its voting stock is owned by >50 percent of U.S. residents.
• Question 203.18 (*Securities Act Rules*) • Question 110.03 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• A permanent U.S. resident is presumed to be a U.S. resident. • Non-permanent U.S. resident status may be deemed a U.S. resident based on any one of the criteria set forth by the Staff (but issuer must apply criteria that has been utilized consistently).
• Question 203.19 (*Securities Act Rules*) • Question 110.04 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• Separate determination must be made for evaluating whether the majority of directors and executive officers are U.S. residents or citizens.
• Question 203.20 (*Securities Act Rules*) • Question 110.05 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• An issuer with two boards of directors must make a "majority" analysis with respect to the board that performs U.S.-style functions. • If relevant functions are allocated to both boards, the issuer may aggregate the members of both boards for purposes of calculating the majority.
• Question 203.21 (*Securities Act Rules*) • Question 110.06 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• To determine if >50 percent of an issuer's assets are located in the United States, an issuer may either: (i) use the geographic segment information determined in the preparation of its financial statements; or (ii) apply on a consistent basis any other reasonable methodology in assessing the location and amount of its assets.
• Question 203.22 (*Securities Act Rules*) • Question 110.07 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• There is no particular factor that is determinative for evaluating whether an issuer's business is administrated principally in the United States. • An issuer must assess on a consolidated basis the location from which the issuer's officers, partners or managers primarily direct, control and coordinate its activities.
• Question 203.23 (*Securities Act Rules*) • Question 110.08 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• Absent any other factors, an issuer that holds an annual (or special) meeting of its shareholders or occasional meetings of its board of directors in the United States would not be deemed to be administering its business principally in the United States.
• Question 102.03 (*Securities Act Forms*) • Question 110.03 (*Exchange Act Forms*)	• F-Series Registration Statement • Form 20-F	• An FPI parent (acting as guarantor) and its non-FPI subsidiaries may use (i) an F-Series registration statement to register an offering of guarantees and guaranteed securities that are issued by a subsidiary (either domestic or foreign) that does not itself qualify as an FPI and (ii) a Form 20-F with respect to any reporting obligations associated with the F-Series registration statement.
• Question 102.04 (*Securities Act Forms*) • Question 110.04 (*Exchange Act Forms*)	• F-Series Registration Statement • Form 20-F	• Where an FPI parent issues securities that are guaranteed (or co-issued) by one or more of its non-FPI subsidiaries, the parent-FPI and subsidiary-guarantor(s) (or co-issuers) may still use an F-Series registration statement to register the offering under the Securities Act and use Form 20-F with respect to associated reporting obligations.
• Question 110.05 (*Exchange Act Forms*)	• Form 20-F	• The Form 20-F must be filed within four months after the end of an issuer's fiscal year. In the case of an issuer whose last day of its fiscal year is the last day of the month (e.g., February 28), the Form 20-F will be due four "complete" months after that day.
• Question 110.06 (*Exchange Act Forms*)		• An FPI's wholly owned subsidiary may omit certain information from its Form 20-F filing, as long as the registrant includes a prominent statement on the Form 20-F's cover page that: (1) it satisfies the conditions set forth under General Instruction I(1)(a) and (b) to Form 10-K; and (2) it is therefore filing the Form 20-F with a reduced disclosure format.
• Question 110.07 (*Exchange Act Forms*)		• An FPI may incorporate by reference information previously filed with the SEC into any item of Form 20-F, subject to certain limitations provided under Rule 12b-23 under the Exchange Act.

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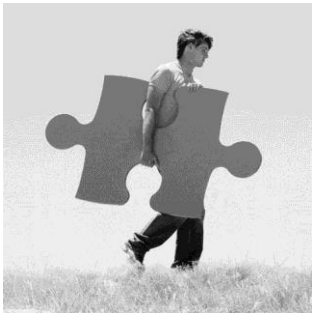
About Morrison & Foerster

Client Alert

November 21, 2016



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.

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About Morrison & Foerster