

# New SEC Guidance on Five Business Day Debt Tender and Exchange Offers

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On November 18, 2016, the Securities and Exchange Commission (“SEC”) published several new compliance and disclosure interpretations (“C&DIs”)<sup>1</sup> that provide guidance on the abbreviated tender and exchange offers no-action letter issued by the SEC in January 2015 (the “No-Action Letter”)<sup>2</sup>. The No-Action Letter provided that the SEC would not recommend enforcement action with respect to a five business day timeline for tender or exchange offers for non-convertible debt securities meeting certain criteria. This superseded prior no-action letters of the SEC relating to abbreviated offering periods in non-convertible debt tender offers and gave companies the opportunity to refinance their debt on a significantly shorter timeline than was previously available. For our prior Client Alert on the No-Action Letter, see [here](#).

The SEC’s guidance in the C&DIs clarifies certain of the requirements that a tender or exchange offer must meet in order to fall under the purview of the No-Action Letter.

- **Section 3(a)(9) Offers.** The C&DIs provide that, for abbreviated exchange offers, in addition to issuing Qualified Debt Securities<sup>3</sup> under Section 4(a)(2) of the Securities Act of 1933, as amended (the “Securities Act”) or Rule 144A of the Securities Act, companies may issue Qualified Debt Securities under Section 3(a)(9) of the Securities Act to all persons who are Qualified Institutional Buyers (as defined in Rule 144A under the Securities Act) (“QIBs”) and/or non-U.S. persons (within the meaning of Regulation S under the Securities Act) (collectively, “Eligible Exchange Offer Participants”) and still conduct the offer in reliance on the No-Action Letter. Since the No-Action Letter limits the issuance of new securities in abbreviated exchange offers to Eligible Exchange Offer Participants, the ability of companies to rely upon Section 3(a)(9) may not provide any significant additional flexibility since they will not be able to issue new securities to accredited investors (as defined in Rule 501(a) of Regulation D under the Securities Act) or non-accredited investors (each of which would otherwise be permissible under Section 3(a)(9) if the other conditions thereto are satisfied).
- **Material Transactions.** The No-Action Letter provides that an abbreviated offer may not be commenced within ten business days after the first public announcement or the consummation of the purchase, sale or transfer by the issuer or any of its subsidiaries of a material business or amount of assets that would require pro forma financial statements pursuant to Article 11 of Regulation S-X. The guidance clarifies that the offeror may announce the abbreviated offer at any time, but should not commence the offer prior to 5:01 p.m. on the tenth business day after the first public announcement of the relevant transaction. The guidance also notes that 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 will be the next business day. Since one of the criteria in

<sup>1</sup> The C&DIs can be found [here](#).

<sup>2</sup> The No-Action Letter can be found [here](#).

<sup>3</sup> “Qualified Debt Securities” are defined in the No-Action Letter as non-convertible debt securities that are identical in all material respects (including but not limited to the issuer(s), guarantor(s), collateral, lien priority, covenants and other terms) to the debt securities that are the subject of the tender offer except for the maturity date, interest payment and record dates, redemption provisions and interest rates; provided that Qualified Debt Securities must have (i) all interest payable only in cash and (ii) a weighted average life to maturity that is longer than the debt securities that are the subject of the offer.

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the No-Action Letter for an abbreviated offer is that it be announced via a widely disseminated press release at or prior to 10:00 a.m., Eastern Time, *on the first business day of the offer*, as a practical matter, companies that are waiting the ten business days until after announcement of a material transaction should announce and commence their offer at or prior to 10:00 a.m., Eastern Time, on the eleventh business day after announcement of the material transaction (or on a subsequent business day if determined appropriate by the offeror).

- **Minimum Tender Conditions.** While the No-Action Letter states that abbreviated offers must be made “for any and all” subject debt securities, the C&DIs provide that offers may have minimum tender conditions. This provides companies with the ability to condition consummation of the abbreviated offer on the tender of a satisfactory percentage of the target securities, a condition that companies engaging in non-abbreviated offers often utilize.
- **Fixed Spread Exchange Offers.** Under the No-Action Letter, abbreviated exchange offers may be made to all Eligible Exchange Offer Participants 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 Eligible Exchange Offer Participants to approximate the value of the offered Qualified Debt Securities. The C&DIs provide that the amount of cash consideration offered concurrently to non-Eligible Exchange Offer Participants can be calculated with reference to a fixed spread to a benchmark (rather than a fixed amount); *provided* that the calculation of the cash consideration is the same as the calculation used in determining the amount of Qualified Debt Securities.
- **Foreign Private Issuers.** The C&DIs provide that a foreign private issuer may satisfy the No-Action Letter’s requirement for Exchange Act reporting companies to furnish a press release announcing the offer on Form 8-K prior to noon (ET) on the first business day of the offer by filing a Form 6-K.

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