

Client Alert

November 2016

SEC Issues New Tender Offer CDIs

On November 18, 2016, the Staff of the Division of Corporation Finance (the Staff) of the Securities and Exchange Commission (SEC) issued [new compliance and disclosure interpretations](#) (CDIs).

Five of the new CDIs provide additional guidance regarding the “[Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities](#)” no-action letter issued January 23, 2015 (Abbreviated TO No-Action Letter), which sanctioned tender offers for non-convertible debt securities held open for as short as five business days (as opposed to the prior 20-business-day requirement), assuming other specified criteria were met.

Below we have provided a brief summary of each of the new CDIs.

CDIs relating to the Abbreviated TO No-Action Letter

- CDI 162.01 makes clear that a foreign private issuer may satisfy the requirement set forth in the Abbreviated TO No-Action Letter that an issuer must furnish a press release announcing the abbreviated offer on a Form 8-K filed prior to noon, eastern time, on the first business day of the abbreviated offer by filing a Form 6-K.
- CDI 162.02 states that the “any and all” requirement does not preclude abbreviated tender offers from including minimum tender conditions.
- CDI 162.03 clarifies that the amount of cash consideration offered concurrently to persons who are not qualified institutional buyers (QIBs) or non-US 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 (as defined in the Abbreviated TO No-Action Letter).
- Pursuant to CDI 162.04, offerors can issue Qualified Debt Securities under Securities Act Section 3(a)(9). Previously the Abbreviated TO No-Action Letter had limited the issuance of Qualified Debt Securities to Securities Act Section 4(a)(2) or Securities Act Rule 144A.
- One condition specified in the Abbreviated TO No-Action Letter is that an abbreviated offer cannot 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 the furnishing of pro forma financial information with respect to such transaction pursuant to Article 11 of Regulation S-X.” CDI 162.05 states issuers may announce an abbreviated offer any time on the tenth business day after the first public announcement of a purchase, sale or transfer by the issuer or any of its subsidiaries, but it should not commence the abbreviated offer prior to 5:01 p.m. on the tenth business day. Furthermore, if the abbreviated offer is commenced after 5:01 p.m. on a particular day, then the first day of the five-business-day period would be the next business day.

The other two new CDIs relate to disclosure of compensatory arrangements for financial advisors required under Schedule 14D-9. Schedule 14D-9 is the filing required by a target company's board in response to a tender offer. Along with other required disclosures, a Schedule 14D-9 discloses the position of the target company's board regarding the proposed tender offer. It states whether the target company's board recommends, opposes, is unable to take a position or is neutral regarding the tender offer. The Schedule 14D-9 disclosure requirements are derived from requirements under Regulation M-A.

CDIs related to Schedule 14D-9

- CDI 159.01 clarifies that the material terms of compensatory arrangements with financial advisors engaged by the company's board or independent committee for the exclusive purpose of providing financial advice must be disclosed. Item 5 of Schedule 14D-9 and Item 1009(a) of Regulation M-A require a summary of all material terms of compensatory arrangements with persons "that are directly or indirectly employed, retained or to be compensated to make solicitations or recommendations in connection with" a transaction subject to Schedule 14D-9. This CDI focuses on the fact that the financial advisors' analyses or conclusions will be discussed in the target company's Schedule 14D-9. Historically, companies and financial advisors have tried to avoid this disclosure by expressly stating in their agreements that the financial advisors are not soliciting or making a recommendation to shareholders; such an approach is now clearly prohibited.
- CDI 159.02 states a generic disclosure indicating that "customary compensation" will be paid to financial advisors is ordinarily insufficient to satisfy the requirements of Item 5 of Schedule 14D-9 and Item 1009(a) of Regulation M-A. The SEC notes that such generic statements "lack the specificity needed to assist security holders in evaluating the merits of the solicitation or recommendation and the objectivity of the financial advisors' analyses or conclusions used to support such solicitation or recommendation." CDI 159.02 goes on to state that an adequate summary of the material terms generally includes the following:
 - the type of fees payable to the financial advisors;
 - if there is no quantification of fees, a sufficiently detailed narrative disclosure of fees – specifically discussing the primary financial incentives for the financial advisors;
 - any contingencies, milestones or triggers relating to the payment of the financial advisors' compensation; and
 - any other information about the compensatory arrangement that would be material to shareholders' assessment of the financial advisors' analyses or conclusions.

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