SEC Issues Guidance on 5-Day Debt Tender Offers and Financial Advisor Disclosure in Equity Tender Offers

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On November 18, the SEC's Division of Corporation Finance published new **guidance** relating to its 2015 **no-action letter** on 5-day debt tender and exchange offers, and also provided guidance on financial advisor disclosure in solicitations involving tender offers for equity securities.

5-Day Tender and Exchange Offers

In January 2015, the SEC staff issued new guidelines for conducting debt tender and exchange offers in 5 business days, instead of the otherwise-required 20 business days, and extending the availability of 5-day offers to the world of high-yield debt, as described in our earlier **client memo**. The new guidance clarifies a few points that have arisen but does not substantially expand the 2015 guidelines.

- ***Section 3(a)(9) exemption.*** In a 5-day offer to exchange new securities for outstanding securities, the guidance states that a company may rely on the Section 3(a)(9) exemption from registration under the Securities Act to issue the new securities. However, because one of the conditions of Section 3(a)(9) is that the company not pay a commission for soliciting the exchange – meaning that a dealer-manager could not be actively involved – it is likely that companies will continue to rely on the Section 4(a)(2) exemption from registration (which, among other things, forbids the use of general solicitation or advertising). Also, while the Section 3(a)(9) exemption might have allowed non-accredited U.S. retail investors to participate in an exchange offer, the 2015 guidelines specifically provide that only qualified institutional buyers (QIBs) and non-U.S. persons are eligible to receive securities in a 5-day offer.

- ***Benchmark pricing for cash consideration.*** For U.S. investors who are not eligible to receive new securities in a 5-day exchange offer, the guidance confirms that the cash consideration payable to these investors may be calculated by reference to the same fixed spread to the benchmark used to determine the amount of new debt offered to QIBs and non-U.S. persons.

- ***Minimum tender conditions.*** While 5-day offers must be made for "any and all" of the subject class, a company may condition its offer on the tender of a minimum principal amount of securities.

- ***Foreign private issuers.*** SEC reporting companies taking advantage of the 5-day offer guidelines are required to file a report on Form 8-K announcing the offer on the first day, before 12 noon Eastern time. The guidance clarifies that a foreign private issuer may file the report on Form 6-K.

- ***Material acquisitions and dispositions.*** A 5-day offer may not be commenced within 10 business days after the first public announcement (or consummation) of an acquisition or disposition that would require the company to file pro forma financial statements. The guidance clarifies that a company may *announce* the offer at any time, but may not *commence* the offer prior to 5:01 p.m. on the 10th business day after such a public announcement, and if commenced after 5 p.m. on that day, the first day of the 5 business day period would be the next business day.

Financial Advisor Disclosure

In a tender offer for equity securities, when certain persons (including the issuer and any director, officer, employee, securityholder or affiliate) solicit or recommend action by holders of the subject securities, the soliciting or recommending person may be required to file a Schedule 14D-9 with the SEC. Schedule 14D-9 requires identification of all persons "directly or indirectly employed, retained, or to be compensated to make solicitations or recommendations in connection with the transaction." A filer must also provide "a summary of all material terms of employment, retainer or other arrangement for compensation."

The SEC staff's new guidance states that –

- If a financial advisor has been retained by the board and its analyses or conclusions are discussed in the Schedule 14D-9, the advisor is covered by the disclosure requirement even if its opinion states that it is not making a solicitation or recommendation, and the material terms of its retention and compensation must be disclosed.
- Generic disclosure, such as a statement that the advisor is being paid "customary compensation," will ordinarily not be enough. The disclosure should be enough to permit evaluation of the advisor's objectivity. While quantification of fees may not always be needed, the guidance states that a summary of the material terms of the advisor's compensation would generally include –
  - the types of fees payable (such as independence fees, transaction or success fees, periodic advisory fees, or discretionary fees);
  - if multiple types of fees are payable but are not quantified, narrative disclosure that allows securityholders to identify which fees provide the primary financial incentives for the advisor;
  - contingencies, milestones or triggers relating to the fees (for example, the payment of a fee upon consummation of the transaction, including with a bidder in an unsolicited tender or exchange offer); and
  - any other information that would be material to a securityholder's assessment of the advisor's analyses or conclusions, including any material incentives or conflicts.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

John A. Bick	**212-450-4350**	**john.bick@davispolk.com**
Michael Davis	**212-450-4184**	**michael.davis@davispolk.com**
Alan F. Denenberg	**650-752-2004**	**alan.denenberg@davispolk.com**
Joseph A. Hall	**212-450-4565**	**joseph.hall@davispolk.com**
Sophia Hudson	**212-450-4762**	**sophia.hudson@davispolk.com**
Michael Kaplan	**212-450-4111**	**michael.kaplan@davispolk.com**
Phillip R. Mills	**212-450-4618**	**phillip.mills@davispolk.com**
Richard D. Truesdell	**212-450-4674**	**richard.truesdell@davispolk.com**

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