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Guidance Provided by SEC on Abbreviated Debt Tender Offers

On November 18, 2016, the SEC's Division of Corporation Finance issued a set of compliance and disclosure interpretations ("C&DIs") pertaining to abbreviated debt tender offers, which were the subject of an SEC no-action letter in early 2015 (the "No-Action Letter"). Our original client alert on the no-action letter can be found here.

- The No-Action Letter states that companies that file reports pursuant to the Securities Exchange Act of 1934 must furnish a press release on Form 8-K prior to 12:00pm eastern on the date of launch of an abbreviated debt tender offer. The C&DI makes clear that foreign private issuers may utilize Form 6-K for such purposes.
- The C&DI clarifies that the condition in the No-Action Letter requiring abbreviated debt tender offers be made for "any and all" subject debt securities does not preclude minimum tender conditions.
- A condition of the No-Action Letter is that investors that cannot receive Qualified Debt Securities (as defined in the No-Action Letter) be offered a comparable fixed amount of cash consideration. The C&DI makes clear that the cash consideration may be tied to a fixed spread to a benchmark, provided that the calculation is the same as that used for the Qualified Debt Securities.
- The C&DI states that abbreviated tender offers involving an exchange of Qualified Debt Securities can be made utilizing the exemption from registration under Section 3(a)(9) of the Securities Act of 1933, rather than Section 4(a)(2) of the Securities Act or Rule 144A.
- Finally, one of the conditions under the No-Action Letter is that an abbreviated tender offer cannot be commenced within 10 business days after the first public announcement or consummation of a material transaction (based on the requirement to file pro forma financial statements pursuant to Article 11 of Regulation S-X). The C&DI allows for announcement, but not commencement, of an abbreviated debt tender offer before 5:01pm on such 10th business day.

The new C&DI's (162.01 – 162.05) are available here (https://www.sec.gov/divisions/corpfin/guidance/cdi-tender-offers-and-schedules.htm).

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