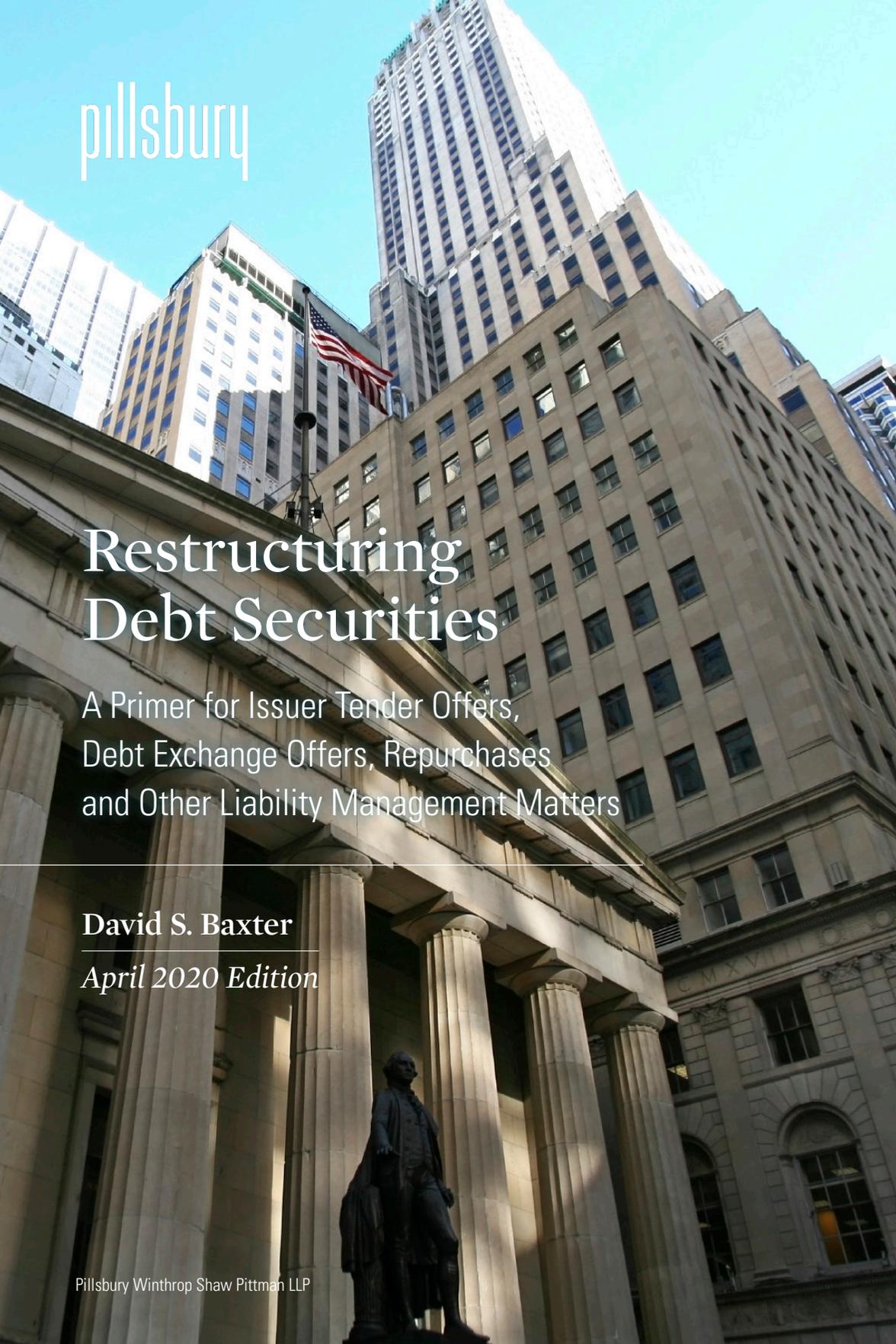




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Restructuring
Debt Securities

A Primer for Issuer Tender Offers,
Debt Exchange Offers, Repurchases
and Other Liability Management Matters

David S. Baxter

April 2020 Edition

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Pillsbury Winthrop Shaw Pittman LLP

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DISCLAIMER

This publication is not intended as a complete analysis of the issues surrounding the restructuring of debt securities under the laws of the United States and, therefore, should not be relied upon as legal advice. In addition, while we have exercised reasonable care to be current, this publication discusses rules, regulations and administrative pronouncements that are subject to change, and we cannot represent or warrant that this publication remains accurate after its date. The reader should not substitute this publication for reviewing primary resources, conducting legal research and due diligence and consulting with counsel on a current basis. We would be pleased to provide additional details or advice about specific situations. For additional information, please feel free to call upon Pillsbury Winthrop Shaw Pittman LLP as provided on the back cover of this publication.

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About Pillsbury

Pillsbury Winthrop Shaw Pittman LLP is an international law firm with a particular focus on the technology & media, energy, financial services, and real estate & construction sectors. Recognized as one of the most innovative law firms by *Financial Times* and one of the top firms for client service by BTI Consulting, Pillsbury and its lawyers are highly regarded for their forward-thinking approach, their enthusiasm for collaborating across disciplines and their authoritative commercial awareness.

Pillsbury is one of the leading law firms in the U.S. securities markets, representing all categories of securities markets participants: issuers, underwriters, agents, broker-dealers, investment advisors, investment and venture funds, institutional investors and private investors.

Pillsbury's experience covers all types of debt and equity securities:

- initial public offerings (IPOs) and secondary offerings;
- registered direct offerings;
- Rule 144A placements;
- "PIPE" offerings;
- alternative public offerings and reverse mergers;
- convertible and equity-linked securities;
- medium-term notes;
- straight and floating rate debt;
- first mortgage bonds and other secured debt; and
- other hybrid and structured debt securities.

Pillsbury's securities lawyers also advise public and private companies on all aspects of corporate governance, including the U.S. Sarbanes-Oxley Act of 2002, Regulation D and other private placements, the resale of restricted securities under Rules 144 and 144A, compliance with insider trading restrictions, compliance with and exemptions from investment company laws, and the preparation of annual reports on Form 10-K and other periodic reports and proxy statements.

Our recent recognition includes:

- Ranked in the "Top 20" for Capital Markets by *Bloomberg* and *Refinitiv* for 2018-H1 2019.
- *Chambers USA* 2019 ranked our Corporate/M&A practice regionally in Northern Virginia, and our Nationwide Startups & Emerging Companies practice. Five of our partners were recognized for their practice excellence and client service.

- *U.S. News* - Best Lawyers recognized Pillsbury's national Corporate, Securities/ Capital Markets and Mergers & Acquisitions practices as Tier 1 in their 2020 "Best Law Firms" report, identifying 18 Pillsbury partners as leading lawyers in those categories.
- *Chambers Global 2020* named eight practices and 19 Pillsbury lawyers among the world's top lawyers.
- The International Association of Outsourcing Professionals (IAOP) named Pillsbury to its annual list of the "World's Best Outsourcing Advisors" for an eighth consecutive year in 2017.
- *Legal 500 US 2019* recognized our M&A: Middle Market (sub- \$500m) practice in Tier 1, along with our Venture Capital and Emerging Companies practice nationally.
- *Legal 500 Latin America 2018* ranked Pillsbury in the Banking and Finance, Corporate M&A and Capital Markets categories.
- IFLR recognized two matters on which Pillsbury advised Deutsche Bank Trust Company as its 2016 High Yield and Restructuring Deals of the Year.
- Over the last two years, Pillsbury was named "Best Onshore Law Firm-Client Service" (2015) and "Best Onshore Law Firm-Hedge Fund Start-ups" by HFMWeek at its annual U.S. Hedge Fund Services Awards.
- Pillsbury's Insolvency & Restructuring practice was once again identified as a leading practice in the 2017 edition of the IFLR1000.
- At the 11th Annual Turnaround Awards, M&A Advisor recognized Pillsbury for its leading role in the publisher's 2016 "Financials Deal of the Year". In 2015, Pillsbury was hailed for its work on both the "Professional Services Deal of the Year" and the "Distressed M&A Deal of the Year (\$100MM to \$1B)".

I. Introduction

A. Scope of Publication

This publication:

- summarizes the U.S. federal securities laws, rules and regulations that apply to debt restructurings (see Part II. below);
- describes various types of debt restructurings (see Part III. below); and
- discusses various practical considerations arising in debt restructurings (see Part IV. below).

This publication focuses on the restructuring of “straight” debt securities outside of bankruptcy and, generally, outside the context of an out-of-court restructuring (or when the issuer is otherwise in distress or in the “zone of insolvency”), where more complex issues may arise. Equity and equity-like securities are subject to a significantly different and more complicated regulatory regime than straight debt securities, and accordingly this publication generally does *not* cover:

- convertible debt securities;
- debt securities exchangeable for equity or equity-like securities; or
- any other equity or equity-like securities.

B. Benefits of Debt Restructurings

Debt restructurings have the following potential benefits to issuers (depending on the type and nature of the restructuring):

- reducing interest rates;
- reducing cash interest expense;
- extending the maturity date of existing debt;
- repurchasing debt securities at a modest premium over the prevailing market price, which at times is below par; and
- relaxing or eliminating covenants and other terms of existing debt securities.

C. Overview of Types of Debt Restructurings

An issuer that wishes to restructure its debt securities has a variety of options to consider, including the following:

- cash tender offers, where the issuer offers a cash payment for all or a portion of its existing debt securities;

- debt exchange offers, where the issuer offers to issue new debt securities in exchange for its existing debt securities;
- open-market purchases by the issuer of its existing debt securities;
- privately negotiated repurchases by the issuer of its existing debt securities;
- consent solicitations, where the issuer seeks to amend the documents governing its existing debt securities (whether on a stand-alone basis or concurrently with a tender offer);
- redemptions by the issuer of its existing debt securities;
- defeasance by the issuer of its existing debt securities; and
- satisfaction and discharge by the issuer of the indenture governing its existing debt securities.

The remainder of this publication describes these options in greater detail.

II. Regulation of Debt Restructurings

A number of U.S. federal securities laws, rules and regulations apply to debt restructurings. These laws, rules and regulations are summarized below. See also Appendix B to this publication for the full text of many of these laws, rules and regulations.

A. Regulation 14E

Section 14(e) of the Securities Exchange Act of 1934 (the **"Exchange Act"**) prohibits the use of certain practices with respect to debt tender offers that may be deemed fraudulent, deceptive or manipulative, including making any material misstatement or omission in connection with any debt tender offer. The Securities and Exchange Commission (the **"SEC"**) promulgated Regulation 14E of the Exchange Act (**"Regulation 14E"**) pursuant to its rulemaking authority under Section 14(e) of the Exchange Act. Regulation 14E does not require an issuer to file any documentation with the SEC in connection with a debt tender offer or to conform with specific form requirements with respect to any offer documents, but does regulate various aspects of debt tender offers.

What Aspects of Debt Tender Offers does Regulation 14E Regulate?

- minimum period for debt tender offer;
- minimum period for change in securities sought or consideration offered;

- return of payments and securities upon withdrawal or termination;
- notice of extension of tender offer period;
- position of subject company;
- transactions in securities on the basis of material nonpublic information;
- prohibited transactions in connection with partial tender offers; and
- prohibited conduct in connection with pre-commencement communications.

Set forth below is more detail regarding these requirements of Regulation 14E.

1. Minimum Period for Debt Tender Offer

Pursuant to Rule 14e-1(a) under the Exchange Act, a tender offer generally must be held open for a minimum of 20 business days in order to protect security holders by affording them a reasonable amount of time to conduct due diligence and determine whether to tender their debt securities.

Pursuant to Rule 14d-1(g)(3) under the Exchange Act, each business day consists of the time period from 12:01 a.m. through 12:00 midnight Eastern time. Nonetheless, the business day on which the debt tender offer is first published or sent to security holders counts as the first business day. It is important to note that the last required business day for purposes of Regulation 14E lasts until 12:00 midnight on that business day.

In January 2015, the SEC's Division of Corporation Finance issued a no-action letter that shortens this 20 business day period to five business days for tender offers of non-convertible debt securities where the tender offer satisfies various criteria. A complete description of those criteria is set forth in Appendix A to this publication.

2. Minimum Period for Change in Securities Sought or Consideration Offered

Pursuant to Rule 14e-1(b) under the Exchange Act, a minimum of 10 business days generally must be provided for any increase or decrease in the percentage of debt securities being sought or in the consideration offered in a debt tender offer. See Part II.A.1. above for further information regarding the calculation of business days.

In January 2015, the SEC's Division of Corporation Finance issued a no-action letter that (i) shortens the 10 business day period requirement for change in consideration offered to five business days and (ii) requires a tender offer to be held open for at least three business days following any other material change to the tender offer, in each case for tender offers of non-convertible debt securities where the tender offer satisfies various criteria. A complete description of those criteria is set forth in Appendix A to this publication.

3. Return of Payments and Securities upon Withdrawal or Termination

Pursuant to Rule 14e-1(c) under the Exchange Act, all payments and securities must be promptly returned after the termination or withdrawal of a debt tender offer. Prompt payment has historically been interpreted to mean within three business days following termination or withdrawal of a debt tender offer, though the SEC ordinarily will permit a reasonably longer period of time where approval of another regulatory agency is required and the offer documents disclose the possibility of such a delay.

4. Notice of Extension of Tender Offer Period

Pursuant to Rule 14e-1(d) under the Exchange Act, any extension of the debt tender offer period must be accompanied by a public announcement disclosing the amount of securities tendered to date within specified time constraints (generally by 9:00 a.m. Eastern time or the opening of a relevant stock exchange on the next business day after the scheduled expiration date of the debt tender offer).

5. Position of Subject Company

Pursuant to Rule 14e-2 under the Exchange Act, the subject company must disclose certain information to security holders regarding its position on the debt tender offer no later than 10 business days from the date that the debt tender offer is first published or sent. The common practice for a debt tender offer by the issuer of a subject security is for the issuer to state in its offer document that it expresses no opinion on the debt tender offer.

6. Transactions in Securities on the Basis of Material Nonpublic Information

Pursuant to Rule 14e-3 under the Exchange Act, a person's purchase and sale of securities subject to a debt tender offer are prohibited if that person is in possession of material nonpublic information. Accordingly, a debt tender offer by an issuer of a subject security should not be conducted at times when the issuer possesses material nonpublic information, which may include, among other things, a potential change in the issuer's credit ratings, a potential merger (or similar business combination) or new or changed earnings guidance that have not yet been publicly disclosed.

In David C. Meyers, SEC No-Action Letter, 1986 WL 67173 (Aug. 6, 1986), the SEC stated that an organization is not in violation of Rule 14e-3 under the Exchange Act where a person in the organization making the investment decision to purchase or sell a security as part of the organization's arbitrage activities did not know any material nonpublic information, including by having established an ethical wall (or similar policies and procedures) designed to prevent the sharing of any such information known elsewhere within the organization.

7. Prohibited Transactions in Connection with Partial Tender Offers

When making a debt tender offer, not all of a security holder's debt securities may be accepted. A security holder may wish to employ certain practices to avoid the risk of proration. One practice, commonly called "short tendering", occurs when a security holder tenders more debt securities than that security holder owns. A similar practice, commonly called "hedged tendering", occurs when a security holder tenders debt securities but sells a portion of those debt securities before the proration deadline to another party who could then tender those debt securities. In order to prevent such practices, pursuant to Rule 14e-4 under the Exchange Act, a tendering security holder is required to have a net long position in the securities subject to the debt tender offer at the time of tendering and at the end of the proration period.

8. Prohibited Conduct in Connection with Pre-Commencement Communications

Rule 14e-8 under the Exchange Act prohibits a person from making a public announcement of plans to make a debt tender offer that has not yet been commenced if the person:

- is making the announcement of a potential debt tender offer without the intention to commence the debt tender offer within a reasonable time and complete the debt tender offer;
- intends, directly or indirectly, for the announcement to manipulate the market price of the stock of the bidder or subject company; or
- does not have the reasonable belief that the person will have the means to purchase debt securities to complete the debt tender offer.

B. Antifraud Provisions

Offers to purchase debt securities are subject to the antifraud provisions of the Exchange Act. Section 10(b) of the Exchange Act prohibits the use or employment of any manipulative or deceptive device or contrivance in contravention of SEC rules and regulations in connection with the purchase or sale of any debt security. The SEC promulgated Rule 10b-5 under the Exchange Act pursuant to its authority under Section 10(b) of the Exchange Act. Rule 10b-5 under the Exchange Act prohibits making any material misstatement or omission in connection with the purchase or sale of any debt security.

Issuers should consider the implications of Rule 10b-5 under the Exchange Act in any debt repurchase or debt repurchase program because of the potential liability for conducting repurchases while in possession of material nonpublic information. To avoid potential liability:

- any nonpublic information that could be deemed material should be disclosed by the issuer prior to initiating any debt repurchase or debt repurchase program;
- debt repurchases should occur only when an issuer knows that it is not in possession of any material nonpublic information; and/or
- debt repurchases should be conducted pursuant to Rule 10b5-1(c) under the Exchange Act via a so-called 10b5-1 plan, which permits issuers to adopt, before becoming aware of material nonpublic information, a written plan for trading debt securities and, once adopted, repurchase the debt securities regardless of subsequent material nonpublic information.

Issuers should be particularly cognizant of the timing of earnings releases, upcoming known announcements by credit rating agencies and other anticipated public disclosures. Issuers may wish to suspend repurchases that would begin immediately before or immediately after earnings announcements. Issuers also may wish to confine debt repurchases within trading windows when directors and officers of the issuer are permitted to trade their securities.

C. Regulation FD

The SEC's Regulation FD (Fair Disclosure) ("**Regulation FD**") provides that, when an issuer discloses material nonpublic information to certain persons (including, among others, institutional investors, analysts and other securities professionals or holders of the issuer's securities who may trade on the basis of the information), the issuer must simultaneously disclose such information to the public. In practice, this means that the issuer must make disclosure to the public prior to the selective disclosure to the audience otherwise targeted.

An issuer should consider the implications of Regulation FD before pursuing debt repurchases or discussions with holders of its debt securities. Not every debt repurchase or discussion will result in disclosures of material nonpublic information. However, in certain instances, the fact that an issuer is seeking to repurchase existing debt securities may itself be a material fact that would trigger Regulation FD disclosure obligations. An issuer may disclose its intent to repurchase debt securities in a Current Report on Form 8-K or in the management's discussion and analysis ("**MD&A**") section of a periodic report.

A more detailed description of Regulation FD follows.

1. Regulation FD Only Applies to Communications Made by Certain Persons

Rule 100(a) of Regulation FD provides that Regulation FD only applies to disclosures made by an issuer or any person acting on behalf of an issuer. An "issuer" is defined in Rule 101(b) of Regulation FD to include an entity that has a class of securities registered under Section 12 of the Exchange Act or is required to file reports under

Section 15(d) of the Exchange Act. Foreign private issuers and foreign governments (each as defined in Rule 405 under the Securities Act of 1933 (the “**Securities Act**”)) and certain investment companies are excluded from Regulation FD’s coverage. “Person acting on behalf of an issuer” is defined in Rule 101(c) of Regulation FD to include:

- any “senior official” of the issuer; or
- any other officer, employee or agent of an issuer who regularly communicates with securities market professionals or holders of the issuer’s securities.

“Senior official”, in turn, is defined in Rule 101(f) of Regulation FD as any director, executive officer, investor relations officer, public relations officer or other person with similar functions.

Pursuant to Rule 101(c) of Regulation FD, an officer, director, employee or agent of an issuer who discloses material nonpublic information in breach of a duty of trust or confidence to the issuer is not considered to be acting on behalf of the issuer.

2. Regulation FD Only Applies to Communications Made to Certain Persons

Rule 100(b)(1) of Regulation FD provides that Regulation FD only applies to disclosures made to four categories of persons:

- any broker or dealer or person associated with a broker or dealer;
- any investment adviser and certain institutional investment managers, and their associated persons;
- any investment company and affiliated persons; and
- any holder of the issuer’s securities under circumstances in which it is reasonably foreseeable that the holder will purchase or sell the issuer’s securities on the basis of the information.

Rule 100(b)(2) of Regulation FD provides that public disclosure is not required when selective disclosure is made:

- to a person who owes a duty of trust or confidence to the issuer (such as an attorney, investment banker or accountant);
- to a person who expressly agrees to maintain the disclosed information in confidence; or
- in connection with certain types of disclosures in offerings of securities registered under the Securities Act, other than certain types of delayed offerings.

Regarding the exclusion for registered offerings, Rule 101(g) of Regulation FD provides that underwritten offerings commence when the issuer reaches an understanding with the broker-dealer that is to act as managing underwriter and continues until the later of the end of the period during which a dealer must deliver a prospectus or the sale of the securities (unless the offering is sooner terminated).

Regulation FD does not provide an exception for communications made in connection with an unregistered offering (e.g., private placements or Rule 144A offerings). As a result, Regulation FD requires that reporting companies engaged in an unregistered offering should either publicly disclose the material information they disclose non-publicly or protect against misuse of that information by having those who receive it agree to maintain it in confidence.

3. Regulation FD Requires “Public Disclosure” of Selectively Disclosed Information

Pursuant to Rule 101(e) of Regulation FD, an issuer must satisfy its “public disclosure” requirement under Regulation FD by furnishing to or filing with the SEC a Form 8-K disclosing the information, unless it disseminates the information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.

4. Regulation FD Differentiates the Timing of Disclosure Based on Intent

The timing of public disclosure required under Regulation FD depends on whether the selective disclosure of material nonpublic information was “intentional”. Rule 101(a) of Regulation FD provides that selective disclosure of material nonpublic information is “intentional” when the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic.

For an “intentional” selective disclosure, Rule 100(a)(1) of Regulation FD provides that the issuer is required to make public disclosure simultaneously. Rule 100(a)(2) of Regulation FD provides that, for a “non-intentional” selective disclosure, the issuer is required to make public disclosure “promptly”. Rule 101(d) of Regulation FD defines “promptly” to mean as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day’s trading on the New York Stock Exchange) after a senior official of the issuer learns that there has been a non-intentional disclosure by the issuer or person acting on behalf of the issuer of information that the senior official knows, or is reckless in not knowing, is both material and nonpublic.

5. Regulation FD Makes Certain Liability Carve-Outs

Rule 102 of Regulation FD provides that no failure to make a public disclosure required solely by Regulation FD shall be deemed to be a violation of Rule 10b-5 under the Exchange Act.

Rule 103 of Regulation FD provides that an issuer’s failure to make a public disclosure required solely by Regulation FD will not affect whether:

- for purposes of Form S-3 under the Securities Act, the issuer is deemed to have filed all the material required to be filed pursuant to Section 13 or 15(d) under the Exchange Act or, where applicable, has made those filings in a timely manner; or
- there is adequate current public information about the issuer for purposes of Rule 144(c) under the Securities Act.

D. Anti-Manipulation Provisions

Offers to purchase debt securities are subject to the anti-manipulation provisions of the Exchange Act. In particular, Section 9(a) of the Exchange Act contains various prohibitions against manipulating security prices.

E. The Securities Act of 1933

In general, every offer and sale of a debt security in the United States is registered with the SEC, is exempt from such registration or is illegal. Absent an applicable exemption, debt exchange offers are subject to the registration requirements of the Securities Act.

Section 5 of the Securities Act requires that every offer and sale of a security involving interstate commerce (including by mail, telephone, email or facsimile) in the United States be registered with the SEC, unless an exemption from registration is available. Section 3 of the Securities Act contains exemptions from registration for certain types of securities (e.g. municipal securities, commercial paper and bank notes). Section 3(a)(9) of the Securities Act generally exempts any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange. Section 4 of the Securities Act contains exemptions from registration for certain types of transactions. Section 4(a)(2) of the Securities Act exempts transactions by an issuer not involving any public offering (i.e. private offerings).

The offer documents in debt exchange offers that are subject to Securities Act registration involve more disclosures than a cash tender offer for debt securities, including a description of the new securities, and debt exchange offers generally take significantly more time to execute than cash tender offers. In addition, since the issuer's agents in a debt exchange offer may have statutory underwriter's liability in respect of the debt exchange offer, it is common for those agents to conduct due diligence and receive opinion letters, negative assurance letters and comfort letters.

F. The Trust Indenture Act of 1939

The Trust Indenture Act of 1939 (the **"Trust Indenture Act"**) generally requires an indenture for debt securities to be qualified under that act. The qualification

requirement of the Trust Indenture Act principally applies to debt exchange offers that involve:

- registered debt offerings;
- debt securities exempt from registration pursuant to Section 3(a)(9) of the Securities Act (i.e. debt securities exchanged outside of bankruptcy where no remuneration is paid for soliciting the exchange);
- debt securities exempt from registration pursuant to Section 3(a)(10) of the Securities Act (i.e. debt securities exchanged outside of bankruptcy that are approved as to fairness by a court or similar authority); and
- debt securities maturing more than one year after the effective date of a bankruptcy reorganization plan that are issued in connection with the reorganization (*see* 11 U.S.C. 1145(d)).

Qualification under the Trust Indenture Act of an indenture for registered debt securities is typically accomplished by filing a Form T-1 or Form T-2 with the issuer's registration statement. Qualification under the Trust Indenture Act of an indenture for unregistered debt securities is typically accomplished by filing a Form T-3. No solicitation of the debt exchange offer may commence until after the appropriate form has been filed, and no sales may be made until the SEC declares the appropriate form effective. In some cases, the issuer may have an open-ended indenture that has already been qualified under the Trust Indenture Act.

G. Non-U.S. Laws

Debt securities are frequently issued to and held by investors located outside the United States. For debt tender offers to security holders located outside the United States, issuers must be cognizant of relevant laws, rules and regulations in the appropriate non-U.S. jurisdictions. While non-U.S. laws are beyond the scope of this publication, note that relevant non-U.S. laws could include:

- the European Union Market Abuse Regulation (596/2014/EU), which broadly applies where the debt securities are traded on a European Union regulated market, multilateral trading facility or organised trading facility (including in circumstances where such securities are admitted to trading without the issuer's consent), which is intended to prevent the abuses of insider trading, dissemination of false or misleading information and market manipulation, and which includes public disclosure requirements and considerations of material nonpublic information similar to Regulation FD;
- the European Union Takeover Bids Directive (2004/25/EC), which applies where an issuer with securities traded on a European Union regulated market conducts a tender offer for its own debt securities after a public offer is made by a third party for the purposes of acquiring control, and which provides that all security holders

must be treated equally and must have sufficient time and information to enable them to reach an informed decision;

- the United Kingdom financial promotion regime under the United Kingdom Financial Services and Markets Act 2000, which prohibits the communication of financial promotions in or from the United Kingdom, unless the communication is issued or approved by a person authorized by the United Kingdom Financial Conduct Authority or the communication is otherwise exempt; and
- in the case of a debt exchange offer:
 - the European Union revised Markets in Financial Instruments Directive (2014/65/EU) and the Markets in Financial Instruments Regulation (Regulation (EU) 600/2014) (together referred to as MiFID II), which establishes (among other things) a new product governance regime designed to enhance the level of investor protection in EEA markets through, among other things, the modification and expansion of transparency and reporting requirements for banks and broker-dealers, and which also requires investment firms that manufacture or distribute financial instruments to have in place a specified process for the approval of each financial instrument (including the identification of a target market and an assessment of relevant risks in relation thereto);
 - the European Union PRIIPs Regulation (Regulation (EU) 1286/2014), which is designed to enhance retail investors' understanding of key features and risks associated with packaged retail and insurance-based investment products (PRIIPs) by imposing certain disclosure obligations on manufacturers of such products, including the requirement to produce a key information document whenever a PRIIP is made available to retail investors in the EEA (regardless of where the PRIIP originated); and
 - the European Union Prospectus Regulation ((EU) 2017/1129), which requires the publication of a European Union regulator-approved prospectus for the offer of debt securities to the public in the EEA, unless an exemption from the European Union Prospectus Regulation is available.

In addition, the United Kingdom left the European Union on January 31, 2020 and is currently in a transition period until December 31, 2020. During this time, the United Kingdom will continue to be subject to European law and regulation and remain a member of the single market and customs union; however, further legislation specific to the United Kingdom may become applicable in the future.

H. Other Potentially Applicable Rules and Regulations

Though not applicable to most debt restructurings, the following rules and regulations should also be considered:

1. Regulation M

Rule 102 of the SEC's Regulation M makes it unlawful for any person, directly or indirectly, "to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period". Regulation M has various exceptions, including for investment grade securities, but it can be implicated in debt restructurings depending on the nature of the existing debt securities and other actions the issuer takes.

2. FINRA Rule 5110

Rule 5110 (Corporate Financing Rule — Underwriting Terms and Arrangements) of the Financial Industry Regulatory Authority, Inc. ("**FINRA**") generally requires a dealer-manager to make certain filings in connection with a registered debt exchange offer. FINRA Rule 5110 has various exceptions, including for investment grade securities and for securities listed on the major stock exchanges, but it can be implicated depending on the nature of the existing debt securities and the issuer.

III. Types of Debt Restructurings

A. What is a Tender Offer?

The SEC's tender offer rules can substantially affect the manner in which a debt repurchase is conducted and the timing of the transaction. Accordingly, an issuer and its counsel must determine whether repurchases of debt securities constitute a tender offer. This determination can pose a significant challenge to an issuer because the term "tender offer" is not defined in the U.S. federal securities laws, rules or regulations. Instead, the term "tender offer" has been interpreted by case law, from which certain central definitional principles have emerged. It is important to note, however, that the case law in which the term "tender offer" has been defined has focused on repurchases of equity securities rather than debt securities. (We are not aware of any court directly addressing the characterization of a tender offer in the context of an issuer's repurchase of its debt securities.) Nonetheless, the same considerations applicable to an issuer's equity repurchase program have customarily been examined in the context of an issuer's debt repurchase program.

The generally accepted test for determining what constitutes a tender offer was set forth by the United States District Court for the Southern District of New York in 1979. In *Wellman v. Dickinson*, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979), *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983), that

court discussed the following eight characteristics that had been suggested earlier by the SEC:

Eight Characteristics of Tender Offers:

- active and widespread solicitation of holders for the securities of an issuer;
- solicitation made for a substantial percentage of the issuer’s securities;
- offer to purchase made at a premium over the prevailing market price;
- terms of the offer are firm rather than negotiable;
- offer contingent on the tender of a fixed number of securities, often subject to a fixed maximum number to be purchased;
- offer open only a limited period of time;
- offeree subjected to pressure to sell his securities; and
- whether the public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of large amounts of the target company’s securities.

Not all eight of these characteristics need to be present to constitute a tender offer. Indeed, the weight attributed to each characteristic can vary with the individual facts and circumstances of each transaction, and none of the characteristics alone is typically determinative.

In addition to this eight-factor test, certain courts have applied a “totality of the circumstances” test in determining whether a transaction involves a tender offer. In *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47 (2d Cir. 1985), the United States Court of Appeals for the Second Circuit focused on whether there would be a substantial risk that the offeree would lack the information needed to make a carefully considered investment decision in the absence of the disclosures and procedures required under the SEC’s tender offer rules. That test was followed by the United States Court of Appeals for the Second Circuit in *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 848 (2d Cir. 1986), *cert. denied*, 479 U.S. 987 (1986), and was also examined by the United States Court of Appeals for the Fifth Circuit in *Pin v. Texaco, Inc.*, 793 F.2d 1448, 1454-55 (5th Cir. 1986).

There are two main types of debt tender offers:

- cash tender offers; and
- debt exchange offers.

B. Cash Tender Offers

In a cash tender offer, an issuer offers a cash payment for all or a portion of the

subject debt securities. The cash payment may be based on fixed prices or, in certain circumstances, on prices determined by reference to fixed spreads over benchmark U.S. Treasury securities. A cash tender offer may be particularly appealing when the advisability of a repurchase of debt securities requires achievement of certain conditions precedent, such as the receipt of financing sufficient to fund the repurchase or the adoption of amendments to debt instruments.

1. Rules and Regulations Governing Cash Tender Offers

Cash tender offers for debt securities are subject to the following U.S. federal securities laws, rules and regulations:

- Regulation 14E (see Part II.A. above);
- antifraud provisions (see Part II.B. above);
- Regulation FD (see Part II.C. above); and
- anti-manipulation provisions (see Part II.D. above).

Because cash tender offers for debt securities do not involve the issuance of new securities, such a tender offer does not implicate the registration requirements of the Securities Act or the qualification provisions of the Trust Indenture Act.

The principal requirement for cash tender offers for debt securities is that the offer must remain open for 20 business days pursuant to Rule 14e-1(a) under the Exchange Act. In January 2015, the SEC's Division of Corporation Finance issued a no-action letter that provides relief from that rule and certain other aspects of Regulation 14E for tender offers of non-convertible debt securities if certain criteria are satisfied. In particular, that no-action letter:

- shortens the 20 business day period for which the tender offer must remain open to five business days;
- shortens the 10 business day period requirement for change in consideration offered to five business days; and
- requires a tender offer to be held open for at least three business days following any other material change to the tender offer.

A complete description of the criteria required for the availability of the relief provided by that no-action letter is set forth in Appendix A to this publication, summarized as follows:

What Criteria are Required to Qualify for Five Business Day Tender Offers?

- offer must be for any or all of a class or series of non-convertible debt;
- offer must be made by issuer of subject debt securities or certain related parties;
- offer must be made for cash and/or "qualified debt securities";

- offer generally must be open to all security holders;
- offer must not be part of consent solicitation;
- no event of default exists under subject indenture or any other material credit agreement;
- issuer cannot be subject to bankruptcy proceedings;
- offer must not be financed with “senior indebtedness”;
- offer must have a guaranteed delivery procedure;
- immediate widespread dissemination requirements, including for material changes
- announcement press release required;
- certain withdrawal rights must be provided;
- no consideration paid until expiration of offer; and
- offer not related to change of control, another tender offer or certain other enumerated events.

2. Alternative Pricing Methods for Cash Tender Offers

A cash tender offer for debt securities in its simplest form entails an offer at a fixed dollar amount. One potential drawback to that approach is that the fixed dollar amount established before the expiration of the tender offer can become undesirable at the expiration of the tender offer because of market conditions that have changed in the meantime, especially since many security holders will only make their decision whether or not to tender very close to the expiration of the tender offer. In addition to the relief described above for five business day tender offers, the SEC has approved the following other forms of relief (principally involving alternative pricing methods) for **investment grade non-convertible** debt securities in the following no-action letters:

- fixed spread over the then-current yield on a specified benchmark U.S. Treasury security determined as of the date, or the date preceding the date, of the tender (Embassy Suites, Inc., SEC No-Action Letter, 1992 WL 87439 (Apr. 15, 1992));
- real-time fixed spread offer (Merrill Lynch, Pierce, Fenner & Smith Inc., SEC No-Action Letter, 1993 WL 270676 (Jul. 19, 1993));
- continuously priced fixed spread tender offer and single simultaneous settlement (Goldman, Sachs & Co., SEC No-Action Letter, 1993 WL 497126 (Dec. 3, 1993)); and
- certain consent solicitation matters (Times Mirror, SEC No-Action Letter, 1994 WL 637182 (Nov. 15, 1994)).

In addition to these alternative forms of relief, the SEC has permitted cash tender offers to be conducted via a modified Dutch auction. See, for example, Equitable Life Assurance Soc’y/Equitable Life Finance PLC, SEC No-Action Letter, 2004 WL 2646611

(Nov. 15, 2004), and MFP Tech. Serv. Inc., SEC No-Action Letter, 1993 WL 398589 (Oct. 5, 1993). Normally, an issuer specifies in its offer documents the amount of debt securities it wishes to repurchase and the price at which it will repurchase those debt securities. In a modified Dutch auction, however, the issuer sets a range of prices at which a security holder may tender its debt securities. The issuer does not need to disclose the minimum and maximum prices to be paid in the tender offer as long as the aggregate amount of debt securities to be purchased is disclosed. The resulting repurchase price to be paid to all successful tendering security holders, often called the “clearing price”, is the highest price at which the issuer can repurchase all of the debt securities for which it has solicited tenders.

C. Debt Exchange Offers

In a debt exchange offer, an issuer offers to issue new debt securities in exchange for its existing debt securities. A debt exchange offer may be particularly appealing if an issuer does not have sufficient liquidity to repurchase its existing debt securities with cash. A debt exchange offer can be a valuable restructuring alternative to bankruptcy for distressed companies.

1. Rules and Regulations Governing Debt Exchange Offers

Debt exchange offers are subject to the following U.S. federal securities laws, rules and regulations:

- Regulation 14E (see Part II.A. above);
- antifraud provisions (see Part II.B. above);
- Regulation FD (see Part II.C. above);
- anti-manipulation provisions (see Part II.D. above);
- the Securities Act (see Part II.E. above); and
- the Trust Indenture Act (see Part II.F. above).

The principal requirement for debt exchange offers is that the offer must remain open for 20 business days pursuant to Rule 14e-1(a) under the Exchange Act. In January 2015, the SEC’s Division of Corporation Finance issued a no-action letter that provides relief from that rule and certain other aspects of Regulation 14E for exchange offers of non-convertible debt securities if certain criteria are satisfied. In particular, that no-action letter:

- shortens the 20 business day period for which the tender offer must remain open to five business days;
- shortens the 10 business day period requirement for change in consideration offered to five business days; and
- requires a tender offer to be held open for at least three business days following

any other material change to the tender offer.

Importantly, the relief provided by that no-action letter is available in a debt exchange offer only if the new debt securities being offered are “qualified debt securities” within the meaning of that no-action letter. Qualified debt securities are 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 rate; provided that they 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.

A complete description of the criteria required for the availability of the relief provided by that no-action letter is set forth in Appendix A to this publication and is summarized in Part III.B.1. above.

2. Structuring a Debt Exchange Offer

There are three typical ways to structure a debt exchange offer, each of which is discussed in more detail below:

- registered with the SEC;
- exempt from SEC registration pursuant to Section 3(a)(9) of the Securities Act; and
- exempt from SEC registration pursuant to Section 4(a)(2) of the Securities Act (by reason of being a private offering).

Since deal participants under any of these approaches have potential statutory liability in relation to the debt exchange offer, it is customary for the issuer to prepare an offer document and for any dealer-manager to conduct due diligence and receive opinion letters, negative assurance letters and comfort letters.

Registered Debt Exchange Offer

Registered debt exchange offers are most often utilized by issuers that are not entitled to rely on any registration exemptions and have existing debt securities held by a large and diverse group of investors. In a registered debt exchange offer, an issuer must file a registration statement on Form S-4. (Form S-3 is unavailable for exchange offers.) That registration statement must disclose the terms of the debt exchange offer, the risks associated with tendering existing debt securities and a description of the issuer.

One advantage of registered debt exchange offers is that an issuer can retain a dealer-manager to solicit tenders from security holders. In addition, because the new debt securities will be freely transferable (subject to certain exceptions), registered debt exchange offers provide security holders with greater liquidity than the other types of debt exchange offers. However, given the possibility of SEC review of the registration statement and the heightened liability provisions of Section 11 of the Securities Act,

registered debt exchange offers require more time to execute and are generally more costly than the other types of debt exchange offers.

Prior to formally launching a registered debt exchange offer, issuers often wish to “test the waters” with key security holders to gauge the receptiveness to a particular debt exchange offer proposal. However, testing the waters prior to a registered exchange can be problematic because U.S. federal securities laws prohibit making offers to sell new securities unless a registration statement has been filed (or a registration exemption is available). This issue has been largely resolved in the SEC’s Compliance and Disclosure Interpretation (“**C&DI**”) 139.29, which provides as follows:

SEC Compliance and Disclosure Interpretation 139.29 (August 11, 2010)

Question: May an issuer contemplating a registered debt exchange offer execute a lock-up agreement (or agreement to tender) with a note holder before the filing of the registration statement?

Answer: The execution of a lock-up agreement (or agreement to tender) may constitute a contract of sale under the Securities Act. If so, the offer and sale of the issuer’s securities would be made to note holders who entered into such an agreement before the exchange offer is made to other note holders.

Recognizing the legitimate business reasons for seeking lock-up agreements in this type of transaction, the staff will not object to the registration of offers and sales when lock-up agreements have been signed in the following circumstances:

- the lock-up agreements are signed only by accredited investors;
- the persons signing the lock-up agreements collectively own less than 100% of the outstanding principal amount of the particular series of notes;
- a tender offer will be made to all security holders of the particular series of notes; and
- all note holders eligible to participate in the exchange offer are offered the same amount and form of consideration

When lock-up agreements are executed before the filing of a registration statement and the circumstances noted above are not satisfied, the subsequent registration of the exchange offer on Form S-4 may be inappropriate. An exchange offer is a single transaction, and a transaction that has commenced privately must be completed privately. Similarly, if a note holder actually tenders its notes - for example, by signing a transmittal form - before the filing of the Form S-4, the staff has objected to the subsequent registration of the exchange offer on Form S-4 for any of the note holders because offers and sales have already been made and completed privately. An issuer seeking to lock up note holders must also consider whether such efforts

represent the commencement of a tender offer.

As a result of C&DI 139.29, communications with accredited investors about a future registered debt exchange offer may be made prior to filing a registration statement. In addition, in an attempt to further clarify C&DI 139.29, the SEC has informally stated that:

- there is no need to obtain a lock-up agreement in order for C&DI 139.29 to apply, and the SEC is not focused on the precise form of any agreement that is obtained; and
- persons acting on behalf of an issuer, including dealer-managers, benefit to the same extent as an issuer from the policy exemptions provided by C&DI 139.29.

Keep in mind that an issuer nonetheless cannot commence a debt exchange offer or issue any new debt securities until the registration statement for the debt exchange offer is declared effective by the SEC.

Deal participants in registered debt exchange offers should also be mindful of FINRA Rule 5110, which requires a dealer-manager to make certain filings absent an available exception to that rule.

Section 3(a)(9) Exchange Offer

Section 3(a)(9) of the Securities Act provides a security-based exemption, with certain exceptions for securities exchanged in a case under Title 11 of the United States Code (i.e. the U.S. federal bankruptcy code), for “any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange”. Accordingly, an issuer is unable to pay a dealer-manager to solicit security holders, which can make this type of debt exchange offer less appealing in certain circumstances. Nonetheless, this exemption permits an issuer (and, in certain circumstances, a party related to the issuer) to consummate a debt exchange offer with its existing security holders without registering the new debt securities under the Securities Act, but the indenture will be subject to the qualification requirements of the Trust Indenture Act (see Part II.F. above). While the offer of new debt securities is not subject to registration with or review by the SEC, the new debt securities will be subject to the same restrictions on resale, if any, as the existing debt securities. The SEC has confirmed this in C&DI 125.08, which provides:

SEC Compliance and Disclosure Interpretation 125.08 (November 26, 2008)

Question: When securities are exchanged for other securities of the issuer under Section 3(a)(9), do the securities received assume the character of the exchanged securities?

Answer: Yes. For example, if restricted securities are exchanged, the new securities

are deemed to be restricted securities and tacking of the holding period of the former securities is permitted.

Accordingly, an issuer proceeding on the basis of this exemption may provide the security holders with registration rights that require the issuer to register the new debt securities with the SEC by a specified future date. The decision as to whether or not to provide such registration rights typically involves an analysis of the holding period required by Rule 144 under the Securities Act.

A securities exchange has the potential of an inequitable allocation depending on the timing of record dates, interest payments and security holder identity, where the issuer would want the unjustly-enriched security holder to reimburse the issuer for the overpayment of interest to that security holder or otherwise waive the right to receive such an interest payment or consideration therefor. Rule 149 under the Securities Act addresses this concern by providing that the term “exchanged” in Section 3(a)(9) of the Securities Act shall be deemed to include “the issuance of a security in consideration of the surrender, by the existing security holders of the issuer, of outstanding securities of the issuer, notwithstanding the fact that the surrender of the outstanding securities may be required by the terms of the plans of exchange to be accompanied by such payment in cash by the security holder as may be necessary to effect an equitable adjustment, in respect of dividends or interest paid or payable on the securities involved in the exchange, as between such security holder and other security holders of the same class accepting the offer of exchange”.

Pursuant to Rule 150 under the Securities Act, the term “commission or other remuneration” in Section 3(a)(9) of the Securities Act does not include “payments made by the issuer, directly or indirectly, to its security holders in connection with an exchange of securities for outstanding securities, when such payments are part of the terms of the offer of exchange”.

When looking to the exemption provided by Section 3(a)(9) of the Securities Act, issuers should be mindful of the following considerations regarding the identity of the issuer and payments made to solicitation agents and other third parties:

Same Issuer

For the exemption provided by Section 3(a)(9) of the Securities Act to be available, both the existing debt securities and the new debt securities must have been issued by the same issuer, subject to certain exceptions for parties related to the issuer.

The principal exception to this “same issuer” requirement has been afforded by the SEC where the issuer and the related party have a parent-subsidiary relationship involving a guarantee of the existing securities, and is due to the term “security” being defined in Section 2(a)(1) of the Securities Act as including a “guarantee of” any security. In Division of Corp. Fin., SEC No-Action Letter, 2010 WL 128054 (Jan. 13, 2010), the SEC confirmed that Section 3(a)(9) of the Securities Act would be available

for the issuance of a security (without any guarantee) by an issuer in exchange for an existing security of the issuer that is fully and unconditionally guaranteed by one or more of the issuer's wholly-owned subsidiaries (i.e. involving a so-called "upstream guarantee"). The SEC has also provided several no-action letters confirming the same outcome for so-called "downstream guarantees", i.e. that a security of an issuer that is fully and unconditionally guaranteed by the issuer's parent is exchangeable for a new security issued by that parent. (A number of those no-action letters are recited in the January 2010 no-action letter described above.) Note, however, that this outcome does not hold true where an existing debt security guaranteed by a parent is sought to be exchanged for a new debt security of that same issuer that is not guaranteed by the parent, as set forth in C&DI 125.05:

SEC Compliance and Disclosure Interpretation 125.05 (November 26, 2008)

Question: A subsidiary has outstanding a class of debentures guaranteed by its parent. The subsidiary proposes to offer a new debenture in exchange for the guaranteed debenture. The new debenture will not be guaranteed by its parent. Will the Section 3(a)(9) exemption be available for the exchange?

Answer: No, because the proposed exchange of the parent guarantee for the subsidiary's debt involves two different issuers.

The SEC has also confirmed in C&DI 125.02 that when, through a merger, acquisition or otherwise, an issuer has fully and unconditionally assumed the obligations of the debt securities of another issuer, the exemption provided by Section 3(a)(9) of the Securities Act is available when exchanging the existing debt securities of the other issuer that have been fully and unconditionally guaranteed by the new issuer for debt securities of the new issuer:

SEC Compliance and Disclosure Interpretation 125.02 (November 26, 2008)

Question: Is the Section 3(a)(9) exemption available for the issuance of securities of one issuer to the holders of debt securities of another issuer if the obligation on such debt securities of the other issuer has been fully and unconditionally assumed by the issuer of the new securities?

Answer: Yes. Once the issuer has fully and unconditionally assumed the obligations on the debt securities of the other issuer, the transaction becomes the exchange of that obligation for the new security of the issuer with its existing security holders.

No Paid Solicitation

For the exemption provided by Section 3(a)(9) of the Securities Act to be available, an issuer may not pay anyone else, directly or indirectly, to solicit the debt exchange offer. Accordingly, payment of a "success fee" (or similar fee based on the outcome of the debt exchange offer) to a financial advisor renders the exemption provided by Section

3(a)(9) of the Securities Act unavailable. However, the SEC has permitted consideration to be remitted to financial advisors in several ways.

In particular, the SEC has permitted an issuer to pay a fixed fee (plus reasonable expenses) to a financial advisor where the fee is not contingent upon the success of the debt exchange offer. The reasoning behind this outcome is that there should be no inference that the financial advisor had an incentive to engage in a solicitation of security holders.

The following C&DIs provide certain guidelines for what sorts of consideration may or may not be permitted:

SEC Compliance and Disclosure Interpretation 125.06 (April 24, 2009)

Question: An issuer proposes to retain a third party for the purpose of consulting with institutional investors as to what they would consider to be an acceptable exchange offer. Would the issuer satisfy the condition of Section 3(a)(9) that “no commission or other remuneration be paid or given directly or indirectly for soliciting such exchange” if it paid such third party?

Answer: No. Accordingly, Section 3(a)(9) would not be available. For examples of the types of activities of a third party, such as a financial advisor, that are consistent with the Section 3(a)(9) exemption, see the Seaman Furniture Co. no-action letter (Oct. 10, 1989) issued by the Division.

SEC Compliance and Disclosure Interpretation 125.03 (November 26, 2008)

Question: Section 3(a)(9) is not available if any commission or other remuneration is paid for soliciting the exchange. An issuer proposes to use the services of a proxy solicitor in connection with an exchange transaction. Would Section 3(a)(9) be available for the transaction?

Answer: Yes, but only if the services of the solicitor are ministerial and involve no recommendation with respect to the proposed exchange or encouragement to vote in a particular manner.

SEC Compliance and Disclosure Interpretation 125.07 (November 26, 2008)

Question: An issuer proposes to conduct a going private issuer tender offer in which it will offer debt securities for its outstanding common stock. Would the issuer be precluded from relying on the exemption from registration provided by Section 3(a)(9) for the issuance of the debt securities simply because it pays an investment banker’s fee for a fairness opinion on the terms of the transaction?

Answer: No. In order to constitute the disqualifying type of remuneration or commission specified in Section 3(a)(9), the remuneration must be paid or given for soliciting the exchange of securities. Payment of a fee for an investment

banker's opinion as to the fairness of the transaction is not considered to be a fee paid for soliciting the exchange of securities. It should be noted, however, that if the investment banker is also conducting soliciting activities, the Section 3(a)(9) exemption would not be available.

A number of SEC no-action letters have provided guidelines for what a financial advisor is permitted to do in a transaction exempt from Section 3(a)(9) of the Securities Act. In *Seaman Furniture Co.*, SEC No-Action Letter, 1989 WL 246436 (Oct. 10, 1989), as followed by *International Controls Corp.*, SEC No-Action Letter, 1990 WL 286830 (Aug. 6, 1990), the following activities have been permitted:

- consulting with and advising the issuer regarding the proposed terms of the debt exchange offer and the new securities;
- rendering a formal opinion as to the "fairness" of the debt exchange offer to security holders from a financial point of view;
- performing tasks that are permitted to be performed by investor relations firms, such as ascertaining what action individual security holders intend to take with respect to the debt exchange offer and communicating that information to the issuer;
- being named as dealer-manager in the offer documents;
- contacting security holders to inquire whether they have received the offer documents or have any questions concerning those documents, but limiting each answer to information contained in those documents;
- advising the issuer and its employees in procedures to be used in conversations with security holders; and
- consulting with and advising the issuer in the preparation of various communications from the issuer to its security holders.

Importantly, a financial advisor should not make any recommendation regarding the debt exchange offer to any security holder (or any advisor to or other representative of any such security holder).

An issuer that wishes to solicit security holders through its own personnel (which is generally permitted) should be mindful of the following recommended guidelines:

- such personnel should have significant responsibilities with the issuer other than the solicitation of the debt exchange offer (such as being a director, officer or other key employee);
- such personnel should not be hired for the purpose of soliciting the debt exchange offer;
- no special or additional bonus, commission, fee or other type of payment should be made to such personnel for their solicitation activities; and
- such personnel should attend to their regular duties, with their solicitation efforts

only being additional assignments.

Private Placement Debt Exchange Offer

An issuer with a significant amount of debt securities held by sophisticated investors may try to structure a debt exchange offer as a private placement pursuant to Section 4(a)(2) of the Securities Act if the issuer cannot meet the criteria for exemption from Securities Act registration under Section 3(a)(9) of the Securities Act. An issuer must structure a private placement debt exchange offer so that it does not constitute a “public offering”. In a private placement exchange offer, while the offer of new debt securities is not subject to registration with or review by the SEC, the new securities will be “restricted securities” and therefore not free from federal securities laws and regulations restricting the free resale of those securities. Accordingly, a private placement debt exchange offer is typically directed to qualified institutional buyers (within the meaning of Rule 144A under the Securities Act) and accredited investors (within the meaning of Regulation D under the Securities Act). An issuer (or its advisor) typically takes care to determine that a particular security holder is such a sophisticated investor before making an offer to that security holder in order to avoid any “general solicitation” of investors that could deem the offer to be a public offering. Unlike transactions taking advantage of the exemption provided by Section 3(a)(9) of the Securities Act, private placement debt exchange offers permit issuers to retain a financial advisor to solicit existing holders of debt securities and to pay that advisor a success-based fee.

The SEC has confirmed in its Manual of Publicly Available Telephone Interpretations (which is the predecessor of the C&DIs) that a security holder possessing restricted securities is not prohibited from tendering the securities pursuant to a tender offer merely because the securities are restricted.

D. Open-Market Purchases & Privately Negotiated Repurchases; Creeping Tender Offers

An issuer may try to structure repurchase(s) of debt securities in such a way that it will not be considered a tender offer (and therefore not subject to tender offer rules and regulations). An issuer taking this approach must exercise particular care to ensure that the repurchase(s) will not be considered a tender offer requiring compliance with those rules and regulations. An issuer may do so by repurchasing existing debt securities through open-market purchases or privately negotiated repurchases. Both of these approaches may be undertaken by the issuer or by a broker or dealer on the issuer’s behalf. (It is customary and sensible for an issuer to appoint as its agent the investment bank that managed the initial offering of the existing debt securities, since that bank is usually in the best position to identify and contact the existing security holders.) These approaches can be particularly effective when an issuer wishes to

repurchase only a small percentage of a series or class of existing debt securities or when the ownership of those debt securities is concentrated among very few holders. Open-market purchases and privately negotiated repurchases of debt securities can provide the following benefits to an issuer:

- savings of time and money by avoiding the need to comply with tender offer rules and regulations;
- greater flexibility in negotiating price and timing with a security holder; and
- faster reaction to secondary market shifts without needing to commit to repurchase large quantities of debt securities or embarking on long-term repurchase programs.

If an issuer wishes to engage in open-market purchases or privately negotiated repurchases of debt securities, it must take care to ensure that its repurchases do not constitute a so-called “creeping” tender offer that would have required the issuer’s compliance with the tender offer rules and regulations. In order to avoid having its repurchase(s) considered such a non-compliant tender offer, an issuer should consider employing the following approaches:

- refrain from any general solicitation of security holders or public announcement of the repurchase(s);
- engage an investment bank that is familiar with the nature and composition of the security holders to conduct the repurchase(s);
- contact only larger, more sophisticated institutional security holders;
- determine in advance the security holders to be approached (the more limited the number, the better);
- refrain from having uniform pricing and terms applicable to the repurchase(s) (the greater the variation in price and other terms, the better);
- do not impose any contingency on a minimum or maximum amount of securities to be repurchased;
- conduct the repurchase(s) over an extended period of time without a deadline on the security holders;
- avoid any “take it or leave it” offers, any offers conditioned on other purchasers or any other form of pressure;
- keep negotiations of any open-market purchases and privately negotiated repurchases independent of one another; and
- refrain from any such repurchase(s) at a time when a conventional tender offer is ongoing.

Issuers engaging in open-market purchases or privately negotiated repurchases typically try to:

- limit the number of security holders approached to ten or less; and/or
- repurchase less than 25% of the particular series or class of debt securities.

E. Consent Solicitations

An issuer can effectuate or augment a debt restructuring by amending or waiving the terms of the agreements governing its existing debt securities via a consent solicitation. Consent solicitations typically seek to relax or eliminate restrictive covenants and/or events of default, either permanently or in the context of a contemplated transaction.

In cash tender offers or debt exchange offers accompanied by a consent solicitation, the security holders are commonly required to consent to the requested amendments or waivers as part of their tender of debt securities. The issuer will be able to effectuate the contemplated amendments or waivers if the requisite amount of existing debt securities required by the underlying indenture is tendered. It is very common for the total consideration offered in such an offer to be increased by an amount characterized as a consent payment. Often, the consent payment is only made available to security holders that tender on or prior to a consent deadline that occurs prior to expiration of the offer. In a traditional offer open for 20 business days, the consent premium is typically provided to security holders that tender in the first ten business days.

An issuer may alternatively seek to amend or waive the agreements governing its existing debt securities by conducting a stand-alone consent solicitation that is not executed concurrently with a tender offer. Typically, a stand-alone consent solicitation involves more limited amendments or waivers because, unlike when they tender their debt securities, the consenting security holders will remain subject to the terms of the underlying indenture as amended or waived.

The terms of the underlying indenture must be carefully analyzed to determine the requisite amount of security holders required to consent to the desired amendments or waivers. A typical indenture contains certain “sacred rights” that cannot be amended without the consent of all security holders (which is traditionally very difficult for an issuer to obtain), while many other provisions are subject to majority approval. In addition, Section 316(b) of the Trust Indenture Act effectively prohibits certain amendments from being included in a consent solicitation absent unanimous consent, including the reduction of principal or interest.

An issuer should also be cognizant of related developments in recent case law. In January 2017, the United States Court of Appeals for the Second Circuit, in *Marblegate Asset Mgmt., LLC v. Education Mgmt. Fin. Corp.*, 846 F.3d 1 (2d Cir. 2017), held that Section 316(b) of the Trust Indenture Act only prohibits non-consensual amendments to an indenture’s core payment terms, and does not extend to non-consensual amendments of other indenture terms or other corporate actions that could practically impair the ability of the issuer to make the payments required by the debt securities. This 2017 decision overruled (actually or effectively) several decisions made during the three preceding years by the United States District Court for the Southern District

of New York in cases involving Marblegate and Caesars, and in doing so reconfirmed the approach that most practitioners had followed before those decisions were made. Nonetheless, issuers should be particularly sensitive to these sorts of issues in out-of-court restructurings or when they are otherwise in distress or in the “zone of insolvency”.

A consent solicitation must also be analyzed to ensure that the amendments requested would not constitute such a significant change in the nature of the debt securities that the remaining debt securities would be deemed an offering of new securities requiring registration under the Securities Act or an exemption from such registration. Issuers should be particularly mindful in this regard of any amendments requiring unanimous consent pursuant to the underlying indenture. Similarly, the amendments effectuated by a consent solicitation could give rise to a significant modification for tax purposes, which should also be analyzed. If there is a significant modification, the deemed exchange may be taxable or tax-free to security holders depending upon the circumstances. However, even if the deemed exchange is tax-free, a significant modification causes a reissuance of the debt security for tax purposes and the “new” debt security may bear original issue discount, which generally would be a material point for security holders. Whether or not any deemed exchange is taxable or tax-free, the issuer may have cancellation of debt income.

Some issuers solicit “exit consents” as part of a cash tender offer or a debt exchange offer, in which, as part of the tender, security holders consent to amendments to the indenture governing the existing debt securities that make the continued holding of those debt securities following the tender offer less appealing. Exit consents are different from other consent solicitations, such as stand-alone consent solicitations, because they are effected by tendering security holders that are about to give up their existing debt securities, but not continuing holders of those debt securities. While the basic payment terms of the existing debt securities cannot be amended without the consent of each affected security holder, many other restrictive covenants and provisions governing priority in the issuer’s capital structure are susceptible to modification with only majority approval in a manner adverse to security holders. Accordingly, when an issuer announces prior to expiration of the offer that a requisite amount of security holders has decided to participate in a cash tender offer or a debt exchange offer, the security holders that have not yet tendered, as a practical matter, must decide whether to tender or be left with debt securities with significantly reduced protections.

F. Redemptions

Certain indentures governing debt securities provide the issuer with an option to redeem those debt securities in whole or in part at pre-determined prices. Often the pre-determined price will be structured as a “make-whole” to preserve the security

holders' yield to maturity. A "make-whole" premium can be substantial and result in pricing levels that are unacceptable to the issuer. Nonetheless, a redemption is a fairly straightforward process that can be effected in one or two months without requiring any security holder consent or particularly onerous documentation. A redemption can be unattractive, however, where:

- better pricing can be achieved by one of the alternative restructuring approaches described above;
- the underlying indenture does not permit redemption (either at the particular point in time or at all); or
- the issuer does not have sufficient funds available to effectuate a redemption (or the ability to effectuate a redemption conditioned on obtaining sufficient financing to fund the redemption).

Prior to embarking on a redemption, the issuer must ensure that the redemption is permitted not only under the governing indenture but also under the terms of the documentation governing the issuer's other debt, including any credit facilities. In particular, those documents can include restrictions on:

- repurchasing or otherwise repaying existing debt securities;
- permitted debt;
- permitted refinancings; and
- permitted liens.

G. Defeasance

Many indentures governing debt securities permit the issuer to discharge all or most of its obligations under the indenture (which is called defeasance) subject to depositing certain funds with the trustee under the indenture. There are two types of defeasance traditionally provided: covenant defeasance and legal defeasance.

Covenant defeasance, which requires an issuer to irrevocably deposit moneys sufficient to cover all future interest and principal on the debt securities through stated maturity, permits an issuer to dispose of most of the restrictive covenants and events of default under the indenture. While not the most commonly used form of debt restructuring, covenant defeasance can be a useful tool in certain circumstances, especially where redemption of the debt securities is not permitted. Our understanding of the accounting treatment of covenant defeasance is that, even though sufficient funds have been set aside for ultimate repayment, the debt securities nonetheless continue to remain obligations of the issuer that need to be reflected in the issuer's financial statements.

Legal defeasance would permit an issuer to extinguish all of its obligations under the underlying indenture. However, legal defeasance usually cannot be effectuated

because it typically is conditioned on the delivery of an opinion of counsel to the effect that, based on a change in law or an Internal Revenue Service ruling, security holders will not have a taxable event as a result of the defeasance and will be taxed in the same amounts, in the same manner and at the same times that they would have been taxed absent the legal defeasance. Under current law, it is not possible to deliver such an opinion.

H. Satisfaction and Discharge

Most indentures governing debt securities permit the issuer to satisfy and discharge the indenture if the debt securities will become due and payable at their stated maturity within one year. In this case, the issuer is required to irrevocably deposit moneys sufficient to cover all future interest and principal on the debt securities through stated maturity. Satisfaction and discharge can be useful when an issuer has sufficient cash available to repay the debt securities prior to maturity and wishes to relieve itself of restrictive covenants in the indenture in the meantime.

IV. Practical Considerations for Debt Restructurings

A. Strategies for Maximizing Success

Security holders might not tender their debt securities in a cash tender offer or a debt exchange offer because they are unsatisfied with the pricing terms offered or because they cannot be located. To discourage these “holdouts”, an issuer often implements one or more of the following structural incentives.

1. Early Tender Deadlines

Many issuers create incentives for security holders to tender early by establishing an early tender premium (and/or early consent payment) for debt securities tendered earlier in the tender offer period. In a traditional offer open for 20 business days, the “early-bird” premium, which is commonly expressed as a specific dollar amount per \$1,000 principal amount of tendered debt securities, is provided to security holders that tender in the first ten business days. This approach is appealing to issuers because it provides earlier visibility as to the likely success of a debt tender offer (and any related consent solicitation).

An issuer typically structures the right to withdraw a tender concurrent with any such early tender premium deadline or early consent payment deadline. An issuer that implements this early withdrawal deadline may also be able to implement an early

settlement that corresponds to the early deadline. Early settlement permits an issuer:

- to save the additional interest that would accrue on the existing debt securities until the expiration of the tender offer; and
- in consent solicitations, to effectuate amendments to the underlying indenture sooner if the requisite amount of debt securities have been tendered prior to the early deadline.

2. Exit Consents

As discussed in Part III.E. above, some issuers solicit “exit consents” as part of a cash tender offer or a debt exchange offer, in which, as part of the tender, security holders consent to amendments to the indenture governing the existing debt securities. While the contemplated amendments to the indenture generally do not affect the tendering security holders, they typically adversely affect “holdouts” by reducing the covenant and event of default protections in their existing debt securities. Accordingly, when an issuer announces prior to expiration of the offer that a requisite amount of security holders has decided to participate in a cash tender offer or a debt exchange offer, the security holders that have not yet tendered, as a practical matter, must decide whether to tender or be left with debt securities with significantly reduced protections.

B. Contractual Limitations

An issuer seeking to implement a debt restructuring should carefully review the contracts governing all its existing debt. Covenants in credit facilities, indentures and other agreements governing an issuer’s debt may restrict the issuer’s ability to repurchase debt or otherwise implement a debt restructuring.

If a private placement exchange offer coupled with a consent solicitation for “exit consents” is contemplated, the underlying indenture should be reviewed to ensure that there is no problematic “payment for consent” covenant that requires all security holders to be paid for consenting to an amendment to the indenture.

C. Tax Considerations

An issuer’s repurchase of its debt securities or exchange of its debt securities generally will have tax consequences to the issuer and to participating security holders.

1. Basic Tax Implications for Issuers

When an issuer purchases its existing debt securities at a discount, the transaction typically gives rise to cancellation of debt income (“**CODI**”), which is generally calculated as the difference between the adjusted issue price of the debt being repurchased and the repurchase price. If the transaction involves exchanging the existing debt securities for new debt securities, the repurchase price (for purposes

of calculating CODI) will generally be the fair market value of the new debt security. Commonly accepted tax principles require that CODI be included as taxable income of the issuer. However, the Internal Revenue Code provides certain exceptions to the rule requiring CODI to be included as taxable income in the case of an insolvent or bankrupt issuer. Under these exceptions, an issuer that recognizes CODI is required to reduce its tax attributes rather than including the CODI as taxable income.

If the issuer purchases its existing debt at a premium (or, in a debt exchange, if the issue price of the new debt is greater than the adjusted issue price of the existing debt), then the issuer typically will have deductible retirement premium.

If there is a significant modification of debt as a result of an actual or deemed debt exchange, the debt must be tested under the applicable high yield discount obligation (AHYDO) rules to determine whether deductions for any discount on the debt is subject to deferral or disallowance.

2. Basic Tax Implications for Security Holders

A security holder whose existing securities are purchased for cash will have a taxable event.

Similarly, a debt exchange offer that does not qualify as a tax-free reorganization will result in the recognition of taxable gain or loss on the exchange to the security holder of existing debt securities that receives new debt securities. This gain or loss will generally be equal to the difference between the value of the consideration received by the security holder (excluding interest) and the security holder's adjusted tax basis in the debt securities exchanged. Consent payments will generally be viewed as additional consideration in exchange for the tendered debt (in which case such payments will be taken into account in determining the gain or loss on the exchange) or as separate consideration in the nature of a fee for consenting to the proposed amendments.

D. Purchases by Affiliates of Issuer

An affiliate of an issuer considering purchasing debt securities of the issuer should consider whether it is putting itself at risk of being equitably subordinated to other creditors in the event that the issuer becomes insolvent. Equitable subordination permits a court to subordinate a claim (which in this case would be the debt securities acquired by the affiliate) to other allowed claims and/or to release liens securing the claims of the affiliate. When evaluating whether equitable subordination of the affiliate's claims is appropriate, courts heavily consider whether the affiliate used its influence over, or control of, the issuer to obtain an inequitable benefit or advantage at the expense of the issuer's arm's-length creditors. Although equitable subordination is not often employed by bankruptcy courts, the consequences can

severely impact recovery rates on the debt securities owned by the affiliate that is equitably subordinated.

A purchase of debt securities by an affiliate of an issuer can also be susceptible to challenge as constituting an inappropriate diversion of a corporate opportunity where the issuer itself might otherwise repurchase its own debt securities.

Affiliates of issuers should also be mindful that many indentures prevent an affiliate of the issuer from exercising voting rights in connection with the underlying debt securities.

An affiliate of an issuer that purchases debt of the issuer at a discount may cause the issuer to have CODI.

E. Advance Disclosure

An issuer with sufficient foresight may disclose its intention to undertake future repurchases of debt securities in its Annual Report on Form 10-K or Quarterly Report on Form 10-Q, and thereby potentially avoid future disclosure issues. A sample disclosure, which would appear in the "Liquidity and Capital Resources" section of the MD&A of the issuer's periodic report, could read as follows:

We may from time to time seek to retire portions of our outstanding debt securities through cash repurchases or exchanges for other securities, in open-market purchases, privately negotiated transactions or otherwise. Such repurchases or exchanges, if any, will be subject to and depend on prevailing market conditions, our liquidity requirements, contractual restrictions and other factors. The amounts involved in any such transactions, individually or in the aggregate, may be material.

F. Appropriate Allocation of Interest Payments

An issuer should be mindful when preparing for a cash tender offer for debt securities to check any record dates and interest payment dates falling within the tender offer period to ensure that the offer is structured to allocate interest appropriately to the intended recipients.

G. Required Documentation

A cash tender offer for debt securities or a debt exchange offer will typically require the following three principal documents:

1. Offer Document

The offer document will set forth the terms and conditions of the offer. The offer document is typically called an “offer to purchase” in the case of a cash tender offer for debt securities and an “offer to exchange” in the case of a debt exchange offer. The offer document is typically prepared by counsel to the issuer.

2. Letter of Transmittal

The letter of transmittal accompanies the offer document and is the document used by security holders to tender their existing debt securities. The letter of transmittal is typically prepared by counsel to the issuer.

3. Dealer-Manager Agreement

The dealer-manager agreement is the contract between the issuer and one or more dealer-managers setting forth the terms of the issuer’s engagement of the dealer-manager(s). The dealer-manager agreement is typically prepared by counsel to the dealer-manager(s).

H. Opinion Letter Matters

Issuers and dealer-managers should be aware of an ongoing discussion among law firms as to opinion letters historically delivered in debt tender offers. In many debt tender offers, the analysis behind the opinions requested depends upon no-action letters and other SEC guidance that are not “black-letter law”, which creates a departure from typical opinion practice. The Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee of the American Bar Association issued a report regarding these matters in its Fall 2017 issue of *The Business Lawyer*. See *Exchange Act Rule 14e-1 Opinions for Debt Tender Offers*, 72 *Bus. Law.* 1047 (Fall 2017).

Appendix A

Five Business Day Tender Offer Requirements

I. January 23, 2015 No-Action Letter

In January 2015, the SEC's Division of Corporation Finance issued a no-action letter (Cahill Gordon & Reindel LLP, SEC No-Action Letter, 2015 WL 295011 (Jan. 23, 2015)) applicable to tender offers of non-convertible debt securities that satisfy the various criteria described below that:

- shortens the 20 business day period required by Rule 14e-1(a) under the Exchange Act to five business days;
- shortens the 10 business day period for change in consideration offered required by Rule 14e-1(b) under the Exchange Act to five business days; and
- requires a tender offer to be held open for at least three business days following any other material change to the tender offer.

Set forth below is a complete description of those various criteria that must be satisfied in order to qualify for this relief:

- Non-Convertible Debt Only: The offer must be made for a class or series of non-convertible debt securities, regardless of any particular rating assigned thereto by any nationally recognized statistical rating organization, as such term is defined in Section 3(a)(62) of the Exchange Act. Separate offers may be made for more than one class or series of debt securities as part of the same offer to purchase document. For the avoidance of doubt, the offer must be for any and all securities of the applicable class or series.
- Identity of Offeror: The offer must be made by the issuer of the subject debt securities, or a direct or indirect wholly owned subsidiary of such issuer or a parent company that directly or indirectly owns 100% of the capital stock (other than directors' qualifying shares) of such issuer.
- Consideration Types: The offer must be made solely for cash consideration and/or consideration consisting of Qualified Debt Securities, for any and all of such debt securities. The consideration offered may be a fixed amount of cash (and/or Qualified Debt Securities) or an amount of cash (and/or Qualified Debt Securities) based on a fixed spread to a benchmark and, in the case of Qualified Debt Securities, the coupon may be based on a spread to a benchmark. A "benchmark" includes U.S. Treasury Rates, LIBOR, swap rates and, in the case of securities denominated in currencies other than U.S. dollars, sovereign securities or swap rates denominated in the same currency as the securities subject to the offer, in each case that are readily available on a Bloomberg or similar trading screen or

quotation service. The spread used for determining the amount of consideration offered must be announced at the commencement of the tender offer. In the case of an offer of Qualified Debt Securities, if the interest rate or the spread used for determining the interest rate for such securities is not fixed and announced at the commencement of the offer, it must be announced at the commencement of the offer as a range of not more than 50 basis points, with the final interest rate or spread to be announced by 9:00 a.m., Eastern time, on the business day prior to the expiration of the offer. The exact amount of consideration and the interest rate (in the case of amounts or interest rate based on fixed spreads to a benchmark) on any Qualified Debt Securities must be fixed no later than 2:00 p.m., Eastern time, on the last business day of the offer. In addition, in the case of an offer of Qualified Debt Securities, a minimum acceptance amount must be announced at the commencement of the offer. **“Qualified Debt Securities”** means 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 rate; 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. Because the Qualified Debt Securities would be a new issuance of securities, it is expected that the offer documents also would contain or incorporate by reference the same types of disclosures with respect to the business and finances of the issuer as would be the case in a Rule 144A/Regulation S offering memorandum for a new issuance of securities.

- **Identity of Offerees:** The offer must be open to all record and beneficial holders of such debt securities; provided that exchange offers in which Qualified Debt Securities are offered would be restricted to qualified institutional buyers (as defined in Rule 144A under the Securities Act) and/or non-U.S. persons (within the meaning of Regulation S under the Securities Act) (collectively, **“Eligible Exchange Offer Participants”**) in a transaction exempt from the registration requirements of the Securities Act; provided, further, that, holders who are not Eligible Exchange Offer Participants (or an affiliate thereof) would be given an option concurrent with such offer (which can be part of the same offer to purchase document) to receive cash (from either the offeror or a dealer manager) for such holders’ debt securities in a fixed amount determined by the offeror, in its reasonable judgment, to approximate the value of the Qualified Debt Securities being offered and such an amount is set forth at the commencement of the offer. In order to limit the amount of cash that an offeror (or a dealer manager) may have to pay to holders who are not Eligible Exchange Offer Participants (or their affiliates), an offeror may decide to include a condition precedent to its offer that no more

than a specified maximum amount of cash would be required to be paid in the offer or else both the cash offer and concurrent exchange offer would terminate.

- **No Consent Solicitation:** The offer must not be made in connection with a solicitation of consents to amend the indenture, form of security or note or other agreement governing the subject debt securities.
- **No Defaults:** The offer must not be made if a default or event of default exists under the indenture, form of security or note or other agreement governing the subject debt securities or any other indenture or material credit agreement to which the issuer is a party.
- **No Bankruptcy:** The offer must not be made if at the time of the offer the issuer is the subject of bankruptcy or insolvency proceedings or has commenced a solicitation of consents for a “pre-packaged” bankruptcy proceeding or if the board of directors of the issuer has authorized discussions with creditors of the issuer to effect a consensual restructuring of the issuer’s outstanding indebtedness.
- **No Senior Debt Financing:** The offer must not be financed with the proceeds of any senior indebtedness, which is indebtedness that is incurred to finance all or a portion of the consideration in the offer (excluding indebtedness or borrowings under any credit or debt facility existing prior to the commencement of the offer) if such indebtedness: (i) has obligors, guarantors or collateral (or a higher priority with respect to collateral) that the subject debt securities do not have; (ii) has a weighted average life to maturity less than that of the subject debt securities; or (iii) is otherwise senior in right of payment to the subject debt securities.
- **Guaranteed Delivery:** The offer must permit tenders prior to the expiration of the offer through a guaranteed delivery procedure by means of a certification by or on behalf of a holder that such holder is tendering securities beneficially owned by it and that the delivery of such securities will be made no later than the close of business on the second business day after the expiration of the offer.
- **Immediate Widespread Dissemination:** The offer must be announced via a press release through a widely disseminated news or wire service disclosing the basic terms of the offer (including the identity of the offeror, the class of securities sought to be purchased, the type and amount of consideration being offered and the expiration date of the offer), and containing an active hyperlink to, or an Internet address at which a record or beneficial holder could then obtain, copies of the offer to purchase and letter of transmittal (if any) and other instructions or documents (including a form of guaranteed delivery instructions) relating to the tender of such debt securities (collectively, **“Immediate Widespread Dissemination”**), in each case at or prior to 10:00 a.m., Eastern time, on the first business day of such five business day period. In addition to Immediate Widespread Dissemination, the offeror in any debt tender offer also must: (i) use commercially reasonable efforts to send via email (or other form of electronic communication)

the press release announcing the offer to all investors subscribing to one or more corporate action e-mails or similar lists; (ii) use other customary methods in order to expedite the dissemination of information concerning the tender offer to beneficial holders of the subject debt securities; and (iii) issue a press release promptly after the consummation of the offer setting forth the results of the offer.

- **Announcement Press Release:** If the issuer or the offeror is a reporting company under the Exchange Act (including “voluntary filers”), the offer must furnish the press release announcing the offer in a Current Report on Form 8-K filed with the SEC prior to 12:00 noon, Eastern time, on the first business day of the offer.
- **Material Changes:** The offer must provide for communication by Immediate Widespread Dissemination at least five business days prior to the expiration of the offer of any change in the consideration being offered and at least three business days prior to expiration of any other material change to the offer, in each case at or prior to 10:00 a.m., Eastern time, on the first day of such five or three business day period, as applicable; and, if the issuer or offeror is a reporting company under the Exchange Act (including a “voluntary filer”), describe any change in the consideration being offered in a Current Report on Form 8-K filed with the SEC prior to 12:00 noon, Eastern time, on the first day of the aforementioned five business day period.
- **Withdrawal Rights:** The offer must provide for withdrawal rights that are exercisable (i) at least until the earlier of (x) the expiration date of the offer and (y) in the event that the offer is extended, the tenth business day after commencement of the offer, and (ii) at any time after the 60th business day after commencement of the offer if for any reason the offer has not been consummated within 60 business days after commencement.
- **Payment of Consideration:** The offer must provide that the offeror will not pay the consideration in the offer until promptly after expiration of the offer pursuant to Rule 14e-1(c) under the Exchange Act.
- **Other Criteria:** The offer must not be: (i) made in anticipation of or in response to, or concurrently with, a change of control or other type of extraordinary transaction involving the issuer, such as a merger (or similar business combination), reorganization or liquidation or a sale of all or substantially all of its consolidated assets; (ii) made in anticipation of or in response to other tender offers for the issuer’s securities; (iii) made concurrently with a tender offer for any other series of the issuer’s securities made by the issuer (or any subsidiary or parent company of the issuer) if the effect of such offer, if consummated (by way of amendment, exchange or otherwise), would be to add obligors, guarantors or collateral (or increase the priority of liens securing such other series) or shorten the weighted average life to maturity of such other series; or (iv) 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 (whether or not the issuer is a registrant under the Exchange Act).

For purposes of this no-action letter, a business day is defined differently than in Rule 14d-1(g)(3) under the Exchange Act. Instead, a business day is any day other than Saturday, Sunday or a federal holiday, and the tender offer would be treated as having commenced on the first business day on which the tender offer is made if Immediate Widespread Dissemination occurs at or prior to 10:00 a.m., Eastern time, on such business day. The last day of the tender offer would be treated as a business day if expiration occurs on or after 5:00 p.m., Eastern time, on such business day.

II. SEC Interpretations

The SEC has issued the following C&DIs interpreting this no-action letter, each as of November 18, 2016:

Question 162.01

Question: The Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities no-action letter (Jan. 23, 2015) states that 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. Can a foreign private issuer satisfy this condition by filing a Form 6-K?

Answer: Yes.

Question 162.02

Question: The Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities no-action letter (Jan. 23, 2015) states that abbreviated offers must be made “for any and all” subject debt securities. Does this mean that abbreviated offers cannot have minimum tender conditions?

Answer: No. Abbreviated offers can have minimum tender conditions.

Question 162.03

Question: Under the Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities no-action letter (Jan. 23, 2015), abbreviated offers for cash consideration to all holders may be made for a fixed amount of cash or for an amount of cash calculated with reference to a fixed spread to a benchmark as of the last business day of the offer. The letter also provides that abbreviated offers for consideration consisting of Qualified Debt Securities, as defined in the letter, may be made to all persons who are 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 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. In the latter case, can the amount of cash consideration offered to persons other than QIBs and non-U.S. persons instead be calculated with reference to a fixed spread to a benchmark?

Answer: Yes, 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.

Question 162.04

Question: Can offerors issue Qualified Debt Securities under Securities Act Section 3(a)(9), rather than Securities Act Section 4(a)(2) or Securities Act Rule 144A, to Eligible Exchange Offer Participants, as defined in the letter, and still conduct an abbreviated offer in reliance on the Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities no-action letter (Jan. 23, 2015)?

Answer: Yes.

Question 162.05

Question: One of the conditions specified in the Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities no-action letter (Jan. 23, 2015) is that the abbreviated offer 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 the furnishing of pro forma financial information with respect to such transaction pursuant to Article 11 of Regulation S-X (whether or not the issuer is a registrant under the Exchange Act).” If the offeror announces one of these transactions, when can it announce the abbreviated offer?

Answer: Offerors may announce the abbreviated offer at any time, but 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 letter. Note 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 would be the next business day.

III. Superseded No-Action Letters

This no-action letter supersedes the following no-action letters:

- Salomon Bros., SEC No-Action Letter, 1986 WL 65340 (Mar. 12, 1986);
- Goldman, Sachs & Co., SEC No-Action Letter, 1986 WL 66561 (Mar. 26, 1986);
- First Boston Corp., SEC No-Action Letter, 1986 WL 65408 (Apr. 17, 1986);

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- Kidder, Peabody & Co., SEC No-Action Letter, 1986 WL 66825 (May 5, 1986);
- Merrill Lynch, Pierce, Fenner & Smith Inc., SEC No-Action Letter, 1986 WL 67037 (Jul. 2, 1986);
- Shearson Lehman Bros., SEC No-Action Letter, 1986 WL 67463 (Dec. 3, 1986); and
- Salomon Bros., SEC No-Action Letter, 1990 WL 286946 (Oct. 1, 1990).

Appendix B

Full Text of Certain Laws, Rules and Regulations Applicable to Debt Restructurings

Set forth below are the full text of certain laws, rules and regulations applicable to debt restructurings that are summarized in the body of this publication.

I. Section 14(e) of the Exchange Act

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

II. Regulation 14E of the Exchange Act

§240.14e-1 Unlawful tender offer practices.

As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, no person who makes a tender offer shall:

(a) Hold such tender offer open for less than twenty business days from the date such tender offer is first published or sent to security holders; provided, however, that if the tender offer involves a roll-up transaction as defined in Item 901(c) of Regulation S-K (17 CFR 229.901(c)) and the securities being offered are registered (or authorized to be registered) on Form S-4 (17 CFR 229.25) or Form F-4 (17 CFR 229.34), the offer shall not be open for less than sixty calendar days from the date the tender offer is first published or sent to security holders;

(b) Increase or decrease the percentage of the class of securities being sought or the consideration offered or the dealer's soliciting fee to be given in a tender offer unless such tender offer remains open for at least ten business days from the date that notice of such increase or decrease is first published or sent or given to security holders.

Provided, however, That, for purposes of this paragraph, the acceptance for payment of an additional amount of securities not to exceed two percent of the class of securities that is the subject of the tender offer shall not be deemed to be an increase. For purposes of this paragraph, the percentage of a class of securities shall be calculated in accordance with section 14(d)(3) of the Act.

(c) Fail to pay the consideration offered or return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of a tender offer. This paragraph does not prohibit a bidder electing to offer a subsequent offering period under §240.14d-11 from paying for securities during the subsequent offering period in accordance with that section.

(d) Extend the length of a tender offer without issuing a notice of such extension by press release or other public announcement, which notice shall include disclosure of the approximate number of securities deposited to date and shall be issued no later than the earlier of: (i) 9:00 a.m. Eastern time, on the next business day after the scheduled expiration date of the offer or (ii), if the class of securities which is the subject of the tender offer is registered on one or more national securities exchanges, the first opening of any one of such exchanges on the next business day after the scheduled expiration date of the offer.

(e) The periods of time required by paragraphs (a) and (b) of this section shall be tolled for any period during which the bidder has failed to file in electronic format, absent a hardship exemption (§§232.201 and 232.202 of this chapter), the Schedule TO Tender Offer Statement (§240.14d-100), any tender offer material required to be filed by Item 12 of that Schedule pursuant to paragraph (a) of Item 1016 of Regulation M-A (§229.1016(a) of this chapter), and any amendments thereto. If such documents were filed in paper pursuant to a hardship exemption (see §232.201 and §232.202(d)), the minimum offering periods shall be tolled for any period during which a required confirming electronic copy of such Schedule and tender offer material is delinquent.

§240.14e-2 Position of subject company with respect to a tender offer.

(a) Position of subject company. As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, the subject company, no later than 10 business days from the date the tender offer is first published or sent or given, shall publish, send or give to security holders a statement disclosing that the subject company:

- (1) Recommends acceptance or rejection of the bidder's tender offer;
- (2) Expresses no opinion and is remaining neutral toward the bidder's tender offer; or

(3) Is unable to take a position with respect to the bidder's tender offer. Such statement shall also include the reason(s) for the position (including the inability to take a position) disclosed therein.

(b) Material change. If any material change occurs in the disclosure required by paragraph (a) of this section, the subject company shall promptly publish or send or give a statement disclosing such material change to security holders.

(c) Any issuer, a class of the securities of which is the subject of a tender offer filed with the Commission on Schedule 14D-1F and conducted in reliance upon and in conformity with Rule 14d-1(b) under the Act, and any director or officer of such issuer where so required by the laws, regulations and policies of Canada and/or any of its provinces or territories, in lieu of the statements called for by paragraph (a) of this section and Rule 14d-9 under the Act, shall file with the Commission on Schedule 14D-9F the entire disclosure document(s) required to be furnished to holders of securities of the subject issuer by the laws, regulations and policies of Canada and/or any of its provinces or territories governing the conduct of the tender offer, and shall disseminate such document(s) in the United States in accordance with such laws, regulations and policies.

(d) Exemption for cross-border tender offers. The subject company shall be exempt from this section with respect to a tender offer conducted under §240.14d-1(c).

§240.14e-3 Transactions in securities on the basis of material, nonpublic information in the context of tender offers.

(a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the "offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from:

- (1) The offering person,
- (2) The issuer of the securities sought or to be sought by such tender offer, or
- (3) Any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time

prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

(b) A person other than a natural person shall not violate paragraph (a) of this section if such person shows that:

(1) The individual(s) making the investment decision on behalf of such person to purchase or sell any security described in paragraph (a) of this section or to cause any such security to be purchased or sold by or on behalf of others did not know the material, nonpublic information; and

(2) Such person had implemented one or a combination of policies and procedures, reasonable under the circumstances, taking into consideration the nature of the person's business, to ensure that individual(s) making investment decision(s) would not violate paragraph (a) of this section, which policies and procedures may include, but are not limited to, (i) those which restrict any purchase, sale and causing any purchase and sale of any such security or (ii) those which prevent such individual(s) from knowing such information.

(c) Notwithstanding anything in paragraph (a) of this section to contrary, the following transactions shall not be violations of paragraph (a) of this section:

(1) Purchase(s) of any security described in paragraph (a) of this section by a broker or by another agent on behalf of an offering person; or

(2) Sale(s) by any person of any security described in paragraph (a) of this section to the offering person.

(d) (1) As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, it shall be unlawful for any person described in paragraph (d)(2) of this section to communicate material, nonpublic information relating to a tender offer to any other person under circumstances in which it is reasonably foreseeable that such communication is likely to result in a violation of this section except that this paragraph shall not apply to a communication made in good faith,

(i) To the officers, directors, partners or employees of the offering person, to its advisors or to other persons, involved in the planning, financing, preparation or execution of such tender offer;

(ii) To the issuer whose securities are sought or to be sought by such tender offer, to its officers, directors, partners, employees or advisors or to other persons, involved in the planning, financing, preparation or execution of the activities of the issuer with respect to such tender offer; or

(iii) To any person pursuant to a requirement of any statute or rule or regulation promulgated thereunder.

(2) The persons referred to in paragraph (d)(1) of this section are:

(i) The offering person or its officers, directors, partners, employees or advisors;

(ii) The issuer of the securities sought or to be sought by such tender offer or its officers, directors, partners, employees or advisors;

(iii) Anyone acting on behalf of the persons in paragraph (d)(2)(i) of this section or the issuer or persons in paragraph (d)(2)(ii) of this section; and

(iv) Any person in possession of material information relating to a tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from any of the above.

§240.14e-4 Prohibited transactions in connection with partial tender offers.

(a) Definitions. For purposes of this section:

(1) The amount of a person's "net long position" in a subject security shall equal the excess, if any, of such person's "long position" over such person's "short position." For the purposes of determining the net long position as of the end of the proration period and for tendering concurrently to two or more partial tender offers, securities that have been tendered in accordance with the rule and not withdrawn are deemed to be part of the person's long position.

(i) Such person's long position is the amount of subject securities that such person:

(A) Or his agent has title to or would have title to but for having lent such securities; or

(B) Has purchased, or has entered into an unconditional contract, binding on both parties thereto, to purchase but has not yet received; or

(C) Has exercised a standardized call option for; or

(D) Has converted, exchanged, or exercised an equivalent security for; or

(E) Is entitled to receive upon conversion, exchange, or exercise of an equivalent security.

(ii) Such person's short position, is the amount of subject securities or subject securities underlying equivalent securities that such person:

(A) Has sold, or has entered into an unconditional contract, binding on both parties thereto, to sell; or

(B) Has borrowed; or

(C) Has written a non-standardized call option, or granted any other right pursuant to which his shares may be tendered by another person; or

(D) Is obligated to deliver upon exercise of a standardized call option sold on or after the date that a tender offer is first publicly announced or otherwise made known by the bidder to holders of the security to be acquired, if the exercise price of such option is lower than the highest tender offer price or stated amount of the consideration offered for the subject security. For the purpose of this paragraph, if one or more tender offers for the same security are ongoing on such date, the announcement date shall be that of the first announced offer.

(2) The term equivalent security means:

(i) Any security (including any option, warrant, or other right to purchase the subject security), issued by the person whose securities are the subject of the offer, that is immediately convertible into, or exchangeable or exercisable for, a subject security, or

(ii) Any other right or option (other than a standardized call option) that entitles the holder thereof to acquire a subject security, but only if the holder thereof reasonably believes that the maker or writer of the right or option has title to and possession of the subject security and upon exercise will promptly deliver the subject security.

(3) The term subject security means a security that is the subject of any tender offer or request or invitation for tenders.

(4) For purposes of this rule, a person shall be deemed to “tender” a security if he:

(i) Delivers a subject security pursuant to an offer,

(ii) Causes such delivery to be made,

(iii) Guarantees delivery of a subject security pursuant to a tender offer,

(iv) Causes a guarantee of such delivery to be given by another person, or

(v) Uses any other method by which acceptance of a tender offer may be made.

(5) The term partial tender offer means a tender offer or request or invitation for tenders for less than all of the outstanding securities subject to the offer in which tenders are accepted either by lot or on a pro rata basis for a specified period, or a tender offer for all of the outstanding shares that offers a choice of consideration in which tenders for different forms of consideration may be accepted either by lot or on a pro rata basis for a specified period.

(6) The term standardized call option means any call option that is traded on an exchange, or for which quotation information is disseminated in an electronic interdealer quotation system of a registered national securities association.

(b) It shall be unlawful for any person acting alone or in concert with others, directly or indirectly, to tender any subject security in a partial tender offer:

(1) For his own account unless at the time of tender, and at the end of the proration period or period during which securities are accepted by lot (including any extensions thereof), he has a net long position equal to or greater than the amount tendered in:

(i) The subject security and will deliver or cause to be delivered such security for the purpose of tender to the person making the offer within the period specified in the offer; or

(ii) An equivalent security and, upon the acceptance of his tender will acquire the subject security by conversion, exchange, or exercise of such equivalent security to the extent required by the terms of the offer, and will deliver or cause to be delivered the subject security so acquired for the purpose of tender to the person making the offer within the period specified in the offer; or

(2) For the account of another person unless the person making the tender:

(i) Possesses the subject security or an equivalent security, or

(ii) Has a reasonable belief that, upon information furnished by the person on whose behalf the tender is made, such person owns the subject security or an equivalent security and will promptly deliver the subject security or such equivalent security for the purpose of tender to the person making the tender.

(c) This rule shall not prohibit any transaction or transactions which the Commission, upon written request or upon its own motion, exempts, either unconditionally or on specified terms and conditions.

§240.14e-5 Prohibiting purchases outside of a tender offer.

(a) Unlawful activity. As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in connection with a tender offer for equity securities, no covered person may directly or indirectly purchase or arrange to purchase any subject securities or any related securities except as part of the tender offer. This prohibition applies from the time of public announcement of the tender offer until the tender offer expires. This prohibition does not apply to any purchases or arrangements to purchase made during the time of any subsequent offering period as provided for in §240.14d-11 if the consideration paid or to be paid for the purchases or arrangements to purchase is the same in form and amount as the consideration offered in the tender offer.

(b) Excepted activity. The following transactions in subject securities or related securities are not prohibited by paragraph (a) of this section:

- (1) Exercises of securities. Transactions by covered persons to convert, exchange, or exercise related securities into subject securities, if the covered person owned the related securities before public announcement;
- (2) Purchases for plans. Purchases or arrangements to purchase by or for a plan that are made by an agent independent of the issuer;
- (3) Purchases during odd-lot offers. Purchases or arrangements to purchase if the tender offer is excepted under §240.13e-4(h)(5);
- (4) Purchases as intermediary. Purchases by or through a dealer-manager or its affiliates that are made in the ordinary course of business and made either:
 - (i) On an agency basis not for a covered person; or
 - (ii) As principal for its own account if the dealer-manager or its affiliate is not a market maker, and the purchase is made to offset a contemporaneous sale after having received an unsolicited order to buy from a customer who is not a covered person;
- (5) Basket transactions. Purchases or arrangements to purchase a basket of securities containing a subject security or a related security if the following conditions are satisfied:
 - (i) The purchase or arrangement to purchase is made in the ordinary course of business and not to facilitate the tender offer;
 - (ii) The basket contains 20 or more securities; and
 - (iii) Covered securities and related securities do not comprise more than 5% of the value of the basket;

- (6) Covering transactions. Purchases or arrangements to purchase that are made to satisfy an obligation to deliver a subject security or a related security arising from a short sale or from the exercise of an option by a non-covered person if:
- (i) The short sale or option transaction was made in the ordinary course of business and not to facilitate the offer;
 - (ii) In the case of a short sale, the short sale was entered into before public announcement of the tender offer; and
 - (iii) In the case of an exercise of an option, the covered person wrote the option before public announcement of the tender offer;
- (7) Purchases pursuant to contractual obligations. Purchases or arrangements to purchase pursuant to a contract if the following conditions are satisfied:
- (i) The contract was entered into before public announcement of the tender offer;
 - (ii) The contract is unconditional and binding on both parties; and
 - (iii) The existence of the contract and all material terms including quantity, price and parties are disclosed in the offering materials;
- (8) Purchases or arrangements to purchase by an affiliate of the dealer-manager. Purchases or arrangements to purchase by an affiliate of a dealer-manager if the following conditions are satisfied:
- (i) The dealer-manager maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of the federal securities laws and regulations;
 - (ii) The dealer-manager is registered as a broker or dealer under Section 15(a) of the Act;
 - (iii) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the dealer-manager that direct, effect, or recommend transactions in securities; and
 - (iv) The purchases or arrangements to purchase are not made to facilitate the tender offer;
- (9) Purchases by connected exempt market makers or connected exempt principal traders. Purchases or arrangements to purchase if the following conditions are satisfied:

- (i) The issuer of the subject security is a foreign private issuer, as defined in §240.3b-4(c);
 - (ii) The tender offer is subject to the United Kingdom's City Code on Takeovers and Mergers;
 - (iii) The purchase or arrangement to purchase is effected by a connected exempt market maker or a connected exempt principal trader, as those terms are used in the United Kingdom's City Code on Takeovers and Mergers;
 - (iv) The connected exempt market maker or the connected exempt principal trader complies with the applicable provisions of the United Kingdom's City Code on Takeovers and Mergers; and
 - (v) The tender offer documents disclose the identity of the connected exempt market maker or the connected exempt principal trader and disclose, or describe how U.S. security holders can obtain, information regarding market making or principal purchases by such market maker or principal trader to the extent that this information is required to be made public in the United Kingdom;
- (10) Purchases during cross-border tender offers. Purchases or arrangements to purchase if the following conditions are satisfied:
- (i) The tender offer is excepted under §240.13e-4(h)(8) or §240.14d-1(c);
 - (ii) The offering documents furnished to U.S. holders prominently disclose the possibility of any purchases, or arrangements to purchase, or the intent to make such purchases;
 - (iii) The offering documents disclose the manner in which any information about any such purchases or arrangements to purchase will be disclosed;
 - (iv) The offeror discloses information in the United States about any such purchases or arrangements to purchase in a manner comparable to the disclosure made in the home jurisdiction, as defined in §240.13e-4(i)(3); and
 - (v) The purchases comply with the applicable tender offer laws and regulations of the home jurisdiction; and
- (11) Purchases or arrangements to purchase pursuant to a foreign tender offer(s). Purchases or arrangements to purchase pursuant to a foreign offer(s) where the offeror seeks to acquire subject securities through a U.S. tender offer and a concurrent or substantially concurrent foreign offer(s), if the following conditions are satisfied:

- (i) The U.S. and foreign tender offer(s) meet the conditions for reliance on the Tier II cross-border exemptions set forth in §240.14d-1(d);
 - (ii) The economic terms and consideration in the U.S. tender offer and foreign tender offer(s) are the same, provided that any cash consideration to be paid to U.S. security holders may be converted from the currency to be paid in the foreign tender offer(s) to U.S. dollars at an exchange rate disclosed in the U.S. offering documents;
 - (iii) The procedural terms of the U.S. tender offer are at least as favorable as the terms of the foreign tender offer(s);
 - (iv) The intention of the offeror to make purchases pursuant to the foreign tender offer(s) is disclosed in the U.S. offering documents; and
 - (v) Purchases by the offeror in the foreign tender offer(s) are made solely pursuant to the foreign tender offer(s) and not pursuant to an open market transaction(s), a private transaction(s), or other transaction(s); and
- (12) Purchases or arrangements to purchase by an affiliate of the financial advisor and an offeror and its affiliates.
- (i) Purchases or arrangements to purchase by an affiliate of a financial advisor and an offeror and its affiliates that are permissible under and will be conducted in accordance with the applicable laws of the subject company's home jurisdiction, if the following conditions are satisfied:
 - (A) The subject company is a foreign private issuer as defined in §240.3b-4(c);
 - (B) The covered person reasonably expects that the tender offer meets the conditions for reliance on the Tier II cross-border exemptions set forth in §240.14d-1(d);
 - (C) No purchases or arrangements to purchase otherwise than pursuant to the tender offer are made in the United States;
 - (D) The United States offering materials disclose prominently the possibility of, or the intention to make, purchases or arrangements to purchase subject securities or related securities outside of the tender offer, and if there will be public disclosure of purchases of subject or related securities, the manner in which information regarding such purchases will be disseminated;
 - (E) There is public disclosure in the United States, to the extent that such information is made public in the subject company's home jurisdiction, of information regarding all purchases of subject

securities and related securities otherwise than pursuant to the tender offer from the time of public announcement of the tender offer until the tender offer expires;

(F) Purchases or arrangements to purchase by an offeror and its affiliates must satisfy the following additional condition: the tender offer price will be increased to match any consideration paid outside of the tender offer that is greater than the tender offer price; and

(G) Purchases or arrangements to purchase by an affiliate of a financial advisor must satisfy the following additional conditions:

(1) The financial advisor and the affiliate maintain and enforce written policies and procedures reasonably designed to prevent the transfer of information among the financial advisor and affiliate that might result in a violation of U.S. federal securities laws and regulations through the establishment of information barriers;

(2) The financial advisor has an affiliate that is registered as a broker or dealer under section 15(a) of the Act (15 U.S.C. 78o(a));

(3) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the financial advisor that direct, effect, or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company with financial advisory services or dealer-manager services; and

(4) The purchases or arrangements to purchase are not made to facilitate the tender offer.

(ii) {Reserved}

(c) Definitions. For purposes of this section, the term:

(1) Affiliate has the same meaning as in §240.12b-2;

(2) Agent independent of the issuer has the same meaning as in §242.100(b) of this chapter;

(3) Covered person means:

(i) The offeror and its affiliates;

(ii) The offeror's dealer-manager and its affiliates;

(iii) Any advisor to any of the persons specified in paragraph (c)(3)(i) and

(ii) of this section, whose compensation is dependent on the completion of the offer; and

(iv) Any person acting, directly or indirectly, in concert with any of the persons specified in this paragraph (c)(3) in connection with any purchase or arrangement to purchase any subject securities or any related securities;

(4) Plan has the same meaning as in §242.100(b) of this chapter;

(5) Public announcement is any oral or written communication by the offeror or any person authorized to act on the offeror's behalf that is reasonably designed to, or has the effect of, informing the public or security holders in general about the tender offer;

(6) Related securities means securities that are immediately convertible into, exchangeable for, or exercisable for subject securities;

(7) Subject securities has the same meaning as in §229.1000 of this chapter; and

(8) Subject company has the same meaning as in §229.1000 of this chapter; and

(9) Home jurisdiction has the same meaning as in the Instructions to paragraphs (c) and (d) of §240.14d-1.

(d) Exemptive authority. Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms or conditions, to any transaction or class of transactions or any security or class of security, or any person or class of persons.

§240.14e-6 Repurchase offers by certain closed-end registered investment companies.

Sections 240.14e-1 and 240.14e-2 shall not apply to any offer by a closed-end management investment company to repurchase equity securities of which it is the issuer pursuant to §270.23c-3 of this chapter.

§240.14e-7 Unlawful tender offer practices in connection with roll-ups.

In order to implement section 14(h) of the Act (15 U.S.C. 78n(h)):

(a)(1) It shall be unlawful for any person to receive compensation for soliciting tenders directly from security holders in connection with a roll-up transaction as provided in paragraph (a)(2) of this section, if the compensation is:

(i) Based on whether the solicited person participates in the tender offer; or

(ii) Contingent on the success of the tender offer.

(2) Paragraph (a)(1) of this section is applicable to a roll-up transaction as defined in Item 901(c) of Regulation S-K (§229.901(c) of this chapter), structured as a tender offer, except for a transaction involving only:

- (i) Finite-life entities that are not limited partnerships;
- (ii) Partnerships whose investors will receive new securities or securities in another entity that are not reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under section 11A of the Act (15 U.S.C. 78k-1); or
- (iii) Partnerships whose investors' securities are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under section 11A of the Act (15 U.S.C. 78k-1).

(b)(1) It shall be unlawful for any finite-life entity that is the subject of a roll-up transaction as provided in paragraph (b)(2) of this section to fail to provide a security holder list or mail communications related to a tender offer that is in furtherance of the roll-up transaction, at the option of a requesting security holder, pursuant to the procedures set forth in §240.14a-7.

(2) Paragraph (b)(1) of this section is applicable to a roll-up transaction as defined in Item 901(c) of Regulation S-K (§229.901(c) of this chapter), structured as a tender offer, that involves:

- (i) An entity with securities registered pursuant to section 12 of the Act (15 U.S.C. 78l); or
- (ii) A limited partnership, unless the transaction involves only:
 - (A) Partnerships whose investors will receive new securities or securities in another entity that are not reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under section 11A of the Act (15 U.S.C. 78k-1); or
 - (B) Partnerships whose investors' securities are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under section 11A of the Act (15 U.S.C. 78k-1).

§240.14e-8 Prohibited conduct in connection with pre-commencement communications.

It is a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act (15 U.S.C. 78n) for any person to publicly announce that the person (or a party on whose behalf the person is acting) plans to make a tender offer that has not yet been commenced, if the person:

- (a) Is making the announcement of a potential tender offer without the intention to commence the offer within a reasonable time and complete the offer;
- (b) Intends, directly or indirectly, for the announcement to manipulate the market price of the stock of the bidder or subject company; or
- (c) Does not have the reasonable belief that the person will have the means to purchase securities to complete the offer.

III. Regulation 14D of the Exchange Act

Note: While Regulation 14D of the Exchange Act generally does not apply to tender offers of debt securities, certain provisions of Rule 14d-1 and Rule 14d-9(g) under the Exchange Act set forth below, which are part of such Regulation 14D, apply to Regulation 14E as provided therein.

§240.14d-1 Scope of and definitions applicable to Regulations 14D and 14E.

- (a) Scope. Regulation 14D (§§240.14d-1 through 240.14d-101) shall apply to any tender offer that is subject to section 14(d)(1) of the Act (15 U.S.C. 78n(d)(1)), including, but not limited to, any tender offer for securities of a class described in that section that is made by an affiliate of the issuer of such class. Regulation 14E (§§240.14e-1 through 240.14e-8) shall apply to any tender offer for securities (other than exempted securities) unless otherwise noted therein.
- (b) The requirements imposed by sections 14(d)(1) through 14(d)(7) of the Act, Regulation 14D and Schedules TO and 14D-9 thereunder, and Rule 14e-1 of Regulation 14E under the Act, shall be deemed satisfied with respect to any tender offer, including any exchange offer, for the securities of an issuer incorporated or organized under the laws of Canada or any Canadian province or territory, if such issuer is a foreign private issuer and is not an investment company registered or required to be registered under the Investment Company Act of 1940, if less than 40 percent of the class of securities outstanding that is the subject of the tender offer is held by U.S. holders, and the tender offer is subject to, and the bidder complies with, the laws, regulations and policies of Canada and/or any of its provinces or territories governing the conduct of the offer (unless the bidder has received an exemption(s) from, and the tender offer does not comply with, requirements that otherwise would be prescribed by Regulation 14D or 14E), provided that:
 - (1) In the case of tender offers subject to section 14(d)(1) of the Act, where the consideration for a tender offer subject to this section consists solely of cash, the entire disclosure document or documents required to be

furnished to holders of the class of securities to be acquired shall be filed with the Commission on Schedule 14D-1F (§240.14d-102) and disseminated to shareholders of the subject company residing in the United States in accordance with such Canadian laws, regulations and policies; or

(2) Where the consideration for a tender offer subject to this section includes securities of the bidder to be issued pursuant to the offer, any registration statement and/or prospectus relating thereto shall be filed with the Commission along with the Schedule 14D-1F referred to in paragraph (b)(1) of this section, and shall be disseminated, together with the home jurisdiction document(s) accompanying such Schedule, to shareholders of the subject company residing in the United States in accordance with such Canadian laws, regulations and policies.

Notes:

1. For purposes of any tender offer, including any exchange offer, otherwise eligible to proceed in accordance with Rule 14d-1(b) under the Act, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold less than 40 percent of such outstanding securities, unless (a) the aggregate trading volume of that class on national securities exchanges in the United States and on NASDAQ exceeded its aggregate trading volume on securities exchanges in Canada and on the Canadian Dealing Network, Inc. ("CDN") over the 12 calendar month period prior to commencement of this offer, or if commenced in response to a prior offer, over the 12 calendar month period prior to the commencement of the initial offer (based on volume figures published by such exchanges and NASDAQ and CDN); (b) the most recent annual report or annual information form filed or submitted by the issuer with securities regulators of Ontario, Quebec, British Columbia or Alberta (or, if the issuer of the subject securities is not a reporting issuer in any of such provinces, with any other Canadian securities regulator) or with the Commission indicates that U.S. holders hold 40 percent or more of the outstanding subject class of securities; or (c) the offeror has actual knowledge that the level of U.S. ownership equals or exceeds 40 percent of such securities.
 2. Notwithstanding the grant of an exemption from one or more of the applicable Canadian regulatory provisions imposing requirements that otherwise would be prescribed by Regulation 14D or 14E, the tender offer will be eligible to proceed in accordance with the requirements of this section if the Commission by order determines that the applicable Canadian regulatory provisions are adequate to protect the interest of investors.
- (c) Tier I. Any tender offer for the securities of a foreign private issuer as defined in §240.3b-4 is exempt from the requirements of sections 14(d)(1)

through 14(d)(7) of the Act (15 U.S.C. 78n(d)(1) through 78n(d)(7)), Regulation 14D (§§240.14d-1 through 240.14d-10) and Schedules TO (§240.14d-100) and 14D-9 (§240.14d-101) thereunder, and §240.14e-1 and §240.14e-2 of Regulation 14E under the Act if the following conditions are satisfied:

(1) U.S. ownership limitation. Except in the case of a tender offer that is commenced during the pendency of a tender offer made by a prior bidder in reliance on this paragraph or §240.13e-4(h)(8), U.S. holders do not hold more than 10 percent of the class of securities sought in the offer (as determined under Instructions 2 or 3 to paragraphs (c) and (d) of this section).

(2) Equal treatment. The bidder must permit U.S. holders to participate in the offer on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offer; however:

(i) Registered exchange offers. If the bidder offers securities registered under the Securities Act of 1933 (15 U.S.C. 77a et seq.), the bidder need not extend the offer to security holders in those states or jurisdictions that prohibit the offer or sale of the securities after the bidder has made a good faith effort to register or qualify the offer and sale of securities in that state or jurisdiction, except that the bidder must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

(ii) Exempt exchange offers. If the bidder offers securities exempt from registration under §230.802 of this chapter, the bidder need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the bidder must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

(iii) Cash only consideration. The bidder may offer U.S. holders only a cash consideration for the tender of the subject securities, notwithstanding the fact that the bidder is offering security holders outside the United States a consideration that consists in whole or in part of securities of the bidder, so long as the bidder has a reasonable basis for believing that the amount of cash is substantially equivalent to the value of the consideration offered to non-U.S. holders, and either of the following conditions are satisfied:

(A) The offered security is a “margin security” within the meaning of Regulation T (12 CFR 220.2) and the issuer undertakes to provide, upon the request of any U.S. holder or the Commission staff, the closing price and daily trading volume of the security on the principal trading market for the security as of the last trading day

of each of the six months preceding the announcement of the offer and each of the trading days thereafter; or

(B) If the offered security is not a "margin security" within the meaning of Regulation T (12 CFR 220.2) the issuer undertakes to provide, upon the request of any U.S. holder or the Commission staff, an opinion of an independent expert stating that the cash consideration offered to U.S. holders is substantially equivalent to the value of the consideration offered security holders outside the United States.

(iv) Disparate tax treatment. If the bidder offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act of 1933 (15 U.S.C. 77a et seq.), the loan notes need not be offered to U.S. holders.

(3) Informational documents.

(i) The bidder must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the home jurisdiction.

(ii) If the bidder disseminates by publication in its home jurisdiction, the bidder must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

(iii) In the case of tender offers for securities described in section 14(d)(1) of the Act (15 U.S.C. 78n(d)(1)), if the bidder publishes or otherwise disseminates an informational document to the holders of the securities in connection with the tender offer, the bidder must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§249.480 of this chapter) by the first business day after publication or dissemination. If the bidder is a foreign company, it must also file a Form F-X (§239.42 of this chapter) with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States.

(4) Investment companies. The issuer of the securities that are the subject of the tender offer is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), other than a registered closed-end investment company.

(d) Tier II. A person conducting a tender offer (including any exchange offer) that meets the conditions in paragraph (d)(1) of this section shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section, provided

that such tender offer complies with all the requirements of this section other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section. In addition, a person conducting a tender offer subject only to the requirements of section 14(e) of the Act (15 U.S.C. 78n(e)) and Regulation 14E thereunder (§§240.14e-1 through 240.14e-8) that meets the conditions in paragraph (d)(1) of the section also shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section, to the extent needed under the requirements of Regulation 14E, so long as the tender offer complies with all requirements of Regulation 14E other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section:

(1) Conditions.

- (i) The subject company is a foreign private issuer as defined in §240.3b-4 and is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), other than a registered closed-end investment company;
- (ii) Except in the case of a tender offer that is commenced during the pendency of a tender offer made by a prior bidder in reliance on this paragraph or §240.13e-4(i), U.S. holders do not hold more than 40 percent of the class of securities sought in the offer (as determined under Instructions 2 or 3 to paragraphs (c) and (d) of this section); and
- (iii) The bidder complies with all applicable U.S. tender offer laws and regulations, other than those for which an exemption has been provided for in paragraph (d)(2) of this section.

(2) Exemptions—

- (i) Equal treatment—loan notes. If the bidder offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act of 1933 (15 U.S.C. 77a et seq.), the loan notes need not be offered to U.S. holders, notwithstanding §240.14d-10.
- (ii) Equal treatment—separate U.S. and foreign offers. Notwithstanding the provisions of §240.14d-10, a bidder conducting a tender offer meeting the conditions of paragraph (d)(1) of this section may separate the offer into multiple offers: One offer made to U.S. holders, which also may include all holders of American Depositary Shares representing interests in the subject securities, and one or more offers made to non-U.S. holders. The U.S. offer must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offers. U.S.

holders may be included in the foreign offer(s) only where the laws of the jurisdiction governing such foreign offer(s) expressly preclude the exclusion of U.S. holders from the foreign offer(s) and where the offer materials distributed to U.S. holders fully and adequately disclose the risks of participating in the foreign offer(s).

(iii) Notice of extensions. Notice of extensions made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of §240.14e-1(d).

(iv) Prompt payment. Payment made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of §240.14e-1(c). Where payment may not be made on a more expedited basis under home jurisdiction law or practice, payment for securities tendered during any subsequent offering period within 20 business days of the date of tender will satisfy the prompt payment requirements of §240.14d-11(e). For purposes of this paragraph (d), a business day is determined with reference to the target's home jurisdiction.

(v) Subsequent offering period/Withdrawal rights. A bidder will satisfy the announcement and prompt payment requirements of §240.14d-11(d), if the bidder announces the results of the tender offer, including the approximate number of securities deposited to date, and pays for tendered securities in accordance with the requirements of the home jurisdiction law or practice and the subsequent offering period commences immediately following such announcement. Notwithstanding section 14(d)(5) of the Act (15 U.S.C. 78n(d)(5)), the bidder need not extend withdrawal rights following the close of the offer and prior to the commencement of the subsequent offering period.

(vi) Payment of interest on securities tendered during subsequent offering period. Notwithstanding the requirements of §240.14d-11(f), the bidder may pay interest on securities tendered during a subsequent offering period, if required under applicable foreign law. Paying interest on securities tendered during a subsequent offering period in accordance with this section will not be deemed to violate §240.14d-10(a)(2).

(vii) Suspension of withdrawal rights during counting of tendered securities. The bidder may suspend withdrawal rights required under section 14(d)(5) of the Act (15 U.S.C. 78n(d)(5)) at the end of the offer and during the period that securities tendered into the offer are being counted, provided that:

(A) The bidder has provided an offer period including withdrawal rights for a period of at least 20 U.S. business days;

(B) At the time withdrawal rights are suspended, all offer conditions have been satisfied or waived, except to the extent that the bidder is in the process of determining whether a minimum acceptance condition included in the terms of the offer has been satisfied by counting tendered securities; and

(C) Withdrawal rights are suspended only during the counting process and are reinstated immediately thereafter, except to the extent that they are terminated through the acceptance of tendered securities.

(viii) Mix and match elections and the subsequent offering period. Notwithstanding the requirements of §240.14d-11(b), where the bidder offers target security holders a choice between different forms of consideration, it may establish a ceiling on one or more forms of consideration offered. Notwithstanding the requirements of §240.14d-11(f), a bidder that establishes a ceiling on one or more forms of consideration offered pursuant to this subsection may offset elections of tendering security holders against one another, subject to proration, so that elections are satisfied to the greatest extent possible and prorated to the extent that they cannot be satisfied in full. Such a bidder also may separately offset and prorate securities tendered during the initial offering period and those tendered during any subsequent offering period, notwithstanding the requirements of §240.14d-10(c).

(ix) Early termination of an initial offering period. A bidder may terminate an initial offering period, including a voluntary extension of that period, if at the time the initial offering period and withdrawal rights terminate, the following conditions are met:

(A) The initial offering period has been open for at least 20 U.S. business days;

(B) The bidder has adequately discussed the possibility of and the impact of the early termination in the original offer materials;

(C) The bidder provides a subsequent offering period after the termination of the initial offering period;

(D) All offer conditions are satisfied as of the time when the initial offering period ends; and

(E) The bidder does not terminate the initial offering period or any extension of that period during any mandatory extension required under U.S. tender offer rules.

Instructions to paragraphs (c) and (d):

1. Home jurisdiction means both the jurisdiction of the subject company's incorporation, organization or chartering and the principal foreign market where the subject company's securities are listed or quoted.

2. U.S. holder means any security holder resident in the United States. Except as otherwise provided in Instruction 3 below, to determine the percentage of outstanding securities held by U.S. holders:

(i) Calculate the U.S. ownership as of a date no more than 60 before and no more than 30 days after public announcement of the tender offer. If you are unable to calculate as of a date within these time frames, the calculation may be made as of the most recent practicable date before public announcement, but in no event earlier than 120 days before announcement;

(ii) Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities. Exclude from those calculations securities held by the bidder;

(iii) Use the method of calculating record ownership in Rule 12g3-2(a) under the Act (§240.12g3-2(a) of this chapter), except that your inquiry as to the amount of securities represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in the United States, the subject company's jurisdiction of incorporation or that of each participant in a business combination, and the jurisdiction that is the primary trading market for the subject securities, if different than the subject company's jurisdiction of incorporation;

(iv) If, after reasonable inquiry, you are unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, you may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business; and

(v) Count securities as beneficially owned by residents of the United States as reported on reports of beneficial ownership that are provided to you or publicly filed and based on information otherwise provided to you.

3. In a tender offer by a bidder other than an affiliate of the issuer of the subject securities that is not made pursuant to an agreement with the issuer of the subject securities, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold less than 10 percent (40 percent in the case of paragraph (d) of this section) of such outstanding securities, unless paragraphs 3.i., ii., or iii. of the instructions to paragraphs (c) and (d) of this section indicate otherwise. In addition, where the bidder is unable to conduct the analysis of U.S. ownership set forth in Instruction 2 to paragraphs (c) and (d) of this section, the bidder may presume that the percentage of securities held by U.S. holders is less than 10 percent (40 percent in the case of paragraph (d) of this section) of the outstanding securities so long as there is a primary trading market for the subject securities outside the U.S., as defined in §240.12h-6(f)(5) of this chapter, unless:

- (i) Average daily trading volume of the subject securities in the United States for a recent twelve-month period ending on a date no more than 60 days before the public announcement of the offer exceeds 10 percent (40 percent in the case of paragraph (d) of this section) of the average daily trading volume of that class of securities on a worldwide basis for the same period; or
- (ii) The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission or any jurisdiction in which the subject securities trade before the public announcement of the offer indicates that U.S. holders hold more than 10 percent (40 percent in the case of paragraph (d) of this section) of the outstanding subject class of securities; or
- (iii) The bidder knows or has reason to know, before the public announcement of the offer, that the level of U.S. ownership exceeds 10 percent (40 percent in the case of paragraph (d) of this section) of such securities. As an example, a bidder is deemed to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the issuer's jurisdiction of incorporation or (if different) the non-U.S. jurisdiction in which the primary trading market for the subject securities is located. The bidder is deemed to know information about U.S. ownership available from the issuer or obtained or readily available from any other source that is reasonably reliable, including from persons it has retained to advise it about the transaction, as well as from third-party information providers. These examples are not intended to be exclusive.

(iv) The bidder knows or has reason to know that the level of U.S. ownership exceeds 10 percent (40 percent in the case of 14d-1(d)) of such securities.

4. United States means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

5. The exemptions provided by paragraphs (c) and (d) of this section are not available for any securities transaction or series of transactions that technically complies with paragraph (c) or (d) of this section but are part of a plan or scheme to evade the provisions of Regulations 14D or 14E.

(e) Notwithstanding paragraph (a) of this section, the requirements imposed by sections 14(d)(1) through 14(d)(7) of the Act {15 U.S.C. 78n(d)(1) through 78n(d)(7)}, Regulation 14D promulgated thereunder (§§240.14d-1 through 240.14d-10), and §§240.14e-1 and 240.14e-2 shall not apply by virtue of the fact that a bidder for the securities of a foreign private issuer, as defined in §240.3b-4, the subject company of such a tender offer, their representatives, or any other person specified in §240.14d-9(d), provides any journalist with access to its press conferences held outside of the United States, to meetings with its representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed tender offer is discussed, if:

(1) Access is provided to both U.S. and foreign journalists; and

(2) With respect to any written press-related materials released by the bidder or its representatives that discuss a present or proposed tender offer for equity securities registered under Section 12 of the Act {15 U.S.C. 78l}, the written press-related materials must state that these written press-related materials are not an extension of a tender offer in the United States for a class of equity securities of the subject company. If the bidder intends to extend the tender offer in the United States at some future time, a statement regarding this intention, and that the procedural and filing requirements of the Williams Act will be satisfied at that time, also must be included in these written press-related materials. No means to tender securities, or coupons that could be returned to indicate interest in the tender offer, may be provided as part of, or attached to, these written press-related materials.

(f) For the purpose of §240.14d-1(e), a bidder may presume that a target company qualifies as a foreign private issuer if the target company is a foreign issuer and files registration statements or reports on the disclosure forms specifically designated for foreign private issuers, claims the exemption from registration under the Act pursuant to §240.12g3-2(b), or is not reporting in the United States.

(g) Definitions. Unless the context otherwise requires, all terms used in Regulation 14D and Regulation 14E have the same meaning as in the Act and in Rule 12b-2 (§240.12b-2) promulgated thereunder. In addition, for purposes of sections 14(d) and 14(e) of the Act and Regulations 14D and 14E, the following definitions apply:

(1) The term beneficial owner shall have the same meaning as that set forth in Rule 13d-3: Provided, however, That, except with respect to Rule 14d-3, Rule 14d-9(d), the term shall not include a person who does not have or share investment power or who is deemed to be a beneficial owner by virtue of Rule 13d-3(d)(1) (§240.13d-3(d)(1));

(2) The term bidder means any person who makes a tender offer or on whose behalf a tender offer is made: Provided, however, That the term does not include an issuer which makes a tender offer for securities of any class of which it is the issuer;

(3) The term business day means any day, other than Saturday, Sunday or a federal holiday, and shall consist of the time period from 12:01 a.m. through 12:00 midnight Eastern time. In computing any time period under section 14(d)(5) or section 14(d)(6) of the Act or under Regulation 14D or Regulation 14E, the date of the event which begins the running of such time period shall be included except that if such event occurs on other than a business day such period shall begin to run on and shall include the first business day thereafter; and

(4) The term initial offering period means the period from the time the offer commences until all minimum time periods, including extensions, required by Regulations 14D (§§240.14d-1 through 240.14d-103) and 14E (§§240.14e-1 through 240.14e-8) have been satisfied and all conditions to the offer have been satisfied or waived within these time periods.

(5) The term security holders means holders of record and beneficial owners of securities which are the subject of a tender offer;

(6) The term security position listing means, with respect to securities of any issuer held by a registered clearing agency in the name of the clearing agency or its nominee, a list of those participants in the clearing agency on whose behalf the clearing agency holds the issuer's securities and of the participants' respective positions in such securities as of a specified date.

(7) The term subject company means any issuer of securities which are sought by a bidder pursuant to a tender offer;

(8) The term subsequent offering period means the period immediately following the initial offering period meeting the conditions specified in §240.14d-11.

(9) The term tender offer material means:

- (i) The bidder's formal offer, including all the material terms and conditions of the tender offer and all amendments thereto;
- (ii) The related transmittal letter (whereby securities of the subject company which are sought in the tender offer may be transmitted to the bidder or its depository) and all amendments thereto; and
- (iii) Press releases, advertisements, letters and other documents published by the bidder or sent or given by the bidder to security holders which, directly or indirectly, solicit, invite or request tenders of the securities being sought in the tender offer;

(h) Signatures. Where the Act or the rules, forms, reports or schedules thereunder require a document filed with or furnished to the Commission to be signed, such document shall be manually signed, or signed using either typed signatures or duplicated or facsimile versions of manual signatures. Where typed, duplicated or facsimile signatures are used, each signatory to the filing shall manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document shall be executed before or at the time the filing is made and shall be retained by the filer for a period of five years. Upon request, the filer shall furnish to the Commission or its staff a copy of any or all documents retained pursuant to this section.

§240.14d-9 Recommendation or solicitation by the subject company and others.

...

(g) Statement of management's position. A statement by the subject company of its position with respect to a tender offer which is required to be published or sent or given to security holders pursuant to Rule 14e-2 shall be deemed to constitute a solicitation or recommendation within the meaning of this section and section 14(d)(4) of the Act.

IV. Section 10(b) of the Exchange Act

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

...

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered,

or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

V. Rule 10b-5 under the Exchange Act

§240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

VI. Section 9(a) of the Exchange Act

It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

- (1) For the purpose of creating a false or misleading appearance of active trading in any security other than a government security, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.
- (2) To effect, alone or with 1 or more other persons, a series of transactions in any security registered on a national securities exchange, any security not so registered, or in connection with any security-based swap or security-

based swap agreement with respect to such security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or a security-based swap agreement with respect to such security, to induce the purchase or sale of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.

(4) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to make, regarding any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security, for the purpose of inducing the purchase or sale of such security, such security-based swap, or such security-based swap agreement any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which that person knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a broker, dealer, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to induce the purchase of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security other than a

government security for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

VII. Regulation FD

§243.100 General rule regarding selective disclosure.

(a) Whenever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any person described in paragraph (b)(1) of this section, the issuer shall make public disclosure of that information as provided in §243.101(e):

- (1) Simultaneously, in the case of an intentional disclosure; and
- (2) Promptly, in the case of a non-intentional disclosure.

(b) (1) Except as provided in paragraph (b)(2) of this section, paragraph (a) of this section shall apply to a disclosure made to any person outside the issuer:

(i) Who is a broker or dealer, or a person associated with a broker or dealer, as those terms are defined in Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a));

(ii) Who is an investment adviser, as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)); an institutional investment manager, as that term is defined in Section 13(f)(6) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(f)(6)), that filed a report on Form 13F (17 CFR 249.325) with the Commission for the most recent quarter ended prior to the date of the disclosure; or a person associated with either of the foregoing. For purposes of this paragraph, a “person associated with an investment adviser or institutional investment manager” has the meaning set forth in Section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)), assuming for these purposes that an institutional investment manager is an investment adviser;

(iii) Who is an investment company, as defined in Section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3), or who would be an investment company but for Section 3(c)(1) (15 U.S.C. 80a-3(c)(1)) or Section 3(c)(7) (15 U.S.C. 80a-3(c)(7)) thereof, or an affiliated person of either of the foregoing. For purposes of this paragraph, “affiliated person” means only those persons described in Section 2(a)(3)(C), (D), (E), and (F) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(3)(C), (D), (E), and (F)), assuming for these purposes that a person who would be an investment company but for Section 3(c)(1) (15 U.S.C.

80a-3(c)(1)) or Section 3(c)(7) (15 U.S.C. 80a-3(c)(7)) of the Investment Company Act of 1940 is an investment company; or

(iv) Who is a holder of the issuer's securities, under circumstances in which it is reasonably foreseeable that the person will purchase or sell the issuer's securities on the basis of the information.

(2) Paragraph (a) of this section shall not apply to a disclosure made:

(i) To a person who owes a duty of trust or confidence to the issuer (such as an attorney, investment banker, or accountant);

(ii) To a person who expressly agrees to maintain the disclosed information in confidence;

(iii) In connection with a securities offering registered under the Securities Act, other than an offering of the type described in any of Rule 415(a)(1)(i) through (vi) under the Securities Act (§230.415(a)(1)(i) through (vi) of this chapter) (except an offering of the type described in Rule 415(a)(1)(i) under the Securities Act (§230.415(a)(1)(i) of this chapter) also involving a registered offering, whether or not underwritten, for capital formation purposes for the account of the issuer (unless the issuer's offering is being registered for the purpose of evading the requirements of this section)), if the disclosure is by any of the following means:

(A) A registration statement filed under the Securities Act, including a prospectus contained therein;

(B) A free writing prospectus used after filing of the registration statement for the offering or a communication falling within the exception to the definition of prospectus contained in clause (a) of section 2(a)(10) of the Securities Act;

(C) Any other Section 10(b) prospectus;

(D) A notice permitted by Rule 135 under the Securities Act (§230.135 of this chapter);

(E) A communication permitted by Rule 134 under the Securities Act (§230.134 of this chapter); or

(F) An oral communication made in connection with the registered securities offering after filing of the registration statement for the offering under the Securities Act.

§243.101 Definitions.

This section defines certain terms as used in Regulation FD (§§243.100-243.103).

- (a) **Intentional.** A selective disclosure of material nonpublic information is “intentional” when the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic.
- (b) **Issuer.** An “issuer” subject to this regulation is one that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78I), or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any closed-end investment company (as defined in Section 5(a)(2) of the Investment Company Act of 1940) (15 U.S.C. 80a-5(a)(2)), but not including any other investment company or any foreign government or foreign private issuer, as those terms are defined in Rule 405 under the Securities Act (§230.405 of this chapter).
- (c) **Person acting on behalf of an issuer.** “Person acting on behalf of an issuer” means any senior official of the issuer (or, in the case of a closed-end investment company, a senior official of the issuer’s investment adviser), or any other officer, employee, or agent of an issuer who regularly communicates with any person described in §243.100(b)(1)(i), (ii), or (iii), or with holders of the issuer’s securities. An officer, director, employee, or agent of an issuer who discloses material nonpublic information in breach of a duty of trust or confidence to the issuer shall not be considered to be acting on behalf of the issuer.
- (d) **Promptly.** “Promptly” means as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day’s trading on the New York Stock Exchange) after a senior official of the issuer (or, in the case of a closed-end investment company, a senior official of the issuer’s investment adviser) learns that there has been a non-intentional disclosure by the issuer or person acting on behalf of the issuer of information that the senior official knows, or is reckless in not knowing, is both material and nonpublic.
- (e) **Public disclosure.**
- (1) Except as provided in paragraph (e)(2) of this section, an issuer shall make the “public disclosure” of information required by §243.100(a) by furnishing to or filing with the Commission a Form 8-K (17 CFR 249.308) disclosing that information.
 - (2) An issuer shall be exempt from the requirement to furnish or file a Form 8-K if it instead disseminates the information through another method (or

combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.

(f) Senior official. "Senior official" means any director, executive officer (as defined in §240.3b-7 of this chapter), investor relations or public relations officer, or other person with similar functions.

(g) Securities offering. For purposes of §243.100(b)(2)(iv):

(1) Underwritten offerings. A securities offering that is underwritten commences when the issuer reaches an understanding with the broker-dealer that is to act as managing underwriter and continues until the later of the end of the period during which a dealer must deliver a prospectus or the sale of the securities (unless the offering is sooner terminated);

(2) Non-underwritten offerings. A securities offering that is not underwritten:

(i) If covered by Rule 415(a)(1)(x) (§230.415(a)(1)(x) of this chapter), commences when the issuer makes its first bona fide offer in a takedown of securities and continues until the later of the end of the period during which each dealer must deliver a prospectus or the sale of the securities in that takedown (unless the takedown is sooner terminated);

(ii) If a business combination as defined in Rule 165(f)(1) (§230.165(f)(1) of this chapter), commences when the first public announcement of the transaction is made and continues until the completion of the vote or the expiration of the tender offer, as applicable (unless the transaction is sooner terminated);

(iii) If an offering other than those specified in paragraphs (a) and (b) of this section, commences when the issuer files a registration statement and continues until the later of the end of the period during which each dealer must deliver a prospectus or the sale of the securities (unless the offering is sooner terminated).

§243.102 No effect on antifraud liability.

No failure to make a public disclosure required solely by §243.100 shall be deemed to be a violation of Rule 10b-5 (17 CFR 240.10b-5) under the Securities Exchange Act.

§243.103 No effect on Exchange Act reporting status.

A failure to make a public disclosure required solely by §243.100 shall not affect whether:

(a) For purposes of Forms S-2 (17 CFR 239.12), S-3 (17 CFR 239.13), S-8 (17 CFR 239.16b) and SF-3 (17 CFR 239.45) under the Securities Act, an issuer is deemed to have filed all the material required to be filed pursuant to Section

13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) or, where applicable, has made those filings in a timely manner; or

(b) There is adequate current public information about the issuer for purposes of §230.144(c) of this chapter (Rule 144(c)).

Contacting Pillsbury

Questions regarding the matters discussed in this publication may be directed to the author listed below, or to any other Pillsbury Winthrop Shaw Pittman LLP lawyer with whom you have consulted in the past on similar matters.

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Mr. Baxter is co-leader of Pillsbury's Capital Markets group and a partner in the Corporate & Securities practice in Pillsbury's New York office who has advised on hundreds of securities issuances, mergers, acquisitions and divestitures involving more than \$75 billion. Mr. Baxter represents issuers, dealer-managers, underwriters, placement agents, purchasers and trustees, advising on public and private issuances of all types of equity, debt and hybrid securities, including structured finance, securitizations and liability management issues. Mr. Baxter also advises on mergers, stock and asset transactions, and joint ventures, focusing on private mid-market deals. Mr. Baxter works with a variety of industries, including energy, pharmaceuticals (including a particular focus on royalty interest monetizations), aircraft, industrial and technology clients. Mr. Baxter can be contacted via email at david.baxter@pillsburylaw.com.

About Pillsbury

Pillsbury Winthrop Shaw Pittman LLP is an international law firm with a particular focus on the technology & media, energy, financial services, and real estate & construction sectors. Recognized as one of the most innovative law firms by *Financial Times* and one of the top firms for client service by BTI Consulting, Pillsbury and its lawyers are highly regarded for their forward-thinking approach, their enthusiasm for collaborating across disciplines and their authoritative commercial awareness.

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