CLIENT UPDATE

# GOT FINANCING? YOU MAY HAVE TO EXTEND YOUR TENDER OFFER

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Recent news coverage has suggested that the Staff of the U.S. Securities and Exchange Commission (the "SEC") has taken a position interpreting its tender offer rules that represents a significant new development. In actuality, however, the Staff has for some time taken the position that the satisfaction of a financing condition in a tender offer for an equity security subject to Regulation 14D constitutes a material change to the tender offer requiring that it remain open for at least five business days following this change. Though nothing new, the Staff's recent reiteration of this position serves as a reminder to bidders who are financing their offers that they may be required to extend the tender offer period and that their financing papers and merger agreement should be drafted to take this into account.

## STAFF POSITION

The Staff has made its position known through comment letters relating to pending Schedules TO and in the course of presentations by and discussions with members of the Staff.[1] The Staff summed up its position nicely in an October 2011 comment letter relating to the Schedule TO for the proposed acquisition of A.C. Moore Arts & Crafts.

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1 *See*, *e.g.*, comments issued by the Staff in May and June 2012 on the Schedule TO for the proposed acquisition of P.F. Chang's China Bistro, Inc.

In the letter, the Staff indicated that "a material change [in an equity tender offer] occurs when the offer becomes financed, *e.g.*, financing is obtained or the financing condition is otherwise satisfied."

The Staff's position is rooted in existing Exchange Act rules, as well as Staff guidance, applicable to tender offers for equity securities subject to Regulation 14D, that require: (i) a Schedule TO to be amended for material changes to information previously provided and (ii) a tender offer to remain open for at least five business days (or more depending upon the event) following a material change in the offer. These rules and Staff guidance are intended to facilitate the timely dissemination of information regarding material changes relating to an offer and provide offerees with sufficient time following receipt of that information to change their investment decision (SEC rules mandate that equityholders be permitted to withdraw securities tendered pursuant to an equity tender offer at any time during the pendency of the offer).

In response to Staff comments, some issuers have attempted to distinguish between a "financing condition" (*i.e.,* conditionality relating to the ability of the offeror to obtain committed financing) and a "funding condition" (*i.e.*, conditionality relating only to the receipt of proceeds from committed financing). The Staff, however, has refused to recognize this distinction and has made clear its position that the satisfaction of either type of condition would constitute a material change to an equity tender offer requiring the tender offer to remain open for at least five business days following the change. Some offerors (such as the acquiror in the P.F. Chang's acquisition) have reacted to the Staff's position by eliminating the financing condition from their equity tender offer and, to the extent required, amending their committed financing arrangements and merger agreement accordingly.

## CONCLUSION

Bidders financing their equity tender offers should be aware of the SEC's position to avoid violating the rules by failing to extend a tender offer for an equity security upon funding or obtaining financing. Further, while there are ways to structure a tender offer to comply with the Staff's position without a bidder taking the full financial risk, they are not necessarily simple and require, among other things, a bidder to ensure that its financing documents and the merger agreement are themselves properly drafted to account for the likely need to extend the offer.

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Please do not hesitate to contact us with any questions.

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