

# SEC Issues New Exemptive Order Updating Governing Five Business Day Tender Offers for Debt Securities

Thursday, July 9, 2026

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## EXECUTIVE SUMMARY

On June 30, 2026, the SEC's Division of Corporation Finance (the "SEC") issued a formal Exemptive Order (the "2026 Order") that supersedes the SEC's January 23, 2015 no-action letter issued to Cahill Gordon & Reindel LLP (the "2015 Letter") regarding abbreviated tender and exchange offers for non-convertible debt securities ("Five Business Day Offers").<sup>1</sup> The 2015 Letter itself superseded a nearly 30-year old position of the SEC with respect to debt tender offers. Rule 14e-1(a) under the Securities Exchange Act of 1934 (the "Exchange Act") requires a minimum offer period for all tender offers – debt or equity – of twenty business days. In 1986, the SEC issued a series of no-action letters allowing issuers to conduct tender offers, as well as exchange offers, for non-convertible debt securities (later limited to debt securities with an investment grade rating) that reduced the minimum offer period to seven to ten calendar days subject to meeting certain qualifications.<sup>2</sup> In the 2015 Letter, the SEC superseded the 1986 no-action relief and allowed issuers to make tender offers, as well as exchange offers, for "any and all" of one or more series of non-convertible debt securities, regardless of credit rating, that are held open for five business days and satisfy certain criteria described in the 2015 Letter. In furtherance of the stated objective "to further expand the availability of a five business day minimum offering period in certain types of debt tender offers in order to address market inefficiencies, better reflect technological advancements, reduce exposure to fluctuations in the market and in interest rates, and facilitate the availability of tender offers as debt management transactions," the 2026 Order grants

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<sup>1</sup> Eleven years following the issuance of the 2015 Letter, members of the SEC staff and attorneys at Cahill Gordon & Reindel LLP ("Cahill") convened a call in January 2026 to begin to discuss further modernization of the SEC's tender offer parameters. The staff requested that Cahill, with input from client investment banks and peer law firms, provide proposed modifications to the 2015 Letter geared towards making it more user-friendly to issuers. In response to the staff's invitation, Cahill submitted proposed modifications to the 2015 Letter to the staff at the SEC, which proposed modifications are each addressed in the relief granted in the 2026 Order.

<sup>2</sup> SEC No-Action Letter, Goldman, Sachs & Co. (March 26, 1986); SEC No-Action Letter, Salomon Brothers Inc. (March 11, 1986).

a formal exemption from Exchange Act Rule 14e-1(a) with respect to Five Business Day Offers for non-convertible debt securities and provides a new and more flexible set of the criteria from those described in the 2015 Letter with respect to determining eligibility to conduct Five Business Day Offers.

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## SUMMARY DISCUSSION

While many of the specific criteria which must be satisfied for an issuer tender offer or exchange offer for non-convertible debt securities to be eligible as a Five Business Day Offer are consistent with those in the 2015 Letter (the complete wording of all of the criteria is set forth in the 2026 Order attached as Annex A to this memorandum), there are some significant updates in the 2026 Order that we expect will make utilization of Five Business Day Offers more prevalent in the market. Below is a summary of the material updates in eligible criteria in the 2026 Order relative to those in the 2015 Letter, the most significant of which we view to be the fact that Five Business Day Offers may now be conducted in connection with offers for less than all subject debt securities and also may be conducted in connection with certain consent solicitations.

### 1. Elevation from No-Action Letter to Formal Exemptive Order

The 2015 Letter was a staff no-action position indicating that the staff of the SEC would not recommend enforcement action if a tender offer were conducted as a Five Business Day Offer so long as it satisfied the eligibility criteria stipulated in the 2015 Letter. The 2026 Order is a formal exemption from Exchange Act Rules 14e-1(a) and (b), providing more durable and reliable relief to market participants.

### 2. Partial Tender Offers Now Permitted

The 2015 Letter required Five Business Day Offers to be made “for any and all” of the subject debt securities. The inclusion of this condition in the 2015 Letter limited the ability of issuers to utilize Five Business Day Offers as a means to repurchase their securities when trading below existing redemption prices. Issuers who were looking to make selective repurchases of their securities were exposed to market risk by the requirement to have a capped tender offer open for twenty business days. The 2026 Order removes this “any and all” requirement, allowing partial tender offers. For partial offers, if more securities are tendered than the offeror is willing to accept, securities must be taken up pro rata according to the amount tendered by each security holder during the offering period.

### 3. Consent Solicitation Condition Narrowed

The 2015 Letter broadly prohibited Five Business Day Offers made “in connection with a solicitation of consents to amend” the underlying indenture. Issuers typically pursue tender offers in connection with concurrent financing exercises. Against this backdrop, issuers desire to establish uniformity in their covenant packages and avoid a situation where covenants in existing debt securities restrict the issuer’s operations in a manner inconsistent with the issuer’s current operating and financial position. As such,

the inability to remove covenants from debt securities that remain outstanding reduced the utilization of the Five Business Day Offer by compelling issuers to rely upon traditional twenty business day tender offers for covenant relief amendments. The 2026 Order narrows the prohibition in the 2015 Letter on Five Business Day Offers not being made in conjunction with consent solicitations, applying it only to consent solicitations “where such amendment requires the consent of the holders of more than a simple majority of the outstanding principal amount of the subject securities.” This permits Five Business Day Offers to be combined with consent solicitations that require only a simple majority, which would include most of the universe of covenant-related amendments.

#### **4. Removal of Senior Indebtedness Financing Prohibition**

The 2015 Letter prohibited the offer from being financed with the proceeds of “Senior Indebtedness” (defined as indebtedness that (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). In doing so, the 2015 Letter essentially merged two independent investment decisions, one being whether to tender existing junior notes and another whether to invest in new senior notes. The 2026 Order eliminates this restriction entirely.

#### **5. Expanded Definition of “Qualified Debt Securities”**

Consistent with the 2015 Letter, the 2026 Order requires that the consideration in an exchange offer constitutes Qualified Debt Securities; however, the definition of Qualified Debt Securities has been substantially updated. The 2015 Letter required Qualified Debt Securities to be “identical in all material respects” to the debt securities subject to the tender offer. The result was that neither issuers nor investors are able to bring covenant packages forward to align with an issuer’s current operating and financial position. As such, they were forced to instead consummate new issuances to refinance existing debt securities rather than pursuing a more efficient exchange offer process. The 2026 Order relaxes the standard in the 2015 Letter to instead require that the securities being issued in the exchange be “substantially similar in all material respects” to those being exchanged. In addition, if this test cannot be met, an alternative standard is provided whereby Qualified Debt Securities may also be substantially similar to “the most recent issuance of debt securities that are *pari passu* to the debt securities that are the subject of the tender offer.” The result is that the 2026 Order now recognizes that the credit quality of issuers can shift significantly since a prior issuance of debt securities, and Five Business Day Offers can now be conducted in the exchange context where the structure of the issuer’s existing debt securities (rather than just the debt securities subject of the exchange) could be mirrored, which would provide investors a readily available comparison point for the new Qualified Debt Securities to be issued in the exchange offer.

It should also be noted that the 2015 Letter required Qualified Debt Securities to have a weighted average life to maturity longer than the subject securities, and the 2026 Order removes this

requirement. As a result, exchange offers can now be conducted where the notes being issued are actually shorter-dated relative to those being exchanged.

## 6. Revised Extraordinary Transaction Restriction

The 2015 Letter prohibited offers “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. Change of control put rights and other covenant restrictions in debt securities often pose significant impediments to potential merger and acquisition transactions. Debt commitments to backstop consent processes aimed at addressing such problematic restrictions come at significant costs to companies. The 2026 Order addresses this reality and now allows issuers to utilize Five Business Day Offers in connection with change of control and other extraordinary transactions so long as they are not commenced within ten business days after the first public announcement or the consummation of such transactions. This provision in the 2026 Order allows issuers the flexibility to address the restrictions in their existing debt securities via accelerated Five Business Offers and thereby significantly increases certainty for issuers as they address their financing needs in the context of significant M&A transactions. For such issuers, the timing of launching financing transactions is often dependent upon receipt of regulatory approvals and clearance of other conditions based hurdles to closing stipulated in M&A agreements. In this context, issuers are put in the difficult position of trying to time the market for obtaining the necessary financing for their transaction. That the 2026 Order eliminates the need to wait twenty business days to determine the results of a tender offer relevant to that financing significantly reduces these timing issues.

## 7. Other Notable Changes

- **Expansion of Eligible Exchange Offer Participants:** The 2015 Letter limited Eligible Exchange Offer Participants to Qualified Institutional Buyers (under Rule 144A) and/or non-U.S. persons (under Regulation S). The 2026 Order adds a third category: institutions that are accredited investors within the meaning of Rule 163B(c)(2) of the Securities Act.
- **Removal of Cash-Out Option for Non-Eligible Holders:** The 2015 Letter required that holders who are not Eligible Exchange Offer Participants be given a concurrent option to receive cash for their securities in a fixed amount. The 2026 Order eliminates this requirement entirely.
- **Removal of Guaranteed Delivery Procedure Requirement:** The 2015 Letter required offers to permit tenders through a guaranteed delivery procedure allowing delivery by the second business day after expiration. The 2026 Order does not include this requirement.

- **Removal of Form 8-K Filing Requirement:** The 2015 Letter required Exchange Act reporting companies (including voluntary filers) to furnish a launch press release on Form 8-K prior to 12:00 noon ET on the first business day of the offer. The 2026 Order removes this requirement.
- **LIBOR Replaced with SOFR:** The 2015 Letter referenced LIBOR as a benchmark for pricing. The 2026 Order replaces LIBOR with SOFR, reflecting the market transition from the London Interbank Offered Rate to the Secured Overnight Financing Rate.
- **Modified Timing for Material Changes and Consideration Changes:** The 2015 Letter required “Immediate Widespread Dissemination” at least five business days before expiration for changes in consideration and at least three business days for other material changes. The 2026 Order replaces this with:
  - **Changes in consideration or percentage of securities sought:** communication by press release or public announcement no later than 9:00 a.m. ET on the third business day before expiration.
  - **Any other material change:** communication by press release or public announcement no later than 9:00 a.m. ET on the second business day before expiration.
- **Updated Consideration Fixing Deadline:** The 2015 Letter required the exact consideration and interest rate for fixed spread tenders to be fixed no later than 2:00 p.m. Eastern time on the last business day of the offer. The 2026 Order extends this deadline to the expiration time of the offer.
- **Press Release and Dissemination Updates:** The 2026 Order replaces the reference to “an Internet address at which a record or beneficial holder could then obtain copies” with “an active hyperlink to a website address where security holders may access” the materials. The 2026 Order requires the press release to include procedures for proration (if applicable). The term “Immediate Widespread Dissemination” is no longer used as a defined term.
- **New Proration Factor Announcement** The 2026 Order adds a new requirement for partial tender offers: the offeror must use commercially reasonable efforts to announce the proration factor by press release by 10:00 a.m. ET on the next business day after the expiration date, or as soon thereafter as practicable.

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## COMMENTARY

As a result of the implementation of the 2026 Order, we anticipate that nearly all tender offers for debt securities will now be conducted via the Five Business Day Offer structure. Under the 2015 Letter, the primary instances we saw of issuers being unable to utilize the Five Business Day Offer structure were (1) partial tender offers, (2) tender offers with consent solicitations, (3) tender offers where the refinancing indebtedness “primes” the existing indebtedness being refinanced, (4) tender offers in connection with changes of control and other extraordinary M&A transactions and (5) exchange offers where issuers desired to update their covenants from those in the subject debt securities to match those contained in their more recent issuances. In the 2026 Order, the SEC has addressed each of these situations and thereby dramatically increased the efficacy of the Five Business Day Offer structure. We note that debt tender offers that do not meet the criteria for Five Business Day Offers can still be done as twenty business day tender offers using the existing “10 + 10” structure (i.e., a twenty business day expiration date with a 10 business day “early bird” date).

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## CONCLUSION

The 2026 Order supersedes the 2015 Letter and any similar no-action or interpretive letters previously issued by the SEC on this topic. The significant changes described above reflect the SEC’s commitment to investor protection by addressing market inefficiencies, better reflecting technological advancements, reducing exposure to fluctuations in the market and in interest rates and facilitating the availability of tender offers as debt management transactions. Please be advised the SEC has noted that it may reconsider, condition, modify, or withdraw this relief if any issues material to such relief come to its attention.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Ted B. Lacey (partner) at 212.701.3669 or [tlacey@cahill.com](mailto:tlacey@cahill.com) or James J. Clark (partner) at 212.701.3849 or [jclark@cahill.com](mailto:jclark@cahill.com).

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## ANNEX A

[Exemptive Order for Tender or Exchange Offers for Non-Convertible Debt Securities](#)