HONORED IN THE BREACH: ISSUES IN THE REGULATION OF TENDER OFFERS FOR DEBT SECURITIES

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I.
INTRODUCTION

Activity in debt capital markets has fluctuated dramatically in the past decade. At first, the markets were booming, with the annual issued volume of underwritten global debt securities reaching a record $6.9 trillion in 2006, of which the U.S. portion reached $4.1 trillion.[1] In the wake of the financial downturn, the overall global debt activity dipped substantially to (a still-sizeable) $5 trillion in 2011.[2] The boom in debt capital markets was fueled by historically low interest rates[3] and historically low default rates on corporate bonds.[4] These fac-

1. Thomson Financial, *Fourth Quarter 2006* DEBT CAPITAL MARKETS REVIEW, MANAGING UNDERWRITERS 1 (2007).

2. Thomson Reuters, *Full Year 2011* DEBT CAPITAL MARKETS REVIEW, MANAGING UNDERWRITERS 1 (2011).

3. *See* Shelly Sigo & Jim Watts, *Bond-Watch*, BOND BUYER, Aug. 25, 2011, at 7; Matthew Sheahan, *High-Yield Market Pauses for Effect*, INV. DEALERS' DIGEST, Dec. 3, 2010, at 8.

4. *See generally* Gordon Platt, *Bond Market Rally Continues as Fed Remains Supportive*, GLOBAL FIN., May 1, 2012, at 98; Serena Ng, *Bonds Mixed Signals Split Investors: Yield Curve, Rates Hamper Treasuries, Muddy Forecasts*, WALL ST. J., Jan. 2, 2007, at R4. A related factor influencing the boom in debt capital markets is the reallocation of funds by many institutional investors from equity to debt securities, which are perceived to be less risky. Recently, commentators have discussed not only the dramatic shift from equity to debt financing, but also the increased use of debt financing for equity buybacks and takeovers to reduce equity exposure. *See generally Taking Stock: Why Equity Markets Have Forgotten Their Function*, ECONOMIST, July 28, 2012, http://www.economist.com/node/21559675.

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tors, combined with strong investor demand for both investment-grade[5] and non-investment grade (or "high-yield") debt,[6] have created opportunities for companies to refinance existing debt on better terms, as well as to finance acquisitions, stock buybacks and other transactions.[7] Additionally, although non-investment grade debt has declined sharply with the economic contraction,[8] the debt market remains integral to capital markets for businesses and investors looking to survive economic decline. At the beginning of the financial crisis, the debt capital markets experienced an upheaval that substantially reduced companies' ability to raise capital.[9] This downward trend continued until the first quarter of 2009, when quarterly global debt underwriting activity increased to

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5. Investment-grade securities refer to the highest categories of credit-worthiness using the rating scales of the three nationally recognized rating organizations: Moody's Investors Service, Inc. ("Moody's"); Standard & Poor's, a division of The McGraw Hill Companies, Inc. ("Standard and Poor's"); and Fitch, Inc. ("Fitch"). On the Moody's scale, investment grade securities are rated Aaa through Baa3. On the Standard & Poor's scale, investment grade securities are rated AAA though BB+, and on the Fitch scale investment grade securities are rated AAA though BBB.

6. Non-investment grade debt is also known as "high-yield debt." High-yield debt refers to debt securities rated below investment grade by Moody's, Standard & Poor's or Fitch. In the past, these debt securities were commonly referred to as "junk bonds" because of their speculative nature. Recently, however, the perception of high-yield debt has changed and the stigma associated with non-investment grade debt has been greatly reduced or eliminated. *See, e.g., Corporate Credit,* FIN. TIMES (London), Nov. 21, 2005, at 18 (stating that "[t]he stigma of a downgrade, or of 'junk' status, is ancient history [and the] cliff that once existed between investment-grade and high-yield companies has eroded").

7. *See* Ng, *supra* note 4, at R4.

8. By 2011, global high yield debt had fallen to $278.1 billion, which was a 14% decrease from 2010. Thomson Reuters, *supra* note 2 at 1.

9. *See* Anusha Shrivastava, *Corporate Bond Market Has Come to a Standstill,* WALL ST. J., Aug. 7, 2007, at C2 (stating that "[t]he investment-grade corporate bond market has ground to a halt, making it difficult for companies to access capital . . . . The problems in the high-grade market . . . come amid turmoil in . . . [the] high-yield bond and [other] markets . . . ."); Julie Creswell & Michael J. de la Merced, *Putting the Clamps on Credit,* N.Y. TIMES, Aug. 7, 2007, at C1 (stating that "[h]igh-yield bond offerings fell off a cliff" in July, with "only $2.4 billion in junk bonds . . . issued, a steep decline from the $22.4 billion that came to market in June." Further, "[h]igh-quality bonds issued by companies with sterling credit have not been immune to the rout either," with "[i]nvestment-grade bond issues [falling] to $30.4 billion in July—the lowest monthly total in five years—from $109 billion in June.").

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its largest amount since the crisis began.[10] In this economic atmosphere, understanding the nuances of globalized debt structuring has become essential to succeeding in a crisis-affected, highly dynamic economy.

These market trends for debt securities have also manifested in the debt tender offer market. The global activity of debt tender offers[11] has closely tracked the activity of the debt capital markets and similarly experienced a decline beginning in the middle of 2007 and a resurgence in early 2009.[12] The rapid fluctuations in the volume of debt offerings, particularly with the earlier increases in tender offer activity, have generated renewed interest in the U.S. federal securities laws, primarily the Securities Act of 1933 (the "Securities Act")[13] and the Securities Exchange Act of 1934 (the "Exchange Act"),[14] governing tender offers.[15] In the U.S. markets, both of the primary federal securities statutes may be involved in a debt tender offer. The Securities Act regulates the offering of debt securities by corporate issuers, and the tender offer rules under the Exchange Act regulate refinancing transactions.[16] Successfully navigating these two acts can be what separates a successful transaction from one that opens the issuer, financial advisor, and perhaps legal counsel as well to liabilities under federal securities law. Given the high stakes involved, having

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10. Thomson Financial, *Fourth Quarter 2007* DEBT CAPITAL MARKETS REVIEW MANAGING UNDERWRITERS 1 (2008); Thomson Reuters, *Fourth Quarter* 2008 Debt Capital Markets Review 1 (2009); Thomson Reuters, *First Quarter* 2009 Debt Capital Markets Review 1 (2009).

11. As will be discussed in greater detail in Part II, *infra*, tender offers involve the purchase of large blocks of securities.

12. *See* Bloomberg Terminal Database (last visited May 7, 2009) (showing that the number of debt tender offers worldwide fluctuated from 351 in the first half of 2007 to 93 in the first half of 2008 and then to 148 in the first four months of 2009).

13. 15 U.S.C. § 77a (2010).

14. 15 U.S.C. § 78a (2010). As discussed in this article, the Exchange Act and a variety of rules adopted under the Exchange Act contain rules applicable to issuer tender offers for debt securities.

15. The laws governing tender offers are integral both to American markets and global markets. *See* Bryant Edwards, *Restructuring European High Yield Bonds*, 1281 PRACTISING L. INST. CORP. L. AND PRAC. COURSE HANDBOOK SERIES 907, 915 (Dec. 2001) (noting that U.S. institutional investors are a principal market for many international offerings).

16. Because this paper primarily addresses the transactions themselves, the Exchange Act will be the main statute discussed.

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clear precedent and binding legal standards is integral to properly functioning capital markets.

Indeed, lack of clarity can delay beneficial refinancing transactions and, in some cases, prevent transactions from being completed. The element of timing is particularly significant because tender offers and bond repurchases are highly sensitive to market conditions—both the market pricing and creditworthiness of the bonds themselves as well as the prevailing interest rates.[17] For debt markets, interest rates are an exogenous variable that can govern a transaction's success or failure.[18] This variable makes timing paramount to achieving desirable refinancing transactions because of the time sensitive nature of interest rate fluctuations.[19] In debt markets, managing timing requirements and maximizing flexibility in the pricing structure are critical to serving a client's needs. However, if timing and pricing obligations are unclear, difficulties can emerge for an issuer attempting to structure its transaction in a manner favorable for it and attractive to bondholders.

This paper addresses these ambiguities and the resulting issues that arise under the tender offer regulations. Its purpose is to show how the current methods employed by the Securities and Exchange Commission ("SEC" or the "Commission"), while perhaps attractive to the SEC and some market participants, create substantial risks and costs for market participants and the transactional attorneys who must guide and approve of the tender offer transaction. Part II provides an overview of the U.S. federal regulation of tender offers, focusing primarily on relevant statutes and regulations, as well as how the SEC has interpreted and promulgated these rules through its various administrative options. The section also addresses how legal practitioners use the SEC's communications, with particular attention paid to the SEC's use of no-action letters; it further addresses how legal practitioners for-

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17. *See* Steven V. Mann & Eric A. Powers, *Determinants of Bond Tender Premiums and the Percentage Tendered*, 31 J. BANKING & FIN. 547, 548 (2007).

18. As a recent study found, the tender offer itself—independent of whether that tender offer is being issued pursuant to a subsequent or a simultaneous debt offering—is correlated with risk-free bond rates, bond spreads, and the yield curve. *Id.* at 557. The authors do note, however, that "[w]hether this is a response to changes in macroeconomic conditions or some other pervasive factor is not clear." *Id.* at 554.

19. *See id* at 557.

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mally engage with these letters through opinion letters for a client's transaction. Part III discusses the legal ambiguities inherent in specific tender offer structures for debt securities and how current tender offer regulations relate to those structures. Specifically, the section discusses the conflicts between many commonly used transaction structures and the securities laws, as well as how the SEC has created a divide between *de facto* and *de jure* legality. Part IV discusses the practical consequence of these ambiguities for attorneys today, both in terms of commercial impact and liability risk. The section shows how the incongruities demonstrated in Part III could create problems for attorneys overseeing the transaction. Part V concludes with suggestions as to how these issues might be rectified moving forward, presenting alternative approaches for the SEC regarding debt tender offers specifically as well as regarding the use of their regulatory toolbox more generally.

II.
Federal Regulation and Procedural Relationships in Tender Offers

A. *Conducting a Tender Offer*

The term "tender offer" is not defined in the Exchange Act or in other U.S. federal securities laws, and it is particularly ambiguous in debt offerings, where the issue of control, a major concern for equity acquisitions, is not present.[20] Instead, courts and the SEC engage in a multifactor analysis of a given transaction that is heavily fact dependent. The analysis typically follows an eight-factor test originally set out in *Wellman v. Dickinson.*[21] According to the *Wellman* standard, the following factors are central to determining whether an offering qualifies as a tender offer:

(1) Active and widespread solicitation of public security holders;
(2) Solicitation for a substantial percentage of the outstanding securities;

20. *See* Norman D. Slonaker, *Liability Management for the Frequent Issuer*, 1150 Practising L. Inst. Corp. L. and Prac. Course Handbook Series 787, 794-95 (Nov. 1999).

21. Wellman v. Dickinson, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979) *aff'd* 682 F.2d 355 (2d Cir. 1982), *cert. denied.* 460 U.S. 1069 (1983).

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(3) Offer to purchase made at a premium over the prevailing market price;
(4) Offer containing terms that are firm, rather than negotiable;
(5) Consummating the offer being contingent on the tender of a fixed minimum number of securities, often subject to a fixed maximum number of securities to be purchased;
(6) Offer being open only for a limited time period;
(7) Offerees being subjected to pressure to sell; and
(8) Public announcements of a purchasing program precede or accompany a rapid accumulation of a large amount of the company's securities.[22]

This list has been broadly adopted but is non-exhaustive. Courts have weighed these factors according to "whether the particular class of persons [subject to the offer] needs the protection of the [securities laws]" when determining whether a transaction qualifies as a tender offer.[23] In addition, because not all of the factors discussed above need to be present for a

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22. *See id.* In addressing the definition of a tender offer, the *Wellman* court stated: "The [SEC] has not yet created an exact definition, but in this case and in others, it suggests some seven elements as being characteristic of a tender offer . . . . These characteristics were recently accepted as appropriately describing the nature of a tender offer. *See* Hoover v. Fuqua Industries, Inc., C. 79-1062A (N.D. Ohio June 11, 1979). In that case, the [SEC] also had listed an 8th characteristic not included here . . . . The reason this last characteristic was left out undoubtedly was because publicity was not a feature of this transaction." *Id.* The *Wellman* case involved the hostile takeover of a public company by the rapid and undisclosed purchase of a controlling interest of the target company's equity securities. *Id.* at 791. With respect to debt transactions, significant judgments must be made on a case-by-case basis to determine if the proposed transaction should be considered a tender offer.

23. *See* SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953) (stating that the applicability of exemptions from registration under the Securities Act "should turn on whether the particular class of persons affected need the protection" of the Securities Act); Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 57 (2d Cir. 1985) (analyzing the *Ralston Purina* case in the context of the tender offer rules and finding that "the question of whether a solicitation constitutes a 'tender offer' within the meaning of § 14(d) turns on whether, viewing the transaction in the light of the totality of circumstances, there appears to be a likelihood that unless the pre-acquisition filing strictures of that statute are followed there will be a substantial risk that solicitees will lack information needed to make a carefully considered appraisal of the proposal put before them").

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transaction to be considered a tender offer,[24] the discretion allowed to courts in this area requires debt issuers to proceed with caution if any of the factors are present.[25]

In many situations, however, a proposed repurchase of a company's debt securities very likely or clearly qualifies as a tender offer under the *Wellman* test. These situations arise where a company proposes to eliminate all or a substantial portion of a class of its debt securities[26] and redemption is prohibited or more costly under the terms of the securities.[27] The reasons for the transaction may include, for example, (i) the need for a distressed company to reduce its debt, (ii) the availability of better terms or lower interest rates in the markets, (iii) the need to eliminate restrictive debt covenants, or (iv) the sale of the company in a leveraged transaction where substantially all of the existing debt is replaced at closing.[28] In

24. *See* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 57 (2d Cir. 1985) ("[I]n any given case a solicitation may constitute a tender offer even though some of the eight factors are absent."). For example, if a purchase of debt securities is followed by a larger purchase of the same series of debt securities, those transactions could jointly be treated as a single tender offer, regardless of whether they, individually or jointly, met the *Wellman* criteria. *See* Mark S. Bergman, *Repurchases of High Yield Debt Securities: Frequently Asked Questions*, 1939 PRACTISING. L. INST. CORP. L. AND PRAC. COURSE HANDBOOK SERIES 853, 859-60 (Mar. 2012).

25. Not every repurchase by a company of its debt securities is, however, considered a tender offer. For example, a company with a strong cash position at the end of each quarter or fiscal year may choose to make small open-market or privately negotiated repurchases of its debt securities from time to time to reduce its debt-service costs and improve its financial ratios. In most cases, these small transactions do not contain any of the eight *Wellman* factors and are not considered tender offers. Some practitioners have concerns that small, repeated purchases could be aggregated into a single so-called "creeping tender offer." Creeping tender offers are unlikely to be problematic for debt issuers because of how few restrictions there are on debt repurchases. Bergman, *supra* note 24, at 855. If permitted by the terms of its debt securities, a company may also redeem or "call" its securities from time to time without implicating the tender offer rules.

26. Typically, a tender offer by a distressed company will require that a very large percentage of the debt in question be tendered. In exchange offers, for example, 90% to 95% acceptance is a common requirement for economic viability. *See* Ford Lacy & David M. Dolan, *Legal Aspects of Public Debt Restructurings: Exchange Offers, Consent Solicitations and Tender Offers*, 4 DEPAUL BUS. L.J. 49, 58 (1991). For listed examples of recent debt exchange offers, see *infra* Appendix F.

27. *See* Mann & Powers, *supra* note 17, at 550-51.

28. *See id* at 550.

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these and other cases, a company must carefully structure its transaction to comply with the applicable tender offer rules.

B. *SEC Rulemaking: Administrative Authority and the Legal Position of No-Action Letters*

1. *SEC Regulatory Hierarchy: Rules, Opinions, and No-Action Letters*

Like other federal administrative agencies, the SEC's authority is governed by and administered through several tiers of regulatory and statutory authority. The following hierarchy of regulatory authorities constitutes the U.S. securities laws:

(1) The U.S. Constitution;
(2) Securities statutes;
(3) Rules and other materials given the force of law;
(4) Policy and interpretive releases;
(5) SEC staff legal bulletins;
(6) Interpretive and no-action letters;
(7) The Manual of Telephone Interpretations;
(8) Telephone interpretations; and
(9) SEC staff comments on filed documents.[29]

This section will briefly characterize each of these regulatory mechanisms involving the SEC's "interpretive authority"[30] but will focus on one particular regulatory tool, the no-action letter, as a uniquely problematic form of policy creation.[31]

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29. Gary M. Brown, *Chapter 1: Approaching Securities Law,* 1912 PRACTISING L. INST. CORP. L. AND PRAC. COURSE HANDBOOK SERIES 79, 92 (Dec. 2011); *see generally* THOMAS LEE HAZEN, *The Work of the SEC,* 1 LAW SEC. REG. § 1.4 (2012). Professor Soderquist, however, notes that "[t]he hierarchy of much of this list is not completely set. For example, for the person to whom an interpretive or no-action letter is addressed, its place is higher on the list than releases of general applicability." LARRY D. SODERQUIST, SOURCES OF FEDERAL SECURITIES LAW, SODERQUIST ON THE SEC. L. § 1.3 n.19 (2012).

30. *See* Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework,* 83 CORNELL L. REV. 921, 933, 935-56 (1998) ("SEC rules, SEC orders, and SEC releases comprise what can be characterized as the official and formal side of the SEC's spectrum of interpretive authority," while the subordinate interpretive authority is made up of all lower-tiered forms of communication.).

31. Part III, *infra,* will further analyze the Exchange statutes relevant to debt tender offers and how the statutes relate to the regulatory avenues discussed here.

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a. Rules, Regulations, Releases, Bulletins and Phone Calls

Rules and regulations are the primary mechanisms that allow the SEC to establish legally binding obligations.[32] Section 4 of the Exchange Act grants the SEC authority to create rules that supplement the statutory securities laws.[33] The SEC's broad rulemaking authority allows the Commission to work with its staff to pass "rules and regulations," which is the statutory aim of Congress.[34] Rules and regulations are binding law and thus enforceable in court.[35] In addition to rules and regulations, there are other SEC actions that similarly carry the full force of law.[36] For example, because Rules 130 and 401(a) incorporate registration statements into the rules themselves, thus the SEC's registration statement forms become legally enforceable standards.[37]

The SEC's rulemaking must comply with the Administrative Procedure Act and cannot exceed the authority delegated to the SEC governing the rulemaking process.[38] Rules can also be challenged if the SEC is found to have neglected financial burdens associated with its policies[39] or if they are held arbitrary.[40] Once passed, however, the rules are recorded in the Federal Register and carry the force of law.[41]

Rules and regulations, however, constitute a small part of the SEC's regulatory policies. The majority of the SEC's an-

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32. *See* Hazen, *supra* note 29, § 1.4[2].

33. 15 U.S.C. § 78(d)(1) (1987); *see also* Brown, *supra* note 29, § 1.3.

34. Brown, *supra* note 29, § 1.3; *see generally* Hazen, *supra* note 29, § 1.4;.

35. Brown, *supra* note 29, § 1.3.

36. *See id.*

37. *See generally id.*

38. *See* Hazen, *supra* note 29 § 1.4[2][A]. For more on the Administrative Procedure Act, 60 Stat. 237 (1946), see Alan B. Morrison, *Administrative Agencies are Just Like Legislature and Courts—Except When They're Not*, 59 ADMIN. L. REV. 79, 83-84 (2007) (discussing the development of agency functions).

39. *See* Chamber of Commerce of the U.S. v. SEC, 412 F.3d 133 (D.C. Cir. 2005) (noting that the SEC had authority to promulgate rules regarding independence of mutual fund directors but failed to adequately consider costs of compliance); *see also* Hazen, *supra* note 29, § 1.4[2][A]; Business Roundtable v. SEC, No. 10-1305, slip op. (D.C. Cir. July 22, 2011) (commenting that the SEC acted "arbitrarily" and "capriciously" in failing to adequately assess the economic effects of a rule).

40. *See* Hazen, *supra* note 29, § 1.4[2][A].

41. LARRY D. SODERQUIST, *Sources of Federal Securities Law*, SODERQUIST ON THE SEC. L. § 1.4 (2012).

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nouncements are "releases," which do not have the force of law.[42] Releases typically provide interpretations, supplemental information or other policy positions regarding a rule or other legally enforceable provision.[43] Many releases, however, do not interpret the law but instead merely announce new or updated rules and regulations.[44] Like other "nonauthoritative" and nonbinding SEC announcements, interpretive releases have become *de facto* law for securities lawyers, guiding the structuring of transactions and compliance with the rules concerned.[45]

Legal bulletins, like releases, are not legally binding on the Commission but still form another body of *de facto* securities law.[46] Bulletins will frequently address ambiguities in a statute or rule and thus provide clarity to market participants looking to comply with the securities laws.[47] For example, the first legal bulletin ever issued addressed the confidentiality of disclosures an issuer must submit to comply with SEC regulations.[48] Similarly nonbinding, lawyers will also sometimes call the SEC to get an informal interpretation of the law.[49] Typically, a market participant or her counsel will leave a voicemail with the SEC staff, then the message is sent to an individual staff member who will respond within one to two days.[50] Like bulletins and releases, these telephone interactions do not carry the force of law.[51] The SEC also publishes a manual of

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42. Hazen, *supra* note 29, § 1.4[3]; *see also* Brown, supra note 29, § 1.3

43. Hazen, *supra* note 29, § 1.4[3]

44. *Id.*

45. Brown, *supra* note 29, § 1.3.

46. *See* Allen v. Admin. Review Bd., 514 F.3d 468, 478 (5th Cir. 2008) ("Unlike a rule promulgated by the SEC . . . an SEC Staff Accounting Bulletin does not carry with it the force of law.") (internal quotations omitted) (citations omitted).

47. *See* Brown, *supra* note 29, § 1.3.

48. *Id.*

49. Oral communications are considered the least binding interpretive method within the SEC. The oral statements are not even accorded "no action" status and are not considered binding on the staff because of their informal nature. Thomas S. Harman, *Orders and Interpretive/No-Action Letters*, ST007 ALI-ABA 709, 713 (2011).

50. Soderquist, *supra* note 29, at 19.

51. For further discussion of the phone message process, see Brown, *supra* note 29, § 1.3. At many law firms, these phone interpretations are often memorialized in memoranda that are shared with hundreds of lawyers in the firm. In some cases, the informal phone interpretations are shared

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telephone interpretations featuring many commonly asked questions.[52]

b. No-Action Letters: Introduction

SEC no-action letters rank with phone calls as the least persuasive form of SEC regulation.[53] Yet, for reasons that will be discussed in the next subsection, it is also the most complex and significant form of SEC regulation for legal practitioners structuring tender offers. SEC no-action letters have little precedential value and do not even bind the Commission.[54] There are two types of no-action letters, with some being straightforward signals that the staff would not recommend action against the proposed transaction and others featuring an interpretation of the securities laws.[55] Most of these letters are compliance-oriented,[56] and, although these letters were not published until 1970, now all letters are publicly available.[57] Combining approval for new, innovative transactional structures with the public availability of the letters, no-action letters have developed into an area of law that lacks a clear *de jure* power but produces real-world practices that define the law's parameters for practitioners.[58] Because these letters are such important tools in the SEC's regulatory capacity, they create many of the problems associated with debt tender offers today and thus have generated many of the problems discussed in

more broadly with the securities bar and become part of the "lore" of securities law. *See id.; see also* SODERQUIST, *supra* note 29, at 19-21.

52. *Manual of Publicly Available Telephone Interpretations*, SEC.GOV, www.sec.gov/interps/telephone.shtml (last modified Feb. 2, 2007).

53. No-action letters have been compared to IRS private letter rulings. *See* Hazen, *supra* note 29, at § 1.4[4].

54. Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 BUS. LAW. 1019, 1031 (1987).

55. This paper will not discuss this distinction because interpretive and traditional no-action letters are treated identically under the law and often are not even clearly categorized as either traditional or interpretive. Richard H. Rowe, *Reliance on SEC Staff "No Action" Letters—A Shield or a Sword?* 896 PRACTISING L. INST. CORP L. AND PRAC. COURSE HANDBOOK SERIES 667, 680 (June 1995); *see also* Lemke, *supra* note 54, at 1042-42; Brown, *supra* note 29, § 1.3. Nagy, *supra* note 30, at 938.

56. Hazen, *supra* note 29, at § 1.4[4].

57. Brown, *supra* note 29, at § 1.3.

58. *See* SODERQUIST, *supra* note 29, at 18 ("Although these policies and interpretations do not have the force of law, as a practical matter they are often given almost that effect by a securities lawyer.").

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this paper. No-action letters have no statutory basis, but they are regarded as falling within the bounds of an administrative agency's implicit authority.[59] The SEC will, however, sometimes use its own past no-action letters as (still nonbinding) "precedent."[60]

2. *No-Action Letters: Use and Purpose*

The basic purpose of no-action letters is to inform petitioning parties that their proposed transaction will not foment an adverse SEC response.[61] After a no-action request is received, an SEC staffer responds to a properly formed petition by signaling that, under the particular facts presented in the letter, the staff would not recommend that the SEC take action against the transaction as described.[62] SEC responses to no-action requests can be either (i) favorable, (ii) "no response on the merits," or (iii) unfavorable.[63] Any SEC response is publicly available, and the SEC publishes a monthly list of the most important letters written by the SEC staff.[64] Often, behind-the-scenes exchanges take place among the staff—and between the staff and the legal counsel who submitted the petition—before the final letter is issued.[65] This back-and-forth process can go on for months before a formal no-action letter

59. Rowe, *supra* note 55, at 695-96. While there is no statutory authority, no-action letters are governed by SEC rules. *See, e.g., id.* at 704-16.

60. *Id.* at 689-90.

61. Nagy, *supra* note 30, at 937.

62. The SEC's characterization of the no-action letter process is that:

> [m]ost no-action letters describe the request, analyze the particular facts and circumstances involved, discuss applicable laws and rules, and, if the staff grants the request for no action, concludes that the SEC staff would not recommend that the Commission take enforcement action against the requester based on the facts and representations described in the individual or entity's original letter.

U.S. Sec. & Exch. Comm'n, *No Action Letters*, http://www.sec.gov/answers/noaction.htm (last modified Sept. 21, 2012).

63. Lemke, *supra* note 54, at 1031.

64. *Id.* at 1041-42.

65. *See* 3 Louis Loss, Securities Regulation 1895 (2d ed. 1961) ("[I]t is no secret that Commission officials do not express opinions on close questions of construction . . . without some clearance with the Commission."); *see also* Nagy, *supra* note 30, at 943 ("[W]hen a no-action letter request involves a novel or highly complex issue or area of interpretation, the staff typically consults with the Commission prior to issuing a response.").

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is submitted, and the interaction is never formally published or otherwise made public.[66]

At least one scholar[67] and one SEC Commissioner[68] have pointed to the public availability of no-action letters, as well as the monthly publication of a digest,[69] as a strong suggestion that the no-action letters should be given precedential value.[70] However, significantly, a favorable response will not address the legal arguments made by the requesting party; instead, the staff respondent will only inform the party that the respondent will not recommend any SEC action.[71] Even this concession, however, is limited to the provisions enumerated and the facts specified by the requesting party.[72]

The SEC's declining to respond can be levied for a number of reasons, typically involving either (i) a failure to provide enough information, (ii) an issue that the SEC's adjudicatory process should decide, or (iii) an area of law that is developing.[73] Also among the reasons for declining to respond, how-

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66. *See* Nagy, *supra* note 30, at 944 (noting that Commission statements approving or reversing no-action letters from staff are informal and generally made at Commission meetings, rather than being published in the Federal Register or the Code of Federal Regulations).

67. *Id.* at 950 n. 130.

68. *See* Separate Statement of Commissioner Fleischmann, Morgan Stanley & Co., Exchange Act Release No. 28,990, 48 SEC Docket 674 (Mar. 20, 1991).

69. *See* U.S. Sec. & Exch. Comm'n, *SEC News Digest*, http://sec.gov/news/digest.shtml.

70. For discussion of specific and general types of no-action positions that are uniquely persuasive or prominent, see Rowe, *supra* note 55, at 689-96.

71. *See, e.g.*, Salomon Bros. Inc., SEC No-Action Letter, 1990 WL 286946 (Oct. 1, 1990) (no action recommended "based on your representations, but without necessarily agreeing with all of your analysis").

72. The SEC typically ends its no-action letters with the following: "Because this position is based on the facts and representations made in your letter, you should note that any different facts or circumstances might require a different conclusion. Further, this response only represents the staff's position on enforcement action and does not purport to express any legal conclusion on the questions presented." *See* Lemke, *supra* note 54, at 1032; *accord*, Merrill Lynch, Pierce, Fenner & Smith Inc., SEC No-Action Letter, 1993 WL 270676, at *9 (July 19, 1993) ("This no-action position is a staff position regarding enforcement action only and should not be understood to express any legal conclusions regarding the applicability of any provisions of the federal securities laws.").

73. *See* Lemke, *supra* note 54, at 1033.

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ever, is that the SEC has already issued "an interpretive rule or release codifying no-action" for an issue.[74] Adverse responses will more frequently explain their reasons for the decision, but the SEC has no obligation to explain the decision and may rely upon its discretionary authority without further comment.[75] Perhaps aware of the precedential value of no-action letters, the SEC is typically "more conservative" where any doubt remains regarding the practice's legality and will respond adversely to the request.[76] There is an appeals process for adverse responses through both the Commission and the courts, but overturning a decision is unlikely.[77]

Because the no-action letter process does not require notice, hearing, or any other regulatory hurdles, it has become increasingly central to the SEC's ability to respond to market needs.[78] Today, the no-action letter has become the primary way the SEC has molded its rules and regulations to new market conditions.[79] There are two primary advantages to the SEC's use of no-action letters. First, and most important, is the timeliness of the no-action letter process. A no-action letter can be issued as soon as the SEC staff has formulated its response.[80] This immediacy allows the SEC to react to new market needs without facing the protracted notice and comment periods that accompany, for example, rule formation.[81] Second, as one scholar noted, the no-action letter "provides the SEC with an escape hatch from the fuzzy standards often set out in SEC releases or announced through litigated proceed-

74. *Id.* at 1034. This type of refusal further suggests that the no-action letter should be regarded as having precedential value similar to a legally binding interpretation.

75. *See id.* at 1035 (citing Computer Language Res., SEC No-Action Letter, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,185, 76,757-58 (Nov. 26, 1985); Kemper Fin. Servs., SEC No-Action Letter, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶78,182, 76,749-50 (Oct. 30, 1985); Cortland Fin. Group, SEC No-Action Letter, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,180, 76,741-42 (Sept. 26, 1985)).

76. *See* Lemke, *supra* note 54, at 1035.

77. *See id.* at 1036-40.

78. Nagy, *supra* note 30, at 951

79. *See id.*

80. *See id.*

81. *Id.*; *see also* 5 U.S.C. §§ 551-59, 701-06 (2010) (detailing rulemaking requirements for federal administrative agencies).

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ings."[82] Because the securities laws contain broadly written provisions that require interpretation and enforcement, the SEC uses no-action letters as a way to guide issuers and their counsel through more specific criteria required for compliance.[83] This importance is not lost on the SEC. The agency has acknowledged that its no-action letters are "the most comprehensive secondary source[84] on the application of [the federal securities] laws" available to practitioners.[85] The use of no-action letters also comports with the SEC's general reluctance to create bright-line rules[86] by allowing the Commission to adjust its standards with minimal delay. As this paper will show, however, the SEC may rely too much on the no-action letter, using it to modify bright-line issuer requirements without subsequently and accordingly modifying the actual law governing the transaction.

a. Use of No-Action Letters in Courts

Courts have disagreed regarding how much deference no-action letters should receive, given the no-action letter's importance to the SEC's regulatory apparatus. The lack of clarity surrounding transactions involving no-action letters is rooted in this disagreement. Even courts' basic characterizations of no-action letters range widely from "law" to "rulings" to "informal opinions."[87] This stems from the fact that, as nonbinding but persuasive authority, the SEC's interpretations through no-

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82. Nagy, *supra* note 30, at 952.

83. *Id.*

84. The use of the term "source" suggests the precedential value of the no-action letters. And indeed, for a number of regulatory concerns that will lead counsel to request a no-action letter, the SEC has declined to grant no-action letters regarding those concerns unless the applicant has raised a new legal issue. *Id.* at 950; *see also* Lemke, *supra* note 54, at 1034.

85. Expedited Publication of Interpretive, No-Action, and Certain Exemption Letters, Securities Act Release No. 6764, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,228, 89,053-54 (Apr. 7, 1988).

86. Donald C. Langevoort, *The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formulation*, 47 WASH. & LEE L. REV. 527, 530-31 (1990).

87. Nagy, *supra* note 30, at 927 (citing Clemente Global Growth Fund, Inc. v. Pickens, 705 F. Supp. 958, 965 n.2. (S.D.N.Y. 1989); Peck v. Greyhound Corp., 97 F. Supp. 679, 680 (S.D.N.Y. 1951); NYC. Emp. Ret. Sys. v. Dole Food Co., 795 F. Supp. 95, 100 (S.D.N.Y. 1992), *vacated as moot*, 969 F.2d 1430 (2d Cir. 1992)).

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action letters are still considered authoritative in some jurisdictions.[88] Even where no-action interpretations are not accorded deference, their status is still unclear. For example, as one commenter notes, the fact that a court "need not" defer to no-action letters—the standard used in the Second Circuit[89]—leaves open the possibility that district courts could interpret the appellate standard as "an option rather than an obligation."[90]

Federal district courts, however, are divided regarding the amount of weight carried by SEC no-action letters. Some courts grant "controlling weight"[91] or "a considerable degree of deference"[92] to no-action letter interpretations. In *United Mine Workers of America v. Pittson Co.*, the court found that the no-action letter, despite the fact that it was drafted by an SEC staffer, "emanate[d] from the cognizant agency entity and its chief legal advisor" and was thus due full deference by the court.[93] Other courts, seen in *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*,[94] have held that the no-action letter is "not an expression of agency interpretation to which the court must defer,"[95] although the SEC's interpretation may be persuasive nonetheless.[96] In no case, however, has a court held itself *bound* by the interpretation, because the no-

88. Nagy, *supra* note 30, at 928.

89. *See, e.g.*, N.Y.C. Emp. Ret. Sys. v. SEC, 45 F.3d 7, 13 (2d Cir. 1995).

90. Nagy, *supra* note 30, at 981.

91. Brooks v. Standard Oil Co., 308 F. Supp. 810, 813 (S.D.N.Y. 1969); *see also* Nagy, *supra* note 30, at 982.

92. United Mine Workers of Am. v. Pittson Co., [1989-1990 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 94,946, 95,266 (D.D.C. Nov. 24, 1989), *opinion withdrawn by* United Mine Workers of Am. V. Pittson Co., No. C.A. 89-0962 NHJ, 1990 WL 711760 (D.D.C. May 21, 1990); *see also* Nagy, *supra* note 30, at 983.

93. Pittson, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,270 n.8; *see also* Nagy, *supra* note 30, at 983.

94. *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.* 821 F. Supp. 877 (S.D.N.Y. 1993).

95. *Id.* at 885.

96. *See id* at 884. (noting that the SEC's interpretation can provide insight into the term "ordinary business operations," and that the consistency of an agency's position may influence the level of deference for no-action letters); *see also* Nagy, *supra* note 30, at 987 ("[N]o-action letters can often provide substantial insight into the meaning of the SEC's 'ordinary business exception.'").

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action letter does not carry any legal authority.[97] No circuit court has yet adopted any form of automatic deference to the SEC's nonbinding regulatory authorities such as no-action letters. Instead, appellate courts have distinguished between legally binding rules and other issuances such as no-action letters that do not carry any legal weight,[98] although there are sometimes exceptions to very well-established SEC policies.[99]

b. No-Action Letters in the Legal Practice

Because practitioners must adapt to market conditions to serve their clients, SEC no-action letters have become "a source of *de facto* law."[100] Indeed, the no-action letter has become so integrated into the SEC's regulatory framework that at least one scholar has treated official and unofficial SEC regulations as equivalently authoritative for practitioners.[101] According to the SEC itself, the securities laws have been "broadly drafted, establishing basic principles and objectives," which allows the SEC to adapt to new market conditions by "engag[ing] in rulemaking to maintain fair and orderly markets and to protect investors by altering regulations or creating new ones."[102] Often, making use of no-action letters is not inherently problematic due to the fact that most statutory law is broadly construed to grant the SEC discretion. So, for exam-

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97. Rowe, *supra* note 55, at 759-60.

98. *See* Nagy, *supra* note 30, at 979-80 (describing recent case law on judicial deference to no-action letters); *see also* Roosevelt v. E.I. Du Pont de Nemours & Co. 958 F.2d 416, 427 n.19 (D.C. Cir. 1992) (reasoning that Chevron deference is inapplicable to no-action letters because they are not "an agency adjudication or rulemaking"); Amalgamated Clothing & Textile Workers Union v. SEC, 15 F.3d 254, 257-58 n.3 (2d Cir. 1994) (noting that no-action letters are not "entitled to the high level of judicial deference" owed legally binding SEC regulations); N.Y.C. Emp. Ret. Sys., 45 F.3d 7, 13 (2d Cir. 1995) (finding that courts "need not" give no-action letters the "same high level of deference" as they do legally binding SEC regulations).

99. *See* Gerstle v. Gamble-Skogino, Inc., 487 F.2d 1281, 1294 (2d Cir. 1973) (holding that it is difficult to attach any significance to the distinction between a rule and the SEC's institutional interpretation of a rule when counsel to the issuer reasonably believed the interpretation and so advised its client).

100. Nagy, *supra* note 30, at 924-25.

101. *Id.* at 957

102. *Researching the Federal Securities Laws Through the SEC Website*, SEC.GOV, http://www.sec.gov/investor/pubs/securitieslaws.htm (last modified Jan. 19, 2012).

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ple, a no-action letter regarding whether an issuer's proposed disclosure is responsive to disclosure requirements so as to avoid a materially misleading disclosure may allow an attorney to adopt the legal conclusion that the broadly drafted statute is not violated. This type of SEC staff interpretation on a general standard requiring adequate disclosure is distinct from a staff interpretation on compliance with a specific bright-line test. This distinction is important because the SEC has used its broad rulemaking authority to adopt SEC rules that include a number of bright-line tests, such as those regarding tender offer time periods as discussed in this paper. Using the no-action process to circumvent these bright-line tests is much different from using no-action letters to provide interpretive guidance on somewhat ambiguous disclosure standards.

An attorney's primary role in a debt tender offer is to oversee the transaction's compliance with the securities laws.[103] As part of this process—indeed, as its culmination—the attorney drafts an opinion letter validating the transaction.[104] Specifically, the letter avers that neither the client nor the transaction itself has violated the securities laws during the course of the deal process.[105] This letter must be grounded in enforceable law, and thus the attorney is charged with interpreting the relevant statutes and other enforceable legal provisions relevant to a given transaction. Because this "no violation" opinion is reliant upon enforceable legal provisions, it is the area where legal counsel's duty confronts the SEC's regulatory approach, with differences between the SEC's practice and their legally enforceable policies creating a substantial obstacle for counsel to sanction otherwise legal transactions.

C. *Legal Opinion Letters: Overview*

Legal opinion letters are an essential part of the securities transaction process for an investment bank acting as an under-

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103. Comm. on Legal Ops., *Guidelines for the Preparation of Closing Opinions*, 57 Bus. Law. 875, 875 (2002).

104. *Id.*

105. *See* Lillian Blackshear, *Wait. . . What did I Just Say?: What Lawyers Need to Be Concerned About When Issuing Third-Party Closing Opinions*, 10 Transactions: Tenn. J. Bus. L. 71, 80 (2008).

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writer or dealer manager in a tender offer.[106] In the tender offer context, the dealer manager typically receives a legal opinion from the issuer's legal counsel (not from the dealer manager's counsel) providing some protection to the dealer manager from liabilities stemming from illegally structured transactions.[107] In securities transactions the legal opinion letter is, from the attorney's perspective, the end product of the legal structuring of the transaction.[108] Due to the limits of opinion letters' use of administrative materials, deal structures that are of unclear legality, even if sanctioned by no-action letters, create problems for the involved parties.

The rules governing opinion letter writing are thus central to client-attorney relations, such that a law firm's refusal to fully accommodate a client with an opinion letter is functionally the same as turning the client's business away.[109] Clients often view opinion letters as a burdensome exercise that must be satisfied to consummate the transaction,[110] while attorneys often view these letters, particularly in the wake of the Enron scandal, as a way to shield the market participants from liability if the deal fails and the opinion letter turns out to be defective.[111] Both parties harbor dissatisfaction with the economic

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106. *See* Jonathan C. Lipson, *Price, Path, & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)*, 3 BERKELEY BUS. L.J. 59, 62 (2005).

107. *Id.* at 61-62. In all debt tender offer transactions the dealer manager's legal counsel is involved in structuring the transaction to comply with securities laws. It is the issuer's counsel, however, that provides the legal opinion to the dealer manager as to whether the transaction will result in a violation of the securities laws. In a typical debt tender offer transaction, this allows counsel for the dealer manager to be more aggressive in structuring the transaction because it is ultimately the issuer's counsel that must formally conclude that the transaction complies with securities laws.

108. Regarding the purpose and scope of opinion letters generally, see 8 ARNOLD S. JACOBS, OPINION LETTERS IN SECURITIES MATTERS §§ 1:3-1:4 (2008); *see also* Lipson, *supra* note 106, at 63.

109. Lisa H. Nicholson, *A Hobson's Choice for Securities Lawyers in the Post-Enron Environment: Striking a Balance Between the Obligation of Client Loyalty and Market Gatekeeper*, 16 GEO. J. LEGAL ETHICS 91 (2002). Market participants' aversion to reasoned or incomplete opinions primarily follows from the letter's failure to shift liability from participant to attorney—a central function of the opinion letter issuance from the market participants' perspective. *See* Lipson, *supra* note 106, at 102-07.

110. Lipson, *supra* note 106, at 102-07.

111. *Id.* at 106-07.

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efficiency[112] and the liability structures imposed by the opinion letter requirement, and at least one commenter has suggested that these letters will become increasingly controversial yet integral in securities transactions in the future.[113]

Attorneys can, however, negotiate the amount of liability they incur by issuing an opinion letter by managing the letter's scope.[114] Opinion letters can offer two levels of approval, either approving of a transaction in its entirety, or limiting the opinion to the aspects of the transaction that the opinion writer determines are fully compliant with the securities laws.[115] Under the latter approach, the firm may offer an opinion that does not approve or disapprove of the transaction outright; instead, the firm limits its opinion to other aspects of the transaction but also discusses the no-action letters supporting the transaction's qualities that violate the letter of the securities laws.[116] This approach is referred to as a "reasoned" opinion because it qualifies the opinion.[117] Due to the fact that opinion letters' cost-effectiveness relates the scope of the opinion to the time involved in creating it,[118] this option is probably the least financially desirable for a client. Financial inefficiency, moreover, may not be the most problematic aspect of this form of opinion letter. Because of clients' hostility to opinion letters as an obligation,[119] any attempts to protract the opinion process through discussion or qualification are

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112. For discussion of economic efficiency of opinion letters, see Lipson, *supra* note 106, at 63-65; *see also* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE. L.J. 239, 274-76 (1984); Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679, 694-97 (1996); Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1 (2005).

113. Lipson, *supra* note 106, at 65. This contention was supported by the opinion of surveyed attorneys, who believed that attorneys were "becoming increasingly attractive litigation targets when transactions failed," and that attorney-produced opinion letters "would form an important link in the chain leading to liability." *Id.*

114. *Id.* at 64-65; *see also* Kelly A. Love, *A Primer on Opinion Letters: Explanation and Analysis*, 9 TRANSACTIONS: TENN. J. BUS. L. 67, 68 (2007).

115. Love, *supra* note 114, at 68.

116. *Id.*

117. *Id.* at 67.

118. *See* Lipson, *supra* note 106, at 77.

119. *See id.* at 80.

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unwelcome from clients and may risk alienating them.[120] The other approach sanctions a transaction without reservation. Because this approach offers comprehensive approval of the transaction, it is known as a "clean opinion."[121] The clean opinion's levels of certainty and standardization make it the much-preferred letter type for clients.[122]

Opinion letters generally establish: (1) the authority of the client to engage in the transaction; (2) the transaction's enforceability against the company; and (3) that the transaction complies with law.[123] For debt tender offers, attorneys typically produce an opinion letter including a "no violation" opinion[124] that sanctions the transaction under the relevant securities laws. This opinion supports the last of the three aforementioned goals—legal compliance—and generates the most market value of any of the individual opinions included in the opinion letter.[125] Like other opinions, "no violation"

120. *See id.*

121. Love, *supra* note 114, at 68.

122. *Id.* And, of course, firms willing to grant clean letters will possess a comparative advantage against those firms who refuse to issue opinion letters validating noncompliant transactions.

123. Lipson, *supra* note 106, at 62. In addition to the actual legal opinions included in an opinion letter, the letters often include or are accompanied by a separate letter addressing the adequacy of disclosure in the transaction documents. *See generally Negative Assurance in Securities Offerings (2008 Revision)*, 64 BUS. LAW. 395, 396-97 (2009). This statement on the adequacy of disclosure is called "negative assurance" and is not technically a legal opinion, although it is commonly referred to as a "10b-5 opinion" in practice. *Id.* at 397. Because the antifraud provisions of Section 10(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5 (2012) ("Rule 10b-5"), also apply to tender offers, this raises the issue of whether negative assurance language should be included in an issuer counsel opinion letter to a dealer manager. The main purpose of negative assurance is to establish a "due diligence" defense for an investment bank acting as an underwriter. Because due diligence is not a defense to a 10b-5 claim, negative assurance is not normally provided by issuer's counsel in connection with a debt tender offer. Dealer managers sometimes request negative assurance on the basis that Rule 10b-5 requires "scienter" and negative assurance from the issuer's counsel will help to demonstrate the absence of scienter. *Id.* (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (describing scienter as the "intent to deceive, manipulate, or defraud or similar reckless conduct")).

124. For a brief description of securities law opinion requirements, see Task Force on Secs. Law Ops., *Legal Opinions in SEC Filings*, 59 BUS. LAW. 1505 (2004).

125. *See* Lipson, *supra* note 106, at 76.

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opinions are not expected to comprehensively cover all areas of law. Instead, as noted by the TriBar Committee, a "no violation" opinion "addresses *only the law* (including published rules and regulations of government agencies) of jurisdictions that are specified for coverage in the opinion letter."[126]

The fundamental principles governing opinion letter writing are customary, but custom only extends to areas such as the understood meaning of words and phrases commonly used in opinions.[127] Custom also guides the degree of factual and legal inquiry undertaken by an attorney to support a legal opinion.[128] While custom governs the communications between client and attorney in this format, legal opinion letters adhere to a definition of law that is fairly rigid. In the definitions provided by the TriBar Opinion Committee, "law" is defined as "statutory, decisional and regulatory law at the state or federal, but not the local, level,"[129] which prevents attorneys from citing no-action letters in their legal analysis. Opinion letters also cannot incorporate so-called "market opinions," which only reflect "that lawyers are rendering [the opinion] in other transactions" instead of actual law.[130] With these constraints, legally enforceable policies and procedures must reflect general market practices for those practices to be accepted by an attorney, which precludes using no-action letters. In areas where the securities laws are ambiguous, however, a no-action letter may serve as a basis for legal *reasoning* but may not be used as actual law.[131]

126. TriBar Op. Comm., *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591, 661 (1998) (emphasis added); *see also* Comm. on Legal Ops., *Legal Opinion Principles*, 53 BUS. LAW. 831, 832 (1998). In addition to only covering the law of specified jurisdictions, a "no violation" legal opinion is understood, as a matter of custom, to cover only laws that a reasonable lawyer would evaluate as part of the transaction. TriBar Op. Comm., *supra*, at 662.

127. TriBar Op. Comm., *supra* note 126, at 600-01.

128. *Id.* at 601.

129. *Id.* at 607.

130. Comm. on Legal Ops., *supra* note 103, at 876.

131. *See* Rowe, *supra* note 55, at 736-37.

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III.
PROBLEMS IN TENDER OFFER STRUCTURING: GENERAL AND SPECIFIC OBSTACLES

With respect to debt tender offers, there are several issues related to tender offer timing and pricing structures that remain open to varying interpretations under Section 14(e) and Regulation 14E. This section addresses some of the most significant interpretive issues under specific structures that have arisen as the SEC has responded to market needs. As has already been discussed, debt securities are extremely susceptible to market forces that are exogenous to the issuer's own financial position. Because debt sales and purchases are so sensitive to prevailing interest rates,[132] the interaction between a tender offer's time window and its pricing structure can mean the difference between success and failure. For example, one study found that in a bond tender offer a one-percent increase in the premium increases the percentage tendered by approximately nine percent.[133] Thus understanding the precise contours—how to operate at the margins of the SEC's policies regarding the securities laws' demands—is paramount both to an optimal tender offer and the value of an attorney's input regarding the transaction.

A. *The Williams Act of 1968*

Tender offer regulation in the United States began with the Williams Act of 1968 (the "Williams Act").[134] The Williams Act intended to place the offeror and the security holder on equal footing, and was a response to fears that both parties

132. Mann & Powers, *supra* note 17, at 554.

133. *Id.* at 549; *see also* Michael Hartzman et al., *Fraud on the Market: Analysis of the Efficiency of the Corporate Bond Market*, 2011 COLUM. BUS. L. REV. 654, 672-73 (2011).

134. Securities Exchange Act of 1934 §§ 13(d)-(f), 14(d)-(f), codified at 15 U.S.C.A. §§ 78l, 78m(d)-(e) and 78n(d)-(f) (West 2012), (the "Williams Act"). The Williams Act has been amended several times by Congress and supplemented by the SEC pursuant to its rulemaking authority under the Exchange Act. The Williams Act is commonly understood to include rules adopted under the authority provided by Section 23(a) of the Exchange Act for the SEC to adopt rules and regulations "as may be necessary or appropriate to implement to the provisions of the [Exchange Act]."

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had means to obstruct or undermine the transaction.[135] The Williams Act thus prohibits "fraudulent, deceptive or manipulative acts or practices" in connection with tender offers[136] by (i) requiring extensive disclosure,[137] (ii) imposing requirements on the length of time tender offers must be held open,[138] and (iii) giving substantive antifraud protections to holders of securities.[139] The provisions of the Williams Act are part of the Exchange Act and are supplemented by detailed rules adopted by the SEC pursuant to its rulemaking authority, and both private and public parties may have standing to sue under the Act.[140]

Not all Williams Act provisions apply to every tender offer. The SEC has noted that the provisions of the Williams Act that apply "depend[ ] on: (i) the party conducting the offer, (ii) the nature of the subject security, (iii) whether the security is registered under Section 12 of the Exchange Act, and (iv) whether or not the bidder would own more than five percent of the securities after the tender offer."[141] Of these factors, the second ("the nature of the subject security") is significant

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135. Specifically, though, most congressional testimony at the time raises fears about "the defenseless position of shareholders and management of target companies in a cash takeover bid." *Investor Protection in Corporate Takeovers; Increase in 'Regulation A' Exemption: Hearing on H.R. 4285, S. 3431, and S. 336 Before the Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 6 (1970) (comments of Rep. Monogan); *see also* David J. White, *Rulemaking Under Section 14(e) of the Exchange Act: the SEC Exceeds Its Reach in Attempting to Pull the Plug on Multiple Proration Pools*, 36 VAND. L. REV. 1313, 1342 (1983).

136. Securities Exchange Act of 1934 § 14(e), 15 U.S.C.A. § 78n(e) (West 2012).

137. The disclosure requirements include filing a Schedule TO with the SEC, 17 C.F.R. § 240.14d-100 (2012), which must contain specific disclosures prescribed by the SEC.

138. *See, e.g.*, Regulation 14E, 17 C.F.R. § 240.14e-1 (2012).

139. The substantive protections include proration requirements in Section 14(d)(6) of the Exchange Act, 15 U.S.C.A. § 78n(d)(6) (West 2012); withdrawal rights in Rule 14d-7, 17 C.F.R. § 240.14d-7 (2012); the best price rule in Rule 14d-10(a)(2), 17 C.F.R. § 240.14d-10(a)(2) (2012); and the all-holders rule in Rule 14d-10(a)(1), 17 C.F.R. § 240.14d-10(a)(1) (2012).

140. For further discussion of standing and maintaining a cause of action under the Williams Act, see W. Jeffrey Edwards, *Tender Offers: Standing to Sue, Prohibited Practices, Reliance of Non-Tenderer*, 37 WASH. & LEE L. REV. 930, 932-38 (1980).

141. SEC Interpretation: Commission Guidance on Mini-Tender Offers and Limited Partnership Tender Offers [hereinafter Tender Offer Gui-

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because debt securities are treated differently than equity securities under the Williams Act. While the entire Williams Act applies to equity securities, debt securities are exempt from some Williams Act requirements.

The tender offer rules under the Williams Act form three primary groups: (1) Section 14(d) and Regulation 14D,[142] which contain rules regarding filing and disclosure; (2) Section 14(e) and Regulation 14E,[143] which contain antifraud and procedural rules; and (3) Rule 13e-4,[144] which contains rules applicable to issuer tender offers. Two of the groups—(i) Section 14(d)[145] and Regulation 14D, and (ii) Rule 13e-4[146]—ap-

dance], Exchange Act Release No. 43069, 2000 WL 34033799 (July 24, 2000).

142. Rules Relating to Tender Offers and Changes in Control, 17 C.F.R. § 240.14d-1 (2012). Regulation 14D is the most extensive of the three categories of tender offer rules.

143. 17 C.F.R. § 240.14e-1 (2012). An important distinguishing feature of Regulation 14E is that it applies to all tender offers, as opposed to Regulation 14D and Rule 13e-4, which each apply only to tender offers for equity securities.

144. 17 C.F.R. § 240.13e-4 (2012).

145. The filing requirement of Section 14(d) is stated generally in the statute, making it "unlawful for any person, directly or indirectly . . . to make a tender offer for, or a request or invitation for tenders of, any class of an *equity security*." 15 U.S.C.A. § 78n(d)(1) (West 2012) (emphasis added). The specific requirement to file a Schedule TO for a third-party tender offer under Section 14(d) is included in Rule 14d-3 of Regulation 14D. 17 C.F.R. § 240.14d-100 (2012) (stating that "[n]o bidder shall make a tender offer . . . unless as soon as practicable on the date of the commencement of the tender offer such bidder . . . [f]iles with the [SEC] a Tender Offer Statement on Schedule TO").

146. Rule 13e-4 defines the term "issuer tender offer" to include "a tender offer for, or a request or invitation for tenders of, any class of *equity security*, made by the issuer of such class of equity security or by an affiliate of such issuer." 17 C.F.R. § 240.13e-4(a)(2) (2012) (emphasis added). The requirements of Rule 13e-4 are then limited to issuer tender offers, including the obligation to file a Schedule TO included in Rule 13e-4(c)(2).

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ply only to equity securities, so debt securities[147] are only subject to Section 14(e) and Regulation 14E.[148]

1. *Section 14(e) and Regulation 14E*

Regulation 14E and the statutory provisions of Section 14(e) of the Exchange Act contain antifraud provisions prohibiting "fraudulent, deceptive, and manipulative acts" in connection with a tender offer.[149] These prohibitions apply to all tender offers, including tender offers for debt securities.[150] The language of Section 14(e) is designed as a catch-all provision for fraudulent tender offer activities, similar to the catch-all provision of Section 10 under the Exchange Act[151] with respect to purchases and sales of securities.[152] The antifraud provisions of the Williams Act found in Section 14(e) are de-

147. The debt/equity distinction is not precisely accurate. Under the Williams Act, if the debt securities in question are convertible into equity securities registered under Section 12 of the Exchange Act, the tender offer must comply with the applicable provisions of Section 14(d) of the Exchange Act, Regulation 14D and Rule 13e-4, in addition to Section 14(e) of the Exchange Act and Regulation 14E.

148. For example, the detailed disclosure requirements for issuer tender offers under Rule 13e-4, including the obligation to file a Schedule TO with the SEC, are limited to issuer tender offers with respect to equity securities. Likewise, the similar disclosure requirements for third-party tender offers under Section 14(d) are limited to tender offers for equity securities.

149. 15 U.S.C.A. § 78n(e) (West 2012).

150. *Id.* stating in pertinent part:

> 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.

151. Exchange Act § 10, 15 U.S.C.A. § 78j (West 2012). ("It shall be unlawful for any person, directly or indirectly . . . [t]o 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 . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.").

152. The rule-making authority of Section 14(e) is also similar to that provided by Section 10(b). It is important to note that the broad antifraud provision of Section 10(b) and Rule 10b-5 also apply to tender offers, in addition to the specific antifraud provisions of the Williams Act. *See supra* note

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fined broadly, with Congress intending that the SEC use its rulemaking authority to define terms such as "fraudulent" or "deceptive" and enforce the statute under those rules.[153]

The SEC adopted Regulation 14E to provide basic procedural protections to investors for almost all tender offers, including those for debt securities.[154] The antifraud provisions of Regulation 14E are in some instances so unclear that they lead to disclosures (and thus expensive information gathering and disclosure drafting) that may be unnecessary for full compliance. For example, Regulation 14E does not require any specific disclosure statement such as the Schedule TO required under Regulation 14D and Rule 13e-3. But the broad language of Section 14(e) prohibiting the omission of material facts in connection with tender offers and potential liability under Rule 10b-5 leads most companies conducting tender offers for debt securities to prepare and distribute an offer to purchase. These disclosures include the same information that would be required in a Schedule TO for an issuer tender offer subject to Rule 13e-4. Unlike a Schedule TO, this offer to purchase document is not filed with the SEC or subject to SEC review.

But the SEC's rulemaking under Section 14(e) has extended beyond demanding certain disclosures and assessing when those disclosures are materially misleading. On the other end of the spectrum, Regulation 14E incorporates some strictures that are governed by bright lines. Regulations define the timing and pricing of a tender, prescribe the time periods a tender must be open, and outline how pricing structures must be structured to avoid being fraudulent.[155] Ironically, the existence of bright lines creates much deeper inconsistencies and confusion for legal practitioners than the aforementioned disclosure obligations.

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122 and related text regarding negative assurance letters under Rule 10b-5 in the context of debt tender offers.

153. White, *supra* note 135, at 1342-43.

154. The provisions of Regulation 14E apply to public and private companies and to tender offers for registered and unregistered securities. Certain tender offers are exempt from Regulation 14E, such as tender offers for "exempt securities" as defined by the Section 3(a)(12) of the Exchange Act. Exempt securities under Section 3(a)(12) include government and municipal bonds, among other specified securities.

155. *See* White, *supra* note 135, at 1343.

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B. *Regulation 14E and Timing Requirements*

For tender offers in debt capital markets, the most problematic provisions of Regulation 14E are the timing requirements of Rule 14e-1.[156] Rule 14e-1(a) requires tender offers to be held open for at least twenty business days, and Rule 14e-1(b) requires tender offers to be held open for at least ten days following a change in the tender offer price or in the percentage of securities sought in the tender offer.[157] Because debt purchases are unusually time-sensitive, the Williams Act initially exempted all debt tender offers until the exception was rescinded on March 1, 1986.[158] As will be seen, the SEC, responding to market needs, almost immediately sought to circumvent the timing requirements for debt tender offers, but their method of addressing the issue left further problems to be resolved.

1. *Twenty Business Day Requirement*

Rule 14e-1(a) prohibits anyone conducting a tender offer from holding it "open for less than twenty business days from the date such tender offer is first published or sent to security holders."[159] Because prices for debt securities are tied closely to the interest rates of benchmark U.S. Treasury securities,[160] fluctuations in those benchmark interest rates cause fluctuations in the prices of the debt securities. This makes it extremely difficult for anyone to determine the proper pricing for a debt tender offer twenty business days in advance. The staff of the SEC recognized soon after Rule 14e-1(a) was adopted in 1986[161] that the requirement would not facilitate

156. 17 C.F.R. § 240.14e-1 (2012).

157. *Id.*

158. CHARLES J. JOHNSON, JR. & JOSEPH MCLAUGHLIN, CORPORATE FINANCE AND THE SECURITIES LAWS 826 (4th ed. 2006).

159. 17 C.F.R. § 240.14e-1 (2012). The SEC defines a "business day" for tender offers as the time period from 12:01 a.m. through 12:00 midnight. Therefore, a tender offer must remain open through midnight on the 20th business day. 17 C.F.R. § 240.13e-4(a)(3) (2012).

160. Mann & Powers, *supra* note 17, at 554.

161. Amendments to Tender Offer Rules; All-Holders and Best-Price, Securities Act Release No. 6,653, Exchange Act Release No. 23,421, Investment Company Act Release No. 15,199, 51 Fed. Reg. 25873 (July 11, 1986). Though the cited release discusses 14e-1(b) (the ten-day requirement), the release had a collateral effect on 14e-1(a) because a tender offer open for

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efficient debt capital markets and thus determined that the twenty-day requirement should not be applied strictly to all tender offers for debt securities.[162]

The SEC's response to the exemption's removal, using no-action relief to abrogate legally binding obligations, illustrates how the Commission's regulatory structure can create tension between *de facto* and *de jure* securities law, providing *practical* clarity at the cost of *legal* certainty. In a series of no-action letters beginning with a request from Salomon Brothers in 1986,[163] the SEC staff stated that it would not pursue enforcement action against issuers or investment banks acting as dealer managers that conduct tender offers for non-convertible debt securities that remain open for seven to ten calendar days instead of the twenty business days required by Rule 14e-1(a).[164] In allowing these shortened tender offers, the staff recognized that tender offers for non-convertible debt securities differ from typical equity self-tenders and are highly sensitive to short-term fluctuations in interest rates.[165] The staff

less than ten days is, by definition, also open for less than twenty. *See* JOHNSON & MCLAUGHLIN, *supra* note 158, at 13, 35-36.

162. *See infra* notes 163-64 and accompanying text.

163. Salomon Bros. Inc., SEC No-Action Letter, 1986 SEC No-Act. LEXIS 1914 (Mar. 12, 1986).

164. *Id.* Subsequent to the 1986 Salomon Brothers no-action letter, the SEC granted relief in almost identical circumstances in no-action letters for Goldman, Sachs & Company, First Boston Corporation, Kidder Peabody & Company, and Shearson Lehman Brothers Incorporated. 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); Kidder, Peabody & Co., No-Action Letter, 1986 WL 66825 (May 5, 1986); Shearson Lehman Bros. Inc., SEC No-Action Letter, 1986 WL 67463 (Dec. 3, 1986).

165. *See, e.g.*, Salomon Bros. Inc., SEC No-Action Letter, 1986 SEC No-Act. LEXIS 1914 Mar. 12, 1986). The staff of the SEC was influenced by Salomon Brothers' explanation, which it repeated in the staff response letter:

> Based on Salomon Brothers' experience, Issuer Debt Tender Offers are generally held open for a period of seven to ten calendar days depending on a number of factors, including the percentage of debt held by individual debtholders and the principal amount of debt that the issuer desires to retire. Extending the period during which an Issuer Debt Tender Offer remains open increases the likelihood that interest rates will increase or decrease during the tender offer period. Both the issuer and its debtholders will be exposed to additional interest rate risk in these circumstances. Because interest rates can move against a debtholder during the tender offer period, a debtholder has a disincentive to tender his

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also noted that individual non-institutional debt holders would not be more likely to participate in a tender offer simply because the tender offer stayed open for twenty business days rather than seven to ten calendar days.[166]

The *Salomon Brothers* no-action letter also shows how the SEC's letter-writing process can blur the distinction between no-action and interpretive letters. In the letter, the SEC staff appears to engage in an in-depth legal analysis similar to the courts' disposition of a case. The letter sets forth criteria that must be satisfied to conduct a shortened tender offer without attracting an SEC enforcement action. According to the letter, shortened tender offers must:

(1) Offer to purchase for cash any and all non-convertible, investment-grade debt securities of a particular class or series;
(2) Be open to all record and beneficial holders of that debt security;
(3) Be conducted in a manner designed to afford all record and beneficial holders of that debt security a reasonable opportunity to participate, including dissemination of the offer on an expedited basis if the offer is to be held open for less than ten calendar days; and
(4) Not be conducted in anticipation of or in response to other tender offers for the issuer's securities.[167]

The SEC's no-action issuance presents two serious legal concerns. First, and most obviously, the SEC is not giving an *interpretation* of the twenty day requirement and is not providing the letter recipient an alternative way to *comply with* the law. Instead, the Commission is informing the letter recipient that it will not take action once the Regulation is violated, so long as the four criteria are met. Because the twenty day rule

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debt early. As a result, if interest rates decline during the tender offer period, the issuer may retire much less debt than it intended. If, on the other hand, interest rates rise during the tender offer period, the issuer may retire much more debt than it intended. In either case, the issuer will be confronted with a substantial potential mismatch between the principal amount of debt it retires and the principal amount of debt it intends to issue in the refunding.

166. *Id.*

167. *Id.*

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is a bright-line standard that is not open to Commission (or court) interpretation as a more broadly written rule would be, the no-action letter leaves the recipient in violation of the law but with the knowledge that it will almost certainly be able to proceed without SEC intervention.

Second, the 1986 *Salomon Brothers* no-action letter, viewed in the context of subsequent letters, shows how much power the SEC staff can exercise through no-action letters without normal regulatory oversight. While the 1986 no-action letter is not restricted to investment grade debt, in a subsequent no-action letter to Salomon Brothers in 1990 the SEC staff added an investment grade rating as a fifth condition to a shortened tender offer period.[168] In the 1990 letter, the Staff stated that it "believes that Issuer Debt Tender offers for cash for any and all non-convertible, investment grade debt securities of a particular class or series may present considerations that differ from any and all or partial issuer tender offers for a class or series of equity securities or non-investment grade debt."[169] This fifth condition has remained since the 1990 Salomon no-action letter.[170]

Thus so long as an issuer is able to meet the five criteria described above, it may complete its debt tender offer in as little as one calendar week. If the offer is held open for less than ten calendar days, however, the third requirement from the 1986 *Salomon* letter mandates dissemination of the tender offer materials on an expedited basis. It is not clear exactly what procedures are required to disseminate tender offer materials on an expedited basis, but the *Salomon* letter noted that a typical issuer tender offer for debt securities is commenced by a press release and that tender offer materials are

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168. Salomon Bros. Inc., SEC No-Action Letter, 1990 WL 286946 (Oct. 1, 1990).

169. *Id.*

170. Although the staff of the SEC has made just one exception in a written no-action letter, one commentator has noted that the staff "has been willing in some instances to grant oral relief in connection with offers for non-investment-grade or split-rated securities." JOHNSON & MCLAUGHLIN, *supra* note 158, at 13-40. The one formal no-action letter was issued in 1999 and related to high-yield bonds of approximately 100 Brazilian corporations. Goldman, Sachs & Co., Brazilian Liquidity Transaction Co., and Banco Nacional de Desenvolvimento Economico e Social, SEC No-Action Letter, 1999 SEC No-Act. LEXIS 546 (May 10, 1999).

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mailed to each registered holder the same day.[171] Then, shortly following the tender offer's commencement, "brokerage houses and depositary institutions usually are contacted by telephone . . . in order to expedite their dissemination of information concerning the tender offer to beneficial owners of the debt."[172]

Comparing the 1986 Salomon letter's suggestions regarding dissemination procedures to its treatment of the 20-day rule shows how the SEC has unsettled the law governing tender offers. The tender offer materials requirement offers interpretive discretion where the twenty day rule only offers the SEC the option to not prosecute a violation. In matters such as the determination of adequate disclosures for compliance, a no-action letter may interpret the required provision to ensure that investors are protected and that the issuer is in full compliance with the law. If a statute or regulation is only protecting against "fraudulent" or "misleading" disclosures, then the SEC's no-action letter, even if not legally enforceable, at least provides reasonable guidance for an attorney and her client to determine that the transaction complies with the law.

The 1986 *Salomon* letter, however, presents very different considerations. Rule 14(e)-1(a) clearly requires a bright-line, twenty-day time frame to be in compliance with the SEC regulations. The 1986 letter does not provide reasons to circumvent the time frame; instead, it merely informs the recipient that no action will be taken. But the requirements presented in the 1986 letter that allow for an expedited time frame have become common practice,[173] and issuers want to take advantage of the SEC's position and enjoy greater financial flexibility regarding the timing of the offer. Small shifts in pricing information or prevailing interest rates can lead to an offering's success or failure in the debt markets, so these timing requirements may be integral to an issuer maintaining a level playing field with competitors who are availing themselves of the SEC staff's position and benefiting accordingly. While issuers insist upon taking advantage of these opportunities, the gap between *de facto* and *de jure* Williams Act policies remains.

171. Salomon Bros. Inc., SEC No-Action Letter, 1986 SEC No-Act. LEXIS 1914 (Mar. 12, 1986).

172. *Id.*

173. *See id.*

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2. *Ten Business Day Requirement*

Another Williams Act timing requirement similarly reveals a divide between the practical, *de facto* reality of Regulation 14E and its actual requirements. Rule 14e-1(b) prohibits tender offers from changing:

> 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.[174]

As noted above, the SEC staff has taken a no-action position with respect to tender offers for investment-grade debt securities, allowing the entire offering to be completed in seven to ten calendar days.[175] Therefore, at least where the conditions of the 1986 line of no-action letters are satisfied, an issuer may reduce the extension period to as little as seven calendar days. This ten-day requirement runs into greater difficulties in some specific pricing structures, notably the various forms of fixed-spread tender offers. The period's length can be critical where a formula is used to determine the tender price, and the variables of the formula are not fixed until after some period following the launch of the tender offer.[176] In those circumstances, the issuer must extend the tender offer period, if necessary, so that at least ten business days remain before expiration of the offer.

The increased flexibility the SEC has provided for the ten-day requirement, however, faces the same difficulties as the required twenty-day window. Maintaining the flexibility to price structures in ways that violate the ten-day rule is integral

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174. 17 C.F.R. § 240.14e-1(b) (2012).

175. *See supra* notes 162-65 and accompanying text.

176. It could also become important, for example, where an issuer's tender offer is so successful that the issuer desires to substantially increase the volume of securities it intends to buy in the tender offer. Although it seems logical that companies would frequently increase the price when they and their dealer managers recognize that they need to raise the price to purchase the desired volume of securities, this practice is not common. *See* Mann & Powers, *supra* note 17, at 547 n.2 ("[I]ncreasing the tender offer price is actually very uncommon. Our conversations with liability management professionals indicate that tendering firms aggressively avoid acquiring a reputation of being soft when faced with bondholder resistance.").

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to debt capital markets. But because the SEC has chosen to adjust its policies through no-action letters, these transactions are, strictly speaking, still illegal whether the SEC takes action against them or not. From an issuer's perspective, the no-action process for the ten-day rule may have been desirable initially. But the ultimate legality of the transaction is at best unclear and at worst completely untenable. This ambiguity may have serious consequences for the attorneys involved in these transactions, or may at least expose them to liabilities and concerns that are directly connected to the SEC's use of promulgations that do not carry any legal weight.

C. *Specific Structures for Debt Tender Offers*

1. *Fixed-Spread Tender Offers*

Issuers have sought to insulate themselves from interest rate risk by delaying setting the price for the security in question.[177] In a "fixed-spread" tender offer, the tender offer price on the date of (or the date preceding) the tender offer is determined by reference to a stated fixed percentage over the current yield on a benchmark U.S. Treasury security.[178] The SEC staff has also given guidance regarding the application of Rule 14e-1(b) to such fixed-spread pricing formulas, which may be deemed to change the tender offer price on a daily basis or, in some cases, throughout the day.[179]

a. Investment-Grade Debt

Following the issuance of the 1986 no-action letters regarding Rule 14e-1(a), Salomon Brothers proposed a fixed-spread pricing method for investment grade debt tender offers.[180] Because the nominal price of the tender offer could vary on a daily basis throughout the tender offer period, the pricing structure undermines the bright-line rule by never settling its actual price until near closing.[181] Of course, true com-

177. *See* SLONAKER, *supra* note 20, at 799.

178. *Id.*

179. Salomon Bros. Inc., SEC No-Action Letter, 1990 WL 286946 (Oct. 1, 1990).

180. *Id.*

181. Although this pricing structure violates the letter of 14e-1(b), it does not necessarily violate its spirit. Rule 14e-1(b) was enacted not to prevent pricing that is ambiguous yet mutually understood (as is the case with fixed-

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pliance with the ten-day rule would result in a perpetually open tender, since the price never settles and thus continually resets the ten-day timer. The issue, then, was whether fixed-spread pricing could be used at all in light of Rule 14e-1(b), which requires that a tender offer be open an additional ten business days following a change in the amount of consideration offered.[182]

The staff concluded that fixed-spread tender offers were permissible when six criteria were met. Because this six-factor test was created in a no-action letter, it has become a customary standard without having any actual legal weight for the issuer or other parties involved in the transaction.[183] According to the SEC, the fixed-spread tender offer must:

(1) Offer to purchase for cash any and all non-convertible, investment grade debt securities of a particular class or series;
(2) Be open to all record and beneficial holders of that debt security;
(3) Provide information regarding the Benchmark Security as reported each day in a daily newspaper of national circulation;
(4) Be conducted in a manner designed to afford all record and beneficial holders of that debt security a reasonable opportunity to participate, including dissemination of the offer on an expedited basis if the offer is to be held open for less than ten calendar days;
(5) Ensure prompt payment to all tendering holders of the debt securities after such securities are accepted for payment; and
(6) Not be conducted in anticipation of or in response to other tender offers for the issuer's securities.[184]

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spread pricing), but instead to prevent "Saturday Night Specials," where an offeror would gain a substantial toehold on a company's equity immediately before launching its tender offer. *See* Steven M. Davidoff, *The SEC and the Failure of Federal Takeover Regulation*, 34 FLA. ST. U. L. REV. 211, 216-23 (2007).

182. Salomon Bros. Inc., SEC No-Action Letter, 1990 WL 286946 (Oct. 1, 1990).

183. *Id.*

184. *Id.*

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Since this no-action letter, fixed-spread pricing has become very common in issuer self-tenders for debt securities.[185] This pricing methodology, however, is not available for all debt tender offers. Many issuers and the dealer managers advising them find that the characteristics of the debt securities at issue or the structure of the proposed tender offer fails to meet the conditions under which the SEC has been willing to grant formal no-action relief to use fixed-spread pricing. But because the SEC has used the no-action process to "legalize" the fixed-spread practice, the Commission is able to govern that territory informally without normal (and extensive) comments from concerned parties involved in formal rulemaking.

b. Non-Investment Grade Debt

When providing no-action relief for fixed-spread tender offers of investment-grade debt, the SEC staff noted the advantages to issuers and holders of debt of using this pricing formula to reduce interest rate risk to all parties.[186] However, the no-action relief in the Salomon Brothers subsequent no-action letters was limited to tender offers for investment grade debt.[187] The SEC staff has determined that tender offers for investment grade debt securities may present considerations that differ from tender offers for non-investment grade debt securities[188] and has been unwilling to broadly extend its no-action position to fixed-spread tender offers for non-investment grade debt.[189]

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185. For recent examples, see *infra* Appendix A.

186. Salomon Bros. Inc., SEC No-Action Letter, 1990 WL 286946 (Oct. 1, 1990).

187. *Id.*

188. *Id.*

189. In limited circumstances, the SEC staff has provided informal no-action relief to companies conducting fixed-spread tender offers for non-investment grade debt. *See* Edwards, *supra* note 15, at 951; and JOHNSON & MCLAUGHLIN, *supra* note 158, at 13-40. *See also* Goldman, Sachs & Co., Brazilian Liquidity Transaction Co., and Banco Nacional de Desenvolvimento Economico e Social, SEC No-Action Letter, 1999 SEC No-Act. LEXIS 546 (May 10, 1999) (in which the SEC staff provided formal no-action relief). In the Goldman Sachs no-action request letter, the authors noted that "we understand that the staff has granted oral relief in connection with fixed spread tender offers for non-investment grade debt provided that, among other things, the yield to maturity of the Benchmark United States Treasury secur-

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Non-investment grade debt differs from investment-grade debt in its higher probability that the tendering company is in financial distress.[190] There are two primary distinctions flowing from the company's likely distress. The first is as uncontroversial as it is also probably innocuous: non-investment grade debt carries a higher interest rate to reflect the (increased) risk that the company will default on its obligation. This is why non-investment grade debt is referred to as "high-yield" debt.

The second difference is much more controversial and, if true, more suggestive that the differing types of investment grades should be treated differently. A distressed company may be more likely to use coercive measures to pressure bondholders to tender their securities in an effort to alleviate financial pressures by reducing indebtedness.[191] Some scholars, however, have argued that coercion is not a major problem with debt tender offers,[192] and at most the only unique "weapon" that issuers of high-yield debt will typically possess is the threat of bankruptcy.[193] Otherwise, in areas such as covenant stripping and exit consents (further discussed below), both investment-grade and non-investment grade debt issuers are always incentivized to strip the bonds of their restrictions.[194] But because the risk of bankruptcy should be priced into the interest rate, it is unclear why this should be an SEC concern. In addition to the weaknesses of the coercion argu-

ity used to price the transaction is measured two days prior to expiration." *Id.*

190. *See* John C. Coffee, Jr. & William A. Klein *Bondholder Coercion: The Problem of Constrained Choice in Debt Tender Offers and Recapitalizations*, 58 U. CHI. L. REV. 1207, 1211 (1991).

191. *See id.*

192. *See, e.g.*, Lewis S. Peterson, *Who's Being Greedy? A Theoretical and Empirical Examination of Holdouts and Coercion in Debt Tender and Exchange Offers*, 103 YALE L.J. 505, 534 (1991) (arguing that "regulators should not impose blanket regulations on a group of potentially coercive restructurings that are already failing at significant rates"); Andrew L. Bab, *Debt Tender Offer Techniques and the Problem of Coercion*, 91 COLUM. L. REV. 846, 881 (1991) (observing that "'coercive' debt tender offers . . . have had little coercive effect"); *see also* Coffee & Klein, *supra* note 189 at 1216-17.

193. The threat of bankruptcy is, however, a very serious one to make against bondholders due to how much a bankruptcy will reduce the value of the debt being held. *See* Coffee & Klein, *supra* note 190, at 1210-11.

194. *See* Mann & Powers, *supra* note 17, at 548, and text accompanying note 17; *see also* Hartzman, *supra* note 133, at 672-73.

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ment, there has also been an increase in the acceptance of non-investment grade debt. As discussed earlier,[195] there is no longer a stigma associated with high-yield debt compared to investment grade debt.[196] The investors in the high-yield market are generally very sophisticated and able to exert significant influence over issuers in the context of tender offers that the investors do not view as favorable.[197]

2. *Real-Time Fixed-Spread Tender Offers*

In 1993, Merrill Lynch proposed this new method for the pricing of debt tender offers.[198] Rather than determining the tender price by reference to a benchmark U.S. Treasury security as of the date, or date preceding the tender of the debt security, the SEC staff was asked whether issuers could use a tender offer price that was a stated fixed price over the yield of a benchmark security at the time the security was tendered.[199] The SEC has further extended the permitted fixed-spread offerings to include offers whose rate is set at the time of the tender instead of a set date and time before or after the tender. This type of transaction is called a "real-time fixed-spread tender offer."[200]

The SEC staff agreed not to take enforcement action in real-time fixed-spread offerings that met a list of conditions and disclosure requirements along with the normal requirements for a typical fixed-spread offer. Specifically, real-time fixed-spread tenders offers must comply with the six above-discussed criteria governing all fixed-spread tender offers as well as:

(1) Identifying the specific benchmark security and specifying the fixed price to be added to the yield on the benchmark security;

195. *See supra* notes 2-7 and accompanying text.

196. *See Corporate Credit*, FIN. TIMES (London), Nov. 21, 2005, at 18.

197. *See* Bab, *supra* note 192, at 882 (institutions that invest in high-yield debt are "highly sophisticated and knowledgeable in the field").

198. Merrill Lynch, Pierce, Fenner & Smith Inc., SEC No-Action Letter, Fed. Sec. L. Rep. ¶ 76,709 (July 19, 1993). Subsequent no-action letters were also issued regarding almost identical facts. *See, e.g.*, Goldman, Sachs & Co., SEC No-Action Letter, Fed. Sec. L. Rep. ¶ 76,833 (Dec. 3, 1993).

199. Merrill Lynch, Pierce, Fenner & Smith Inc., SEC No-Action Letter, Fed. Sec. L. Rep. ¶ 76,709 (July 19, 1993).

200. *See* SLONAKER, *supra* note 20, at 799-800.

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(2) Stating the nominal purchase price that would have been payable under the offer based on the applicable reference yield immediately preceding commencement of the offer;
(3) Indicating the reference source to be used during the offer to establish current yield information on the benchmark security;
(4) Describing the methodology to be used to calculate the purchase price to be paid for the tendered securities; and
(5) Indicating that the current yield on the benchmark security and the resulting nominal purchase price of the debt securities will be accessible on a real-time basis by contacting the dealer manager or a toll-free number.[201]

In addition to the disclosures necessary in the tender offer materials, the SEC staff also requires the dealer manager in a real-time fixed-spread debt tender offer to maintain records showing the date and time of the tenders, the current yield on the benchmark security at the time of tender and the purchase price of the security based on that yield.[202] The dealer manager must confirm this information with the tendering security holder no later than the next business day.[203] As with the daily fixed-spread tender offers, the staff of the SEC limited its no-action relief to real-time fixed-spread debt tender offers for investment grade debt.

3. *Waterfall Tender Offers*

In a waterfall tender offer, the issuer makes an offer to purchase a maximum amount of debt securities from more than one class or series of debt securities. The issuer lists the bonds in the order of priority that they will be accepted and then accepts tendered securities up to the maximum amount by eliminating securities tendered at the lower priority levels. The offering is thus referred to as a "waterfall" because only when the total amount of the offering exceeds the lowest tier of requested securities will the offering "spill over" into the

201. *Id.*; *see also* JOHNSON & MCLAUGHLIN, *supra* note 158, at 830.
202. Merrill Lynch, Pierce, Fenner & Smith Inc., SEC No-Action Letter, Fed. Sec. L. Rep. ¶ 76,709 (July 19, 1993).
203. *Id.*

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next tier of debt.[204] Waterfall tender offers have become common in recent years.[205]

Like the other topics addressed in this section, waterfall tender offers pose several possible conflicts with the securities laws. First, with respect to the twenty business day requirement of Rule 14e-1(a), it seems that an issuer cannot satisfy the condition of the no-action letter requiring that the offer be made for "any and all" of the "securities of a particular class or series."[206] This condition may be satisfied for the series included at the top of the priority list, but at some point further down the waterfall the tender offer is likely made for only a portion of the securities of that class or series.[207]

Likewise, it is not clear that fixed-spread pricing is available for waterfall tender offers. In a fixed-spread tender offer, the price fluctuates daily (or even more frequently for a real-time fixed-spread tender offer) based on changes in the price of the benchmark security. Under a strict reading of Rule 14e-1(b), each change would require that the offer be left open for an additional ten business days. Like the no-action letters under Rule 14e-1(a), the no-action letters granting relief from Rule 14e-1(b) for fixed-spread tender offers require that the offer be made for "any and all . . . securities of a particular

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204. For example, an issuer with five series of bonds outstanding with a total principal amount of $1 billion, evenly divided with $200 million per series, may desire to purchase only $500 million of its bonds. The issuer determines the priority of the bonds it would like to retire based on interest rates, maturity and other factors, then informs the holders of the bonds in the tender offer materials of the acceptance priority level of the five series. If $150 million of bonds are tendered in each series, the issuer will accept all of the securities tendered in the top three priority levels, or $450 million, and accept on a pro rata basis $50 million of the securities from the fourth priority level. The issuer would not accept any tendered securities in the fifth priority level.

205. For recent examples, see *infra* Appendix C.

206. Salomon Brothers Inc., SEC No-Action Letter, Fed. Sec. L. Rep. ¶ 79,643 (Oct. 1, 1990).

207. Theoretically, market factors could influence only the very bottom classes to tender, in which case any and all of the securities tendered in those classes would be accepted. However, logic dictates that the issuer, in making a tender offer for a maximum amount that is less than the total amount of securities outstanding in the subject classes, is not making the offer for any and all securities in each class. Based on this reasoning, any waterfall tender offer, even for investment grade securities, must be held open for at least twenty business days as required by Rule 14e-1(a).

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class or series."[208] As discussed above with respect to the twenty business day requirement of Rule 14e-1(a), this condition does not appear to be satisfied with respect to a waterfall tender offer. Based on this reasoning, fixed-spread pricing would be available, but the notional price based on the fixed spread over the benchmark security must be fixed ten days before the expiration of the tender offer.

The lack of clarity surrounding the twenty-day requirement of Rule 14e-1(a) and the ten-day requirement of Rule 14e-1(b) has caused some issuers to structure waterfall tender offers using a fixed price and holding the offer open for at least twenty business days. Other issuers have structured waterfall tender offers with fixed-spread pricing or in other ways, making it unclear whether the requirements of Rule 14e-1, as interpreted by SEC staff no-action letters, have been met. In these cases, it is possible that the issuers or dealer managers have received informal oral no-action relief from the SEC staff. Nevertheless, the lack of formal guidance leaves it unclear how the SEC staff would view waterfall tender offers under the tender offer rules.

D. *Consent Solicitations*

Consent solicitations to amend the terms of debt securities are often conducted in conjunction with tender offers.[209] In most cases the issuer is attempting to eliminate covenants that are considered too burdensome or that prevent the issuer from taking actions like redeeming or defeasing all of the securities.[210] According to a recent study, the most frequently cited reason for instituting a tender offer is to remove restrictive covenants through a consent solicitation.[211] Tender offers that include a consent solicitation average five restrictive cove-

208. With respect to fixed-spread tender offers, see Salomon Bros. Inc., SEC No-Action Letter, Fed. Sec. L. Rep. ¶ 79,643 (Oct. 1, 1990); with respect to real-time fixed price tender offers, see Merrill Lynch, Pierce, Fenner & Smith Inc., SEC No-Action Letter, Fed. Sec. L. Rep. ¶ 76,709 (July 19, 1993).

209. *See infra* Appendix D for recent examples.

210. Timothy Kruse et al., *The Decision to Repurchase Debt,* (Soc. Sci. Research, Working Paper No. G32, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1364846.

211. Mann & Powers, *supra* note 17, at 558. Of the tender offers with a stated motive, 63.4 percent were conducted to eliminate restrictive covenants.

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nants per series, as opposed to 1.1 per series in typical, non-tendering bond purchases.[212] Thus, like timing and pricing structures, policies surrounding consent solicitations are central to the success or failure of a debt tender offer.

A consent solicitation does not require compliance with the federal proxy rules under Regulation 14A of the Exchange Act,[213] but to avoid antifraud concerns a consent solicitation statement is normally distributed to debt holders as part of the tender offer materials. When a tender offer is combined with a consent solicitation, the issuer may offer additional consideration for consents in addition to the separate tender offer consideration.[214] Separating the consideration in this way raises issues under the tender offer rules. In many cases, the consent deadline is early in the tender offer period to encourage holders of securities to tender.[215] Those that tender securities by the early deadline receive the consent payment in addition to the separate tender offer consideration. If the consent payment is considered part of the tender offer consideration, then the issuer is both changing the tender offer price on the consent deadline and paying different security holders different prices in the tender offer.[216] In this situation, if the consent deadline is considered a change in the tender offer consideration, then consent solicitations could run into the same issues with respect to Rule 14e-1(b) fixed-spread pricing.[217]

212. *Id.* at 559.

213. *See* Rule 14a-2, 17 C.F.R. § 240.14a-2 (2012). As stated in Rule 14a-2, the federal proxy rules apply only to securities registered pursuant to Section 12 of the Exchange Act , 15 U.S.C.A. § 78a (West 2012).

214. As discussed in a previous section, including a consent solicitation in a tender offer also commands a premium on the bond issue, separate from the covenant issuance. *See* Mann & Powers, *supra* note 17 at 549.

215. *See, e.g., infra* Appendix E.

216. Because Rule 14d-10's "best-price rule" is not applicable to debt tender offers, the different tender prices under this interpretation should be allowed.

217. This interpretation of the rules is not accepted by practitioners, and it is unclear whether the SEC staff or a court would have this view. In a typical tender offer that includes a consent solicitation, the consent payment is made only to holders that tender and consent by the early tender and consent deadline. The early tender and consent deadline is typically ten business days after launching the offer, with the final tender deadline twenty business days after launch. This typical structure complies with the twenty-day requirement of Rule 14e-1(a) and the ten-day requirement of Rule 14e-1(b), even if the expiration of the consent payment is deemed a change in

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Alternatively, if the consent solicitation is a separate transaction or offering, then fixed-spread pricing may be unavailable due to the no-action requirement that the offer not be made in connection with a separate offering. These are issues that are ambiguous instead of clearly noncompliant (as is the case with shortened tendering windows). Up to this point, the SEC has only "informally" stated that full payment for consenting holders is consistent with the securities laws.[218]

Another issue raised by consent solicitations is whether the proposed modifications to the debt securities will constitute an "offer" and "sale" of new securities under the Securities Act and the Trust Indenture Act[219] requiring registration or an exemption from registration. This principle, often referred to as the "new security doctrine," is implicated when the terms of the security are modified so that there is a fundamental change in the nature of the investment.[220] Changes to the basic financial terms of the security[221] are examples of fundamental changes in the nature of the investment. While each set of modifications should be analyzed on a case-by-case basis, simply stripping out the restrictive covenants (other than those that relate to the basic financial terms of the security) is generally not believed to implicate the new security doctrine.[222]

Additionally, when the consent solicitation is done in connection with a tender offer, the holder's ability to consent to

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tender offer consideration. It is doubtful, however, that a transaction would comply with these provisions where the early tender and consent deadline is extended without also extending the final tender deadline. The reason for this is straightforward: when the early tender and consent deadline is extended by even one day without a corresponding extension of the final tender deadline, there is no longer a ten-day period before expiration after a change in the tender offer consideration. *See generally infra* note 240 and accompanying text.

218. David Brittenham & Peter Loughram, *Doing a Debt Tender Offer and Consent Solicitation,* 21 INSIGHTS: THE CORP. & SEC. L. ADVISOR 9, 12 (Dec. 2007).

219. Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbbb (2010).

220. *Id.*

221. These include, for example, the obligation to repay the principal amount, the interest rate, the redemption premium and the maturity date.

222. *See* Bryant B. Edwards & Jon J. Bancone, *Modifying Debt Securities: The Search for the Elusive "New Security" Doctrine,* 47 BUS. LAW. 571, 609-10 (1992); *see also* Lacy & Dolan, *supra* note 26, at 65.

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the modifications is often tied to his or her tendering the related notes. This "exit consent" prevents the holder from consenting to the changes while still retaining the security with the modified terms. The removal of these covenants serves the interests of both issuers and bondholders to maximize the transaction's value, insofar as the bondholder receives a premium on the bond itself while the issuer frees itself from restrictions in issuing new debt.[223] From the issuer's perspective, the restrictive covenants may impair its ability to rollover its debt or otherwise have the financial flexibility to adapt to market conditions.[224] But, as with the other transactions described in this paper, the efficiencies of the present system obscure the fact that these transactions, strictly speaking, may violate the rules and regulations governing pricing set out by the SEC. As with fixed-spread pricing or abrogating the twenty day offer requirement, combining a consent solicitation with a tender offer appears to be a transactional form that the SEC tolerates without formal ratification, instead of one warranting rule adjustment to legalize various forms of the transaction structure. The resulting incongruity between the practical reality and statutory provisions create a problematic legal landscape for the attorneys overseeing the transaction.

E. *Dutch Auction Tender Offers*

There are instances, however, where an issuer's desired transaction structure can be altered in a way that adheres to the securities laws while producing the desired pricing advantages. Although its use may be limited,[225] the "Dutch auction" tender offer is an example of attorney innovation. In a Dutch auction tender offer, price is determined by the amount for which securities holders are willing to sell their securities to the issuer.[226] There are two variants of the Dutch auction. In a Dutch auction, the issuer gives holders the opportunity to

223. Mann & Powers, *supra* note 17, at 559 (the premium attached to a bond featuring a $20 allotment for the consent solicitation is $14 per $1000 of the bond's par value); *see also id.* at 564.

224. *See id.* at 564 ("as the firm evolves these covenants can subsequently impose considerable costs").

225. *See* Alison Overseth, *Exchange Offers and Debt Tenders*, 699 PRACTISING L. INST. CORP. L. AND PRAC. COURSE HANDBOOK SERIES 7, 21 (July-Aug. 1990).

226. *See* Edwards, *supra* note 15, at 952-53.

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tender securities at a price specified by the holders.[227] The issuer then accepts securities beginning at the lowest price until it has purchased its desired volume of securities.[228] For example, if an issuer desires to buy only $100 million of debt securities out of $500 million outstanding, it may prepare tender offer materials disclosing the terms of the offer and inviting price bids from holders who want to tender. If holders of $125 million of bonds tender their securities at prices ranging from $900 to $910 per $1000 bond, while holders of an additional $125 million of bonds tender at prices ranging from $915 to $925 per bond, the issuer will purchase all $100 million from the first group at the lowest possible tender prices to achieve the desired $100 million. No purchases will be made from those holders specifying higher tender prices.[229] A pure Dutch auction might comply, depending on pricing structure, with the securities laws for straight debt tender offers,[230] but the "best price" rule under Rule 13e-4 prevents debt securities with any equity features from using this method.[231]

Because pure Dutch auctions involve setting a price at the end of the offering period, issuers began structuring tender offers as "modified" Dutch auctions.[232] This structure has also become common for debt tender offers.[233] In a modified Dutch auction, the issuer gives securities holders the opportunity to either (i) tender securities at a price specified by the

227. *See* Anita I. Anand, *Regulating Issuer Bids: The Case of the Dutch Auction,* 45 McGILL L.J. 133, 135 (2000).

228. *Id.*

229. In the example, the issuer is treating securities holders differently based on the prices specified by the holders in the tender offer. The best-price rule of Rule 14d-10 under Regulation 14E of the Exchange Act prohibits pure Dutch auction tender offers as it requires that the consideration paid to any security holder be equal to the highest consideration paid to any other security holder. 17 C.F.R. § 240.14d-10 (2012). However, Rule 14d-10 applies only to equity securities and commentators have reasoned that it is possible for issuers to conduct pure Dutch auction tender offers for debt securities. *See* Edwards, *supra* note 15, at 952-53; *see* James J. Junewicz, *Tender Offers for Debt Securities,* 10 INSIGHTS: THE CORP. & SEC. L. ADVISOR 1, 4 (Jan. 1996). On the other hand, a broad interpretation of the antifraud rules of Section 14(e) and Regulation 14E could find that discrimination against holders of debt securities in this manner is prohibited.

230. *See* Overseth, *supra* note 225, at 21.

231. *See id.*

232. Bergman, *supra* note 24, at 859.

233. For recent examples, see *infra* Appendix D.

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holders within a range of prices specified by the issuer or (ii) tender their securities without any specified price (known as a "non-competitive"[234] tender).[235] Following the tender period, the issuer then pays the lowest price that will allow it to purchase the desired volume of securities.[236] However, the issuer will pay the same price to each tendering security holder who tendered at the final price or below.[237] The advantage to holders of securities is that they get the highest price paid to any other security holder, even if they were willing to sell at a lower price. At the same time, the issuer pays the lowest price necessary to buy its desired securities as determined by the market.[238]

The modified Dutch auction is an example of market participants working around the Williams Act to structure a transaction in a manner mutually beneficial to buyer and seller.[239] While the pure Dutch auction clearly violates some of the bright-line Williams Act provisions, notably the best price rule, the modified Dutch auction renders the offer fully compliant

234. These "non-competitive" tenders will have priority in the event that there is a waterfall provision built into the offer. Bergman, *supra* note 24, at 860.

235. *Id.*

236. *Id.* at 860-61.

237. Angela L. Fontana & Lucas E. Spivey, *De-Levering Through Debt Buybacks*, 1792 PRACTISING L. INST. CORP. L. AND PRAC. COURSE HANDBOOK SERIES 113, 116 (Feb. 2010). For example, using the facts from the example above, in a modified Dutch auction the issuer would buy all $100 million of its desired debt securities at a price of $910 per bond, because that is the lowest price that will allow the issuer to achieve its desired $100 million volume.

238. Bruce K. Dallas & Vincent T. Cannon, *Issuer Share Repurchases: Derivative Strategies*, 1653 PRACTISING L. INST. CORP. L. AND PRAC. COURSE HANDBOOK SERIES 9, 14 (Feb. 2008). Dutch auction tender offers can be structured with a range of fixed prices or, if the conditions are satisfied, with a range of fixed-spreads. In either case, the market determines the appropriate pricing details during the tender offer. Structuring a debt tender offer in this fashion may be more expensive for an issuer compared to a pure Dutch auction, but it eliminates the risk of antifraud or other claims that may arise with a pure Dutch auction format. *Id.*

239. Interestingly, one Canadian scholar has argued that Dutch auctions should be exempted from any "best price" considerations because securities laws should distinguish equality of resulting compensation (the current priority) from equality of opportunity (which, she argues, is the true aim of the securities laws in this area). Anand, *supra* note 227, at 134.

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without undermining the fundamental goals of the transaction structure.

F. *Early Tender Premiums*

Unlike the above-discussed transaction structures, the final structure is so uncontroversial (or perhaps simply pervasive) that its legality has not been as open to challenge. A company conducting a tender offer for its debt securities may encourage bondholders to tender by offering to pay an "early tender premium" to holders who tender before a specified deadline.[240] Those who tender securities by the early deadline receive the premium payment in addition to the other tender offer consideration. This structure is similar to a tender offer combined with a consent solicitation, where the premium payment (like a consent payment) may be considered part of the tender offer consideration. In this situation, the issuer is both changing the tender offer price on the early tender deadline and paying different security holders different prices in the tender offer. Because the best-price rule of 14d-10 is not applicable to debt tender offers, the different tender prices under this interpretation should be allowed.

The debt tender offer exemption from 14d-10 does not mean, however, that issues do not arise when offering an early tender premium. Because the early tender deadline creates a change in the tender offer consideration, the tender offer must remain open for an additional ten days under Rule 14e-1(b). In a typical tender offer structure with an early tender premium, the early tender deadline is ten business days after launch, with the final tender deadline twenty business days after launch. Structured this way, the offer complies with the twenty-day requirement of Rule 14e-1(a) and the ten-day requirement of Rule 14e-1(b). Where the early tender deadline is extended without also extending the final tender deadline, however, the ten-day requirement is violated without ex-

240. *See* JOHNSON & MCLAUGHLIN, *supra* note 158, at 13-40 ("For example, Cox Communications, Inc. launched a tender offer on August 26, 2003 for any and all of approximately $1.8 billion principal amount (at maturity) of its outstanding discount debentures . . . To the extent that the falling away of the early tender premium on September 9 amounted to a change in the consideration offered, the offer would still comply with [the ten-day requirement of] Rule 14e-1(b) because it would not expire until September 23."); *see also infra* Appendix E for recent examples.

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tending the tender offer window to fulfill the ten-day price stabilization. When the early tender deadline is extended by even one day without a corresponding extension of the final tender deadline, there is no longer a ten-day period before expiration after a clear change in the tender offer consideration.[241]

Issues may otherwise desire to have a shorter early tender offer deadline (for example, nine days) followed by ten days of price stability to comply with the ten-day rule. Though little argument can be made for the legality of early tender premiums in structures where the early tender deadline is fewer than ten days before final expiration, the SEC does not take action against the violation of these timing requirements, leaving their legality in doubt yet sanctioning their use in practice. The result of this situation suits issuers quite well but leaves opinion writers to sanction practices that, while acceptable in the market, clearly violate the law that constrains opinion letters.

IV.
ETHICAL AND COMMERCIAL CONSEQUENCES FACING LEGAL PRACTITIONERS

Lack of clarity regarding an issuer's timing and pricing obligations can delay beneficial refinancing transactions and, in some cases, prevent transactions from being completed at all due to the rapid fluctuation of market conditions. The SEC staff has offered no-action relief on a case-by-case basis with respect to many debt tender offer structures. Additionally, the Commission has issued interpretive guidance with respect to Section 14(e) of the Exchange Act and Regulation 14E. Yet the legality of many transactional structures remains either unclear or clearly noncompliant in relation to the securities laws themselves, and many of these transactions consequently come with liabilities for many of the parties concerned.

For issuers and the SEC, these ambiguities or outright violations are not inherently problematic. In fact, they are often advantageous. The issuer is able to execute the transaction

241. It is somewhat common to extend the early tender deadline without extending the final expiration date.

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with a negligible chance of SEC enforcement action,[242] while the SEC is able to promulgate new policies responding to changing market conditions in a way that spares administrative cost and effort while also allowing the Commission the maximal degree of flexibility and discretion.[243] The stakes may, however, be high for the issuer: negotiating the "no violation" opinion letter can dramatically alter a transaction's structure.[244] This risk is mitigated, however, by the fact that, often, attorneys will compromise and mold their opinion letters to the contours of the issuer's desired end, effectively signing off on a transaction.[245]

Issuing these opinion letters is helped by the fact that the antifraud provisions of Section 14(e) and Regulation 14E are broad and subject to different interpretations.[246] In the context of tender offers for debt securities, the staff of the SEC has provided guidance on a case-by-case basis through no-action letters addressing specific factual circumstances. In addition, the SEC has provided general interpretive guidance on the antifraud provision of Section 14(d) and Regulation 14E on one occasion in a release addressing mini-tender offers and tender offers for limited partnership interests.[247] Former Commissioner Edward Fleishman referred to the conflict between the SEC's position that the letters are only for the requesting party

242. *See* Nagy, *supra* note 30, at 950 (noting that the SEC expects that "most regulatory interpretations in no-action letters to extend beyond the specific factual contexts in which they were issued" such that they are "generally applicable to similarly situated third parties").

243. *Id.*

244. Lipson, *supra* note 106, at 79.

245. *See id.* at 100-01.

246. Section 14(e) gives broad rule-making authority to the SEC, stating "[t]he 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." 15 U.S.C.A. § 78n (West 2012).

247. *See* Tender Offer Guidance, *supra* note 141. Although this release focuses on mini-tender offers, or offers for less than five percent of a class of securities, and tender offers for limited partnership interests, it provides several examples of tender offer practices that the SEC considers fraudulent, deceptive or manipulative under Section 14(e) and Regulation 14E. These interpretations can be useful to issuers and their advisors in structuring debt tender offers.

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and the SEC's expectation that other parties rely upon those past letters as a "kind of institutional schizophrenia."[248]

A. *No-Action Letters and Legal Opinions: Tilting the Commercial Playing Field*

This "schizophrenia" on the SEC's part has real consequences for practicing attorneys. In most debt tender offer transactions, neither the dealer manager nor the issuer will proceed with a transaction unless the issuer's counsel has issued an opinion letter stating that the transaction complies with the federal securities laws,[249] so the attorney is left with the choice of approving the transaction or losing not only a role in the transaction, but also potentially a client's other business as well. The divide between the SEC's legally enforceable regulations and its *de facto* policies forces every law firm and each attorney to confront this choice in the shadow of knowingly risking liability or sanction, even if the chances are minimal, or at least knowingly violating the professional obligation to only approve transactions that adhere to the law. Alongside the transaction itself, attorneys must also weigh the important role opinion letters play in building the reputation of both the attorney and her firm.[250] The law firm's reputation is tied not only to its ability to generate business, but also to the legitimacy of its opinion letters, thus increasing the importance of adhering to clear guidelines in the opinion letter process.[251] Understanding that opinion letters granting full legal coverage are more desirable to clients,[252] the attorney has three possible responses to an issuer seeking to engage in a transaction that may violate the letter of the securities laws but fully complies with the SEC staff's policies.

First, the attorney can choose to issue opinion letters solely where the transaction is fully compliant with the letter of the law. This approach amounts to refusing clients and poten-

248. Separate Statement of Commissioner Fleischman, Morgan Stanley & Co., Inc., Exchange Act Release No. 28,990, 48 S.E.C. Docket 674 (Mar. 20, 1991).

249. *See* Brown, *supra* note 29, § 1.7 and text accompanying note 29.

250. *See* Gilson, *supra* note 112, at 291 (stating that the opinion letter "most prominently highlight[s] the reputational intermediary role played by [lawyers]").

251. *See* Lipson, *supra* note 106, at 86-87.

252. *See id.* at 77.

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tial clients seeking to engage in otherwise legitimate transactions, particularly given the likelihood that other attorneys will meet their need.[253] Regarding both ethical and liability considerations, this is the more conservative approach for a firm and ensures that the firm and its attorneys are fully compliant with the law and will not face sanction. But this conservative stance comes at the steep price of refusing to deal with clients who want to structure their deals in full compliance with SEC staff policy. Unlike a situation where a client is attempting to circumvent the securities laws, these transactions are not themselves unethical; the issuers merely wish to make use of the SEC's nonbinding guidance—guidance provided through no-action letters to *facilitate*, not hamper, the transaction-formation process.

In direct contrast to the first possibility, a firm could issue a clean opinion for the transaction. The primary advantage to this approach is the obvious benefit the firm will derive from improved client relations, at least for an imminent transaction.[254] Given market participants' skepticism of the value or cost-efficiency of opinion letters, they will naturally desire a letter that will both maximize value and grant them the highest degree of legal protection. A third option occupies a middle ground between open acceptance and refusal of the issuer's terms, where the firm will issue a qualified opinion that either does not specifically address the noncompliant aspects of the transaction[255] or specifically limits the compliance to interpre-

253. *See id.*

254. There is significant reputational and liability risk for a law firm in giving overly aggressive legal opinions. In the context of tax opinions, the law firm Jenkins & Gilchrist suffered massive liability and reputational harm due to the firm's use of opinion letters to sanction illicit tax shelters. Macy Gordon, *Jenkins & Gilchrist to pay $76M, Shut Doors for Promoting Tax Shelters*, U-T SAN DIEGO, (Mar. 29, 2007), http://legacy.utsandiego.com/news/business/20070329-1344-taxshelters-lawfirm.html; Lynnley Browning, *Tax Shelter Inquiry Expands*, N.Y. TIMES, Jan. 25, 2006, http://www.nytimes.com/2006/01/25/business/25shelter.html. The damage resulting from the accusations and public exposure ultimately led to the firm's bankruptcy. *See* David Glovin & Cynthia Cotts, *Jenkins to Close after U.S. Agrees not to Prosecute*, BLOOMBERG, Mar. 29, 2007, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=AMElpx5dib2w&refer=home.

255. Under this approach, the opinion letter would include typical "no violation" opinion language, then add disclosure elsewhere in the letter stating, for example, "we express no opinion as to the compliance of the tender offer with the provisions of Rule 14e-1(a) and (b) promulgated by the Secur-

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tations of the SEC staff in no-action letters issued in similar circumstances.[256] Firms using this option may choose to include a discussion of the no-action letters supporting the noncompliant aspects of the transaction. In any event, the propriety of the third option is unclear due to the requirement that opinion letters only discuss relevant *law* governing the transaction.[257]

The tension between approving and refusing to sanction are inversely related to one another, such that any practicing attorney suffers some cost from the current situation. The more permissive a firm is with its issuer clients, the more ethical hazards it risks; the more restrictive a firm is in adhering to the letter of the law, the less issuers and financial advisors will be willing to retain that firm for counsel. One might argue that this inverse relationship has always been the case for firms and clients and is simply a part of the legal practice (or even of doing business in general). Indeed, the firm that engages in more creative interpretations of the law to provide their clients

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ities and Exchange Commission." Although the authors have seen this type of language in practice, it is exceedingly rare and dealer managers and their legal counsel typically seek a cleaner legal opinion from issuer's counsel. This language also poses problems from the perspective of issuer's counsel, which is rendering a "no violation" of law opinion on a transaction that technically violates law.

256. Under this approach, the opinion letter would include typical "no violation" opinion language, then add a paragraph of disclosure elsewhere in the letter stating, for example:

> In rendering the no violation opinion set forth above, we have relied, in the absence of binding legal authority, on certain no-action letters issued by, and other interpretive guidance provided by, the staff of the Securities and Exchange Commission (the "Commission"). You should be aware that no-action letters issued by, or guidance provided by, the staff of the Commission are not official expressions of opinions of the Commission, but merely reflect the views of staff members whose responsibilities involve administering the federal securities laws in question. Moreover, such no-action letters or guidance are not binding on any court, governmental agency, including the Commission, or any other person and will not operate to bar any governmental agency, including the Commission, or any other person from initiating litigation with respect to the matters addressed therein or herein.

This approach seems superior to the approach discussed in note 252, *supra*, because it is both specific and transparent in how counsel is addressing the conundrum associated with reliance on SEC staff no-action letters.

257. *See* TriBar Op. Comm., *supra* note 126, at 607.

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with maximal efficiency and flexibility perhaps should, up to a point, have the competitive advantage. But this intellectual (if not ethical) flexibility does not apply in the same way in the no-action letter and opinion letter context. Instead of creative or efficient legal interpretation determining winners and losers, the no-action letters simply exist as tools that may or may not be utilized by legal practitioners. A practitioner's reliance upon them, while knowing that they are not actual law, is far different than parsing current law to fit a transaction within its boundaries.[258] Clean and qualified letters in this context are not separated by ingenuity or creativity; instead, they are separated by a party's appetite for risk and relative regard for opinion letter obligations.

While the SEC has not sanctioned attorneys or otherwise taken action regarding any of these structures, no individual firm should ignore the possibility of adverse SEC action.[259] Though not often studied, at least one piece of very recent scholarship suggests that the SEC will indeed treat different companies within the same field quite differently, discriminating against businesses based on, for example, size or capitalization.[260] This fact may suggest that law firms could face similarly disparate treatment and lessens the predictive power of the no-action letters upon which firms rely. The possibility is perhaps exacerbated by the turnover rate of SEC staffers—a "key institutional feature of the SEC."[261] And, as suggested by the new liability rules following the Sarbanes-Oxley Act of 2002

258. For discussion of attorneys' motives in this context, see Donald C. Langevoort, *The SEC as a Lawmaker: Choices About Investor Protection in the Face of Uncertainty*, 84 WASH. U. L. REV. 1591, 1604-05 (2006).

259. Even in limited opinion letters, courts have, in other contexts, held that equitable principles may render an attorney liable despite the limitations. *See* Reich Family L.P. v. McDermott, Will & Emery, No. 101921-03, 2003 N.Y. Misc. LEXIS 2060 (N.Y. Sup. Ct. Oct. 10, 2003). SEC actions against law firms are typically settled before trial, but scholars have discussed some of the pre-settlement considerations and negotiations. *See, e.g.*, Lipson, *supra* note 106, at 84, 127 n.125 (discussing SEC actions against White & Case that were ultimately settled before trial).

260. *See, e.g.*, Stavros Gadinis, *The SEC and the Financial Industry: Evidence From Enforcement Against Broker-Dealers*, 67 BUS. LAW. 679, 679 (2012) (finding that big firms were treated much less harshly during SEC enforcement actions than smaller firms). This fact may suggest that law firms could face similarly disparate treatment and lessens the predictive power of the no-action letters upon which firms rely.

261. Langevoort, *supra* note 257, at 1598.

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("SarbOx"),[262] the manner in which the SEC takes action can change dramatically after a given series of events. Typically, scholars have characterized the SEC's reactions as attempts to avoid "regulatory capture" from other agencies.[263] Because we cannot know how the SEC's enforcement policies will shift in the future,[264] attorneys are left to either refuse to engage with clients or to hazard the (admittedly small) risk of sanction, not to mention bearing the knowledge that the conduct of the attorney, as a professional, falls outside the bounds of his or her professional obligations.

B. *No-Action Letters and Legal Opinions: Liability Risks*

The liabilities associated with an attorney's participation in a transaction can be substantial because the attorney's sanction is generally required for a transaction to go forward.[265] This sanctioning responsibility is accompanied by the attorney's obligation to protect the public, which gives rise to liabilities if the transaction violates the law.[266] For legal opinions, law firms face two forms of liability for issuing a faulty opinion letter. The first includes the basic monetary harms arising from actions against the firm under the securities laws; the second and far more important harm is the reputational harm the firm suffers.[267] And indeed, while a lawyer writing an opinion letter may be committing an ethical violation, more serious problems may arise from the transaction if the lawyer is more integrated than acting solely as counsel.[268] As one practitioner has noted, "a securities lawyer typically does not merely advise clients on how to accomplish a transaction, but

262. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

263. *See* Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 922 (1994).

264. For a further example of the SEC's shifting enforcement policies, see Lewis D. Lowenfels, *Expanding Public Responsibilities of Securities Lawyers: An Analysis of the New Trend in Standard of Care and Priorities of Duties*, 74 COLUM. L. REV. 412, 433 (1974).

265. SODERQUIST, *supra* note 29, at 28.

266. *Id.* at 28-29.

267. Thomas L. Ambro & J. Truman Bidwell, Jr., *Some Thoughts on the Economics of Legal Opinions*, 1989 COLUM. BUS. L. REV. 307, 312-13 (1989); *see also* Darrel A. Rice & Marc I. Steinberg, *Legal Opinions in Securities Transactions*, 16 J. CORP. L. 375, 376-77 (1992).

268. SODERQUIST, *supra* note 29, at 29.

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rather he or she usually is an active participant in the transaction."[269] Becoming more fully integrated within the transaction's negotiation and structure can give rise to an even greater level of liability for the attorney.

Although there is scant case law in this area,[270] the advent of SarbOx has imposed an entirely new liability regime for parties engaged in a securities offering, such as accountants and attorneys. Section 307 of SarbOx requires the SEC to create rules governing professional conduct for securities lawyers representing issuers.[271] These rules require attorneys representing issuers to report any material violations committed by the issuer or an officer, director, employee, or agent of the issuer.[272] The rules allow the SEC to sanction violators "as if they had violated one of the federal securities laws."[273] Moreover, third parties will have a cause of action against any attorney involved in legitimating a fraudulent transaction where the attorney's position is sufficiently integrated into the transaction.[274]

So by issuing a flat opinion in any of the areas detailed above, the law firm could be sanctioned so long as the violation was material. The legal status of the no-action letter is paramount here: the mere fact that the SEC has not taken action against, for example, nine-day tendering windows with settled prices where the standard is ten, does not legalize that transaction. Instead, the legal question will become whether that violation is material.[275] Case law suggests that a one-day

269. Brown, *supra* note 29, § 1.7.

270. Blackshear, *supra* note 105, at 73.

271. This mandate resulted in the SEC's "Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer." *See* Brown, *supra* note 29, § 1.7 (discussing the SEC's rules and how they go beyond what is required by Section 307).

272. 17 C.F.R. §§ 205.1-7 (2012).

273. 17 C.F.R. § 205.6 (2012); Brown, *supra* note 29, § 1.7.

274. For further discussion of the various forms of liability that can result from opinion letters, see Robert B. Robbins, *Ethics and Professional Responsibility for Attorneys in Securities Transactions in* FUNDAMENTALS OF SECURITIES LAW, at 749, 752 (Annual ALI-ABA Course of Study for Inside and Outside Counsel, Printed Coursebook Ser. No. SR043, 2010).

275. Also, some factors do mitigate the risks involved in opinion letter writing. First, more sophisticated opinion recipients lessen the burden for an attorney to establish adequate disclosure. *See* Day v. Dorsey & Whitney,

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change in the tender's timing would not be material,[276] but other areas such as the waterfall tender offer or fixed-spread pricing may be more problematic because they strike at significant pricing and access aspects of the offer. Although 10b-5 actions now appear to be unavailable against attorneys representing a company,[277] attorneys remain at the mercy of the SEC's sanctioning authority under the Rules promulgated following SarbOx's passage.

V.
CONCLUSION

While market participants and the SEC may be comfortable with the present formal and informal regulation of debt tender offers, attorneys and their law firms are increasingly exposed to potential breaches of ethical obligations or even liability for approval of an illegal securities transaction.[278] With the increasing volume of debt securities in the U.S. market, the lack of clarity surrounding some of the most common transaction structures is more important. The SEC could improve efficiency in the refinancing of debt securities by revising portions of Rule 14e to incorporate accepted no-action positions. Some of the existing SEC positions[279] should also be eliminated in light of the broad acceptance by the capital markets and regulators of high-yield debt securities. Other issues could be resolved by formally clarifying the SEC's position, for example, that fixed-spread pricing qualifies as a fixed consideration for the purposes of Rule 14e-10(b). Clear guidance in

No. 98-1425, 2001 U.S. Dist. LEXIS 26149 at *21 (D. Minn. Feb. 21, 2001), *aff'd*, 21 F. App'x 530 (8th Cir. 2001).

276. *See* Press v. Chem. Inv. Serv. Corp., 166 F.3d 529, 538 (2d Cir. 1999) (explaining that a one-day delay in availability of funds is not material for deciding whether to purchase treasury bills).

277. *See* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769 (2008) (finding that where a party has no duty to disclose, there can be no presumption of reliance on that party's representations and therefore no liability for a private action under Rule 10b-5); *see also* Brown, *supra* note 29, § 1.7 (noting that *Stoneridge* "effectively eliminates 10b-5 liability for nonspeaking secondary actors who have no duty to disclose information").

278. *See* Lipson, *supra* note 106, at 107-108.

279. For example, the disparate treatments of investment-grade and non-investment grade debt are distinctions entirely maintained through no-action interpretations.

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these and other areas would be beneficial and welcomed by the debt capital markets.

A. *Recasting the No-Action Letter*

Where does this leave securities lawyers today in the context of no-action letters? As one characterization would have it, the post-Enron role of securities lawyers will be balancing "client loyalty" against "market gatekeeping," which one commenter characterizes as a Hobson's Choice for attorneys, leaving attorneys to take or leave clients' transactional needs.[280] Because attorneys have the dual role of market facilitator (which generates a great deal of their revenue) and market gatekeeper (where they are supposed to be an institutional check on their own client), they are forced to take or leave the client's desired transactional structure and accompanying potential for liability.[281]

The Commission could address the problems associated with no-action letters in a number of ways. First, the Commission could use the no-action letter process as a bridge to a potential rule change. Instead, the SEC has used the no-action letter to effect change without later enacting its change more formally. The 1986 Salomon Brothers no-action letter was formulated 12 days after an exemption for straight-debt tender offers was removed from Rule 14e-1(a)[282] and was the first in a series of letters that created a *de facto* exemption for debt tender offerings.[283] But the rule itself was never changed. The SEC could instead use the no-action letter to respond to market needs, as it does today, while also having a policy that encourages enacting consistently accepted practices into rule or regulation.

Alternatively, the SEC could avoid passing bright-line rules and regulations altogether and use the no-action letters as a guide for interpreting broader provisions. For example, if

280. *See* Nicholson, *supra* note 109, at 94. Though Nicholson discusses this choice in the context of fraud or material misrepresentation, this characterization accurately characterizes the choices facing attorneys in the no-action context as well.

281. *Id.* at 100.

282. JOHNSON & MCLAUGHLIN, *supra* note 158.

283. *See* Salomon Bros. Inc., SEC No-Action Letter, 1986 SEC No-Act. LEXIS 1914 (Mar. 12, 1986).

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Rule 14e-1(a) were to only require a "reasonable amount of time," then the SEC could simply adjust its interpretation as "reasonable" through the no-action process. Although this may grant more authority to the SEC staff, which may bother some critics, the practicing attorney would be able to use the broader standard to sign off on transactions that today clearly violate the exemption timing requirement. Although this situation may not be optimal regarding democratic participation in an agency's regulatory process, it at least addresses the serious burdens facing practicing attorneys today. Admittedly, the level of discretion would almost certainly require a higher degree of assurance from the SEC in its no-action relief, which may require a recasting of the no-action letter's entirely discretionary status altogether.

B. *Alternatives: Moving Forward by Looking Backward*

The two possibilities discussed above need not be considered a comprehensive list or even a particularly persuasive one. But for the purposes of Section 14(e), the Commission could also look to the history of the statute to shape its future. Instead of looking to some new normative standard of SEC policy formation or institutional control, the SEC could also consider simply reversing its policies that have caused these issues in the first place. Rule 14e-1 did not apply to debt tender offers until March 1, 1986. Then, on March 12, the SEC began its extensive no-action campaign that fully abrogated the exemption's removal. Today, more than 25 years later, the SEC has not changed the rule itself. While this approach has allowed many transactions that would otherwise be illegal to move forward, no studies have addressed whether the conflict between the securities laws and the practical realities has prevented some issuers or underwriters from engaging more extensively in the debt markets. Given the importance of opinion letters in shaping market transactions, the possibility that such a chilling effect has arisen is at least possible, if not probable. Regardless of the extent of practical consequences, protracted divergences between the securities laws and the realities of securities practice weakens the force of the securities laws themselves. This weakening serves neither market participants nor the SEC, and simply changing the rule

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back to its pre-1986 language would allow SEC policy to reflect actual practice.

If these issues are not addressed, then the problems that were the focus of this paper—problems attorneys face due to the incongruous securities law and securities practice—may escalate in seriousness. From commercial, liability, and ethical perspectives, the SEC could surely do more to ensure that its legal structure facilitates the type of attorney-client interactions that promotes efficiency and good faith from both law-abiding parties. However, to pursue these goals, the securities laws must begin to reflect the practices that now characterize good-faith dealers in the capital markets, or attorneys will be left to bear the liabilities resulting from a market structure where legality and reality have increasingly different meanings.

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Appendix A – Fixed-Spread Tender Offers

Closing Date	Issuer	Amount	Fixed Spread
March 2012	Wyndham Worldwide	$250,000,000	85 basis points over the .25% U.S. Treasury Notes due February 28, 2014
July 2011	Marsh & McLennan Companies, Inc.	$800,000,000 less the amount tendered in another series, up to an aggregate of $500,000,000	165 basis points over the .875% U.S. Treasury Notes due February 28, 2017
		$250,000,000 less the amount tendered in another series, up to an aggregate of $500,000,000	190 basis points over the 2% U.S. Treasury Notes due February 15, 2012
		$250,000,000	115 basis points over the .75% U.S. Treasury Notes due June 15, 2014
July 2009	Freddie Mac	$250,000,000	105 basis points over the 1.75% U.S. Treasury Notes due May 31, 2016
		$732,928,000	100 basis points over the 1.125% U.S. Treasury Notes due June 30, 2011
February 2009	Kansas City Southern	$1,214,167,000	125 basis points over the 3.25% U.S. Treasury Notes due June 30, 2016
		$1,927,755,000	125 basis points over the 3.125% U.S. Treasury Notes due May 15, 2019
		$176,645,00	50 basis points over the 4.00% U.S. Treasury Note due June 15, 2009
July 2008	Pentair, Inc.	$250,000,000	265 basis points over the 2.875% U.S. Treasury Note due June 30, 2010
		$710,000,000	75 basis points over the 3.625% U.S. Treasury Note due January 15, 2010

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		$300,000,000	85 basis points over the 3.625% U.S. Treasury Note due June 15, 2010
June 2008	Rite Aid Corporation	$409,000,000	50 basis points over the 3.25% U.S. Treasury Notes due January 15, 2009
November 2007	TECO Energy, Inc.	$221,587,000	28 basis points over the 4.625% U.S. Treasury Note due November 2009
June 2007	CMS Energy Corporation	$265,315,000	75 basis points over the 4.625% U.S. Treasury Note due November 2016
January 2007	Occidental Petroleum Corporation	$75,596,000	88 basis points over the 4.500% U.S. Treasury Note due February 2036
November 2006	Bristol-Myers Squibb Company	$200,000,000	88 basis points over the 4.500% U.S. Treasury Note due February 2036
October 2006	North American Energy Partners Inc.	$328,355,000	85 basis points over the 4.500% U.S. Treasury Note due February 2036
		$2,500,000,000	20 basis points over the 4.50% U.S. Treasury Note due September 30, 2011
		$60,481,000	50 basis points over the 4 7/8% U.S. Treasury Note due May 31, 2008
		$350,000,000	35 basis points over the 4.375% U.S. Treasury Note due December 31, 2007
		$192,470,000	25 basis points over the 3.25% U.S. Treasury Note due August 15, 2008
April 2006	Pioneer Natural Resources Company	$175,000,000	80 basis points over the 4.500 U.S. Treasury Note due February 15, 2009

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April 2006	Tommy Hilfiger U.S.A., Inc.	$362,000,000	75 basis points over the 4.500 U.S. Treasury Note due February 15, 2009
March 2006	Aracruz Celulose	$200,000,000	69 basis points over the 4.500% U.S. Treasury Note due November 2015
December 2005	ING Group	$200,000,000	78 basis points over the 5.375% U.S. Treasury Note due February 2031
June 2005	Service Corporation International	$450,000,000	80 basis points over the 5.375% U.S. Treasury Note due February 2031
		$299,119,00	85 basis points over the 5.375% U.S. Treasury Note due February 2031
January 2005	Del Monte Corporation	$300,000,000	75 basis points over the 2.00% U.S. Treasury Note due May 15, 2006

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Appendix B – Dutch Auction Tender Offers

Closing Date	Issuer	Amount	Price Per $1,000 Principal Amount
July 2012	Fibria Celulose S.A.	$510,000,000	$1060
March 2012	Radian Group, Inc.	$146,480,000	$900
April 2010	Marathon Oil Corporation	$67,989,000	$1046.02
March 2009	Celestica Inc.	$105,560,000	$1039.94
		$112,545,000	$1140.63
		$150,000,000	$980–$1,000
March 2009	Ford Motor Credit Company	$500,000,000	$380–$470
March 2009	Laureate Education, Inc.	$40,000,000	$600
February 2009	Intelsat, Ltd.	$375,000,000	$735–$817.50
February 2009	PNM Resources, Inc.	$157,000,000	$930
December 2008	Cell Genesys, Inc.	$47,800,000	$400
December 2008	Flextronics International Ltd.	$250,000,000	$870
December 2008	Liberty Media Corporation	$285,000,000	$587.50
December 2008	Weyerhaeuser Company	$250,000,000	$875
March 2008	French Lick Resorts & Casino, LLC	$150,000,000	$730-$780
February 2008	Pixelworks, Inc.	$50,248,000	$740
April 2007	Avago Technologies	$76,879,000	$1,060
April 2007	Saks Incorporated	$100,000,000	$1,043.05
March 2002	TranSwitch Corporation	$200,000,000	$700
December 2001	Friendly Ice Cream Company	$53,695,000	$800

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APPENDIX C – WATERFALL TENDER OFFERS

Closing Date	Issuer	Amount	Number of Classes/Series
November 2011	Williams Companies, Inc.	$1,000,000,000	8
May 2010	Lennar Corp.	$289,398,000	3
March 2010	TECO	$550,000,000	4
May 2009	Colonial Properties Trust	$250,000,000	6
May 2009	Ventas, Inc.	$310,000,000	4
December 2008	YRC Worldwide Inc.	$100,000,000	5
October 2008	Charter Communications, Inc.	$100,000,000	5
June 2008	Colorado Interstate Gas Company	$100,000,000	2
April 2008	The McClatchy Company	$250,000,000	3
March 2008	HCA Inc.	$500,000,000	3
December 2007	Temple-Inland Inc.	$500,000,000	2
November 2007	Unum Group	$400,000,000	7
November 2007	AES Corporation	$1,240,000,000	3
June 2007	Delhaize America	$1,100,000,000	2
May 2007	Weyerhaeuser Company	$519,000,000	6
May 2006	UnumProvident Corporation	$300,000,000	6
April 2005	Dole Food Company, Inc.	$275,000,000	3
December 2004	Fairfax Financial Holdings Limited	$150,000,000	4
December 2004	Dana Corporation	$635,000,000	3
December 2003	Qwest Communications	$3,000,000,000	3

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APPENDIX D – TENDER OFFERS WITH CONSENT SOLICITATIONS

Closing Date	Issuer	Amount	Description of Consent Solicitation
July 2012	Community Health Systems, Inc.	$934,000,000	Eliminate restrictive covenants and some events of default.
June 2012	Selected Medical Corp.	$345,000,000	Eliminate all restrictive covenants, as well as shortening minimum notice or redemptions from 30 days to 3 days.
April 2012	NCO Group, Inc.	$365,000,000	Eliminate restrictive covenants and some events of default.
February 2010	McClatchy Co.	$171,830,000	Eliminate restrictive covenants and eliminate some "events of default" provisions.
May 2009	Ingles Markets, Incorporated	Any and all	Amend indenture governing the notes
April 2009	Jones Apparel Group, Inc., Jones Apparel Group Holdings, Inc., Jones Apparel Group USA, Inc., Nine West Footwear Corporation and Jones Retail Corporation	$250,000,000 (separate consent solicitation only for $500,000,000 notes)	Amend the indenture governing the notes to provide a carve out for the lien covenant for liens incurred in connection with a new senior secured credit facility
March 2009	Alltel Communications, LLC and Alltel Communications Finance, Inc.	$190,000,000	Amend indenture governing the notes to remove certain reporting requirements and make other changes
February 2009	Advanced Medical Optics, Inc.	$250,000,000	Amend indenture governing the notes
February 2009	Kansas City Southern	All outstanding ($175,000,000)	Amend the notes and the indenture governing the notes
February 2009	Landry's Restaurants, Inc.	All outstanding ($400,000,000)	Amend indenture governing the notes
November 2008	IKON Office Solutions, Inc.	All outstanding ($225,000,000)	Amend indenture governing the notes

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September 2008	Clear Channel Communications Inc.	$750,000,000	Amend the notes and the indenture governing the notes to eliminate substantially all of the restrictive covenants and the covenants regarding mergers and consolidations, eliminate certain events of default and modify or eliminate other provisions, including provisions regarding defeasance
August 2008	Ferro Corporation	$150,000,000	Amend indenture governing the notes
June 2008	Rite Aid Corporation	$710,000,000	Amend indentures to eliminate or modify substantially all restrictive covenants, certain events of default and other provisions governing the notes, release the subsidiary guarantees and release all the collateral securing the obligations of the subsidiary guarantors under certain notes
October 2007	Bausch & Lomb	$250,000,000	Amend indentures governing the notes to eliminate or make less restrictive substantially all of the restrictive covenants, certain events of default and related provisions
April 2007	iPCS, Inc.	$290,000,000	Amend indenture governing the notes
July 2005	Saks Incorporated	$658,000,000	Amend indentures governing the notes and the waivers contained in the indentures
January 2005	Del Monte Corporation	$300,000,000	Unclear

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May 2004	Sun Communities, Inc.	$350,000,000	Amend indenture to eliminate substantially all restrictive covenants under indenture and notes

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APPENDIX E – EARLY TENDER PREMIUMS

Closing Date	Issuer	Amount	Early Tender Payment per $1,000 principal amount
August 2012	Ameren Illinois Company	$400,000,000	$30
		$337,000,000 less the above tender total, up to an aggregate total of $450,000,000	$30
April 2012	CenturyLink, Inc.	$575,000,000	$30
		$308,000,000	$30
February 2012	Charter Communications, Inc.	$334,000,000	$25
July 2011	CCS Corporation	$312,000,000	$30
April 2009	Colonial Properties Trust	$250,000,000	$30
April 2009	Ventas, Inc.	$310,000,000	$30
March 2009	Cablevision Systems Corporation	$952,490,000	$5–$27.63
February 2009	Isle of Capri Casinos, Inc.	$140,000,000	$30
November 2008	Triad Financial Corporation	$90,000,000	$50
September 2008	Broadridge Financial Solutions, Inc.	$125,000,000	$30
September 2008	River Rocket Entertainment Authority	$150,000,000	$30
July 2008	Pentair, Inc.	$250,000,000	$30
June 2008	Visteon Corporation	$344,000,000	$40
May 2008	Pulte Homes, Inc.	$312,863,000	$30
April 2008	The McClatchy Company	$250,000,000	$25
March 2008	Hillenbrand Industries, Inc.	$250,000,000	$20
November 2007	TECO Energy, Inc.	$300,000,000	$20
June 2007	CMS Energy Corporation	$360,000,000	$20
June 2005	Puget Sound Energy	$80,250,000	$40

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APPENDIX F – EXCHANGE OFFERS

Closing Date	Issuer (or Parent of Issuer)	Amount	Public/Private
May 2012	Verso Paper Corporation	$157,500,000	Private
November 2011	American International Group, Inc.	$2,500,000,000	Private
December 2010 (abandoned)	Dr. Pepper Snapple Group, Inc.	$600,000,000	Private
April 2009	Harrah's Entertainment Inc.	$5,550,000,000	Private
February 2009	Ashton Woods USA, L.L.C.	$125,000,000	Private
December 2008	GMAC Financial Services	$17,500,000,000	Private
December 2008	CIT Group Inc.	$1.500,000,000	Private
June 2008	Six Flags, Inc.	$530,600,000	Private
June 2008	Charter Communications, Inc.	$500,000,000	Private
February 2007	Alcoa Inc.	$1,500,000,000	Private
January 2006	Level 3 Communications, Inc.	$1,230,272,000	Private
November 2003	Alamosa Holdings, Inc.	$750,000,000	Public
June 2003	Sea Containers Ltd.	$158,798,000	Public
April 2002	Conseco, Inc.	$2,540,299,000	Private

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