> A Blueprint for All Tender Offers

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The Importance of Notice of Guaranteed Delivery in 251(h) Transactions

Tender Offers have historically provided two ways for shareholders to tender their shares: directly and by Notice of Guaranteed Delivery ("NOGD"). The direct tender is easily understandable, where a shareholder sends the Depositary (i.e., Paying/Exchange Agent) a Letter of Transmittal, plus its share certificate; or for beneficial owners, the bank/broker custodian tenders the shares to the Depositary electronically through the Depositary Trust Company's tender system. The NOGD is less straightforward and therefore requires a more detailed explanation on what it is, and more importantly, its function in the marketplace.

Tendering by NOGD is essentially tendering by "IOU" when a shareholder doesn't yet have the shares. The NOGD is a legally binding obligation of the shareholder (or the beneficial owner's custodian tendering on its behalf) to deliver shares within the "protect period," which currently aligns with the U.S. trading settlement practice of one (1) trading day after expiration. So, if Investor A tenders 25,000 shares by NOGD and the tender closes (i.e., isn't terminated or extended), Investor A must "cover" (deliver) its NOGD (sometimes referred to as a "protect") one (1) trading day after the expiration of the tender by sending 25,000 shares to the Depositary.

Why Tender By NOGD?

The primary reason to tender by NOGD is because the shareholder wants to tender but does not yet have the shares in its possession. This most often happens when a shareholder buys shares in the market on the Expiration Date. Since shares on U.S. exchanges settle Trade Date + 1 trading day (T+1), if a shareholder buys shares on the Expiration Date, the shareholder will not receive those shares until the next trading day. As that shareholder doesn't physically (or electronically) have the shares on the Expiration Date, the shareholder cannot tender those shares directly. The only way that shareholder can participate in the tender is if they tender by NOGD, which, in effect, is a promise to deliver shares that can be counted towards satisfaction of a tender offer's Minimum Tender Condition (now typically greater than 50% of the outstanding shares as explained further below). However, in practice, when the NOGD shares are the sole reason that a Minimum Tender Condition is satisfied, the Tender Offer is typically extended to allow the NOGDs to be covered. This way the Buyer has comfort that they actually own the necessary number of shares to control the Target company.

DGCL 251(h) – Making Top-Up Options Extinct in Delaware

Before DGCL 251(h) was enacted in 2013, for companies to acquire 100% of a Target by Tender Offer, a Buyer had two choices. The first wasn't very attractive because it required the Buyer to buy at least 50% by tender and then go through the long-form merger process of filing a proxy and holding a vote. The second option worked much faster but required the Buyer to own at least 90% of the shares after the tender expiration so that the Buyer could then squeeze out the remaining shares using the short-form merger provisions of DGCL 251(g).

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In the years leading up to the adoption of 251(h), lawyers created the Top-Up Option for two-step mergers. In those deals, if the Buyer hit a minimum tender condition of 50% and the Target had enough authorized shares under its charter, once the minimum tender condition was satisfied, the Target would issue a massive number of new shares to the Buyer so that the Buyer's ownership would be 90%, allowing for an immediate 251(g) short-form merger and squeeze out of all the untendered shares.

While creative, the top-up option only worked when a target had a significant number of authorized unissued shares available. To put the two-step merger on level footing with traditional mergers, Delaware adopted 251(h), which allowed for public companies to be taken out with short-form mergers as long as the tender achieved the number of shares necessary for a long-form merger (typically 50% of outstanding shares unless there is a supermajority charter provision). An important caveat to 251(h), however, is that minimum conditions must ignore shares tendered by NOGD.

Because NOGD shares don't count towards the minimum condition for 251(h), beginning in 2013, some tender offers started eliminating the ability to tender by NOGD.

The Value of NOGD

Even though shares tendered by NOGD are not counted for purposes of 251(h), there is still value in providing NOGDs. Since shares trading on the day of expiration can't otherwise be tendered, NOGD gives shareholders an ability to tender. This provides trading liquidity on the Expiration Date as merger arbitrageurs are more eager to purchase shares on the Expiration Date if the arbs know that they can tender the shares by NOGD. More importantly, NOGDs provide insight into which shares are going to be delivered to the Depositary the next trading day when the NOGDs are covered. When a tender fails to get to the minimum condition on the day of expiration, you might opt for a shorter extension if you know that the covered NOGDs will get you over the minimum condition. In a T+1 settlement environment, extending a tender for one business day is inconsequential to most buyers and the market generally.

The Impact of a Contingent Value Right ("CVR") on Tenders

The NOGD is particularly important in deals that have merger consideration consisting of Cash, plus a CVR. We see that most frequently in pharmaceutical transactions where CVRs are structured to provide some sort of "earn-out" value to the Target shareholders post-closing.

CVRs can create issues for passive investors, such as index funds that are designed to track trading prices of stocks in specific indexes. Since the CVR has the probability of a future value, it is common for Cash + CVR transactions to trade above the cash value per share to be delivered at closing. Holding the non-tradable CVR post-closing can cause tracking error for index funds because the CVR will not be part of the post-closing index the fund is benchmarked against. As a result, most index funds do not tender into tender offers with CVRs.

While index funds don't readily tender directly into these tender offers, the index shares often participate nonetheless because most of the major index providers – S&P, LSE Russell, MSCI, and CRSP – will remove stocks from the respective indexes when the index provider expects the transaction to close and there is a mandatory squeeze-out at the backend. These index removals are often announced in the week leading up to the Expiration Date of the tender and the removal itself often begins the day following the Expiration Date. If a stock is removed from the index, the index funds will sell their holdings on the day the stock is removed.

When a stock is removed from an index, we see heavy volumes of index rebalance trades at the 4:00 pm ET market close on the day of expiration. The index funds are all exiting the stock at the Market Closing Price (i.e., no tracking error) and the shares are purchased by index rebalance arbitrage desks who promptly tender the shares by NOGD. These index rebalances can often account for 10%-20% (or more) of outstanding shares for a given Target. Without NOGD, these shares would otherwise be unavailable to tender. NOGD provides the potential for greater certainty, transparency and speed.

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A Blueprint for Tenders

A recent tender offer is a perfect example of how this plays out in practice. In July 2025, Sanofi completed its tender for Blueprint Medicines Corp. following a short, one-trading day extension to allow NOGDs to cover.

Blueprint shareholders were to receive tender consideration of $129.00 in cash and a CVR with aggregate payments of up to $6.00. Since the market attributed measurable value to the CVR, Blueprint's stock was trading over the $129 cash consideration prior to the initial tender expiration of Midnight on July 16, 2025 ("Original Expiration Date"). It is important to note that the CVR was a small portion of the total consideration yet still had market impact.

Leading up to the Original Expiration Date, the various index providers (S&P, LSE Russell, MSCI) announced that Blueprint would be removed from the indexes following the Expiration Date. As a result of these index removal announcements, on the trading day of the Original Expiration Date, nearly 26 million shares traded hands, which was nearly 40% of Blueprint's outstanding shares. Of those shares traded, there were nearly 19 million shares in block trades – virtually all of which were index rebalance trades at the 4:00 pm Market Close. Because the index rebalance trades settled the next day (T+1), they weren't available to be tendered directly, but they were available to tender by NOGD.

Before the market opened on July 17th, Sanofi announced that as of the Original Expiration Date, 45.85% of outstanding shares had been tendered, plus an additional 36.08% had tendered by NOGD. A short extension was necessary for the NOGDs to be delivered into the tender. Sanofi extended the tender until 5:00 pm on July 17th to give the index rebalance trades time to settle and the NOGD tenders time to cover. On July 17th, the tender expired and Sanofi promptly completed its acquisition of Blueprint, squeezing out all remaining shares under DGCL 251(h).

Conclusion

While DGCL 251(h) excludes NOGDs from minimum condition calculations, their strategic utility—especially in CVR-linked and index-heavy transactions—makes them a vital tool for tender offers. As CVR structures gain traction across industries—particularly pharmaceuticals—ensuring NOGD availability can be the difference between a smooth close and a delayed deal. Depending on the shareholder base, index fund participation may be unnecessary for buyers to reach minimum tender conditions. However, since index ownership can be quite meaningful at many companies, Innisfree sees increased importance for tender offers to make NOGDs available so that index rebalance shares can be tendered. Providing an NOGD option not only enhances shareholder flexibility but also gives buyers greater certainty in meeting tender thresholds without unnecessary delays. While there may be certain tender offers where NOGDs are unwarranted, NOGDs should always be a consideration, and Innisfree is available to discuss at your convenience.

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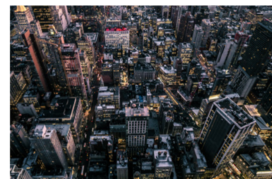

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