

## Are We There Yet? Issuer Debt Tender Offers and Offering Period Requirements

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Despite the straightforward, 20-business-day offering period requirement set forth in Rule 14e-1(a), determining a tender offer period for a given transaction is not always simple. Issuers that are considering repurchasing their debt securities should be aware that some of the most mechanical features of issuer debt tender offers also can be some of the least understood. To tailor an issuer debt tender offer to complement an issuer's individual needs and concerns, one must examine the subtleties—and potentials for missteps—that exist under the securities laws.

The SEC, in various no-action letters issued between 1986 and 1993, has noted that a tender offer by an issuer for any and all of a particular class of non-convertible debt securities involves different factors, and may warrant different treatment, than would a tender offer by such issuer for convertible debt securities.<sup>2</sup> One notable divergence is that, under certain circumstances, a straight debt tender offer may not need to be held open for a full 20 business days and may be permitted to expire in as few as 7 calendar days.

Specifically, the SEC's Division of Corporation Finance has expressed, in multiple no-action letters, that the Division:

believes that issuer debt tender offers for any and all non-convertible 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.... For example, because of the modest premiums typically offered in an Issuer Debt Tender Offer, it is not clear that participation in the tender offer by individual non-institutional debtholders would be materially increased by requiring that the tender offer be held open for twenty business days.<sup>3</sup>

The no-action letters further state that the Division will not take enforcement action under Rule 14e-1(a) or (b) against issuers conducting cash tender offers for straight debt securities with offering periods of less than 20 business days, if the tender offer meets certain criteria set forth in such no-action letters. Additionally, the Division has noted in such no-action letters that it will not take enforcement in certain instances where the offering period is less than ten calendar days, provided that the means by which to tender are submitted to debt holders on an "expedited" basis.

As noted by in the book *U.S. Regulation of the International Securities and Derivatives Market*:

There are, however, no withdrawal rights under Section 14(e). Thus, although a tender offer for debt securities (where the Regulation 14D rules do not apply) generally must be kept open for 20 business days, the bidder (often the issuer) can purchase the debt securities as they are tendered, rather than waiting until the offer expires. In addition, the SEC has issued no-action letters allowing certain issuer debt tender offers for nonconvertible, investment-grade debt securities to be kept open for fewer than 20 business days provided that the offer (i) is for any and all such securities, (ii) is open to all holders of such securities, (iii) is conducted in a manner designed to afford all record holders a reasonable opportunity to participate and (iv) is not made in anticipation of or in response to other tender offers for the issuer's securities. See *Salomon Brothers Inc* (avail. March 11, 1986), *Goldman Sachs & Co.* (avail. March 26, 1986), *Goldman Sachs & Co.* (avail. December 3, 1993) and *Salomon Brothers Inc* (avail. October 1, 1990) (adding the investment grade requirement)<sup>4</sup>

While the Division's no-action positions have never been formally codified into the tender offer rules, issuers regularly conduct cash debt tender offers with offering periods of as few as seven calendar days.

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<sup>2</sup> See FN 4, *infra*.

<sup>3</sup> See, e.g., *Goldman, Sachs & Co. No-Action Letter* (avail. Dec. 3, 1993) and *Merrill Lynch, Pierce, Fenner & Smith Inc. No-Action Letter* (avail. July 19, 1993).

<sup>4</sup> *U.S. Regulation of the International Securities and Derivatives Market*, Edward F. Greene (2003), FN 93.

Indeed, recent issuer requests for no-action letters on unrelated matters refer to, and rely upon, the exceptions to the 20 business day rule as settled precedent.<sup>5</sup>

### **Lucky Number 7? Complexity in Counting Seven Calendar Days**

Although issuer debt tender offers for straight debt are governed by Regulation 14E and not Regulation 14D,<sup>6</sup> Rule 14d-1(g)(3) sets forth the procedure for counting days in all tender offer contexts, stating,

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

Rule 14d-2(a), in turn, states:

*Date of Commencement.* A bidder will have commenced its tender offer for purposes of Section 14(d) of the Act and the rules under that section at 12:01 a.m. on the date when the bidder has first published, sent or given the means to tender to security holders. For purposes of this section, the means to tender includes the transmittal form or a statement regarding how the transmittal form may be obtained.

In practice, the “means to tender” refers to the Offer to Purchase and the accompanying Letter of Transmittal. Historically, when issuers had to transmit thousands of Offers to Purchase to individual holders, which could take several days to complete, there was an accepted concept that the “date of commencement” was the date on which the mailings had substantially begun.

Present day issuer debt tender offers often “look” somewhat different. For example, the establishment of The Depository Trust Company (DTC) in 1973 and the advent of new communication forms, such as e-mail, have changed the way in which issuer debt tender offers are executed and even have changed the way in which days are counted.

Now, an issuer may decide to launch its issuer debt tender offer immediately after the market closes on a given day and, instead of having to mail thousands of Offers to Purchase and Letters of Transmittal, the issuer may only need to e-mail DTC two PDFs, one containing the Offer to Purchase, and the other containing the Letter of Transmittal. Indeed, DTC may be the only party that needs to receive the “means to tender.”

Nevertheless, to count that first day for purposes of a seven-day offering period, an issuer that needs only to deliver to DTC the “means to tender” must deliver to DTC the Offer to Purchase and the Letter of Transmittal prior to the close of DTC’s business, which, in practice, means that DTC must receive the e-mail before 5:00 P.M. (Eastern). In practice, this ability to count, as a full day, the period after the market closes on the day on which the tender offer is announced means that an issuer debt tender offer can span only six calendar days, yet still meet the seven calendar day requirement!<sup>7</sup>

However, in the event that an issuer suffers a delay and does not deliver to DTC the “means to tender” until after DTC’s close of business, then, for purposes of counting the seven-day period, Day One will be the following day on which DTC is open for business.

<sup>5</sup> See, e.g., Eaton Vance Management No-Action Letter (avail. June 13, 2008), which contains the following footnote:

See the series of investment grade debt tender No-Action Letters that, among other things, granted relief for tenders that were open for less than ten calendar days and tenders at a fixed spread over U.S. Treasury securities: Times Mirror Co., SEC No-Action Letter, 1994 WL 637182 (Nov. 15, 1994); Goldman, Sachs & Co., SEC No-Action Letter, 1993 WL 497126 (Dec. 3, 1993); Merrill Lynch, Pierce, Fenner & Smith Inc., SEC No-Action Letter, 1993 WL 270676 (July 19, 1993); Salomon Brothers Inc., SEC No-Action Letter, 1990 WL 286946 (Oct. 1, 1990); Shearson Lehman Brothers Inc., SEC No-Action Letter, 1986 WL 67463 (Dec. 3, 1986); Goldman, Sachs & Co., SEC No-Action Letter, 1986 WL 66561 (Mar. 26, 1986); First Boston Corp, SEC No-Action Letter, 1986 WL 65408 (Apr. 17, 1986); Kidder, Peabody & Co. Inc., SEC No-Action Letter, 1986 WL 66825 (May 5, 1986).

<sup>6</sup> See Rule 14d-1(a).

<sup>7</sup> See Form 8-K (and Press Release) filed December 12, 2008, by Prologis, and Form 8-K (and Press Release) filed January 22, 2009, by Brandywine Realty Trust and Brandywine Operating Partnership, L.P., for examples.

Additional complexity exists at the end of the counting period. For example, many issuers specify that their respective issuer debt tender offers will close at 5:00 P.M. (New York time) on the final day of the tender offer. However, for counting purposes, issuers may not count the final day of the tender offer unless the tender offer closes at 11:59 P.M.

In practice, issuers announce on the launch date of the issuer debt tender offer the date and time at which the offer is expected to close. If an issuer's failure to deliver to DTC the "means to tender" prior to DTC's close of business on the day on which the issuer announces its tender offer means that the issuer cannot count the announcement date as Day One, then one might wonder why an issuer ever would choose a 5:00 P.M. closing time, instead of an 11:59 P.M. closing time that would permit the issuer to count the final day, just in case.

Consider the following scenarios, the first two of which comply with the tender offer rules, and the third of which does not comply.

<b>Day 1</b> Friday: Launch 4:30 P.M.	<b>Day 2</b> Saturday	<b>Day 3</b> Sunday	<b>Day 4</b> Monday	<b>Day 5</b> Tuesday	<b>Day 6</b> Wednesday	<b>Day 7</b> Thursday Close: 11:59 P.M.	
<b>Day 0</b> Friday: Launch 6:00 P.M.	<b>Day 1</b> Saturday	<b>Day 2</b> Sunday	<b>Day 3</b> Monday	<b>Day 4</b> Tuesday	<b>Day 5</b> Wednesday	<b>Day 6</b> Thursday	<b>Day 7</b> Friday Close: 11:59 P.M.
<b>Day 0</b> Friday: Launch 6:00 P.M.	<b>Day 1</b> Saturday	<b>Day 2</b> Sunday	<b>Day 3</b> Monday	<b>Day 4</b> Tuesday	<b>Day 5</b> Wednesday	<b>Day 6</b> Thursday	Friday Close: 5:00 P.M.

Although an expiration time of 11:59 P.M. may seem to provide issuers with increased flexibility without any attendant drawbacks, one reason for which issuers nonetheless may select a 5:00 P.M. closing time is to avoid administrative burdens on such issuers' management. For instance, if an issuer decides to extend the expiration time of its debt tender offer (for instance, if too few notes were tendered), then such issuer must make that extension determination prior to the opening of the market on the first business day after the expiration time and must release a corresponding press release. An 11:59 P.M. (New York time) expiration time requires that issuers' management scramble in the middle of the night to determine the tender offer results and whether to extend the tender offer period. Accordingly, many issuers choose the 5:00 P.M. (New York time) expiration time.

As noted above, issuers that are planning to repurchase their respective debt securities should be aware that some of the most fundamental aspects of an issuer debt tender offer may involve greater complexity than immediately is apparent. To implement an issuer debt tender offer that best fits an issuer's individual needs and concerns, it is important to understand the nuances, potential traps and flexibility that may or may not exist under the securities laws.