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SEC Provides Mini-Tender Guidance

A recent Securities and Exchange Commission interpretative release provides guidance regarding so-called “mini-tender offers” to acquire less than 5% of an issuer’s shares. Designed to stay below the Regulation 14D radar screen, mini-tenders were originally employed to acquire illiquid limited partnership interests. More recently, they have been utilized by speculators as a quick and easy way to profit in shares of publicly traded companies at the expense of less sophisticated investors. This has been particularly popular in the high-tech area, with companies such as iVillage Inc., Geoworks Corp. and Sunrise Technologies being targeted.

Typically, mini-tenders provide virtually no disclosure and are structured as first-come first-serve offers without withdrawal or proration rights. The holder is thus pressurized into tendering without the benefit of full disclosure and is then locked into his rash decision until the offer is closed or abandoned. These abusive practices have been prevalent for some time (see our memorandum dated December 23, 1996). While early mini-tenders tended to be made below the market price, in the currently popular version the bidder offers a slight premium but does not close the purchase unless the market rises above the offer price. Frequently the offers are tied to pending developments relating to the target firms. The absence of withdrawal rights essentially gives the bidder a free option. Other abusive practices have been the deduction of fees from the tender offer price without adequate disclosure, and failure to pay the purchase price promptly. Following recent SEC enforcement actions against these kinds of abuses, the new Release provides guidance both in terms of additional disclosure required and proper dissemination of offers. It is hoped that adherence to the SEC’s guidance will result in a decline in the number of abusive and fraudulent mini-tender offers.

The Release also provides guidance for issuers subject to mini-tenders as to how they should react. As in any tender offer, the subject company is required to inform its shareholders of its position with respect to a mini-tender offer. However, since bidders are not required to send a mini-tender directly to the issuer (although the SEC encourages this) a subject company may only learn about an offer after its commencement through shareholder inquiries. Accordingly, the 10-day rule applicable to tender offers in general will not be strictly enforced but the issuer should advise its holders of its position as promptly as possible after learning of the offer. NASD members who are requested to forward mini-tenders to their clients should guard against allowing their names to be used to further confuse unsophisticated investors. The NASD has by separate release offered guidance to its members regarding additional disclosures to consider to ensure that investors are properly informed regarding a mini-tender.

Certain aspects of the Release have applicability beyond the arcane world of mini-tenders, such as the SEC’s clear indication that a tender offeror’s obligation to “promptly” pay for acquired securities generally implies payment within three business day of closing the tender offer. In addition, the disclosure and dissemination principles discussed in the Release should also be considered in structuring debt tender offers which, like mini-tenders, may not be subject to Regulation 14D but are always subject to the anti-fraud rules of Regulation 14E.

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