

NASD Notice to Members 99-53

NASD Regulation Offers Guidance To Members Forwarding Mini Tender Offers To Their Customers

Suggested Routing

- ☒ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☒ Corporate Finance
- ☐ Executive Representatives
- ☐ Government Securities
- ☒ Institutional
- ☐ Insurance
- ☐ Internal Audit
- ☒ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ☒ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☒ Research
- ☐ Syndicate
- ☐ Systems
- ☒ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

Recent press coverage of “mini tender offers” has highlighted a practice that may be generating significant confusion among National Association of Securities Dealers, Inc. (NASD[®]) members and public customers, and may result in monetary losses to customers. NASD Regulation, Inc. (NASD Regulation[®]) is publishing this *Notice* to alert members to the practice and to discuss the steps members can take to reduce the risk that customers and others tendering shares in a mini tender offer will be victimized.

Questions regarding this *Notice* may be directed to Elliott Curzon, Assistant General Counsel, Office of General Counsel, NASD Regulation, at (202) 728-8451.

Background

In a mini tender offer, the offeror makes an offer directly to an issuer's shareholders to purchase a small number or percentage (under five percent of the total shares outstanding) of an issuer's securities, often at a price below the current market price, by a certain day. The offer also contains a promise to pay for the tendered shares within a specified period.¹ When the offeror obtains tendered shares, the offeror resells the shares in the open market, pays the tendering shareholder, and retains the difference as profit.

Because the offers are for five percent or less of the outstanding shares, the offerors presently are not required to comply with the disclosure, filing, and transmission requirements of the Securities and Exchange Commission's (SEC) tender offer rules in Regulation 14D. They are, however, subject to the general tender offer anti-fraud prohibitions in SEC Regulation 14E.

A mini tender offer is solicited when the offeror forwards offering material describing the terms of the offer to the Depository Trust Company (DTC) or directly to shareholders.² DTC sets up an account where acceptances of tendering shareholders are recorded and where payments by the offeror will be made in exchange for the tendered shares. DTC then notifies its participants (NASD members) of the offer. DTC's participant banks and broker/dealers that tender on behalf of their customers pay a small fee to DTC in connection with the tender. As discussed below, participants that receive these notices sometimes forward them to their customers.

Discussion

There may be legitimate reasons for mini tender offers, such as providing liquidity for very illiquid securities or permitting institutions to dispose of block positions without moving the market price for the security. Nevertheless, NASD Regulation is concerned that some shareholders may be disadvantaged by such offers if they agree, either through mistake or lack of sophistication, to tender their securities at prices that are lower than those they could obtain if they offered their securities for sale in the open market.

Moreover, NASD Regulation notes that there is no statute or rule that requires members to forward tender offer information to their customers.³ Currently, some members forward all such offers to their customers without regard to the merits or terms of the offers.

In order to address concerns about shareholders tendering by mistake or as a result of lack of knowledge about the effect of an offer, NASD Regulation believes that members that forward information to customers concerning mini tender offers may wish to consider including

the following disclosures as appropriate in the circumstances:

(1) If the member has not reviewed the offer:

(a) that by forwarding the offer to the customer, the member is not endorsing or recommending the offer, and the terms of the offer have not been reviewed to determine if accepting the offer would be in the customer's interest; and

(b) the customer is not required to accept the offer.

(2) If the member has reviewed the offer:

(a) whether the member is endorsing or recommending acceptance of the offer;

(b) whether the member is providing other information to the customer to assist the customer

in making an informed decision about the offer; and

(c) the customer is not required to accept the offer.

(d) Information that could be supplied to the customer could include, for example: an indication of the current or recent market price for the security, *e.g.*, either the most recent closing price or the trading range for a recent period such as the previous week or month; recent news about the issuer or announcements from the issuer; or a statement that there are no news reports or announcements.

such offers can be expensive and time consuming relative to the size of the offer. Nevertheless, we understand that some offerors are resorting to direct solicitation in order to avoid a recently instituted \$2,700 DTC mini-tender offer processing fee designed to cover DTC's costs in mini tender offers. (See Exchange Act Release No. 41032 (February 9, 1999).)

³The NASD's Rule governing the Forwarding of Proxy and Other Materials (Rule 2260) does not cover information relating to tender offers. In addition, the SEC Rules governing tender offers (Regulations 14-D and 14-E) do not require broker/dealers to forward tender offer information to shareholders.

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Endnotes

¹SEC Rule 14e-1(c) requires offerors to pay for tendered securities promptly.

²The offeror can attempt to provide offering material directly to shareholders; however, obtaining and using shareholder lists for