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Mini-tender offers spell major trouble

The SEC has brought enforcement action against several bidders engaged in mini-tender offers, but the SEC's dissemination requirements for such offers remain unclear.

By James J. Moloney

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Some offers are truly too good to be true. After 25 years of SEC reticence, the largest and most influential companies in America continue to watch their shareholders fall victim to so-called "mini-tender" offers that escape regulation.

A mini-tender offer is an offer to purchase securities that, when completed, will result in the bidder owning less than 5% of a public company's equity. Staying below the 5% threshold is crucial because it allows the bidder to avoid certain SEC tender offer regulations including public filing and disclosure requirements, mandatory withdrawal rights, equal treatment for offerees, and notice obligations. Commission Guidance on Mini-Tender Offers, Exchange Act Release No. 34-43069 (July 31, 2000).

By staying below 5%, astute bidders have navigated around the protections afforded by the SEC's tender offer rules for decades. More recently, a handful of savvy bidders have adapted their tactics to maximize their ability to deceive unsuspecting investors. Several repeat offenders such as Comrit Investments 1, LP and CMG Partners, LLC have targeted entities with illiquid securities, such as real estate investment trusts (REITs), hoping to lure investors into tendering their securities when liquidity is low or pricing is not transparent. Other recidivists, like TRC Capital Investment Corporation (TRC), go straight for the jugular. TRC's modus operandi is to make a mini-tender offer to shareholders of large public companies, offering a price that is either at or slightly below market value, hoping to capitalize off the general understanding that a "tender offer" is associated with a premium offer price. So long as a small percentage of shareholders tender their shares without checking the offer price against the market price, TRC's strategy succeeds. In 2024, corporate giants like Johnson & Johnson, Pfizer, and GE Vernova found themselves in the crosshairs of a TRC offer.

But by far, the most aggressive bidder in terms of deploying creative offer tactics is Tutanota LLC ("Tutanota"). In 2024, Tutanota targeted some of the nation's largest corporations, including Alphabet Inc., Abbvie, Bank of America, and Bristol-Myers Squibb. Tutanota's strategy is to initially offer a price per share at a slight premium to market, while reserving the right to extend the offer until the market price exceeds the offer price. Without understanding the fine print, shareholders tender, only to realize later that the offer was extended, and when the market price rises above the offer price Tutanota then accepts the shares to make a tidy profit at the investor's expense. To make matters worse, Tutanota often

extends an offer's expiration date when the offer price is above the market price, and then abruptly accelerates the expiration date when the market price increases above the offer price, all without notice to investors in order to reap a quick profit.

Keeping an offer below the 5% threshold helps bidders avoid having to comply with Section 14(d) of the Exchange Act. Commission Guidance on Mini-Tender Offers, Exchange Act Release No. 34-43069 (July 31, 2000). But all tender offers, including mini-tender offers, are subject to the provisions of Section 14(e) and Regulation 14E which prohibit bidders from engaging in "fraudulent, deceptive or manipulative" practices. 17 C.F.R. § 240. 14e-1. In 1999 and 2000, the SEC brought enforcement action against several bidders engaged in mini-tender offers claiming the bidder owned more than 5% of the outstanding target company shares upon consummation of the offer and/or that the bidder failed to disclose certain material information to offerees. At the time, the SEC used its interpretative powers to apply the dissemination requirements in Rule 14d-4 to bidders making mini-tender offers. Stephen I. Glover & James J. Moloney, *SEC Provides Guidance on Mini-Tender Offers and Limited Partnership Tender Offers*, M&A Law., Sept. 2000, at 2. Rule 14d-4 essentially requires bidders to either publish the tender offer in a newspaper or send or give copies of the offer to security holders. 17 C.F.R. § 240.14d-4. The SEC made clear in its case against *IG Holdings, Inc*. that posting offer information on a website alone, without more, was not sufficient to disseminate a mini-tender offer and violates Regulation 14E. In the Matter of IG Holdings, Inc., Exchange Act Release No. 34-41759 (Aug. 19, 1999).

Today, it is unclear how bidders such as Tutanota are complying with the SEC's dissemination requirements applicable to their tender offers. Unlike a standard tender offer where a bidder that seeks to own more than 5% following consummation of the offer can request a shareholder list, a target company is not required to provide mini-tender offer bidders with a shareholder list. As a result, mini-tender bidders like Tutanota would need to rely on state law or charter provisions to obtain a shareholder list. Due to the significant costs and time associated with obtaining a shareholder list and mailing full sets to target company shareholders, most mini-tender bidders rely on publication as the preferred approach for dissemination of their offers.

Historically, Tutanota has published summary advertisements for its mini-tender offers in the *Investor's Business Daily*. It appears the last time Tutanota published a notice in the *Investor's Business Daily* was back in April 2022. Since then, it appears Tutanota is advertising its mini-tender offers and updates on PRLog, a press release distribution service. It is unclear whether all their offers are included on this website. In order for security holders to obtain a complete copy of the tender offer materials (describing all material terms and conditions) they must call a phone number in the summary advertisement and leave a message. It's unclear whether security holders are able to get a complete copy of the offering documents in a timely manner.

While Tutanota's approach to dissemination seems low-budget and designed to hide the full offer terms, their success in obtaining tenders is likely reliant on the fiduciary duty stockbrokers owe to their clients, requiring them to pass along notice of such offers to the broker's customers and clients. The broker's notice is typically a short e-mail indicating that an offer is being made for their securities and seeking instruction on whether to tender on their behalf, without any description of the material terms of the offer. Such notice does not include the name of the bidder, the price offered, much less summarize the material terms and conditions of the offer or indicated the mini-tender nature of the offer. This minimalist approach to dissemination exploits the SEC's rules and increases the chance a shareholder will make an ill-informed and hasty investment decision, tendering securities into an offer that will only close if the market price is above the offer price where the bidder makes a quick profit and the seller loses money.

Companies targeted by such mini-tender offers often struggle to respond effectively. Rule 14e-2 requires target companies to publish, send, or give shareholders their recommendation with respect to the offer within 10 business days of the dissemination of the mini-tender offer. 17 C.F.R. § 240.14e-2. But frequently the target companies don't know about the offer until after the deadline to publish their position on the offer has passed. Nevertheless, companies routinely issue press releases seeking to warn their investors of the dangers associated with mini-tender offers. Yet the number of such offers continues to rise.

Such predatory tactics translate into profits for bidders like Tutanota as the firm rolls out dozens of mini-tender offers every year targeting the nation's largest corporations. More than a quarter century after the publication of SEC guidance in this area, the mini-tender offer shell game is alive and well, with bidders like Tutanota taking full advantage of unsuspecting investors and plaguing them with "bait-and-switch" terms designed to get shares tendered at a discount to market.

The time has come for the SEC to revisit its regulations on mini-tender offers and to close this dissemination and disclosure loophole frequently used to deprive shareholders of critical information about an offer.

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