AUTORITÉ DES MARCHÉS FINANCIERS

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Mini-tender offers for US equities: watch out for traps!

Certain unregulated corporate actions relating to companies listed in the United States, called "mini-tender offers", may have been sent on by French account-keepers to French shareholders holding such US securities. However, when investigating the case that I will present to you this month, I noted that one of them was inevitably unfavourable for potential sellers.

The Ombudsman's Office enabled the French shareholder to escape the trap and brought about changes in this account-keeper's practices with regard to these mini-tenders.

The facts

Mr T stated that, on 3 September 2020, he received a mail from his account-keeper informing him of an offer to buy all or part of his X shares, issued by a US company listed on the Nasdaq, at a price of $48 per share. This offer was made by company P. at a time when the share price was $35.

He specified that this letter mentioned 23 November 2020 as being the deadline for receipt of the instruction voucher and also indicated that it was possible to cancel any decision to take part in this public tender offer, "at any time, until the close of the offer".

On 25 September, i.e. two months before the deadline, Mr T therefore confirmed his desire to take part in this purchase. However, when his shares still appeared on his account after 23 November 2020, Mr T legitimately thought that his instruction had not been taken into account since the initiator planned to acquire only a limited number of securities.

On 16 March 2021, however, Mr T was informed that all of his shares had finally been sold within the framework of the tender.

Mr T contacted his account-keeper and pointed out that it was by no means mentioned that his agreement to take part in this public tender offer would extend over several months, far beyond the date of 23 November 2020.

Considering that he had been misled, Mr T considered that this situation had caused him a loss amounting to $2,750, i.e. the difference between the price of his shares on 16 March 2021 ($60), at which he could have sold his shares on the Nasdaq, and the amount received within the framework of the offer at a price of $48 per share.

Under these circumstances, Mr T called on me to intervene.

The investigation

I contacted Mr T's account-keeper, which first confirmed that the latter had indeed taken part in the public tender offer of September 2020, and which sent me a copy of the instruction voucher that he had filled in.

The account-keeper added that even though the sale of the securities did not take place in November, this offer could not be cancelled and the clients who had taken part in the offer had received information in early March to notify them of the extension until 10 March 2021.

Finally, the account-keeper stressed that this was a type of offer called a "mini tender", for which the following disclaimer always appeared in its notices of corporate action:

WARNING: This 'mini tender' offer is not subject to registration with the US market authority (the SEC) and does not offer the same level of protection as conventional public offers. The purchase price proposed by the initiator may be lower than the market price and does not

take into account possible charges. It is strongly recommended to refer carefully to the terms and conditions of the offer.

The account-keeper therefore considered that Mr T had been informed that the purchase price could be lower and was therefore unwilling to accept his request.

After receiving this response, I carried out an in-depth analysis of the purchase offer proposed in this case, and more especially the mechanism of mini-tender offers.

I thus noted that the AMF's US counterpart, the Securities and Exchange Commission (SEC), had expressed reservations and issued warnings on this subject.[1]

The SEC had issued a reminder, for example, that mini-tender offers aim to acquire less than 5% of a company's shares outstanding, thereby avoiding numerous disclosure and procedural requirements imposed by it, which apply to offers concerning more than 5% of a company's shares outstanding. As a consequence, mini-tender offers do not provide investors with the same level of protection as that provided by larger public tender offers in accordance with US legislation on investment securities.

Moreover, the SEC warns investors that certain initiators making mini tenders at below-market prices hope that they will catch investors off guard if the latter do not compare the offer price with the current market price, and that others initiate mini tenders with a premium - betting that the market price will rise before the close of the offer, and then extending the offer until that is the case.

Furthermore, in this specific case, I also noted that issuer X, the listed company targeted by this unsolicited mini tender, had published a statement on 28 July 2020 recommending to its shareholders not to accept this offer since it was contingent on the fact that the share price, at the close of the tender, would exceed 48 dollars.

Lastly, I was also able to find the documentation and terms of the offer online, which confirmed that the latter was contingent on the closing price exceeding the tender price.

Recommendation

Based on this information, I went back to the account-keeper. I told it that I was perplexed by the fact that it had passed on such an offer to its clients, as it looked very much like a trap.

For my part, I consider that this type of offer is like a sort of free option for the initiator insofar as the offer is triggered ONLY if the market price of the stock exceeds the offer price, after its tacit, discretionary extension, without the investors who have filled in their subscription form being able to go back on their decision, contrary to what was originally indicated.

I also stressed that the warning appearing on the notice of corporate action ("OST") sent to its clients appeared to me insufficient, because it was too general, since in this specific case a sale below the market price is no longer a possibility but a certainty, the discretionary extension is omitted, and the possibility for the shareholder to go back on their decision is misleading.

Therefore, in light of the very exceptional circumstances of this case, I told the account-keeper that I considered a commercial gesture should be proposed to Mr T on the basis of the difference between the price at which his shares were bought on 16 March 2021 and the share price at that date, i.e. a total amount of $2,750.

In reply, the account-keeper told me that it agreed to follow my recommendation, and I informed Mr T of this.

Furthermore, apart from this case, I told the account-keeper that, given the special nature of "mini-tender offers", very unfavourable to the share sellers, this institution should reflect, in the future, on whether it is really advisable to pass such offers on to its clients; at the very least, it should far more significantly reinforce the warning message. Regarding this point, and I am delighted by this, the account-keeper informed me that it had decided to no longer communicate "mini-tender" offers to its clients, notably due to the complexity of understanding these deals and the numerous conditions involved, generally to the disadvantage of the client.

Lesson to be learned

The irrevocable nature of the offer and its discretionary extension are the two main characteristics which allow the "mini tenders" trap to close on the shareholders who have accepted the tender. "Mini tenders", reported by the account-keepers as corporate actions, should not be confused with public offers, subject to European regulators, the prices of which generally offer a premium relative to the market price, and which may be cancelled up to the deadline.

Specifically, while it may seem attractive at the time of the offer because it is higher than the share price, it is standard practice for the initiator to tacitly and discretionarily extend the

offer period until the share price exceeds the purchase price originally proposed, whereas the shareholders cannot pull out. The initiator thus acquires shares at a far lower price than their market price and can pocket the difference at the shareholder's expense.

Shareholders should therefore be extremely vigilant if they learn of such an offer concerning US securities that they hold. In any case, as I have stressed in this case, I consider that account-keepers should not communicate this type of offer as they inevitably turn out to be unfavourable for the client, because they are contingent on a purchase price lower than the market price. At the very least, the warning notice appearing on the notice of corporate action sent to clients should, in my opinion, include clear and comprehensive information on all the risks inherent in mini tenders, so that shareholders are thoroughly warned and capable of making an informed decision.

[1] https://www.sec.gov/reportspubs/investor-publications/investorpubsminitendhtm.html |

https://www.investor.gov/introduction-investing/investing-basics/glossary/mini-tender-offers

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