

Responding to Unsolicited Offers to Buy

Bill McIntyre

This article was reviewed by Ben Wells, ESOP attorney with the law firm of Dinsmore & Shohl and Rob Edwards, ESOP attorney with Steiker, Fischer, Edwards & Greenapple, P.C.. Nothing in this article should be construed to be legal advice or opinion. For answers to your specific questions, consult your ESOP professional.

One of the perpetual issues for ESOP companies is how to handle unsolicited offers to purchase the company. Every ESOP CEO is familiar with the letter that begins "I represent a serious buyer who wants to purchase companies like yours" ESOP CEOs and their boards of directors are often in a quandary as to how to react to those unsolicited offers. Can the letter simply be thrown in the wastebasket? Does the ESOP trustee need to be involved? Does the board need to formally reject it? Do they need to conduct a pass-through vote in which the ESOP participants direct the trustee how to vote their shares?

Some ESOP company boards of directors have handled the issue by passing a resolution saying essentially that the company liked being an ESOP company, that it was in its best interests to remain an ESOP company, and therefore was not for sale. These "not for sale" resolutions were intended to avoid considering casual offers to purchase the company.

Unfortunately, there is a problem with "not for sale" resolutions. "At least with respect to the ESOP, this resolution is worthless. In fact, it is likely worse than worthless. If the ESOP fiduciaries blindly follow this resolution, it may be a violation of fiduciary responsibility since ESOP fiduciaries must discharge their duties for the exclusive purpose of providing benefits to ESOP participants and their beneficiaries. Ignoring an offer that may be many times greater than the company's appraised value could possibly be a violation of that fiduciary responsibility." (See "20 Misconceptions about ESOP Fiduciary Responsibility and Liability," OAW Summer 2005.)

ESOP practitioners have continued to wrestle with the issue, though, and there appears to be a breakthrough in wording that specifies the criteria under which an ESOP company will consider an offer to purchase the company. It was developed by Rob Edwards, an ESOP attorney in the Providence, RI, office of Steiker, Fischer, Edwards & Greenapple, P.C. This board resolution is NOT a "not for sale" resolution, but a "Policy on Unsolicited Offers." It allows management to focus on successfully managing the company without being diverted by non-serious offers.

The following template for the resolution contains time sensitive wording, so it should be reviewed and approved periodically (suggestion: annually) by the board of directors.

POLICY ON UNSOLICITED OFFERS

The Board of Directors of [Company] has adopted the following policies and procedures with respect to unsolicited offers to purchase the Company:

Generally, a sale of the Company is not deemed to be in the best interests of the shareholders at this time.

Notwithstanding the general policy set forth in Paragraph 1, serious offers to acquire the Company will be considered as described below.

Unsolicited offers will be subject to a preliminary review process. If the offer is deemed to be serious, it will be referred to the Board for further action.

In determining whether an unsolicited offer is serious, the prospective acquirer will generally be asked to supply the following information:

Identify the prospective acquirer and all related parties; State the prospective acquirer's preliminary acquisition terms including price, key representations, warranties and conditions, timing of the transaction, and proposed payment terms; Provide detailed financial information establishing the prospective acquirer's capability to complete the transaction; Describe the effect of the proposed acquisition on current Company operations, management, employees, customers and communities served by the Company; State the industry experience of the prospective acquirer; Provide examples of prior successful acquisitions by the prospective acquirer; and State the key elements of the prospective acquirer's business plan following acquisition of the Company.

Serious offers will be referred to the [Board/Board Committee] for negotiation of terms. Final disposition of the Company is subject to Board and shareholder approvals required by federal and state corporate law, including a pass through procedure whereby participants in the company's employee stock ownership plan direct the trustee of the ESOP plan as to how to vote the shares held by the plan.

A pass-through vote of participants' shares would be required only if required by law, or if the company had a standard practice of passing through the participants' vote on all items voted by the shareholders.

Serious potential buyers who have given thought to acquisition should be willing and able to meet the requirements of the policy. All others' representations can be sent to the circular file, and the CEO can concentrate on navigating the ESOP company through these turbulent times. OAW