

To Our Clients:

Tender Offers

The decision in Commonwealth Oil Refining Co. v. Tesoro Petroleum Corp., [Current] CCH Fed. Sec. L. Rep. (S.D.N.Y. Apr. 30, 1975) covers a number of interesting tender offer questions:

(1) A tender offer for less than all of the shares of the target which may result in damage to the target through the loss of a license or other right which expires on a change of control is not a per se violation of the Williams Act. Insofar as the Williams Act is concerned all that is required is disclosure. The Court quoted with approval the Ronson and Texasgulf cases that: "Clearances from administrative agencies need not be secured prior to a final tender offer provided disclosure is made of the potential loss and its value in [the] tender offer." The Court did not consider this question under state corporation or common law.

(2) The disclosure of potential material losses from a change of control following a tender offer must include dollar amounts to the extent they are determinable by the offeror. In this case the target's 10-K showed certain of the dollar amounts at stake and the target informed the offeror as to others.

(3) Secrecy by the offeror followed by an 11-day offer do not violate the Williams Act. The Court said: "Secrecy is a common condition surrounding tender offers and is a legitimate tactic which an offeror can invoke to dissipate the otherwise strong position enjoyed by entrenched management. . . . Similarly, the short time frame of the offer, 11 days, though disadvantageous to [target's] management, is not a violation of the Williams Act. Speed is an asset of an offeror which the act does not dislodge."

(4) The dealer-manager for the offeror informing the New York Stock Exchange of the impending offer with a view toward the NYSE suspending trading pending the announcement of the offer and thereby freezing the price does not violate the Williams Act.

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(5) It is not a violation of the Williams Act for the offeror to "corner" all three proxy soliciting firms.

(6) A short-offering period, 11 days, is a factor to be taken into account in determining materiality of disclosure matters. The Court said: "Where . . . the offeror has consciously limited the target's ability to respond to the offer, it logically follows that the offeror be held to a higher standard of disclosure and that omissions which might have been overlooked in other contexts become material in these circumstances."

(7) The appropriate remedy for inadvertent disclosure violations of the Williams Act is a preliminary injunction requiring extension of the offer period, amendment of the offering document and opportunity for the tendering shareholders to withdraw in light of the amended offer disclosures.

(8) The Court in dicta implied that it is not a violation of the Williams Act for the management of the target to seek to delay the tender offer in order to gain time to arrange a defensive merger.

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