

To Our Clients:

Tender Offers

Rule 14d-4 requires management of a target company to file a Schedule 14D with the SEC at the time management makes a recommendation with respect to a tender offer. Rule 14d-2(f) permits management of a target to respond to a surprise tender offer before filing a Schedule 14D if the management statement does no more than state that management is studying the tender offer and request that securityholders defer their decision until management makes its recommendation. In The Anaconda Co. v. Crane Co., CCH ¶95,364 (S.D.N.Y. Nov. 17, 1975) the court held that the following was permitted by Rule 14d-2(f):

"When Crane does file a registration statement and preliminary prospectus with the SEC, Anaconda will be in a position to consider an evaluation of the situation. Until that time it should not be assumed that the Anaconda management is sympathetic to the proposed offer."

The opinion in Anaconda is significant for three additional matters. The court rejected various contentions by the offeror that the target's letters to securityholders urging rejection of the tender offer violated §14(e) because of failure to include information which might have softened management's attack points. The court relied on Missouri Portland Cement Co. v. Cargill, 498 F.2d 851, 874 (2d Cir. 1974) for the basic proposition that it is not necessary that the "parties to a tender fight . . . conform to standards of sterilization."

The court accepted a stipulation by the offeror that it would not acquire more than 22% of the target and would not seek control or board representation as dispositive of the issue of offeror's purpose and the antitrust preliminary injunction question.

The court indicated that an acquisition by a target designed solely or primarily to create an antitrust block to a tender offer may be a violation of §14(e) which proscribes "fraudulent, deceptive or manipulative acts" in connection with tender offers. Such an interpretation of §14(e) could provide the basis for attack on such defensive tactics as classified boards and migratory mergers.