

May 2, 1978

To Our Clients:

Tender Offers; Open Market
and Private Purchases

Cutler-Hammer, Inc. v. Tyco Laboratories, Inc., Civ. No. 78-C-221 (E.D. Wisc. Apr. 28, 1978) completes a trilogy with Financial General Bankshares and Kennecott holding that open market and private purchases are not "tender offers" within the Williams Act. Indeed Cutler-Hammer goes further and specifically states, "there is nothing in the legislative history of the Williams Act which . . . supports the suggestion that the purchase of even a large block of stock on the open market resulted in the equivalent of a tender offer."

One aspect of Cutler-Hammer involved an announcement by one of the competing buyers of Cutler-Hammer stock that it intended to acquire at least 20% as soon as possible in order to avail itself of equity accounting, which announcement was followed by various brokers soliciting customers and then selling the solicited shares to that buyer. The buyer achieved 21% ownership in a few days. Thus, there was public announcement of a specific ownership objective and solicited purchases in the open market from sellers who were not all sophisticated, a combination that comes close to, if not being, an example of a buying program within the "impact" test. The decision of the court, based on the legislative history, thus directly and strongly supports the argument that only formal tender offers are within the Williams Act and completely refutes the SEC position in the Sun-Becton Dickinson case.

Cutler-Hammer also approved the now standard 13D purpose disclosure by a buyer who is accumulating a block and does not presently intend a formal tender offer or merger proposal, but reserves the option to review the situation or propose or attempt a takeover.

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