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MODIFICATIONS OF RULES 13e-4 AND 14d-8: A LIMITED EQUAL FOOTING OPPORTUNITY

In January of 1986, the Securities Exchange Commission ("SEC") adopted amendments to rule 13e-4¹ that conform the time periods for proration,² withdrawal rights³ and length of issuer self-tender offers⁴ to those time periods required of third party bids.⁵ The SEC believes that the shorter time periods for issuers under the current scheme place the third party bidder at an unfair disadvantage in a bidding war. Before the amendments became effective, the issuer could lock-in⁶ tendering shareholders and begin buying shares before the third party bidder, even if the third party initiated a tender offer before the issuer.⁷ By conforming the time periods, the SEC is attempting to place the issuer and third party on "equal footing."⁸ As a practical matter, however, issuer and third party

1. 17 C.F.R. 240.13e-4 (1985).

2. Partial tender offers often are oversubscribed. In that case, SEC rules 13e-4(f)(3) and 14d-8 provide that the issuer or third party offeror prorate its purchases over all those securities tendered within a specified period (10 days for issuer tender offers and 20 days for third party offers). Additionally, the proration period is extended if the bidder increases the consideration offered. See 17 C.F.R. 240.13e-4(f)(3) & 14d-8 (1985).

3. Rules 13e-4(f)(2)(i) and 14d-7(a)(1) provide for initial withdrawal periods of 10 and 15 days respectively. During that time, a security holder who has tendered shares to the bidder may demand return of his shares. See 17 C.F.R. 240.13e-4(f)(2)(i) & 14d-7(a)(1) (1985). Rules 13e-4(f)(2)(ii) and 14d-7(a)(2) extend the withdrawal periods for issuers and third party bidders when another party makes a tender offer. See 17 C.F.R. 240.13e-4(f)(2)(ii) & 14d-7(a)(2) (1985).

4. Currently, the issuer must keep its tender offer open for a minimum 15-day period. 17 C.F.R. 240.13e-4(f)(1) (1985). Third party tender offerors have a minimum 20-day offering period. 17 C.F.R. 240.14e-1(a) (1985).

5. The final amendments appear in 17 C.F.R. 240.13e-4 (1985); see also SEC Sec. Exch. Act Rel. No. 34-22788, 18 SEC. REG. & L. REP. (BNA) 125 (Jan. 14, 1986).

6. Tendering shareholders become "locked-in" to a tender offer when their withdrawal rights expire. In an issuer tender offer, for example, a shareholder who tenders immediately after the tender offer begins has 10 days in which to demand return of his shares. After the tenth day, the issuer has the unqualified right to decide whether to consummate the sale. Of course, a shareholder who tenders after the tenth day becomes "locked-in" immediately and has no withdrawal rights.

7. A tender offeror can begin buying shares as soon as withdrawal and proration rights expire. Even though the rules require that a tender offer continue to remain open after the expiration of withdrawal and proration rights, the tender offeror knows at that time how many sales must be prorated. Shareholders tendering later risk locking-in their shares on a deal that the tender offeror may decide not to consummate.

8. One of the major concerns of the Williams Act, under which these tender offer rules are promulgated, is "to avoid favoring neither management or the takeover bidder." *Edgar v. MITE Corp.*, 457 U.S. 624, 633-34 (1982). The SEC believes that the amendments will bring issuers and third party bidders "closer to equal footing." SEC Sec. Exch. Act. Rel. No. 34-22199, 17 SEC. REG. & L. REP. (BNA) 1310, 1312 (July 1, 1985) [hereinafter cited as SEC Release 34-22199].

bidders will rarely stand on "equal footing." Even under amended rule 13e-4, one party will almost always be able to lock-in tendering shareholders and begin purchases before the other.⁹

The SEC's authority to regulate tender offers derives from the Williams Act amendments to the 1934 Securities Exchange Act.¹⁰ In enacting the Williams Act, Congress recognized that investors need a minimum amount of unpressured time in which to consider the merits of a tender offer.¹¹ Section 14 of the Act explicitly provides shareholders ten unpressured days to evaluate the tender offer¹² without losing the opportunity to participate,¹³ on a pro rata basis, with other tendering

9. "Equal footing" can only mean that the issuer and third party begin purchasing shares simultaneously. In the context of a step-by-step bidding war, one party will always be able to begin purchasing shares before the other under the proposed amendments. Only in the fortuitous event that the issuer and third party make bids on the same day can they begin purchasing simultaneously.

10. The Williams Act added new §§ 13(d), 13(e), 14(d), 14(e) and 14(f) to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(e) & 78n(d)-(f) (1982).

11. The 1967 Senate Report states:

The competence and integrity of a company's management and of those persons who seek management positions, are of vital importance to stockholders. Secrecy in this area is inconsistent with the expectations of the people who invest in the securities of publicly held corporations and impair public confidence in securities as a medium of investment.

S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967) [hereinafter cited as SENATE REPORT]. In addition, Congress heard testimony about the need to insure sufficient time to make an investment decision in order to avoid undue pressure on shareholders during a tender offer. *See generally Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. (1967) (statement of Hon. Manual F. Cohen, Chairman, SEC) [hereinafter cited as *Hearings*].

12. Section 14(d)(5) reads, in pertinent part,

Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders. . . .

15 U.S.C. § 78n(d)(5) (1982).

In addition, withdrawal rights are revived after 60 days from the date of the original tender offer. *Id.* Between the seventh day and the sixtieth day, however, tendered shares are "locked-in." The tender offeror then has a statutory period of 53 days in which to consider whether to consummate sales with those shares tendered without fear of withdrawal by the shareholders. *See supra* note 6. However, § 14(d)(5) authorizes the SEC to prescribe rules and regulations as "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(d)(5) (1982).

13. Section 10(d)(6) reads, in pertinent part,

Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata.

15 U.S.C. § 78n(d)(6) (1982). Moreover, there is a 10-day pro rate period upon an increase in the consideration offered to security holders. *Id.*

shareholders.¹⁴ The provision also allows tendering shareholders seven days to withdraw a previous decision to tender.¹⁵ Moreover, section 14 grants investors an additional ten days of pro rata participation rights following an increase in consideration by the tender offeror.¹⁶

Because tender offers usually involve a contest for control of a corporation,¹⁷ Congress tried to avoid favoring either management or the outside tender offeror.¹⁸ Before the SEC began to regulate issuer self-tender offers in 1979, however, the securities laws explicitly excluded issuers from the minimum withdrawal and time periods that apply to third party tender offerors.¹⁹ Under section 14 of the Williams Act, for example, issuers could initiate "short-fuse" self-tender offers and pressure shareholders to tender quickly, thereby defeating the third party tender offeror before he had a chance to begin buying shares.²⁰ The exclusion of

14. The tender offeror cannot begin buying shares until the shareholders' proration rights expire. Only then does it know whether and how it must prorate purchases.

15. Of course, a shareholder is under no compulsion to tender hastily because by statute he can participate on a pro rata basis for 10 days. *See supra* notes 12 and 14. Shareholders tendering after the seventh day, however, have no right to withdraw their shares. *See supra* note 13.

16. 15 U.S.C. § 78n(d)(6) (1982).

17. *Hearings, supra* note 11, at 115-16. An outside tender offeror is always trying to wrest control from current management. An issuer, by contrast, does not always initiate a self-tender offer as a way to defend itself in a fight for control.

18. The 1967 Senate Report states that Congress took

[E]xtreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The bill is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.

SENATE REPORT, *supra* note 11, at 3.

19. Section 14(8)(B) exempts "any offer for, or request or invitation for tenders of, any security . . . by the issuer of such security . . ." from the provisions of § 14(d) of the Williams Act. In 1968, Congress did not view issuer self-tender offers as attempts to gain or maintain corporate control. Issuers often purchase their own securities for a variety of corporate purposes: (1) to reduce the number of shares of a class of securities outstanding, (2) to fund employee stock option or stock purchase plans, or (3) to issue stock in a merger with another company. *See SEC Release 34-22199, supra* note 8. *See also* Nathan & Sobel, *Corporate Stock Repurchases in the Context of Unsolicited Takeover Bids*, 35 BUS. LAW. 1545 (1980).

20. No minimum withdrawal or proration rights pertain to issuer tender offers under the Act. Section 14(d)(8)(B) of the Act exempts issuer tender offers from the provisions of § 14(d). *See supra* note 19. Section 13(e) governs issuer self-tender offers but provides for no minimum withdrawal and proration periods. 15 U.S.C. § 78m(e) (1982). Section 13(e) only makes it unlawful for an issuer with a class of equity securities registered pursuant to § 12 to purchase its equity securities in contravention of rules adopted by the Commission "to define acts and practices which are fraudulent, deceptive or manipulative" and "to prescribe means reasonably designed to prevent such acts and practices." 15 U.S.C. § 78m(e)(1) (1982). During hearings prior to the enactment of the Williams Act, the SEC emphasized that "an issuer making such a tender offer probably should disclose substantially more information with respect to its own business and prospects than can reasonably be

issuers from the requirements of section 14 reflected two understandings: (1) in 1968, when Congress enacted the Williams Act, issuers did not use the self-tender offers as a defensive tactic²¹ and (2) that issuers repurchase shares for business reasons irrelevant to a contest for control.²² While third party offers always involve a contest for control, issuer self-tender offers have many purposes.

In 1979, however, the SEC decided to regulate issuer self-tender offers in the same way that the Williams Act explicitly regulates third party tender offers.²³ By adopting rule 13e-4, the Commission extended withdrawal and pro rata rights to issuer self-tender offers. Rule 13e-4 provided ten-day withdrawal²⁴ and pro rata periods²⁵ and an additional ten-day pro rata period upon an increase in consideration by the issuer.²⁶ Moreover, rule 13e-4 required an additional ten-day withdrawal period if an outside bidder initiates a competitive tender offer.²⁷

Rule 13e-4 also established a minimum offering period of fifteen days²⁸ or, if the issuer made a self-tender offer in anticipation of or in response to a third party tender offer, twenty days.²⁹ In the latter case, however, the initial ten-day pro rata period still applied. Although the self-tender

expected of a third party [tender offeror]." *Supplemental Memorandum of the Securities and Exchange Commission with Respect to Certain Comments on S. 510*, 90th Cong., 1st Sess. at 202 (1967).

21. See *supra* note 19.

22. *Id.* Nathan and Sobel cite various economic reasons for issuer stock repurchase plans: (1) favorable effects on earnings, (2) favorable effects on book value per share, (3) financial benefits of increased leverage particularly in an inflationary era, and (4) reduction of aggregate dividend costs and shareholder servicing costs. Nathan & Sobel, *supra* note 19, at 1545. Until the SEC promulgated rule 13e-4, the only regulation of issuer tender offers was pursuant to the antifraud provisions of § 10(b) and rule 10b-5. 17 C.F.R. 240.10b-5 (1985).

23. 17 C.F.R. 240.13e (1985); SEC Sec. Act. No. 33-6108 (Aug. 17, 1979). The rule was patterned on § 14(d) of the 1934 Act. The SEC asserted that § 13(e) did limit its authority to disclosure requirements involving issuer tender offers. 17 C.F.R. 240.13(e) (1985); SEC Sec. Exch. Act No. 34-14185, 42 Fed. Reg. 60,090 (Nov. 23, 1977). The SEC emphasized that in adopting rules for the protection of investors and in the public interest to prescribe means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices, SEC rulemaking power under § 13(e) may include substantive provisions as well as disclosure requirements. *Id.*

24. 17 C.F.R. 240.13e-4(f)(2)(i) (1985).

25. 17 C.F.R. 240.13e-4(f)(3) (1985).

26. 17 C.F.R. 240.13e-4(f)(3) (1985).

27. 17 C.F.R. 240.13e-4(f)(2)(ii) (1985). This provision adds a very significant element to investor protection during a contest for control. Under the statutory scheme, "locked-in" shareholders would not be able to consider the offer by a new tender offeror. See *supra* notes 6 & 12-15.

28. 17 C.F.R. 240.13e-4(f)(1) (1985). The minimum offering period does not mean that withdrawal and pro rata rights are coterminous. After pro rata rights expire, a shareholder may not necessarily procure a sale to the tender offeror no matter how long the offer remains open.

29. 17 C.F.R. 240.14e-1(a) (1985).

offer remained open for twenty days, rule 13e-4 effectively required the investor to decide by the end of the ten-day proration period if he wanted to participate equally with other shareholders.³⁰

Soon after the adoption of rule 13e-4, the SEC promulgated rule 14d-8, which expanded the statutory provisions of section 14(d) of the Williams Act.³¹ Rule 14d-8 required all third party tender offers to remain open for a minimum of twenty business days.³² The rule further provided a fifteen-business-day initial withdrawal period,³³ rather than seven days as in section 14(d),³⁴ and a twenty-business-day proration period.³⁵ Therefore, an outside tender offeror could not lock in³⁶ any tendered shares for fifteen business days or begin buying shares for twenty business days after the offer's inception.³⁷ Taken together, rules 13e-4 and 14d-8 asserted that investors need more time to consider *outside* tender offers than to consider *self*-tender offers.³⁸ By granting investors a ten-day period of unpressured time to consider issuer self-tender offers, however, rule 13e-4 did offer additional shareholder protection.³⁹

In the context of an issuer/third-party bidding war, however, rules 13e-4 and 14d-8 gave the issuer a significant advantage in initiating a defensive stock repurchase program. An issuer could counter a third

30. The SEC recognizes the critical importance of the proration period to the security holder. A security holder must realistically choose and implement one of three investment options before the proration period ends: (1) tender to the bidder in order to be sure of participating in the tender offer; (2) sell on the open market at prices reflecting the tender offer price, the risks of proration and the likelihood of competing bids; or (3) hold and remain a security holder of the subject company at least for the immediate future. Failure to select one of these three options before the expiration period essentially means the security holder chooses the third option. The first and second options disappear at the end of the proration period if the offer is oversubscribed. SEC Sec. Exch. Act No. 34-18761, 47 Fed. Reg. 24,338 (June 4, 1982) (concerning rules governing third party tender offers).

31. 17 C.F.R. 240.14d-8 (1985).

32. 17 C.F.R. 240.14e-1(a) (1985).

33. 17 C.F.R. 240.14d-7(a)(1) (1985).

34. See *supra* note 12.

35. 17 C.F.R. 240.14d-8 (1985).

36. See *supra* notes 6 & 12-15.

37. The tender offeror cannot begin purchasing until it knows if and how it must prorate purchases.

38. See *supra* notes 12-13 & 20. Section 14(d) provides no minimum periods for issuer self-tender offers. This timing priority does not necessarily establish a *presumption* that investors need more time to consider third party tender offers. It merely suggests a presumption that investors need more time to consider competing offers in a contest for control than to consider an issuer's repurchase program based on nondefensive, pure economic reasons. See *supra* notes 19 & 22.

39. See SEC Sec. Exch. Act. Rel. No. 34-16112 (Aug. 16, 1979), 44 Fed. Reg. 49406 (Aug. 22, 1979) (withdrawal rights protect shareholders from being pressured into accepting the tender offer prior to the time all material facts relating to the tender offer are fully disclosed and disseminated).

party bid and still begin repurchasing shares before the third party could purchase shares.⁴⁰ Thus, the issuer could create substantial uncertainty as to the values that will remain in the company for security holders who do not tender to the issuer.⁴¹ The timing disparities between rules 13e-4 and 14d-8 pressured security holders to tender quickly into the issuer's hands and thereby prevented security holders from receiving the protection of the twenty-day proration period for third party tender offers.⁴² In other words, the rules put the issuer and third party on equal footing and created the sort of pressured investment decisions that SEC rules should prevent.⁴³

Of course, the present regulatory scheme only mirrors the legitimate scheme. The Williams Act established minimum withdrawal and proration periods for third party tender offers but left issuers unregulated.⁴⁴ Because the SEC believed that issuers too frequently used these timing advantages to defend themselves against third party tender offerors rather than to accomplish legitimate economic goals,⁴⁵ the SEC amended rule 13e-4 to conform the time periods for issuer tender offers to those

40. To succeed in thwarting a third party bidder, the issuer must repurchase stock as quickly as possible. See Nathan & Sobel, *supra* note 19, at 1557. Under the current rules, for example, the third party bidder makes a tender offer on day one. The issuer can make an offer as late as day nine and still begin purchasing shares before the third party bidder. The proration and withdrawal rights for the issuer's bid would expire on day 19 of the third party's bid. Of course, the proration rights for the third party do not expire until day 20.

41. See SEC Release 34-22199, at 1314. An issuer stock repurchase program may make the issuer less attractive as a target for potential or existing raiders by eliminating excess cash and/or increasing debt. In this way, the issuer can remove the incentive for a "bootstrap" acquisition. In a "boot-strap" acquisition, the raider repays a significant portion of the cost of acquisition by refinancing his acquisition debt using the target's credit.

42. See 17 C.F.R. 240.13e-4 & 240.14d-8 (1985); SEC Release No. 34-22199, *supra* note 8 at 1314.

43. See *Edgar v. MITE Corp.*, 457 U.S. 624, 633-34. The Supreme Court stated that the regulations under the Williams Act should permit investors to make well-informed, unpressured investment decisions. Additionally, the rules should favor neither management nor the takeover bidder. *Id.* The SEC's Advisory Committee on Tender Offers has recommended that "[t]akeover regulation should not favor either the acquiror or the target company, but should aim to achieve a reasonable balance while at the same time protecting the interests of shareholders and the integrity and efficiency of the markets." *SEC Advisory Committee on Tender Offers: Report of Recommendations*, Recommendation 3 at 15 (July 8, 1983).

44. See *supra* note 38.

45. SEC Release 34-22199, *supra* note 8, at 1311 (1985). An issuer can make a tender offer in anticipation of possible hostile tender offers, especially when third parties have filed statements under § 13(d) of the Exchange Act of 1934. Section 13(d) requires the filing of statements by parties who have acquired more than five percent of the issuer's securities. The SEC notes that these defensive issuer tender offers are often for a greater percentage of the issuer's outstanding securities than issuer tender offers made in uncontested situations. *Id.* at 1311 (1985).

applicable to third party tender offers.⁴⁶ Under these amendments, the issuer can get a timing advantage over a third party bidder only by initiating a self-tender offer before the third party makes a bid.⁴⁷

The proposed amendments offer a superficial simplicity to tender offer regulation, but this simplicity belies two problems. First, absent the fortuity of simultaneous bids, bidders will usually initiate tender offers on successive days, and one bidder will ultimately be able to purchase shares before the other. The ability to purchase shares before a rival bidder can purchase confers a tremendous advantage. If the first bidder can lock up enough tendered shares and consummate enough sales before the subsequent bidder can begin purchasing, then the first bidder may defeat the second bidder regardless of the merits of the second bidder's offer.⁴⁸ Ultimately, bidders will not stand on "equal footing," as Congress hoped they would.⁴⁹

Second, the staggering of time periods exists only because bidders initiate tender offers on different days and bears no rational relation to investor protection.⁵⁰ When two or more bidders have initiated tender offers, shareholders effectively must make their decisions by the time the withdrawal and proration periods expire for the earliest bidder. Shareholders must compare these options all at once, not in isolated time sequences. After the earliest bidder's proration period expires, nontendering shareholders may tender to a subsequent bidder. Consummation of a sale, however, hinges on the success or failure of the first bidder, who has already begun to purchase shares.⁵¹ The proration and purchase delay

46. 17 C.F.R. 240.13e-4 (1985); SEC Release 34-22199, *supra* note 8.

47. *Id.* at 1314.

48. *Id.*

49. Of course, the Williams Act itself never provided for uniform withdrawal and proration periods for third party tender offerors and issuers. *See supra* notes 12-13 & 19-20.

50. *Id.* Of course, one can certainly argue that even with a uniform set of rules, the interplay of withdrawal, proration and offering time periods is very complicated and confusing.

51. *See, e.g., SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945 (9th Cir. 1985). In *Carter Hawley Hale*, The Limited commenced a cash tender offer on April 4, 1984 to begin purchasing shares. Carter Hawley Hale, the target, began a repurchase program on April 16 and by April 24 had repurchased more than 50% of its stock. By then, Carter Hawley Hale's repurchasing had raised the market price of the stock over The Limited's cash tender offer price. The Limited soon abandoned its efforts to gain control of Carter Hawley Hale. The Carter Hawley Hale repurchase program did not even qualify as a tender offer subject to rule 13e-4 because Carter Hawley Hale was able to negotiate block purchases of stock on a private basis. *Id.* at 948-53 (rejecting the argument that all substantial repurchases constitute tender offers and adopting an 8-factor test to determine whether a repurchase program constitutes a tender offer). Nevertheless, the case demonstrates the great defensive power in being able to begin purchasing first.

imposed on subsequent bidders has no justification if shareholders must effectively choose by the time the first bidder can begin purchasing.⁵²

Ideally, competing tender offers, whether issuers or third party bidders, ought to have enough time to develop the merits of their offers and begin buying shares simultaneously. In political elections one candidate cannot lock up votes before the other candidates; voters must choose between all contenders on the same day. The SEC likewise could implement a flexible time scale that, within the limitations of the market place, would give tender offerors some opportunity to begin buying shares simultaneously.

The following modifications to rules 13e-4 and 14d-8 are offered as a model for a limited "equal footing" opportunity. The model would give any subsequent tender offeror, whether an issuer or a third party, the option of adopting the initial withdrawal, proration and offering periods of any prior tender offeror if it meets the following requirements:

- (1) A subsequent tender offeror must make at least two bids by the eighth business day following the initiation of a tender offer by the prior tender offeror.
- (2) Each subsequent tender offeror's bid must be made at least two business days apart.
- (3) For purposes of this option, a "bid" may consist of a reaffirmation of a prior bid.
- (4) The subsequent tender offeror, in its public tender offer announcement, must identify the prior tender offeror whose initial time periods it wishes to adopt and must give the dates on which each initial period for withdrawal, proration and length of offer will expire.

As a necessary corollary to this option, a minimum initial withdrawal period of twenty days, applicable to all tender offerors, would be established. This provision would obviate conflicts between the current fifteen-day period,⁵³ the proposed option and the provision that an increase in consideration triggers a ten day withdrawal period.⁵⁴

The following example will clarify application of the rule modification.

52. If the second tender offer must wait another six or 10 days after the first offeror has begun purchasing, the investor is not receiving any additional protection from that time period. Assuming each tender offeror has made full disclosure, the investor compares the two in the 10 days allotted for that comparison. See 17 C.F.R. 240.13e-4(f)(2)(ii) (1985). If the investor chooses the second bidder's offer, why must he wait the extra time to consummate a sale? If the first bidder's buying activity is strong enough in the interim, the second bidder may withdraw his offer altogether. See *Carter Hawley Hale*, 760 F.2d 945.

53. See *supra* note 28 and accompanying text.

54. See *supra* note 16 and accompanying text.

Assume tender offeror X initiates a tender offer on business day one. Tender offeror Y must initiate a tender offer by business day six to take advantage of the “flexi-time” option. Between business days six and eight, tender offeror X can respond or remain silent. In any case, on business day eight, tender offeror Y must either change its first bid or reaffirm the bid. Tender offeror X then has two days, until business day ten, to respond without triggering an extension of its withdrawal, proration, or offering time periods. Assuming tender offerors X and Y do not further develop their bids beyond business day ten, they will both be able to buy shares simultaneously, on business day twenty-one. Furthermore, if a third tender offeror initiates a bid after business day ten, then rules 13e-4(f)(2)(ii) and 14d-7(a)(2) would trigger an additional withdrawal period applicable to offerors X and Y equally. Beyond business day ten, however, either tender offeror X or Y may forfeit its equal footing with the other if it changes its bid and triggers extensions of its withdrawal and proration periods. Thus, subsequent tender offerors cannot extend offering periods indefinitely by changing their *existing* bid. In all cases, the proposal offers shareholders a minimum of ten business days to either compare competing bids or withdraw a previous acceptance.

The numerical requirements of the option serve four purposes. First, the two-bid requirement⁵⁵ will encourage competing tender offerors to communicate several times.⁵⁶ Second, the two day requirement⁵⁷ ensures that the prior tender offeror will have some minimum time in which to respond to the subsequent tender offeror. Third, the eight-day requirement ensures that the prior tender offeror will have the last opportunity to respond without incurring time disadvantages. This result neutralizes any disincentive to be the first tender offeror.⁵⁸ Finally, the combination

55. See § 1 of the proposal.

56. The proposal’s basic goal is to approximate the auctioneering model. That is, tender offerors should be able to make a series of bids without the concern of triggering extensions of the pro rata and withdrawal periods applicable to their bids.

57. See § 2 of the proposal.

58. If the subsequent tender offeror could wait until the tenth day to make a bid, the prior tender offeror could respond only by triggering extensions of his pro rata and withdrawal time period. Thus, the prior tender offeror would have little incentive for initiating the bidding process in the first place. The subsequent tender offeror would have too much advantage: (1) he would adopt the prior tender offeror’s time period, (2) he would know what he must do to top the prior tender offer’s bid, and (3) the prior tender offeror would as a practical matter have to respond after the tenth day and thus incur timing disadvantages. The eighth-day requirement balances the incentives between both tender offerors. The subsequent tender offeror has the opportunity to adopt the prior tender offeror’s time periods, but the prior tender offeror has the last opportunity to respond without incurring timing disadvantages.

of the two-day requirement and eight-day requirement ensure that the prior tender offeror will have at least two days to respond to a subsequent tender offeror.

The proposal outlined above is workable because it does not discriminate in favor of previous tender offerors and, in all cases, allows shareholders a minimum of ten business days to either compare competing bids or withdraw acceptance. The proposal is also optional. The notice requirement averts any danger that a subsequent tender offeror's adoption of shorter time periods regarding withdrawal and probation rights will confuse investors. Most important, the proposal lets tender offerors, if they wish, stand on equal footing in a contest for control without extending the process indefinitely. Within the confines of the marketplace, the Commission can infuse democracy into tender offer battles. The Williams Act should protect investors, and simultaneously avoid favoring either management or third party tender offerors.

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