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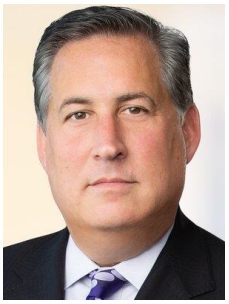
With Esmark Case, SEC Returns Focus To Tender Offer Rules

By **Spencer Klein, Joe Sulzbach and Hannah Yang** (October 15, 2024, 4:38 PM EDT)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On Sept. 6, the U.S. Securities and Exchange Commission charged Esmark Inc. and its founder, chairman and former CEO James Bouchard under Section 14(e) of the Securities Exchange Act and Rule 14e-8[1] thereunder, in connection with Esmark's failed bid to acquire United States Steel Corp.

The SEC focused on Part (c) of Rule 14e-8, which specifically prohibits a person from publicly announcing a tender offer without a reasonable belief that the person will have the means to purchase securities to complete the offer.

This case serves as a reminder of the SEC's active regulatory oversight of tender offers, and indicates a renewed focus under Rule 14e-8 on truthful tender offer communications with respect to adequate financial resources at the time they are made.

Case Summary

Esmark first announced its tender offer to acquire all issued and outstanding shares in U.S. Steel for $35 per share — an equity value of $7.8 billion — in a press release on Aug. 14, 2023. This announcement came a day after Cleveland-Cliffs Inc. announced its offer to acquire U.S. Steel in a mixed cash and stock offer, with an implied total consideration of $35 per share ($17 in cash and 1.023 shares of Cliffs).

The next day, Bouchard appeared in an interview on CNBC to discuss Esmark's proposed tender offer. Bouchard emphasized that, unlike Cliffs, Esmark had provided an all-cash offer. He further noted that Esmark had "$10 billion available in cash committed to the deal," according to an SEC press release announcing the order,[2] and that it would not put up any of Esmark's assets as collateral in connection with the offer.

The initial offer period was to run from Aug. 14, 2023, to Nov. 30, 2023. However, on Aug. 23, Esmark withdrew its offer.

In its investigation, the SEC found that Esmark did not even have 1% of the required $7.8 billion in cash required to complete the tender offer as of Aug. 31, 2023. Consequently, the SEC determined that Esmark and Bouchard lacked a reasonable belief that they would have the means to complete the tender offer, and that their public announcements had violated Section 14(e) of the Exchange Act and Rule 14e-8 thereunder.

According to the order, the SEC accepted settlement offers from Esmark and Bouchard, who agreed to pay civil penalties of $500,000 and $100,000, respectively, and to cease and desist from committing or causing any future violations of these provisions. Esmark and Bouchard neither admitted nor denied the SEC's findings.

In the press release announcing the order, Antonia M. Apps, director of the SEC's New York Regional Office, underscored the importance of investor trust, noting, "Investors should be able to trust companies' and executives' public statements."

History of the Rule

Sections 14(d)-(f) of the Exchange Act were added in 1968 as part of the amendments known as the Williams Act, which was enacted in response to the increased popularity of hostile takeover attempts in the U.S. via cash tender offers. The Williams Act introduced tender offer rules applicable to both cash and stock offers, such as mandatory disclosure requirements.

The "five-day rule" — previously Rule 14d-2(b)(2) — required an offeror to either withdraw or commence its offer by providing shareholders with the means to tender their shares within five business days of the first announcement of a cash tender offer. After three decades, the SEC repealed this rule through Regulation M-A. However, to address concerns that the absence of the five-day rule would increase the prevalence of illusory takeover offers, Rule 14(e)-8 was adopted in 1999.

Prior SEC Actions

In March 2023, the SEC staff updated its Compliance and Disclosure Interpretations on Tender Offer Rules and Schedules to include a reference to Rule 14e-8, reminding prospective bidders of their obligations "to have a bona fide intent to commence a tender offer once a Schedule TO has been filed."[3]

The SEC staff also recently cited Rule 14e-8 in a comment letter to Osprey Bitcoin Trust's tender offer statement filed on Jan. 11, 2024, on Schedule TO-I. The staff asked the offeror to provide assurance that it could pay for the tendered securities pursuant to Rule 14e-8(c). The last time the staff had cited Rule 14e-8 asking for similar assurances of financial means in a published comment letter was in 2015.[4]

This came after the SEC successfully obtained a judgment against Melville Peter ten Cate in January 2023 for violation of Rules 10b-5 and 14e-8. The SEC's complaint had alleged that the defendant "knowingly or recklessly" made a financially unviable tender offer for Textron Inc., noting the credit facility and available cash referenced in the offer did not exist. The SEC further asserted that ten Cate had also failed to disclose multiple prior bankruptcy and default judgments against him and his entities. He was ordered to pay $500,000 in civil penalties.[5]

The above examples appear to break the pattern of most prior enforcement actions, which were often brought in conjunction with other sections of the Exchange Act — e.g., Rule 10b-5 — and allegations of price manipulation.

For example, in November 2023, the SEC charged ArciTerra Companies LLC, its CEO Jonathan Larmore and related entities for issuing press releases stating an intent to purchase a majority of the minority stake in WeWork Inc. at a substantial premium. The SEC alleged that Larmore was looking to manipulate

the stock price, having purchased 72,000 call options in the company far below the stock price prior to the tender offer, and that he did not intend to consummate the offer, in violation of Rules 14e-8 and 10b-5.[6]

Other instances of SEC enforcement actions arising out of Rule 14e-8 include the following.

SEC v. Lee Simmons

In this case before the U.S. District Court for the Southern District of New York, the SEC charged Lee Simmons for, among other things, announcing a fraudulent tender offer for BlueLinx Holdings Inc. in violation of Rules 10b-5 and 14e-8.

The SEC found Simmons had purchased "out-of-the-money" BlueLinx call options, and then subsequently announced a tender offer to acquire at least 35% of BlueLinx's outstanding stock at more than a 75% premium in multiple press releases. A final judgment was entered by consent against Simmons on May 15, 2023, including $250,196 in monetary relief.

SEC v. Edgar M. Radjabli

The SEC charged Edgar M. Radjabli and his two entities in the U.S. District Court for the District of South Carolina in 2011 for three separate securities fraud schemes, including, among other things, violating Rules 10b-5 and 14e-8 in connection with a tender offer to acquire all the outstanding shares of Veritone Inc.

The defendants allegedly misrepresented their existing ownership stake in Veritone in the tender offer announcement and lacked the financial means to complete the offer. Radjabli allegedly generated $162,800 of illicit profits in subsequent sales of Veritone securities and put options.

A final judgment was entered by consent against Radjabli on July 19, 2021, including $600,000 in monetary relief.

SEC v. Robert W. Murray

The SEC charged Robert W. Murray in 2017 for filing a tender offer form in the name of a fictitious company, stating that the company had submitted a potential tender offer to the board of Fitbit Inc. The SEC alleged in the case before the Southern District of New York that Murray arranged for the filing after purchasing out-of-the-money call options in Fitbit and subsequently profiting by selling the options minutes after the false filing.[7]

In July 2018, the SEC filed additional charges against Mark E. Burns in connection with the same scheme. A final judgment was entered by consent against Burns on Aug. 5, 2019, including $73,886 in monetary relief.

SEC v. PTG Capital Partners LTD

In 2015 in the Southern District of New York, the SEC charged PTG Capital Partners Ltd. and other defendants in connection with three different tender offers for Avon Products Inc., Tower Group International Ltd. and Rocky Mountain Chocolate Factory Inc.

The SEC's complaint alleged that the associated filings and press release were fraudulent, as the group's intent was to drive up the stock price of the three companies so they could sell their equity positions at the artificially inflated prices.

In 2020, the SEC settled with two of the defendants and obtained a default judgment against another.

SEC v. Luis Chang

Also in the Southern District of New York, the SEC in 2014 charged Luis Chang and Everbright Development Overseas Ltd. for issuing press releases about a false tender offer for Allied Nevada Gold Corp.

The complaint alleged that the defendants profited from the tender offer announcement by selling their equity positions in Allied Nevada into the falsely inflated market. The defendants settled the charges for nearly $6 million in disgorgement, prejudgment interest and penalties.

SEC v. Allen E. Weintraub and AWMS Acquisition Inc. d/b/a Sterling Global Holdings

In 2011, the SEC charged Allen E. Weintraub and AWMS Acquisitions Inc. in connection with false tender offers for stock of Eastman Kodak Co. and AMR Corp. at a premium of nearly 50% over the companies' then-current stock prices.

At the time, Weintraub had owed the SEC over $1 million for past convictions. Weintraub never disclosed that he had prior felony convictions for organized fraud and money laundering, or that he was permanently enjoined from acting as an officer or director of any public company.

The U.S. District Court for the Southern District of Florida found that Weintraub misrepresented his financial situation and lacked the resources to complete the offers. The court ordered both parties to pay civil penalties of $200,000 each.

SEC v. Theodore Roxford a/k/a Lawrence David Niren and Hollingsworth, Rothwell and Roxford

The SEC in 2007 charged Theodore Roxford and his entity Hollingsworth, Rothwell & Roxford with violating, among other things, Rule 14e-8 in connection with a series of proposed tender offers to acquire stock in five separate companies.

The SEC alleged in the Southern District of New York that the defendants generally misrepresented their ability to finance the tender offers. Furthermore, the defendants allegedly acquired options and stock of one proposed target prior to making the public announcement with an intent to profit from the rise in share price, and sought fees from another proposed target as compensation for manipulating the company's stock price.

The SEC obtained default judgments against the defendants on March 3, 2008, including $900,000 in civil penalties.

SEC v. Treyton L. Thomas

In 2004 in the U.S. District Court for the District of Massachusetts, the SEC charged Treyton L. Thomas and Pembridge Group Ltd. with securities fraud and stock manipulation under Rules 10b-5 and 14e-8,

including in connection with a public announcement for a proposed tender offer to acquire shares of Imagis Technologies Inc.

The SEC alleged that neither Thomas nor Pembridge Group had access to the capital or the means to complete the tender offer. Instead, prior to the announcement, Pembridge Group and Thomas had allegedly purchased, or caused to be purchased, warrants of Imagis stock.

The SEC obtained a partial default judgment against Pembridge Group on Sept. 12, 2005, including $550,000 in civil penalties.

SEC v. Toks Inc. and Ade O. Ogunjobi

In 2003, the SEC charged Toks Inc. and its founder, chairman, and CEO Ade Ogunjobi in the U.S. District Court for the District of Columbia of violating, among other things, Rule 14e-8 in connection with public announcements of plans to acquire stock of several major publicly traded companies without having any reasonable belief that they would have the means to acquire the securities to complete the tender offer.

The SEC's Division of Corporation Finance referred the matter to the Division of Enforcement after having already notified Ogunjobi of Rule 14e-8 and the deficiencies in his filings thereunder. The SEC obtained a final judgment on March 24, 2004.

SEC v. Richard M. Ryan

In 2003, in the U.S. District Court for the Northern District of Illinois, the SEC charged Richard Ryan, president and CEO of Standard Power & Light, with violating Rules 10b-5 and 14e-8 in connection with Standard's public announcement of a planned tender offer to acquire the majority shares of Enron Corp.

The SEC alleged that neither Ryan nor Standard had the financial means or commitments to commence or complete the tender offer. The SEC and Ryan agreed to a settlement the next day.

SEC v. Global Airlines Corp.

The SEC charged Global Airlines Corp. and Emil Bernard, its sole owner, officer, director and employee, with violating Rules 10b-5 and 14e-8 in connection with public announcements of tender offers for two companies. The SEC in 2003 in the Southern District of New York alleged that the defendants made materially false and misleading public statements to legitimize the offers, although neither party had the assets or resources to complete the tender offers.

Conclusion

The Esmark case is thus the latest indicator of the SEC's vigilance toward ensuring the veracity of tender offer communications under Rule 14e-8, separate and additional to any obligations under Rule 10b-5. This shift is evident from recent SEC activities and comments, which could suggest a more proactive stance in scrutinizing the authenticity and feasibility of future tender offer announcements. The case aligns with the SEC's commitment to maintaining investor trust by holding entities accountable for misleading announcements about their ability to complete a tender offer.

Potential bidders should be cautious when announcing plans to make a tender offer, minimizing any

appearance of a lack of bona fide intent to complete the offer. Companies or other persons considering tender offers should exercise heightened diligence in their disclosures and ensure they have the requisite financial resources to support their public commitments.

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[1] https://www.ecfr.gov/current/title-17/chapter-II/part-240/subpart-A/subject-group-ECFR465b90927e2fdb3/section-240.14e-8.

[2] https://www.sec.gov/newsroom/press-releases/2024-117.

[3] https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/tender-offer-rules-schedules.

[4] See comment letter to Ally Financial Inc.'s Schedule TO-I filed on April 23, 2015. More recently, the SEC staff had cited Rule 14e-8 in a comment letter to La Jolla Pharmaceutical Company's Schedule TO-C filed on May 12, 2020. In the letter to La Jolla, however, the staff focused on whether an offer that was "non-binding and conditioned on material, undisclosed contingencies" violated Rule 14e-8(a). In its response, La Jolla clarified that it had not announced a proposed tender offer, only that its proposed merger agreement would be structured as a tender offer if accepted. La Jolla included this clarification in its subsequent filings.

[5] The U.S. Attorney for the Southern District of New York announced separately on April 5, 2022, that. ten Cate was charged with tender offer fraud, securities fraud, and wire fraud.

[6] The U.S. Attorney for the Southern District of New York announced separately on March 14, 2024, that Larmore was arrested and charged with tender offer fraud and securities fraud.

[7] In 2018, Murray was sentenced to two years imprisonment in connection with criminal charges filed against him by the U.S. Attorney for the Southern District of New York for the manipulation of Fitbit stock. The court further ordered Murray to forfeit $3,914.08.