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III. Corporate & Securities Law

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Interpreting the Williams Act's Requirements For Disclosure of A Tender Offeror's Financing: IU International Corp. v. NX Acquisition Corp.

Congress enacted the Williams Act[1] in 1968 to include tender offers within the coverage of federal security laws.[2] In drafting the Williams Act, Congress intended to require bidders in tender offers to disclose relevant information to shareholders of target companies and to the Securities and Exchange Commission (SEC).[3] Congress intended that shareholders in a tender offer would receive information regarding a bidder's qualifications and intentions before the bidder required the shareholders to respond to the bidder's offer.[4] Accordingly, the Williams Act requires a bidder to include in the bidder's disclosures to shareholders and the SEC the sources of the funds that the bidder will use to purchase tendered shares.[5] Furthermore, the SEC promulgated regulations pursuant to the Williams Act that require a bidder to disclose the names of the parties to the loan transaction

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1. Securities-Corporate Equity Ownership-Disclosure Act (Williams Act), Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m, 78n (1982 & Supp. 1986)).

2. *See* H.R. REP. No. 1711, 90th Cong. 2d Sess. 3, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811 [hereinafter HOUSE REPORT] (stating that purpose of Williams Act is to require disclosure of pertinent information to shareholders in tender offer or in corporate stock repurchase plan). Until the Williams Act became law, federal securities laws required disclosure only in proxy contests. *Id.* at 2813. In a tender offer the offeror seeks corporate control like the initiator of a proxy contest. *Id.* Because tender offers affect shareholders of the target company much like a proxy contest, Congress, in enacting the Williams Act, sought to protect shareholders of the target companies. *Id.*

3. *Id.* at 2811. The Williams Act allows management of a target company an opportunity to communicate management's position on the tender offer to the shareholders of the target company. *Id.* Congress intended that the Williams Act would not favor either a bidder or a target company in a tender offer. HOUSE REPORT, *supra* note 2, at 2813; *see also* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58-59 (1975) (interpreting legislative history of Williams Act as Congress' intention not to provide management weapons in defending against tender offers). Congress, in limiting the substantive requirements of the Williams Act, empowered the Securities and Exchange Commission (SEC) to decide which specific bidder disclosures sufficiently would protect shareholders. 15 U.S.C. §§ 78m(d)(1), (2) (1982). Pursuant to the authority that the Williams Act granted the SEC, the SEC issued regulations that specify the timing and the contents of bidders' disclosures in tender offers. *See* 17 C.F.R. §§ 240.14d-.14e (1988) (stating SEC disclosure requirements of bidders in tender offers); *see also infra* note 6 (listing specific SEC requirements).

4. HOUSE REPORT, *supra* note 2, at 2813; *see infra* note 64 and accompanying text (discussing United States Supreme Court's interpretation that Williams Act, by requiring bidders to make disclosures, protects shareholders).

5. 15 U.S.C. § 78m(d)(1)(B) (1982).

and the loan's maturity date, collateral, and applicable interest rate if the bidder uses borrowed funds to purchase the shares of a target company.[6] Although the Williams Act and SEC regulations require a bidder in a tender offer to include information describing the bidder's arrangements for financing the bidder's offer, neither the Williams Act nor the SEC explicitly requires a bidder to have secured commitments for financing (firm financing) before a bidder may initiate a tender offer.[7] In *IU International Corp. v. NX Acquisition Corp.*[8] the United States Court of Appeals for the Fourth Circuit considered whether the Williams Act and SEC regulations governing disclosure by a bidder implicitly require a tender offeror either to have firm financing before the offeror commences a tender offer or to disclose in the bidder's original disclosures to shareholders and the SEC the expected sources and terms of prospective financing.[9]

In *IU* NEOAX Inc. formed NX Acquisition Corporation (NX) to make a tender offer for the shares of IU International Corporation (IU).[10] NX, in initiating the tender offer, filed disclosure documents with the SEC and transmitted to IU shareholders an offer to purchase all IU shares for $17.50 per share until February 3, 1988.[11] NX's offer to IU shareholders disclosed commitments from banks to lend $311 million to NEOAX for the purchase of IU shares.[12] The offer also disclosed NEOAX's intention to raise an

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6. *See* 17 C.F.R. § 240d-100, sched. 14D-1, item 4 (special instructions for complying with sched. 14D-1) (1988) (providing that bidder must disclose summary of each borrowing transaction). The SEC requires a bidder to disclose the terms of the bidder's offer, the identity and background of the bidder, and the bidder's past contacts with the target company. *Id.* at items 1-3 (special instructions for complying with sched. 14D-1). A bidder also must disclose the purpose of the bidder's offer and the bidder's plans for the target company. *Id.* at item 5 (special instructions for complying with sched. 14D-1). Furthermore, a bidder must include in the bidder's disclosures to the SEC and shareholders of the target company any interest that the bidder holds in the securities of the target company and any contracts that the bidder has with the target company. *Id.* at items 6, 7 (special instructions for complying with sched. 14D-1). Finally, under the SEC regulations, a bidder must disclose the names of persons that will solicit shares on behalf of the bidder, financial statements of the bidder if the bidder is not a natural person, and other information that is material to shareholders' decisions whether to accept or reject the bidder's offer. *Id.* at items 8-10 (special instructions for complying with sched. 14D-1).

7. *See* Newmont Mining Corp. v. Pickens, 831 F.2d 1448, 1450 (9th Cir. 1987) (determining that text of Williams Act is silent on whether bidder must have firm financing to initiate tender offer). The *Newmont Mining* court reasoned that neither the Williams Act nor SEC regulations provide that a bidder must disclose all financing information in the bidder's initial disclosures to the SEC and shareholders of the target company. Id.

8. 840 F.2d 220 (4th Cir. 1988), *aff'd en banc*, 840 F.2d 229 (4th Cir. 1988).

9. IU Int'l Corp. v. NX Acquisition Corp., 840 F.2d 220, 221 (4th Cir. 1988), *aff'd en banc*, 840 F.2d 229 (4th Cir. 1988).

10. *Id.* at 220-221.

11. *Id.* In *IU*, after NX made NX's initial offer to purchase IU shares at $17.50 per share, NX, by amending NX's offer, later raised NX's offering price to $20.00 per share and extended the expiration date of NX's offer to February 12, 1988. *Id.* at 221.

12. *Id.* In *IU* bank commitments to finance NX's offer totalled $416 million but only $311 million was for the purchase of IU shares. *Id.* NX intended that the remaining $105 million of the bank commitments would refinance existing debts of NEOAX. *Id.*

additional $400 million for the IU purchase by selling NEOAX's debt securities and preferred stock through Drexel Burnham Lambert, Inc. (Drexel Burnham), an investment banking firm.[13] In NX's offer to IU shareholders, NX disclosed that Drexel Burnham had issued a letter to NX that expressed Drexel Burnham's confidence in arranging financing for NX's tender offer.[14] Because Drexel Burnham had not sold the $400 million worth of NEOAX's debt securities and preferred stock to investors prior to NX's offer to purchase IU shares, NX could not disclose to IU shareholders the sources and terms of NEOAX's prospective $400 million financing arrangement.[15]

In response to NX's offer for IU shares, IU filed an action in the United States District Court for the District of Maryland.[16] IU requested the district court to enjoin NX's tender offer.[17] IU complained that NX, in failing to disclose in NX's initial disclosure either firm financing or the expected sources and terms for the $400 million financing that Drexel Burnham was going to arrange, violated the Williams Act and SEC regulations.[18] IU further claimed that because NX had not disclosed the expected sources and terms of NEOAX's prospective $400 million financing in NX's initial offer, IU shareholders had insufficient time and information to evaluate the terms of NEOAX's prospective financing before NX's offer forced IU shareholders to decide whether to sell or whether to retain IU shares.[19] The district court denied IU's motion for a preliminary injunction against NX's tender offer.[20] IU appealed the district court's decision to the

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13. *See id.* (stating that Drexel Burnham Lambert, Inc. (Drexel Burnham) intended to raise $360 million through sale of NEOAX's debt securities and $40 million through sale of NEOAX's preferred stock).

14. *Id.*

15. *See id.* at 222 (stating that bidder cannot disclose sources and terms of financing that does not exist). NX's disclosure to the SEC and IU shareholders, however, indicated that Dyson-Kissner-Morgan Corporation, a defendant in *IU*, had committed to buy $10 million worth of NEOAX's preferred stock through Drexel Burnham. *Id.* at 221.

16. *Id.*

17. *Id.*

18. *Id.* In IU's complaint, IU did not allege that NX withheld information in NX's initial disclosure to IU shareholders, but alleged that the Williams Act required more substantial steps in acquiring firm financing than NX took before NX made an offer to IU shareholders. *Id.* IU charged that NX should have been able to disclose expected sources and expected terms of financing when NX made an offer to IU shareholders. *Id.*

19. *Id.* at 223. In IU's complaint, IU claimed that a bidder's financing information is material to shareholders because financing terms are evidence of a bidder's strength and can affect the future performance and dividends of the target company if the bidder's offer succeeds. *Id.* IU, therefore, claimed that IU shareholders needed to receive information on NX's sources and terms of financing in NX's initial disclosures to IU shareholders. *Id.*

20. *Id.* at 221. In denying IU's motion for a preliminary injunction, the district court in *IU* used three factors of a four factor test. *Id.* First, the district court in *IU* determined that the harm to NX from an injuction of NX's tender offer is greater than the harm to IU should NX's offer continue. *Id.* Second, the district court in *IU* determined that IU did not show a strong likelihood of success on the merits of IU's claims. *Id.* Finally, the district court reasoned that a preliminary injunction against NX would not serve the public interest. *Id.* The district court did not address the requirement that IU had to show irreparable harm to IU

United States Court of Appeals for the Fourth Circuit.[21]

In affirming the district court's decision to deny IU's motion, the Fourth Circuit in *IU* held that IU had no chance of success on the merits of IU's claims and that IU had failed to show that IU shareholders would suffer irreparable harm if the court did not enjoin NX's tender offer.[22] In the *IU* court's analysis of IU's claims, the *IU* court applied the same test that the district court used to deny IU's motion to enjoin NX's tender offer.[23] The *IU* court determined that IU had no chance of success on the merits of IU's claims because the *IU* court reasoned that the Williams Act requires a bidder to disclose only existing firm financing, not prospective financing.[24] The *IU* court, in requiring a bidder to disclose only firm financing, reasoned that a bidder's prospective financing arrangement was not an essential element of a bidder's offer.[25] The *IU* court narrowly construed the Williams Act to require that a bidder's initial offer must contain only the bidder's identity, the number of shares that the bidder seeks, the price of the offer and the expiration date of the offer.[26] In narrowly construing the substantive requirements of the Williams Act, the Fourth Circuit determined that the Williams Act requires a bidder to inform shareholders that the tender offer is contingent upon the bidder receiving financing if the bidder does not have firm financing at the time of the bidder's initial disclosures.[27] The *IU* court emphasized that Congress intended

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shareholders if the court allowed NX's tender offer to continue. *Id.*; *see also* Blackwelder Furniture Co. v. Selig Mfg. Co., 550 F.2d 189, 193 (4th Cir. 1977) (stating four factor test that appellate courts should consider in reviewing decisions on motions for preliminary injunctions).

21. *IU*, 840 F.2d at 221. In *IU* a majority of a three judge panel of the Court of Appeals for the Fourth Circuit affirmed the district court's denial of IU's motion for a preliminary injunction. *Id.* at 225. IU petitioned the Court of Appeals for the Fourth Circuit for a rehearing en banc. *Id.* at 228. The full court granted IU's petition for rehearing. *Id.* The full court then affirmed the district court's denial of IU's motion for a preliminary injunction. IU Int'l Corp. v. NX Acquisition Corp., 840 F.2d 229, 229 (4th Cir. 1988). A majority of the full court in *IU* agreed with the reasoning of the majority of the three judge panel. *Id.*

22. IU Int'l Corp. v. NX Acquisition Corp., 840 F.2d 220, 221 (4th Cir. 1988), *aff'd en banc*, 840 F.2d 229 (4th Cir. 1988).

23. *See supra* note 20 (discussing four factor test that district court applied in denying IU's motion for preliminary injuction of NX's tender offer).

24. *Id.* at 222.

25. *Id.* at 223. The *IU* court, in reasoning that a bidder's prospective financing arrangement is not an essential element of a bidder's offer, determined that the identity of the bidder, the number of shares that the bidder seeks, and the offer's price and expiration date are essential to a bidder's tender offer. *Id.* The *IU* court, therefore, determined that a bidder must disclose the essential elements of the bidder's offer to shareholders and the SEC before the bidder's offer is valid. *Id.*

26. *Id.*

27. *Id.* The *IU* court reasoned that although the Williams Act is primarily a disclosure statute, the Williams Act has some substantive effects. *Id.* The *IU* court reasoned that, if a bidder does not have firm financing, a bidder is unable disclose the terms and sources of financing. *Id.* at 222. Furthermore, the *IU* court recognized that when the bidder's financing becomes firm, the Williams Act requires a bidder to amend the bidder's disclosure statement and possibly to extend the offer's expiration date. *Id.* at 223.

that the Williams Act would favor neither incumbent management of the target company nor the bidder in a tender offer.[28] Accordingly, the *IU* court reasoned that a broader construction of the Williams Act that would require bidders either to have and disclose firm financing or to disclose expected sources and terms of financing would favor target companies and frustrate Congress' policy of neutrality in tender offers.[29] The *IU* court determined that a narrow construction of the substantive requirements of the Williams Act adheres to Congess' intent that the Williams Act favor neither a bidder nor a target company in a tender offer.[30] The *IU* court, therefore, reasoned that NX, in disclosing that NEOAX's prospective $400 million financing was contingent upon Drexel Burnham's sale of NEOAX's debt and preferred stock, sufficiently complied with the substantive requirements of the Williams Act.[31]

In determining that NX's disclosures complied with the Williams Act, the *IU* court agreed with the interpretation of the Williams Act that the SEC, as amicus curiae, presented to the *IU* court.[32] The *IU* court reasoned that Congress in the Williams Act gave the SEC broad discretion to determine specific disclosure requirements in tender offers.[33] The *IU* court noted that neither Congress nor the SEC require a bidder to have firm financing or to disclose expected sources and terms of the bidder's prospective financing.[34] In response to IU's argument that the SEC previously had interpreted the Williams Act to require firm financing, the *IU* court

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28. *See id.* at 222, 223 (recognizing that Congress intended Williams Act to remain neutral between bidder and target company in takeover attempt). The *IU* court reasoned that by narrowly construing the substantive provisions of the Williams Act, the *IU* court would respect Congress' intent of neutrality between a bidder and a target company. *Id.* at 223. The *IU* court cited the United States Supreme Court's decision in Rondeau v. Mosinee Paper Corp. to support the *IU* court's conclusion that Congress intended that the Williams Act would maintain neutrality between a bidder and a target company. *Id.*; *see also* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58-59 (discussing Congress' intentions in passing Williams Act); *infra* note 65 and accompanying text (discussing *Rondeau* Court's determination that drafters of Williams Act took extreme care not to favor management of target company or bidder in takeover attempt).

29. *IU*, 840 F.2d at 223. The *IU* court acknowledged that requiring a bidder to disclose the expected sources and terms of the bidder's financing for a tender offer may pose minor obstacles to the bidder. *Id.* The *IU* court, nevertheless, reasoned that imposing even a minor obstacle would favor a target company over a bidder. *Id.*

30. *Id.*

31. *Id.* at 222.

32. *Id.* In *IU* the SEC as amicus curiae argued that neither the Williams Act nor SEC regulations require a particular state of financing before a bidder may commence a tender offer. *Id.* at 222, 224.

33. *See id.* at 224 (determining that Congress left within SEC's discretion specific disclosure requirements for bidder in tender offer); *see also* Newmont Mining Corp. v. Pickens, 831 F.2d 1448, 1451 (9th Cir. 1981) (determining that Congress gave SEC latitude to decide which specific disclosure requirements are necessary to protect shareholders of target company); 15 U.S.C. § 78n(d)(1) (1988) (authorizing SEC to prescibe rules and regulations necessary or appropriate to public interest or to protect shareholders).

34. *IU*, 840 F.2d at 224, 225.

found no inconsistencies between past SEC positions and the SEC's current position on the firm financing issue.[35] Because the Williams Act is silent on the firm financing issue and delegates authority to the SEC to determine specific disclosure requirements, the *IU* court, therefore, deferred to the SEC's interpretation in the SEC's amicus curiae brief that the Williams Act did not require a bidder either to have and disclose firm financing or to disclose expected sources and terms of prospective financing.[36]

In addition to determining that IU had no chance of success on the merits of IU's claims, the *IU* court also determined that IU did not show that NX's failure to disclose expected sources and terms of the prospective $400 million financing would cause irreparable harm to IU shareholders.[37] The *IU* court reasoned that the Williams Act requires a bidder to disclose material information to protect shareholders of the target company.[38] After noting the potential harms to shareholders if a bidder fails to disclose the actual sources and terms of the bidder's financing for a tender offer, the *IU* court reasoned that requiring NX to disclose the expected sources and terms of the Drexel Burnham arrangement would not insure that IU shareholders would receive the material information on the actual sources and terms of NEOAX's $400 million financing.[39] The *IU* court further reasoned that under NX's proposal to disclose the actual sources and terms of the Drexel Burnham financing arrangement at least five days before the offer expired, IU shareholders would have sufficient time to consider the actual

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35. *Id.* In *IU* IU stated that in 1970 the SEC testified in Senate committee hearings that the SEC had enjoined a tender offer because the bidder did not have sufficient funds with which to pay for the bidder's offer. *Id.* at 224. IU argued that the SEC testimony in 1970 indicates that the SEC previously had required a bidder to have firm financing before the bidder commences a tender offer. *Id.* The *IU* court determined that the SEC's testimony on enjoining a tender offer when a bidder could not pay for shares that the bidder sought referred to fraud, not disclosure. *Id.* The *IU* court reasoned that the SEC may have enjoined the tender offer in 1970 for practices other than a lack of firm financing. *Id.* The *IU* court also reasoned that because the SEC never issued a regulation requiring firm financing by a bidder, the SEC never considered that a bidder's lack of firm financing violated the Williams Act. *Id.*

36. *Id.* at 224.

37. *Id.* at 223.

38. *See id.* at 222 (discussing decision of United States Supreme Court in *Rondeau*, which held that Williams Act, in requiring bidder's disclosures, protected shareholders in tender offers); *see also infra* notes 64, 65 and accompanying text (discussing *Rondeau* Court's interpretation of purpose of Williams Act); *supra* note 2 and accompanying text (discussing legislative history of Williams Act).

39. *IU*, 840 F.2d at 223. In *IU* IU argued that shareholders in a tender offer need information concerning the bidder's financing to determine the financial strength of the bidder and the future performance of the target company if the bidder's offer succeeds. *Id.* The *IU* court, however, determined that disclosure of a bidder's expected sources and terms of financing does not give shareholders of the target company information on sources and terms of a bidder's firm financing. *Id.* The *IU* court, in reasoning that information on a bidder's expected sources and terms of financing did not aid shareholders in a tender offer, characterized an amendment to a statement of expected sources and terms of financing as an amendment to a statement of nothing. *Id.*

sources and terms of NEOAX's $400 million financing before deciding to sell or retain IU stock.[40] The *IU* court determined that, in tender offers, shareholders generally will receive information on a bidder's firm financing because the bidder usually will have firm financing before the bidder's offer expires.[41] The *IU* court reasoned that bidders usually will have firm financing because of pressure from shareholders of the target company for a bidder's financing information and the SEC's requirement of prompt payment upon expiration of a tender offer.[42] The *IU* court, therefore, determined that IU failed to show that NX's disclosures harmed IU shareholders and that IU failed to show that a disclosure of expected sources and terms of NX's prospective financing would benefit IU shareholders.[43]

In contrast to the majority's reasoning in *IU*, the dissenting opinion in *IU* determined that the language of the Williams Act requires a bidder to disclose the sources and terms of financing for the bidder's offer at least twenty days before the bidder's offer expires.[44] The dissenting opinion reasoned that the sources and terms of the borrowed funds, even if conditional or contingent upon some event, are material to a shareholder's decision whether to sell or whether to retain the shareholder's shares in the target company.[45] The dissenting opinion determined that information on a bidder's expected sources and terms of financing helps the shareholder to assess the probability of payment from the bidder.[46] In response to the

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40. *See id.* (reasoning that amendment by NX to NX's original filing disclosing firm financing five days before expiration of offer would give shareholders sufficient time in which to revoke tender).

41. *Id.* at 223-224.

42. *Id.*; *see* 17 C.F.R. § 240.14e-1(c) (1988) (requiring that, if shareholders accept bidder's offer, bidder must pay shareholders within prompt period of time after bidder's offer expires). The court in *IU* acknowledged that under current SEC practices payment is prompt if a bidder pays shareholders within five days of the expiration date of the bidder's offer. *IU*, 840 F.2d at 223.

43. *IU*, 840 F.2d at 222-223.

44. *See id.* at 225 (Winter, C.J., dissenting) (finding no need to look behind terms of Williams Act or SEC regulations to determine what bidder must disclose). In *IU* the dissenting opinion determined that the Williams Act specifically requires a bidder to file a statement with the SEC that identifies the sources of the funds that the bidder will use to purchase the shares that the bidder seeks. *Id.* at 225-226. The dissenting opinion also determined that the SEC regulations clearly require a bidder to summarize in the bidder's filing with the SEC the agreement for any loan agreement that the bidder will use to finance the bidder's offer. *Id.*

45. *Id.* at 227 (Winter, C.J., dissenting) The dissenting opinion in *IU* reasoned that the Williams Act does not require a bidder to complete all details of the bidder's financing before the bidder commences a tender offer. *Id.* at 225. The dissent, however, reasoned that, before a bidder makes a tender offer, the financing source must make a commitment to the bidder to provide financing for the bidder's offer. *Id.* at 227. The dissenting opinion recognized that a lender may make the lender's commitment to a bidder to finance a tender offer contingent upon an event or upon the bidder meeting a certain condition. *Id.* at 225. The dissent determined that a bare assertion in the bidder's disclosure that a third party was confident of success in arranging financing for the bidder's offer does not satisfy the requirements of the Williams Act for disclosure of the sources and terms of a bidder's financing. *Id.*

46. *Id.* at 227. (Winter, C.J., dissenting).

argument that a bidder may amend the bidder's original filing with the SEC to reflect changes in tender offer financing, the dissenting opinion determined that the bidder still must allow shareholders a minimum of twenty days to consider the bidder's sources and terms of financing.[47]

In addressing to the majority's position in *IU* that generally a bidder will have firm financing before the bidder's offer expires, the dissenting opinion reasoned that the SEC's prompt payment regulations may not force a bidder to have firm financing before a bidder's offer expires.[48] The dissenting opinion in *IU* suggested that, if an offer expired without firm financing, the bidder would have no legal duty to disclose the terms of contingent financing after the offer expired.[49] The *IU* dissent, therefore, reasoned that, if the offer expired without firm financing, shareholders that faced a tender offer never would know the sources and terms of the bidder's financing.[50] The dissenting opinion in *IU* reasoned that Congress, in drafting the Williams Act, did not intend to rely on economic reality to force a bidder to disclose the sources and terms of financing to the shareholders of a target company.[51] Rather, the dissenting opinion reasoned that, regardless of economic conditions, Congress intended that the Williams Act would require a bidder to disclose the sources and terms of a bidder's financing.[52] Reasoning that the Williams Act requires disclosure of contingent sources and terms of financing in a bidder's initial offer, the dissent would have granted IU's request for an injunction that would have lasted until NX disclosed to IU shareholders the contingent sources and terms of NEOAX's financing.[53]

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47. *Id.* at 228 (Winter, C.J., dissenting). In *IU* the dissenting opinion viewed as imperative the disclosure of terms and sources at least twenty days before the offer's expiration date. *Id.* The dissenting opinion did not interpret the Williams Act to allow the bidder to decide when to disclose material information to shareholders. *Id.*

48. *Id.* at 228 n.6 (Winter, C.J., dissenting). In *IU* the dissenting opinion determined that the SEC was relying on pressure from the prompt payment requirement to force a bidder to receive firm financing before the bidder's offer expired. *Id.* The dissenting opinion, however, asserted that the Williams Act clearly did not make a bidder's financial disclosures dependent upon a requirement that the bidder pay the shareholders promptly after the tender offer expires. *Id. See* 17 C.F.R. § 240.14e-1(c) (1988) (requiring, upon expiration of tender offer, offeror either to pay shareholders promptly or to return shares to shareholders promptly).

49. *Id.* (Winter, C.J., dissenting).

50. *See supra* note 48 and accompanying text (discussing circumstances in which SEC regulations would not require bidder's disclosure of sources and terms of financing to shareholders of target company).

51. *IU*, 840 F.2d. at 228 (Winter, C.J., dissenting).

52. *Id.* (Winter, C.J., dissenting).

53. *Id.* (Winter, C.J., dissenting). The dissenting opinion determined that NX's failure to disclose the expected sources and terms of NX's $400 million financing harmed IU shareholders. *Id.* The dissenting opinion also determined that IU had a strong likelihood of success on the merits of IU's claims under the Williams Act. *Id.* The dissenting opinion stated that NX's failure to disclose expected terms of NX's financing deprived IU shareholders of IU shareholders' statutory right under the Williams Act to receive material information from NX concerning NX's offer. *Id.*

In *IU* the Fourth Circuit Court of Appeals properly determined that IU had no chance of success on the merits of IU's claims because Congress intended that the Williams Act would maintain neutrality between a bidder and a target company in a tender offer.[54] The United States Supreme Court's interpretation of the legislative history of the Williams Act in *Rondeau v. Mosinee Paper Corp.*[55] supports the *IU* court's view of the Williams Act and Congress' intent in drafting the Williams Act.[56] In *Rondeau* Francis Rondeau admitted that he had violated the Williams Act by not filing a disclosure form with the SEC within ten days after Rondeau acquired more than five percent of Mosinee's outstanding shares of stock.[57] Mosinee brought an action against Rondeau in the United States District Court for the Western District of Wisconsin.[58] Mosinee requested that the district court permanently enjoin Rondeau from purchasing additional Mosinee stock or voting the stock that Rondeau owned.[59] Mosinee further requested that the court require Rondeau to divest Rondeau's interest in Mosinee.[60] The district court denied Mosinee's motion for a permanent injunction and granted Rondeau's motion for summary judgment because Mosinee failed to show that Rondeau's actions irreparably would harm Mosinee's shareholders.[61] In reversing the district court, the United States Court of Appeals

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54. *See supra* note 28 and accompanying text (discussing *IU* court's interpretation of Williams Act); *infra* notes 64, 65 and accompanying text (discussing United States Supreme Court's interpretation in *Rondeau* that Congress intended Williams Act to maintain neutrality in tender offers).

55. 422 U.S. 49 (1975).

56. *See infra* notes 64, 65 (discussing *Rondeau* Court's interpretation of Congress' intent in enacting Williams Act).

57. Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 51-52 (1975). In *Rondeau* Rondeau testified that Rondeau purchased Mosinee's stock under the mistaken belief that the law required a stockholder to file a disclosure only after the stockholder acquired more than ten percent of a public company's stock. *Id.* at 55 n.4. When Rondeau discovered that the threshold percentage for shareholder disclosure was 5%, Rondeau disclosed to the SEC Rondeau's background, sources of funds, purpose in purchasing Mosinee's stock, and contracts or arrangements with Mosinee. *Id.* at 51-53 n.1; *see also* 15 U.S.C. § 78m(d)(1) (1982) (requiring shareholder to file disclosure with SEC within 10 days after shareholder acquires more than 5% of stock in public company). Rondeau filed Rondeau's disclosure with the SEC more than three months after Rondeau acquired more than five percent of Mosinee's stock. *Rondeau*, 422 U.S. at 55.

58. *Rondeau*, 422 U.S. at 54.

59. *Id.* at 55.

60. *Id.* In *Rondeau*, in addition to Mosinee's request for a permanent injunction against Rondeau, Mosinee moved for a preliminary injunction against Rondeau, but later withdrew the motion. *Id.* In *Rondeau* Mosinee's complaint alleged that Rondeau and the two banks that had financed Rondeau's purchases schemed to defraud Mosinee shareholders. *Id.* at 54. Mosinee further alleged in *Rondeau* that Rondeau harmed the shareholders who had sold Mosinee stock to Rondeau because the shareholders had not received the information concerning Rondeau's financing that the Williams Act required Rondeau to disclose. *Id.* at 55-56. Mosinee also alleged that Rondeau's failure to disclose denied Mosinee a chance to communicate Mosinee's position to Mosinee shareholders. *Id.* at 55.

61. *Id.* at 56. In determining that Rondeau had not harmed Mosinee shareholders

for the Seventh Circuit determined that Mosinee, after establishing that Rondeau violated the Williams Act, did not need to show that Rondeau irreparably would have harmed Mosinee shareholders.[62] In reversing the Seventh Circuit's decision, the United States Supreme Court in *Rondeau* determined that, because an injunction is an equitable remedy, traditional equitable principles, including a showing of irreparable harm by the mover, should apply to a motion for an injunction that would prevent further violation of the Williams Act.[63] The *Rondeau* Court analyzed the congressional reports on the Williams Act and determined that, by requiring a bidder to disclose information relevant to the shareholder's decision to sell or retain the target company's shares, Congress intended to protect shareholders of target companies.[64] The *Rondeau* Court determined that the legislative history of the Williams Act emphasized that Congress intended the Williams Act to remain neutral between a bidder and a target company in a tender offer.[65] The *IU* court, in following the *Rondeau* court's inter-

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irreparably, the district court in *Rondeau* also held that Rondeau and the two banks that financed Rondeau's purchases of Mosinee's stock did not conspire to defraud Mosinee shareholders. *Id.*

62. *Id.* at 57.

63. *Id.* at 64. The Supreme Court in *Rondeau* determined that although Mosinee proved that Rondeau had violated the Williams Act, before a court could grant injunctive relief to Mosinee, Mosinee needed to show irreparable harm to Mosinee shareholders. *Id.* at 65. The *Rondeau* Court, in examining the harms that Mosinee claimed, determined that, because Rondeau had not made a tender offer for control of Mosinee and had filed the proper disclosure statements with the SEC, Rondeau did not harm either current Mosinee shareholders or Mosinee. *Id.* at 59. The *Rondeau* Court also determined that, if Rondeau harmed the persons who sold Rondeau the stock, those persons had an adequate remedy at law in damages and, therefore, did not need to seek injunctive relief. *Id.* at 60.

64. *Id.* at 58; *see also* Edgar v. MITE Corp., 457 U.S. 624, 633 (1982) (determining that Congress by requiring bidder to make disclosures to shareholders of target companies intended to protect shareholders in tender offers); Piper v. Chris-Craft Indus., 430 U.S. 1, 31 (1977) (determining that legislative history shows that Congress' only design in enacting Williams Act was to ensure that adequate information reached shareholders in tender offer). The *Rondeau* Court noted that Congress intended that the Williams Act would allow shareholders in a tender offer to make informed decisions whether to sell or whether to retain shares of the target company. *Rondeau*, 422 U.S. at 58.

Congress in the legislative history of the Williams Act observed that tender offers provide a check on inefficient management of public companies. HOUSE REPORT, *supra* note 2, at 2813. The legislative history also stated that the Williams Act avoids regulation that favors either management of a target company or a bidder. *Id.* The drafters of the Williams Act designed the Williams Act to provide equal opportunity for both the bidder and the management of the target company to communicate to the shareholders in a tender offer. *Id.*

65. *See Rondeau*, 422 U.S. at 58 (determining that legislative history of Williams Act shows that Congress in maintaing neutrality did not intend to give target companies weapon with which to discourage takeovers); *see also MITE*, 457 U.S. at 634 (determining that Congress intended to balance shareholder protection with interests of bidder and target company); *Piper*, 430 U.S. at 30-31 (determining that drafters of Williams Act designed Williams Act to favor neither bidder nor target company); Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 55 (2d Cir. 1985) (reasoning that Congress considered neutrality between target company and bidder crucial to Williams Act).

pretation of the Williams Act as remaining neutral in a tender offer, narrowly construed the substantive requirements of the Williams Act to adhere to Congress' intention of not favoring either a bidder or a target company.[66] The *IU* court, therefore, properly determined that NX's disclosure of Drexel Burnham's letter that stated Drexel Burnham's confidence in arranging financing for NX's tender offer met the substantive requirements of the Williams Act.[67]

In addition to determining that NX's disclosure of only Drexel Burnham's highly confident letter met the substantive requirements of the Williams Act, the *IU* court also properly determined that NX's failure to disclose the expected sources and terms of NX's prospective financing would not irreparably harm IU shareholders.[68] A bidder's disclosure of the expected sources and terms of prospective financing for a tender offer would not provide the shareholders of a target company with the actual sources and terms of a bidder's financing that the Williams Act requires the bidder to disclose.[69] Also, in *IU* NX proposed to disclose the actual sources and terms of NX's firm financing at least five days before NX's offer expired.[70] After NX discloses the actual sources and terms of NX's financing, the SEC has the power to extend NX's offer to ensure that IU shareholders have sufficient time to consider NX's firm financing before NX's offer expires.[71] Also, the SEC regulations requiring prompt payment by the bidder after the bidder's offer expires usually will cause a bidder to have firm financing before the bidder's offer expires.[72] As the court in *IU* reasoned, fraud provisions of

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66. *See supra* notes 28, 38 and accompanying text (discussing *IU* court's reliance on Supreme Court's interpretation in *Rondeau* of congressional purpose and intent behind Williams Act).

67. *See supra* notes 64, 65 and accompanying text (discussing cases in which United States Supreme Court has interpreted legislative history of Williams Act); *supra* note 66 and accompanying text (discussing *IU* court's reliance on *Rondeau* Court's interpretation of Williams Act).

68. *See supra* note 39 (discussing *IU* court's reasoning that IU shareholders would not benefit from NX's disclosure of expected sources and terms of $400 million financing for NX's offer); *infra* notes 69-71 and accompanying text (analyzing *IU* court's reasoning that IU shareholders would not benefit from NX's disclosure of expected sources and terms of NX's financing for NX's offer).

69. *See supra* notes 5, 6 and accompanying text (discussing Williams Act's and SEC's requirements for bidder's disclosure of financing for tender offer); *see also* 17 C.F.R. § 240.14d-6(d) (1988) (requiring bidder to disclose material changes to bidder's original offer).

70. IU Int'l Corp. v. NX Acquisition Corp., 840 F.2d 220, 223 (4th Cir. 1988) *aff'd en banc*, 840 F.2d 229 (4th Cir. 1988).

71. *See* Newmont Mining Corp. v. Pickens, 831 F.2d 1448, 1452 (9th Cir. 1987) (determining that Williams Act authorizes the SEC to prescribe extensions of time of tender offers to allow shareholders to review bidder's amendments if additional time is necessary); 15 U.S.C. § 78m(d)(2) (1982) (authorizing SEC to make rules to protect shareholders or public interest if material changes in bidder's tender offer occur); 17 C.F.R. § 240.14d-7(a) (1988) (allowing shareholders in tender offer to withdraw shares until point at which bidder's offer expires).

72. *See Newmont Mining*, 831 F.2d at 1453 (9th Cir. 1987) (acknowledging SEC position that bidder must pay shareholders promptly after offer expires); *see supra* note 48 and

the Williams Act and SEC regulations protect shareholders if a bidder that has firm financing does not disclose the actual sources and terms of the bidder's financing to shareholders of the target company.[73] The *IU* court, therefore, correctly determined that NX's disclosure of only the letter from Drexel Burnham that stated Drexel Burnham's confidence in arranging financing for NX's tender offer would not harm IU shareholders.[74]

In analyzing the harm to IU shareholders, *IU* court observed that Congress delegated to the SEC the authority to determine the specific disclosures that would protect shareholders in a tender offer.[75] The text of the Williams Act is silent on when a bidder must have firm financing for a tender offer.[76] The SEC has interpreted the Williams Act and SEC regulations not to require a bidder to have firm financing or to disclose expected sources and terms of a bidder's financing before a bidder commences a tender offer.[77] Because the Williams Act is silent on the firm financing issue and because the Williams Act delegates authority to the SEC to draft specific rules for disclosures, the *IU* court was correct in deferring to the SEC's interpretation of the Williams Act and SEC regulations.[78]

The Fourth Circuit's interpretation of the Williams Act and SEC regulations in *IU* is consistent with the opinions of all other federal courts that have addressed the firm financing issue.[79] For example, in *Newmont*

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accompanying text (discussing SEC's prompt payment regulations). In *IU* the SEC, as amicus curiae, indicated that if a bidder pays the shareholders within five days after the bidder's offer expires, the bidder's payment to shareholders is prompt. *IU*, 840 F.2d at 223.

73. *See* 15 U.S.C. § 78n(e) (1982) (authorizing SEC to make rules and to take action to prevent fraud in tender offers); 17 C.F.R. § 240.10-b(5) (1988) (listing SEC rules on what actions constitute fraud by bidder in tender offer). In *IU* the SEC, as amicus curiae, indicated that if bidder chose to allow the bidder's offer to expire without the bidder having firm financing, the SEC would examine the bidder's offer for fraud. *IU*, 840 F.2d at 224.

74. *See supra* notes 39-42 and accompanying text (discussing *IU* court's reasoning that NX's disclosures to IU shareholders did not harm IU shareholders); *supra* notes 69-73 and accompanying text (analyzing *IU* court's reasoning that NX's failure to disclose expected sources and terms of NX's financing did not harm IU shareholders).

75. *See* 15 U.S.C. § 78m(d)(1) (1982) (authorizing SEC to prescibe disclosure of information necessary to protect public interest or investors); *Newmont Mining*, 831 F.2d at 1451 (observing that Congress gave SEC wide latitude in which to determine disclosure requirements).

76. *See Newmont Mining*, 831 F.2d at 1450 (noting that Williams Act is silent on question of appropriate point in tender offer at which bidder must receive firm financing for bidder's tender offer). The *Newmont Mining* court found nothing in the text of the Williams Act, in the legislative history of the Williams Act, or in the SEC regulations that indicated that a bidder must disclose financing information to the shareholders of the target company at the outset of the bidder's tender offer. *Id.*

77. *See IU*, 840 F.2d at 224 (stating that SEC as amicus curiae in *IU* argued that no requirement that bidder receive firm financing to commence tender offer exists); *Newmont Mining*, 831 F.2d at 1452 (recognizing SEC's position that Williams Act and SEC regulation do not require bidder to obtain firm financing before bidder commences tender offer).

78. *See supra* note 75 and accompanying text (discussing SEC's authority to decide specific disclosure requirements); *supra* note 76 and accompanying text (discussing silence of Williams Act on firm financing issue).

79. *See Newmont Mining*, 831 F.2d at 1453 (holding that bidder, in commencing tender

Mining Corp. v. Pickens[80] the United States Court of Appeals for the Ninth Circuit considered whether the Williams Act requires a bidder to have arranged firm financing at the inception of the bidder's tender offer.[81] In *Newmont Mining* T. Boone Pickens and others (the Pickens Group) made a tender offer of $3.3 billion for the shares of Newmont Mining Corporation.[82] The Pickens Group disclosed that Drexel Burnham was highly confident of arranging $1.1 billion in financing through the issuance of debt instruments for the Pickens Group's purchase of Newmont shares.[83] Newmont brought an action against the Pickens Group in the United District Court for the District of Nevada.[84] Newmont, in asserting that the Williams Act requires a bidder to have arranged firm financing and to disclose the sources and terms of a bidder's firm financing, claimed that the Pickens Group's disclosure of a letter from Drexel Burnham that only indicated Drexel Burnham's confidence in arranging financing for the Pickens Group violated the Williams Act.[85] Newmont, in claiming that the Pickens Group's failure to disclose the actual sources and terms of the Pickens Group's financing violated the Williams Act, requested the court to enjoin the Pickens Group's tender offer.[86] The district court in *Newmont Mining* denied Newmont's request for a preliminary injunction.[87] Newmont Mining Corporation appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit.[88] In determining that the Pickens Group's disclosure did not violate the Williams Act, the Ninth Circuit in *Newmont Mining* recognized Congress' intent, in enacting the Williams Act, to require disclosures in a tender offer and to empower the SEC to decide which disclosures are necessary to protect shareholders of a target company.[89] The

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offer without firm financing, did not violate Williams Act or SEC regulations); Warnaco, Inc. v. Galef, Civ. No. B-86-146 (D. Conn. 1986), *aff'd mem.*, 800 F.2d 1129 (2d Cir. 1986) (holding that Williams Act and SEC regulations do not require bidder to obtain firm financing before a bidder may initiate tender offer); Plaza Sec. Co. v. Fruehauf Corp., 643 F. Supp. 1535, 1541 (E.D. Mich. 1986) (reasoning that no requirement exists that would force bidder to have funding before bidder commences tender offer).

80. 831 F.2d 1448 (9th Cir. 1987).

81. Newmont Mining Corp. v. Pickens, 831 F.2d 1448, 1449 (9th Cir. 1987).

82. *Id.*

83. *Id.* In *Newmont Mining* the Pickens Group disclosed that, in addition to Pickens' prospective $1.1 billion financing arrangement from Drexel Burnham, the Pickens Group had raised $600 million in equity and had commitments from lenders for $1.5 billion to fund Pickens' tender offer for Newmont Mining stock). *Id.*

84. *Id.* at 1448.

85. *See id.* at 1449, 1450 (discussing Newmont management's claim in *Newmont Mining* that Williams Act requires bidder to have firm financing when bidder commences tender offer).

86. *Id.* at 1448.

87. *See id.* (discussing district court's decision in *Newmont Mining).*

88. *Id.* at 1449.

89. *Id.* at 1450, 1451. The court in *Newmont Mining* followed the United States Supreme Court's interpretation in Rondeau v. Mosinee Paper Corp. of Congress' intent in enacting the Williams Act. *Id.*; *see also supra* note 64 and accompanying text (discussing United States Supreme Court's interpretation in *Rondeau* of legislative history of Williams Act). In analyzing

Newmont Mining court recognized that the text of the Williams Act and the SEC regulations that govern a bidder's disclosures are silent on when a bidder must have firm financing for a tender offer.[90] Because the Williams Act and the SEC regulations fail to address the firm financing issue, the *Newmont Mining* court determined that a bidder may commence a tender offer without previously having arranged all terms of financing.[91] The court in *Newmont Mining* acknowledged that legislation was pending in Congress that would require firm financing at the commencement of a tender offer.[92] The *Newmont Mining* court viewed congressional and regulatory debates on whether to require firm financing prior to a tender offer as evidence that changes in the regulation of the financing of tender offers must come from Congress or the SEC, not from the courts.[93] The Ninth Circuit in *Newmont Mining*, therefore, affirmed the district court's decision not to enjoin the Pickens Group's tender offer.[94] The *IU* court, in determining that the Williams Act did not require a bidder to have firm financing before commencing a tender offer, relied heavily upon the *Newmont Mining* court's reasoning.[95]

Because of the prevalent and controversial use of letters to bidders that indicates the investment banks's confidence in arranging financing for bidders's tender offers (highly confident letter), Congress has considered legislation that would require a bidder to arrange firm financing prior to commencing a tender offer.[96] Proponents of a firm financing requirement

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the Williams Act the court in *Newmont Mining* cited the provisions of the Williams Act that delegated authority to the SEC to decide which disclosure requirements are necessary to protect shareholders in a tender offer. *Id.* at 1452. *See* 15 U.S.C. § 78n(d)(1) (1982) (authorizing SEC to require any information that SEC decides is necessary to protect shareholders or public interest).

90. *Newmont Mining*, 831 F.2d at 1450.

91. *See id.* (determining that Williams Act did not require bidder to provide shareholders with all information at outset of tender offer).

92. *See id.* at 1453 (discussing House and Senate proposals that would change bidder's financing requirements in tender offer); *infra* note 96 and accompanying text (discussing House and Senate proposals that would change bidder's financing requirements in tender offer).

93. *See Newmont Mining*, 831 F.2d at 1453 (reasoning that congressional and regulatory debate show that Congress and SEC are proper bodies to require firm financing in tender offers).

94. *Id.* at 1450, 1453.

95. *See* IU Int'l Corp. v. NX Acquisition Corp., 840 F.2d 220, 222 (4th Cir. 1988), *aff'd en banc*, 840 F.2d 229 (4th Cir. 1988) (agreeing with *Newmont Mining* court in rejecting argument that Williams Act requires firm financing before bidder may initiate tender offer). The *IU* court also agreed with the *Newmont Mining* court in determining that the SEC's prior positions on firm financing issue did not reveal inconsistencies with current SEC position. *Id.* at 224.

96. *See* S. 1324, 100th Cong., 1st Sess. § 11(a)(i)(2)(B) (1987) (changing financing requirements for bidders in tender offers); *see also* H.R. 2172, 100th Cong., 1st Sess. § 7 (1987) (changing disclosure requirements for bidder in tender offer). The Senate proposal would have required that, before a bidder may commence a tender offer, the bidder must have sufficient funds to finance the offer on deposit in a bank, or legally enforceable, unconditional and irrevocable commitments from a bank for the amount of the bidder's tender

argue that highly confident letters from investments bankers to bidders lead to abuse of tender offers by bidders that are not contending seriously for control of the target companies but that attempt to manipulate the price of a company's stock for quick profits.[97] Opponents of a firm financing requirement argue that the highly confident letters from investment bankers, like the letter from Drexel Burnham in *IU*, increase competition among financing sources and make the capital markets more efficient.[98] The SEC, in deciding not to require bidders to have firm financing to commence a tender offer, determined that the marketplace and the courts adequately are addressing takeover tactics, including the use of highly confident letters from investment bankers by bidders.[99] Congress, however, by enacting the Williams Act and delegating authority to the SEC to determine specific disclosures requirements, did not intend for a court to impose the court's

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offer, or a combination of cash and binding commitments. S. 1324, 100th Cong., 1st Sess. § 11(a)(i)(2)(B) (1987). The House proposal would have required bidder to disclose in the bidder's initial filing with the SEC the conditions that a lender requires of a bidder before lender will commit to finance the bidder's offer. H.R 2172, 100th Cong., 1st Sess. § 7 (1987).

97. *See* BRANCATO, TAKEOVER BIDS AND HIGHLY CONFIDENT LETTERS 1-2 (Cong. Res. Service 87-724E, August 28, 1987) (citing fears of possible manipulation of securities market by tender offerors that have not arranged firm financing). In initiating tender offers, bidders frequently use letters from investment bankers to bidders that indicate the investment banker's confidence in arranging financing for the bidder's tender offer (highly confident letters). The low cost of obtaining a highly confident letter relative to commitment from a commercial bank encourages a bidder to make the bidder's offer conditional on the bidder receiving financing. *Id.* at 15. Some members of Congress and investment bankers are concerned that the relatively low cost of obtaining a highly confident letter and the incentive for an investment banker to issue the letter may allow an insincere bidder to "put a company into play". *Id.* at 2. By putting a company into play, the insincere bidder hopes to manipulate the price of the target company without committing the bidder to purchase the shares that shareholders tender. *Id.* at 15.

98. *See id.* at 8-10 (outlining argument that highly confident letters compete with commercial bank's lending commitments in market to provide capital for tender offers). Some investments bankers argue that, because highly confident letters are as reliable as conditional commercial bank commitments in tender offers, Congress should not single out highly confident letters for additional regulation. *Id.* at 21. Investment bankers claim that investment banking firms before rendering highly confident letters exercise due diligence in examining the merits of the bidder's offer and the probability that the offer will succeed. *Id.* at 9. Investment bankers also claim that, if an investment banker failed to arrange financing for a bidder after issuing a "highly confident" letter, the market for capital financing would view that investment banker as unreliable and not furnish more chances for the investment banker to issue financing letters. *Id.*

99. *See* BRANCATO, *supra* note 97, at 21 (discussing letter from SEC Chairman John Shad to Chairman of House Subcommittee on Telecommunications, Consumer Protection, and Finance). In the letter the SEC chairman recounted the SEC's positions concerning takeover tactics, including the use of highly confident letters in tender offer. *Id.* at 20. The SEC chairman reported that members of the SEC unanimously concluded that the marketplace and courts adequately were addressing takeover tactics. *Id.* at 21. The SEC, therefore, did not recommend any law or regulation that would require bidders to have firm financing to commence a tender offer. *Id. See Newmont Mining*, 831 F.2d at 1453 (stating that SEC, after considering firm financing requirement, decided not to require that bidder have firm financing before bidder commences tender offer).

view of fairness in overseeing a tender offer.[100] The Fourth Circuit, in analyzing only the potential harm to IU shareholders from NX disclosures and compliance with the Williams Act, properly left the economic and social issues of tender offer financing to the Congress and the SEC.[101] Until the Congress or the SEC require a bidder to have firm financing, the court's decision in *IU* allows bidders to continue using the highly confident letters from investment bankers in initiating tender offers.[102]

In *IU International Corp. v. NX Acquisition Corp.* the Fourth Circuit Court of Appeals affirmed the district court's denial of IU's motion for a preliminary injunction against NX's tender offer because NX's disclosure of the highly confident letter from Drexel Burnham met the narrow substantive requirements of the Williams Act and did not harm IU shareholders.[103] In holding that NX's disclosures complied with the Williams Act, the court in *IU* recognized the United States Supreme Court's determination that a narrow construction of the substantive requirements of the Williams Act closely adheres to Congress' intent that the Williams Act would remain neutral in tender offers.[104] In holding that NX's disclosure did not irreparably harm IU shareholders, the *IU* court also properly determined that a disclosure of the expected sources and terms of NX's financing would not have given IU shareholders additional time or information with which to consider

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100. *See* Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 10 (1985) (reasoning that, through federal security law and through SEC, Congress consistently created requirements and safeguards that emphasize shareholder choice in tender offers). The *Schreiber* Court determined that judges are not to oversee tender offers for substantive fairness but judges are to determine whether the tender offer meets the broad disclosure requirements and the narrow substantive requirements. *Id. See also* Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 948 (2d Cir. 1969) (reasoning that no tender offer is perfect and courts should not impose unrealistic laboratory conditions on tender offers).

101. *See* IU Int'l Corp. v. NX Acquisition Corp., 840 F.2d 220, 225 (4th Cir. 1988), *aff'd en banc*, 840 F.2d 229 (4th Cir. 1988) (determining that SEC could require firm financing, but noting that SEC has not taken action on firm financing issue); *Newmont Mining*, 831 F.2d at 1453 (reasoning that debate over issue in Congress and at SEC indicates that firm financing issue is legislative or administrative matter); *supra* notes 96-98 and accompanying text (discussing proposals in Congress that would change financing requirements in tender offers and discussing social and economic arguments regarding proposals to change requirements for bidder's financing of tender offers).

102. *IU*, 840 F.2d at 225 (determining that NX's disclosure, including mention of highly confident letter, was proper because NX had disclosed all NX knew about NX's financing for NX's tender offer). *See supra* notes 96-98 (discussing controversial use of highly confident letters in tender offers).

103. *See supra* note 31 and accompanying text (discussing *IU* court's holding that NX's disclosure complied with Williams Act); *supra* note 43 and accompanying text (discussing *IU* court's holding that IU failed to establish that NX's disclosure would irreparably harm IU shareholders).

104. *See supra* notes 28, 38 and accompanying text (discussing *IU* court's reliance on decision of United States Supreme Court in Rondeau v. Mosinee Paper Corp., which interpreted Congress' intent to remain neutral); *supra* note 65 and accompanying text (discussing *Rondeau* Court's interpretation of legislative history of Williams Act).

NX's firm financing.[105] Moreover, the *IU* court, in holding that neither the Williams Act nor the SEC regulations require firm financing or disclosure of expected sources and terms of financing, appropriately deferred to the SEC's authority under the Williams Act to draft disclosure rules for tender offers.[106] The *IU* court's interpretation and analysis agreed with all other federal courts of appeal that have addressed the firm financing issue.[107] By refusing either to interpret broadly the terms of the Williams Act or to assume authority that properly rests with the SEC, the *IU* court has allowed bidders in the Fourth Circuit to continue to use highly confident letters from investment bankers to initiate tender offers until Congress or the SEC changes the financing or disclosure requirements in tender offers.[108]

ROGER ALSUP

105. *See supra* note 39 and accompanying text (discussing *IU* court's reasoning that disclosure of expected sources and terms of bidder's financing does not affect timing and content of bidder's disclosure of actual sources and terms of financing); *supra* note 69-72 and accompanying text (analyzing *IU* court's reasoning that NX's failure to disclose expected sources and terms of NX's financing to IU shareholders did not harm IU shareholders).

106. *See supra* notes 75, 76 and accompanying text (analyzing *IU* court's reasoning in deferring to SEC's authority to determine specific disclosure requirements in tender offers).

107. *See supra* note 79 and accompanying text (discussing prior federal court opinions on firm financing issue).

108. *See supra* note 97 and accompanying text (discussing effect of highly confident letters on market for capital that finances tender offers); *supra* note 101 and accompanying text (discussing *IU* court's recognition that only SEC and Congress have power to change disclosure requirements in tender offers).