

Tulsa Law Review

Volume 13 | Number 3

1978

Problems in the Regulation of Tender Offers: The Williams Act, State Takeover Statutes, and SEC Rules

Everette D. Hull

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Everette D. Hull, *Problems in the Regulation of Tender Offers: The Williams Act, State Takeover Statutes, and SEC Rules*, 13 Tulsa L. J. 552 (1978).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol13/iss3/5>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

Notes & Comments

PROBLEMS IN THE REGULATION OF TENDER OFFERS: THE WILLIAMS ACT, STATE TAKEOVER STATUTES, AND SEC RULES

I. INTRODUCTION

Problems have developed in the interpretation of the various regulations of tender offer takeover bids. Such tender offers are described as "publicly made invitations addressed to all shareholders of a corporation to tender their shares for sale at a specified price,"¹ and are regulated by federal and state statutes, and Securities and Exchange Commission (SEC) guidelines. Confusion in the regulation of tender offers has stemmed from the varied application of such regulations² and from recent court decisions relating to takeover bids.³ This confused state of the various regulatory guidelines has been magnified by the increased use of tender offers, now one of the most popular ways of taking over a company.⁴

1. R. JENNINGS & H. MARSH, *SECURITIES REGULATION* 936-37 (3d ed. 1972). The consideration offered may be cash or other securities. *Id.* The terms "cash tender offer" and "exchange tender offer" (or "exchange offer") are generally used to distinguish between the different forms of consideration. *See, e.g.,* Sowards & Mofsky, *Corporate Take-Over Bids: Gap in Federal Securities Regulation*, 41 ST. JOHNS L. REV. 499, 500-02 (1967); Note, *The Developing Meaning of "Tender Offer" under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 nn.7 & 8 (1973) [hereinafter cited as "*Tender Offer*" under the S.E.A. of 1934]; *cf.* ALI FED. SEC. CODE §§ 299.9 (Tent. Draft Nos. 1-3, 1974) (using the term "tender request").

2. *See* Securities & Exchange Act of 1934, §§ 14(d)-(e) (codified at 15 U.S.C. § 78n(d)-(e) (1976)). Sections 14(d) and 14(e) were originally enacted as parts of the Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified at 15 U.S.C. §§ 78m(d)-(e), n(d)-(f)(1976)); *see also* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, codified at 15 U.S.C. § 18a (1976).

3. *See* Wilner & Landy, *The Tender-Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1, 5-9 (1976) [hereinafter cited as Wilner & Landy, *Tender-Trap*], which discusses the various state takeover statutes. *See also* Great Western United Corp. v. Kidwell, 439 F. Supp. 420 (N.D. Tex. 1977).

4. *See* Appelton, *The Proposed S.E.C. Tender Offer Rules*, 32 BUS. LAW. 1381, 1381 (1977), reporting that "in fiscal 1970 there were only 34 [tender offers]." *But see* E. ARANOW, H. EINHORN, & G. BERLSTEIN, *DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL* vi (1977)

The tender offer takeover bid and its proclivity to squeeze out minority shareholders of the target company may be the most important corporate law issue of current concern because of the number of American and European companies jumping into the takeover market, the enormous dollar amounts which are usually involved in a tender offer,⁵ and the confusion which exists in their regulation.⁶

This article will discuss current problems in interpreting the regulations which attempt to control tender offer takeover bids in light of

[hereinafter cited as DEVELOPMENTS IN TENDER OFFERS], showing that the rate of recent tender offer filings is increasing, as follows:

Year	Tender Offer Filings
1973 (last 8 months)	92
1974	111
1975	93
1976	126
1977 (first 4 months)	50

5. A recent discussion of the growing number of corporate chieftains that are shopping for merger and acquisition possibilities through the use of a takeover bid appears in the WALL ST. J., April 11, 1978, at 1, col. 6, and states that:

In 1977, there were 41 transactions valued at \$100 million or more, up from 39 in 1976 and only 11 in 1975 Last year, 193 merger proposals were made to publicly held companies, excluding 74 offers that later were canceled, up 18% from 1976 and the highest total since the merger binge of the late 1960s

But the big transactions are only part of the activity. The vast majority of the 2,224 mergers and acquisitions last year were purchases of small businesses or divisions that the large company buyers think will speed up the rate of earnings growth.

With hundreds of U.S. companies seeking acquisitions to speed their profit growth, and more foreign buyers jumping into the market, the takeover wave has pushed up the asking price for many privately held concerns, and is sparking bidding contests for publicly traded merger targets. Sellers are prospering, but some buyers are paying prices that may make it hard to get the expected rate of return on investment

6. See generally E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL (1973); F. O'NEAL, SQUEEZE-OUTS OF MINORITY SHAREHOLDERS (1975) [hereinafter cited as F. O'NEAL]; DEVELOPMENTS IN TENDER OFFERS, *supra* note 4; Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAW. 149 (1966); Fleischer, *Defensive Tactics in Tender Offers*, THE REV. OF SEC. REG. 853 (1976); Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317 (1967); Fleischer, Mundheim & Murphy, *An Initial Inquiry into the Responsibility to Disclose Market Information*, 121 U. PA. L. REV. 798 (1973); Griffin & Tucker, *The Williams Act Public Law 90-439—Growing Pains? Some Interpretations with Respect to the Williams Act*, 16 HARV. L. REV. 554 (1971); Gurry, *Aspects of the Law of Contract in Relation to Takeover Offers*, 50 AUST. L. J. 167 (1976); Hayes & Taussig, *The Tactics of Cash Takeover Bids*, 45 HARV. L. REV. 135 (1967) [hereinafter cited as Hayes & Taussig]; Lipton, *Review of Tender Offers for Corporate Control*, 72 MICH. L. REV. 358 (1973); Shipman, *Some Thoughts About the Role of State Takeover Legislation: the Ohio Takeover Act*, 21 CASE WEST. RES. L. REV. 722 (1970); Wilner & Landy, *Tender-Trap*, *supra* note 3; A.B.A. National Institute, *Corporate Takeovers—The Unfriendly Tender Offer and the Minority Stockholder Freezeout*, 32 BUS. LAW. 1443 (1977) [hereinafter cited as *Corporate Takeovers*]; Note, *The Second Circuit adopts a Business Purpose Test for Going Private: Marshel v. A.F.W. Fabric Corp. and Green v. Santa Fe Industries, Inc.*, 64 CALIF. L. REV. 1184 (1976); Note, *The Regulation of Corporate Tender Offers Under Federal Securities Law: A New Challenge for Rule 10b-5*, 33 U. CHI. L. REV. 359 (1966); Note, *Tender Offer Regulation—Injunction Standards Under the Williams Act*, 45 FORDHAM L. REV. 51 (1976); Comment, *Protection of Minority Shareholders from Freezeouts Through Merger*, 22 WAYNE L. REV. 1421 (1976); "Tender Offer" under the S.E.A. of 1934, *supra* note 1.

the conflicts between state and federal regulations. Recent case law dealing with the standing to sue of parties to a tender offer contest, and the possibility of federal preemption of state takeover statutes will also be discussed. Finally, the future use of the tender offer as a corporate takeover technique will be analyzed in a review of proposed SEC Tender Offer Rules.

II. USE OF A TENDER OFFER BID AND THE NEED FOR REGULATION

There are a number of ways by which an individual or a corporation can acquire control of another corporation. Among these are the proxy method, the stock-for-stock exchange offer, and the cash tender offer or "takeover bid." The first method, which involves the solicitation of proxies by the person or group interested in gaining control from the stockholders of the target corporation, will not be considered in this article.⁷ The second method is an offer by an outsider to take stock from all or some of the target company's stockholders in exchange for the stock or other securities of the offeror. Such an offeror may be either an individual or a corporation, and the exchange may be for part securities and part cash.⁸ The third way of acquiring control of the target corporation is to make a tender offer for sufficient shares of stock of the target company to insure voting control, and agree to pay cash to those stockholders who tender their shares.⁹ This is the conventional use of a tender offer as an acquisition technique. Although the tender offer was used in the 1960's primarily as a means by which a corporation could repurchase its own securities rather than as a method of taking over another company, today it is the most significant corporate takeover weapon, and has supplanted the proxy contest.¹⁰

The second and third methods of acquiring control mentioned above are best illustrated by an analysis of a hypothetical tender contest where control of target company, *T*, is being sought by two tender offerors, *A* and *B*.

7. For consideration of the proxy method, see Annot., 6 A.L.R. Fed. 906, 909 nn.4 & 6 (1971).

8. *Id.*

9. The respective advantages and disadvantages, as well as the mechanics of these three methods, are discussed extensively in several articles, *See, e.g.,* Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, *supra* note 6, at 149; Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317 (1967); Schmults & Kelly, *Cash Take-over Bids—Defense Tactics*, 23 BUS. LAW. 115 (1967); *see also* VI LOSS, SECURITIES REGULATION 3655 (Vol. 3, 2d ed. Supp.).

10. "Tender Offer" under the *S.E.A. of 1934*, *supra* note 1, at 1253.

T is controlled principally by members of one family, who own thirty percent of the outstanding stock. Offeror *A* attempts to secure voting control of *T* through cash and exchange tender offers for *T*'s common stock. Meanwhile, a new offeror, *B*, enters the picture also seeking to gain control of *T*, but with the support of those presently in control. The struggle begins when *A* makes cash purchases of common stock of *T*. At first, *A* is able to acquire only a small percentage of the outstanding shares, and therefore *A* announces a cash tender offer at a premium price. *T*'s management opposes offeror *A*'s tender offer, and after so advising its stockholders by letter, sells authorized but unissued stock to a third party, thus increasing the amount of stock necessary for offeror *A* to secure control. Offeror *A* continues to acquire shares of stock.

While offeror *A*'s tender offer is pending, the family sells thirty percent of its stock to favored offeror *B*, but at an inflated price. At the conclusion of both offers, offeror *B* owns a total of forty-five percent of *T* stock while offeror *A* has only forty percent, with fifteen percent remaining in the hands of the public.

As the price of the stock continues to rise, offeror *A* eventually gives up the takeover attempt having paid top dollar for non-controlling shares. There has been a year-long battle for control, and *B* has also been forced to pay an increased price for the shares required to gain control. Offeror *A*, when it appears the battle for control is lost, sues *T*, alleging that *B* gained control of the target corporation as a result of violations of federal securities laws. If *B* had lost, the same allegation in a suit against *T* would probably be made. If *T* had been in danger of losing control of its shares to the undesirable offeror, *A*, then a suit to enjoin the takeover by offeror *A* would probably have ensued. Hence, the term "tender contest" is employed. Many suits, such as those above, arise out of bids to take over another company.

This hypothetical tender contest illustrates the problems the parties to such a contest face when more than one bid for control of the target company is made, or when the takeover is fought by the target company. The parties involved must confront the issue of whom the regulations are meant to protect in such a contest, and who has standing to bring suit under federal or state regulations. Some of the other complexities which must be analyzed in such situations include time constraints placed upon the takeover attempt, the effect of delay from adherence to regulations such as disclosure requirements, and the prac-

tical effects of the uncertainties generated by regulatory constraints placed upon tender offers.

Despite these obvious difficulties afflicting the parties to a tender contest, the number of quality companies which are willing to consider a proposition of corporate takeover through the use of a tender offer continues to grow.¹¹ This is especially true where the cash tender offer is compared to alternative methods of changing a company's structure, such as corporate merger or acquisition.¹² More popular uses of the tender offer include the takeover of: (1) a potential target company with weak management, (2) a company with widespread stock ownership where there is no large family block or no stock in management hands, (3) a company where stock is widely and freely traded with a good deal of liquidity, (4) a company with little debt or one that is earning money but selling at a reasonably low price-earnings ratio, or (5) a company with tangible book value assets of a non-technological nature that may be managed without expertise.¹³

The tender offer may be used to purchase all of a company's outstanding shares, or simply enough shares to give the purchaser control. The purchaser may or may not attempt to buy the shares of minority holders, yet the majority shareholders may get a handsome premium for their shares. However, when the latter event occurs, several theories have been used to require majority sellers to share the premium price received for their controlling shares or to pay damages to the minority shareholders.¹⁴ Liability to minority shareholders under such theories may result if misrepresentation, breach of a fiduciary duty, sale of a corporate office, circumvention of corporate action, or diversion of a corporate opportunity has occurred in the takeover.¹⁵ A seller of control through a tender offer must therefore confront the problem that such control may be considered a corporate asset, and any premium paid for that control should go to the corporation's treasury.¹⁶ The right to a special profit simply as a price paid to the controlling shareholders for relinquishing control has also been theorized.¹⁷ But the fact that this

11. Flom, *The Role of the Takeover in the American Economy*, 32 BUS. LAW. 1299, 1300 (1977).

12. *Corporate Takeovers*, *supra* note 6, at 1299.

13. *See id.*

14. *See* F. O'NEAL, *supra* note 6, § 4.04 at 189-98 & 1977 Supp., at 12.

15. *Id.* at 190.

16. *Id.* at 198, *See also* Perlman v. Feldman, 219 F.2d 173 (2d Cir. 1955), *cert. denied*, 349 U.S. 952 (1955); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952); *see also* Jennings, *Trading in Corporate Control*, 44 CALIF. L. REV. 1, 31, 38-39 (1956) [hereinafter cited as Jennings].

17. *See* Perlman v. Feldman, 219 F.2d 173, 178, which states:

We do not mean to suggest that a majority stockholder cannot dispose of his controlling

control is the holder's ability to dominate property which in equity also belongs to others, including minority shareholders, causes many minority freeze-out problems.¹⁸ Subsequent discussion will evaluate whom the tender offer regulations attempt to protect, the conflict among various sources of regulation which purport to control the use of tender offers, and the feasibility of continued use of the tender offer as a corporate takeover technique.

III. DEVELOPMENTS IN THE FEDERAL REGULATION OF TENDER OFFERS

The tender offer has become an increasingly popular device for taking control of a corporation away from present management.¹⁹ As a result, in 1968 Congress passed the Williams Act,²⁰ which extends the disclosure and antifraud provisions of the Securities and Exchange Act of 1934 to protect investors suddenly confronted by a tender offer.²¹ Prior to the enactment of the Williams Act, a shareholder was often forced to make a hasty decision, although he was unaware of the identity of the prospective purchaser, its plans for the company upon gaining control, or its financial ability to carry out its program.²² These

block of stock to outsiders without having to account to his corporation for profits or even never do this with impunity when the buyer is an interested customer, actual or potential, for the corporation's product. But when the sale necessarily results in a sacrifice of this element of corporate good will and consequent unusual profit to the fiduciary who has caused the sacrifice, he should account for his gains. So in a time of market shortage, where a call on a corporation's product commands an unusually large premium, in one form or another, we think it sound law that a fiduciary may not appropriate to himself the value of this premium. Such personal gain at the expense of his coventurers seems particularly reprehensible when made by the trusted president and director of his company.

See also Jennings, *supra* note 16, at 38; *North & Co. v. Huffines*, 416 F.2d 1189, 1190 (2d Cir. 1969).

18. F. O'NEAL, *supra* note 6, § 3.10, at 107.

19. See the chart at note 5, *supra*, showing the annual increase in use of tender offers for the years 1973-1977. *See also* DEVELOPMENTS IN TENDER OFFERS, *supra* note 6, at vi.

20. Act of July 29, 1968, Pub. L. No. 90-439, §§ 2, 3, 82 Stat. 454 (codified at 15 U.S.C. §§ 78n(d)-(e), n(d)-(f) (1976)).

21. The following cases indicate that a major purpose of the Williams Act is the protection of investors: *Piper v. Chris-Craft Industries Inc.*, 430 U.S. 1, 53 (1977) (Stevens J. & Brennan J. dissent); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Sargent v. Genesco, Inc.*, 492 F.2d 750 (5th Cir. 1974); *Wulc v. Gulf & W. Ind., Inc.*, 400 F. Supp. 99 (E.D. Pa. 1975); *Texasgulf, Inc. v. Canada Dev. Corp.*, 366 F. Supp. 374 (S.D. Tex. 1973); *Cattlemen's Inv. Co. v. Fears*, 343 F. Supp. 1248 (W.D. Okla. 1972).

22. Before 1968, the cash tender offeror was under no obligation to supply relevant information to the shareholders whom it solicited. *See* S. REP. NO. 550, 90th Cong., 1st Sess. 3, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 521; *see also* Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317, 326 (1967); Note, *Cash Tender Offers*, 83 HARV. L. REV. 377, 380 (1969). However, other takeover devices previously had been reached by federal disclosure requirements. *See* S. REP. NO. 550, 90th Cong., 1st Sess. 3, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 521, 523. An exchange offer, since it entails an issuance of the offeror's own

concerns posed a threat to the shareholders' accrued equity ownership in stock.

Section 14(d) of the Williams Act²³ requires a tender offeror seeking to acquire more than five percent²⁴ of any class of equity security to make an advance disclosure of specific information about the tender offer directly to the shareholders at the time the offer is announced.²⁵ This section is intended to provide the offeree shareholders an opportunity to make a well-informed decision.²⁶ In addition, section 13(d) of the Act²⁷ provides that a person who, by any means, has acquired more than a five percent interest in any equity security must, within ten days, make a similar disclosure.²⁸ This is an after-the-fact disclosure in contrast to the restrictions on proposed takeovers in section 14(d). Finally, section 14(e) of the Act²⁹ prohibits all persons from making "untrue statement[s] [or misleading omissions, and from] engag[ing] in any fraudulent, deceptive, or manipulative . . . practices . . . in connection with any tender offer."³⁰

The Williams Act has been considered an attempt to remove the advantage of surprise in the tender offer takeover technique³¹ through its requirement of a comprehensive advance disclosure by those mak-

securities, is subject to the formidable anti-fraud and disclosure provisions of the Securities Act. 15 U.S.C. §§ 77h(d), 77k, 771(2)(1976) (anti-fraud); S.E.C. Form S-1, 17 C.F.R. § 239.11 (1977) (registration statement, disclosure); See also I. A. BROMBERG, *SECURITIES LAW* § 6.2, at 400 (1975).

23. 15 U.S.C. § 78n(d)(1) (1976).

24. The designation of five percent of any class of equity security under 15 U.S.C. § 78m(d) (1976) and 15 U.S.C. § 78n(d)(1) (1976), as opposed to the ten percent designation which appears in the original Act, S. 510, 90th Cong., 2d Sess. §§ 2(d)(1), 3(d)(1), reprinted in [1968] *U.S. Code & Ad. News* 521, 523, appears to be somewhat arbitrary. Nevertheless, the effect of a tender offer is the same at five percent as it is at ten percent of a class of stock.

25. See 17 C.F.R. § 240.14d-1(c) (1977). The Act also requires that such advance disclosures be made to the S.E.C. and to the issuer of the securities—the target corporation.

26. The Act was "designed to require full and fair disclosure for the benefit of investors." S. REP. NO. 550, 90th Cong., 1st Sess. 3, reprinted in [1968] *U.S. CODE & AD. NEWS* 521.

27. 15 U.S.C. § 78m(d)(1) (1976). See also 17 C.F.R. §§ 240.13d-1 to 13d-101 (1977).

28. This provision covers both open market and negotiated purchases of shares and requires the preparation and filing of S.E.C. Schedule 13D. Schedule 13D requires the purchaser to set forth, *inter alia*, his identity and background, his means of financing the acquisitions the purpose of the transactions and, if he seeks working control of the issuer, his plans upon successful completion of the takeover. See Schedule 13D, 17 C.F.R. § 240.13d-101 (1977). These disclosures must be made to the issuer, the S.E.C., and the exchanges where the security is traded. 15 U.S.C. § 78m(d)(1) (1976).

29. 15 U.S.C. § 78n(e) (1976).

30. *Id.* This provision is broader in scope than are the general anti-fraud provisions of the federal securities laws, which protect only purchasers and sellers of securities. Compare 15 U.S.C. § 78j(b) (1976) with 17 C.F.R. § 240.10b-5 (1977) (Rule 10b-5). "In effect [section 14(e)] applies Rule 10b-5 both to the offeror and to the opposition . . ." *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 940 (2d Cir. 1969); see Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L. F. 462, 471 (1969).

31. Hayes & Taussig, *supra* note 6, at 137.

ing a tender offer.³² The Act has also been viewed as serving an overall congressional purpose of closing the "gap" in takeover attempt disclosure by providing shareholders with substantial and timely disclosure whenever shares are being acquired in what might be a potential takeover situation.³³ However, a close examination of the original bill,³⁴ proposed by Senator Williams, reveals some confusion as to whom this Act purports to protect: the minority shareholders, the management of the target company, potential investors, or all participants in the tender contest. Senator Williams explained the purposes of the bill as follows:

I have taken extreme care with this legislation to balance the scales equally to *protect the legitimate interests of the corporation, management, and shareholders* without impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders *while at the same time providing the offeror and management equal opportunity to fairly present their case.* . . .

This bill will put *all* on an equal footing with respect to the availability of significant facts about a tender offer. . . . All will be able to deal in the securities markets knowing that all the pertinent facts are available.³⁵

The Williams Act has indeed given a substantial amount of protection to minority shareholders in the tender contests which have oc-

32. 15 U.S.C. § 78n(d)(1) (1976):

It shall be unlawful for any person . . . to make a tender offer for, or a request or invitation for tenders of, any class of any equity security . . . if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 13(d) of this title

As written, the statute anticipates that one must first classify a transaction as a tender offer before one determines (by reference to the five percent condition) whether the disclosure requirement will apply.

33. "Tender Offer" under the *S.E.A. of 1934*, *supra* note 6, at 1257 n.41.

34. S.REP. No. 550, 90th Cong., 1st Sess. 3, *reprinted in* [1968] U.S. CODE & AD. NEWS 521.

35. *See* S. REP. No. 550, 90th Cong., 1st Sess. 1,3; H. R. REP., 90th Cong., 1st Sess. 1,4, 113 CONG. REC. 854, 856, *reprinted in* [1968] U.S. CODE & AD. NEWS 2811, 2813; *See also* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 67-68 (1977) (Stevens J., dissenting), where Stevens states that:

protection of tender offerors is not only consistent with protection of shareholders . . . [i]t is indispensable to protecting shareholders. . . . Thus, the most realistic deterrent to fraud on shareholders is a damages suit brought by the opposition in the tender contest. Moreover, disallowing such suits creates an incentive to violate the Act in retaliation for violations by the other side. When no effective judicial remedy is available, self help is more attractive. Finally, a damages remedy for the tender offeror is necessary for the protection of one particular class of shareholders: those shareholders of target corporations who accept an exchange offer and thereby become shareholders of the tender offeror.

curred since its enactment,³⁶ and the current trend is toward more scrutiny of tender offers in order to prevent minority freeze-outs.³⁷ Prior to the Williams Act, stockholders who were confronted with tender offers for their stock usually had to rely on their own ingenuity and resources in determining the merits of an offer, since the offeror was not bound to, and often did not, disclose all the facts which the offerees needed or wanted to know in deciding whether to accept or reject the offer.³⁸ But since the passage of the Act, courts have also allowed the Act to be asserted as a shield to protect against unwanted tender offers.³⁹ Such a position by the courts has provided protection for shareholders' management and investors.

The first case attempting to ascertain which group the Williams Act purported to protect came in the form of a judicial expansion of the meaning of the term "tender offer." In *Cattlemen's Investment Co. v. Fears*,⁴⁰ a coordinated series of negotiated purchases from a large number of shareholders during a relatively short period of time was held to constitute a tender offer for purposes of sections 14(d) and 14(e).⁴¹ The district court argued that a "remedial statute" like the Williams Act should be "interpreted liberally" to fulfill the purposes of Congress,⁴² which included disclosure of material information concerning "any effort to acquire control," and relief of pressure on shareholders to make hurried decisions "as to whether to dispose of or retain their securities."⁴³ Specifically, the court stated that the purpose of Congress in passing the Act was clearly

36. See, e.g., *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976); *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505 (Mass. 1975).

37. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976); *Donahue v. Rodd Electrotype Co., Inc.*, 328 N.E.2d 505 (Mass. 1975); see also *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. Super. 1977); DEVELOPMENTS IN TENDER OFFERS, *supra* note 4, at 286, 297 nn.73 & 74, 298 n.112, 299 nn.116 & 117, 300 nn.132 & 133; F. O'NEAL, *supra* note 6, at iv (1977 Cum. Supp.).

38. See *Susquehanna Corp. v. Pan American Sulphur Co.*, 423 F.2d 1075 (5th Cir. 1970); Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269 (1969). See generally Annot., 6 A.L.R. Fed. 906, 910 (1971).

39. See Aranow, Einhorn & Berstein, *Standing to Sue to Challenge Violations of the Williams Act*, 32 BUS. LAW. 1755 (1977) (adapted from E. ARANOW, H. EINHORN & G. BERLSTEIN, TENDER OFFERS (1977) [hereinafter cited as Aranow, *Standing to Sue*]). See also Comment, *Tender Offers: The Liberalization of Standing Requirements Under Section 14(e)*, 7 U.S.F.L. REV. 561 (1973).

40. 343 F. Supp. 1248 (W.D. Okla. 1972), *vacated per stipulation*, No. C72-152 (W.D. Okla., May 8, 1972), *noted in* 1972 DUKE L.J. 1051. See also "Tender Offer" under the S.E.A. of 1934, *supra* note 1, at 1263-66.

41. 15 U.S.C. § 78n(d), § 78n(e) (1976). See also 17 C.F.R. § 240.14d-e (1977).

42. 343 F. Supp. at 251 (citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967), and *Marriott v. National Mut. Cas. Co.*, 195 F.2d 462, 466 (10th Cir. 1952)).

43. 343 F. Supp. at 1251.

to provide *investors* who hold equity interests in public corporations material information with respect to the potential impact of any effort to acquire control of a company, sufficient time within which to make an unhurried investment decision as to whether to dispose of or retain their securities, and to assure fair treatment of the *investors*.⁴⁴

The classes of investors who were intended to benefit from the tender offer legislation is open to an interpretation which would include both majority and minority shareholders, and would also encompass the management of the target company who might seek to avoid an unwanted takeover bid. Therefore, the groundwork is present for the use of the Williams Act by any participant in a tender contest to prevent any other participant from achieving an unwanted takeover of the target company, if proper information has not been filed with the SEC as required.⁴⁵

In *J. I. Case Co. v. Borak*,⁴⁶ the United States Supreme Court held that a derivative suit on behalf of the corporation could be brought under section 14(a) of the Securities and Exchange Act of 1934,⁴⁷ although it seems clear that the primary beneficiaries of that section were intended to be individual stockholders rather than corporations.⁴⁸ The rationale given was that authorizing individual shareholders to bring an action for rescission or damages for a violation of section 14(a) was essential for the protection of investors.⁴⁹ Although *Borak* was a proxy

44. *Id.* (emphasis added).

45. The information required by 15 U.S.C. § 78n(d)(A)-(E) (1976) to be filed with the S.E.C. in reference to tender offers includes the following: (1) the identity and background of persons on whose behalf the purchases are being made; (2) the source and amount of funds to be used and a description of financing arrangements; (3) the purposes of the purchase, and if one such purpose is to acquire control, a description of plans or proposals relating to any major change in the company; and (4) any contracts, arrangements, or understanding with respect to any of the securities to be acquired.

The Rule has additional provisions designed to afford further protection to a tender offeree. For example, it gives a right of withdrawal of tendered shares for seven days after the first publication or transmission of the tender offer and at any time after 60 days from the date of the original offer; provides for pro rata acceptance of securities tendered within the first ten days of the offer (where more securities have been deposited than the tender offeror is bound to take up); and requires that any increase in the tender price shall be paid to all persons whose securities are taken up. *Cattlemen's Inv. Co. v. Fears*, 343 F. Supp. 1248, 1251 (W.D. Okla. 1972); see also 15 U.S.C. § 78n(d)(5) (1976).

46. 377 U.S. 426 (1964).

47. 15 U.S.C. § 78n(a) (1976).

48. The purpose of §14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosures in a proxy solicitation, thus protecting the stockholder first and foremost. Such a purpose is to control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which frustrate the free exercise of the voting rights of the stockholders. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 427 (1964); H.R. REP. NO. 1383, 73d Cong., 2d Sess., 13 (1934).

49. 377 U.S. at 426.

contest rather than a tender offer contest, its rationale has been argued to be equally applicable so as to give a tender offeror who is also a shareholder-investor a position within the class protected by tender offer legislation.⁵⁰ However, in the recent Supreme Court opinion, *Piper v. Chris Craft Industries, Inc.*,⁵¹ the purpose of the Williams Act was held to be the protection of investors who are confronted with a tender offer,⁵² without including a private cause of action for damages by one of several contending offerors against a successful bidder or by a losing contender against the target corporation.⁵³ The *Piper* case suggests the possibility of applying the Williams Act not only to minority shareholders in a tender contest target company, but also to the rival contestants for control.⁵⁴ In denying standing to the tender offeror to claim damages for statutory violations, the majority of the Court in *Piper* indicated that the Williams Act was not intended to benefit tender offerors, but only the shareholder-offerees.⁵⁵ This conclusion is not entirely supported by the language of Senator Williams, who stated that the purpose of his bill was "to protect the legitimate interests of the corporation, management, and shareholders without impeding cash takeover bids."⁵⁶

The *Piper* ruling that a tender offeror does not have standing under the Williams Act to bring suit for damages against a competing tender offeror or against the target corporation is contrary to virtually all prior decisions, which gave unquestioned standing to every interested party to a tender offer.⁵⁷ Several earlier court decisions had specifically given tender offerors standing to sue under the Williams

50. See *Piper v. Chris Craft Indus., Inc.*, 430 U.S. 1, 55 (1977) (Stevens, J. and Brennan, J., dissenting).

51. 430 U.S. 1 (1977); see also *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975).

52. 430 U.S. at 25.

53. *Id.*

54. *Id.*

55. 430 U.S. at 26; see also *Cort v. Ash*, 426 U.S. 66 (1975).

56. S. REP. NO. 550, 90th Cong., 1st Sess. 3, reprinted in [1968] U.S. CODE & AD. NEWS 21.

57. See *Ronson Corp. v. Liquifin Atkiengesellschaft*, 497 F.2d 394 (3d Cir.), *aff'g per curiam*, 370 F. Supp. 597 (D.N.J.), *cert. denied*, 419 U.S. 870 (1974); *Sonesta Int'l Hotels Corp. v. Wellington Assoc.*, 483 F.2d 247 (2d Cir. 1973); *H. K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973); *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687 (2d Cir. 1973); *Butler Aviation Int'l Indus. v. Comprehensive Designers, Inc.*, 425 F.2d 842 (2d Cir. 1970); *Otis Elevator Co. v. United Technologies Corp.*, 405 F. Supp. 960 (S.D.N.Y. 1975); *Copperweld Corp. v. Imetal*, 403 F. Supp. 579, 588 (W.D. Pa. 1975); *D-Z Inv. Co. v. Holloway* [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94-771 (S.D.N.Y. 1974); *Texasgulf, Inc. v. Canada Dev. Corp.*, 366 F. Supp. 374 (S.D. Tex. 1973); *MGM v. Transamerica Corp.*, 303 F. Supp. 1344 (S.D.N.Y. 1969) (cases giving a target company's management standing to sue for injunctive relief). See also Aranow, *Standing to Sue*, *supra* note 39, at 1762-68 (concerning standing to sue of particular plaintiffs).

Act.⁵⁸

It seems clear from the Court's discussion of the legislative history of the Williams Act that the Court believed only shareholder-offerees, not tender offerors or target corporations, were those for whose special benefit the Act was adopted.⁵⁹ However, even though there is no specific legislative history to indicate that Congress intended to so limit standing to sue for damages, the standing of every party to a tender offer to bring suit under the Williams Act had been virtually unquestioned until the *Piper* decision.⁶⁰ Therefore, with the standing issue somewhat unsettled because of the questions left unanswered by *Piper*,⁶¹ it is somewhat premature to expect certainty with respect to precisely which parties are to be given standing to sue under the Williams Act. Additionally, the relief to which those parties will be entitled, and under what circumstances, remains unclear.⁶²

Even though *Piper* has restricted the offeror's standing to sue, it may be interpreted as leaving a right for offerors to seek injunctive relief against misstatements made by the target's management.⁶³ Such relief for an offeror, unlike an award of money damages, is fully

58. *E.g.*, *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); *H. K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973); *Emhart Corp. v. USM Corp.*, 403 F. Supp. 660 (D. Mass.), *vacated on other grounds*, 527 F.2d 177 (1st Cir. 1975).

59. 430 U.S. at 35.

60. *See* Aranow, *Standing to Sue*, *supra* note 39, at 1755. Only two court decisions had held that standing to sue was restricted where tender contest participants were concerned. *See* *Applied Digital Data Systems, Inc. v. Milgo Elec. Corp.*, [1977] FED. SEC. L. REP. (CCH) ¶ 95,824 (broad standing to sue); *Royal Indus., Inc. v. Monogram Indus.*, [1976] FED. SEC. L. REP. (CCH) ¶ 95,863 (broad standing to sue). *Cf.* *Kaus v. Hi-Shear Corp.*, 528 F.2d 225, 232 (9th Cir. 1975) (restricting standing); *Sargent v. Genesco, Inc.*, 492 F.2d 750 (5th Cir. 1974) (restricting standing). In neither *Kaus* nor *Sargent*, however, were there harmful misrepresentations to the protected shareholders. In *Kaus*, the tender offeror was the one misled, and in *Sargent*, the issue was actually whether the offeror had violated any duties it had toward the plaintiff shareholder. *But see* *Piper v. Chris Craft Indus., Inc.*, 430 U.S. 1 (1977) (denying standing to sue to an offeror).

61. *Piper* leaves the question of who has standing to sue under the Williams Act somewhat open when it held merely that tender offerors do not have standing. *See* 430 U.S. 1, 55 (Stevens, J., dissenting).

62. Aranow, *Standing to Sue*, *supra* note 39, at 1769.

63. *See* *Humana, Inc. v. American Medicorp, Inc.*, 46 U.S.L.W. 2416 (S.D.N.Y. Jan. 7, 1978). The U.S. District Court for the Southern District of New York held that tender offerors have standing to seek injunctive relief against competing tender offerors and against the target company's management for violation of the provisions of the Williams Act. Misrepresentations concerning the original tender offer, which the target's management opposed, and a competing offer approved by management, justified the issuance of a preliminary injunction. Management breached its obligation to furnish its shareholders with all information it had so that the shareholders could intelligently decide between the two competing offers. Shareholders are likely to rely heavily on management as corporate insiders, the court indicated, and management's failure to fulfill its responsibilities justified the injunction against misrepresentations concerning both offers. *See also* Aranow, *Standing to Sue*, *supra* note 39, at 1760; Note, *Tender Offer Regulation-Injunction Standards Under the Williams Act*, 45 FORDHAM L. REV. 51 (1976).

consistent with the underlying purposes of the Williams Act and is not detrimental to the interests of the target's shareholders. In *Piper*, the Supreme Court stated that "the Williams Act cannot consistently be interpreted as conferring a monetary remedy upon regulated parties, particularly where the award would not redound to the direct benefit of the protected class."⁶⁴ This language would not restrict the right to injunctive relief for the offeror seeking to enforce the requirements of the Williams Act. Further, the target's shareholders would be protected, and the purposes of the Act would be served by insuring that the shareholders could evaluate both the tender offer and the opposition to it based upon accurate statements of all material facts. Unlike a damage award, a grant of injunctive relief would not harm either the shareholders who tendered their shares, or those who did not.⁶⁵

Although *Piper* raises some questions as to the standing of any party other than shareholders in a tender contest, regardless of the relief sought, tender offerors' standing to seek injunctive relief is essential to insure that shareholders receive complete and accurate information concerning tender offers from the management of the target as well as from the offeror. Practically speaking, the tender offeror is the only party likely to be able to seek relief in order to protect the target's

64. 430 U.S. at 28.

65. Injunctive relief has been recognized in a series of cases beginning with *Electronic Specialty Co. v. International Control Corp.*, 409 F.2d 937, 944-46 (2d Cir. 1969) (target companies held to have standing to seek injunctive relief under sections 14(d) and 14(e), where materially violated). However, guidelines for asserting injunctive relief have been set in a series of related cases. In *Sonesta Int'l Hotels Corp. v. Wellington Assoc.*, 483 F.2d 247 (2d Cir. 1973), a preliminary injunction was issued where the plaintiff had made a strong showing of irreparable harm, but had not clearly demonstrated probable success on the merits. Conversely, where a strong showing of probable success has been made, the plaintiff need show only the possibility of irreparable harm. *Id.* at 250; *Checkers Motors Corp. v. Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); *Dino DeLaurentis Cinematografica, S.P.A. v. D-150, Inc.*, 366 F.2d 373, 375 (2d Cir. 1966); *Hamilton Watch Co. v. Bemus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953). A number of cases, however, have suggested that a tender offer that violates the Williams Act is "unlawful" and probably should be enjoined with little or no direct discussion of irreparable harm. *See Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687 (2d Cir. 1973) (requiring that only a probable material violation be shown); *cf. Elco Corp. v. Microdot, Inc.*, 360 F. Supp. 741 (D. Del. 1973) (preliminary relief justified by threatened irreparable harm to the target plaintiff). *See also General Host Corp. v. Triumph American, Inc.*, 359 F. Supp. 749 (S.D.N.Y. 1973). More recently, *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975) reaffirmed the need for a showing of irreparable harm as a prerequisite for injunctive relief to a private litigant, but did not directly address the issue of materiality espoused in *Electronic Specialty Co.* Cases after *Mosinee* have followed a somewhat less strict test for granting injunctive relief. *See Stecher-Traung-Schmidt Corp. v. Self*, 529 F.2d 567 (2d Cir. 1976) (*per curiam*) (issuance of a preliminary injunction, at the behest of the target, of a potential takeover bid where the plaintiff had shown merely a likelihood of sustaining irreparable damage). An even greater departure from the strict interpretation of *Mosinee* came in *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910 (N.D. Tex. 1976), where the court found that merely an interest of the target's shareholders in receiving full disclosure justified injunctive relief.

shareholders and himself when the tender contest is at a preliminary stage where an injunction would be appropriate and where misstatements made by the parties may be corrected or enjoined.

The Tender Offer and the Business Purpose Test

On September 23, 1977, the Supreme Court of Delaware, in *Singer v. Magnavox Co.*,⁶⁶ applied a "business purpose test" in formulating a rule first utilized in an earlier case⁶⁷ to evaluate whether a tender offer action by majority shareholders had as its primary purpose the "freezing out" of a minority interest, without regard to the fairness of the price. In applying this test, *Singer* held that the majority stockholders and management of Magnavox violated their respective fiduciary duties by their participation in a tender offer to the minority stockholders of Magnavox, pursuant to a merger with T.M.C. Development Corporation. The violations occurred when the majority shareholders and the management agreed to the terms of a tender offer wherein a grossly inadequate cash price was offered for the shares of Magnavox. The Court said:

A Delaware Court will not be indifferent to the purpose of a merger when a freeze-out of minority stockholders on a cash-out basis is alleged to be its sole purpose. In such a situation, if it is alleged that the purpose is improper because of the fiduciary obligation owed to the minority, the Court is duty-bound to closely examine that allegation even when all of the relevant statutory formalities have been satisfied.⁶⁸

The Court in *Singer* considered an earlier case in which the plaintiff shareholder alleged that the dominant shareholder caused the issuance of new shares to impair plaintiff's minority interest and to force him out of the corporation.⁶⁹ The equitable doctrine, whereby corporate officers, directors,⁷⁰ and controlling shareholders⁷¹ owe the corporation and its minority shareholders a fiduciary obligation of honesty, loyalty, good faith and fairness, was applied.⁷² The legal propriety of the motives of the controlling stockholders is judged according to this fiduciary standard. *Singer* illustrates that evaluation of the propriety of a tender offer is within the responsibility of a court of equity. Such a

66. 380 A.2d 969 (Del. 1977).

67. *Bennett v. Breuil Petroleum Corp.*, 99 A.2d 236, 239 (Del. Ch. 1953).

68. *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977).

69. *Bennett v. Breuil Petroleum Corp.*, 99 A.2d 236 (Del. Ch. 1953).

70. *Guth v. Loft, Inc.*, 5 A.2d 503, 511 (Del. Sup. Ct. 1939).

71. *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 109-10 (Del. Super. 1952).

72. *Bennett v. Breuil Petroleum Corp.*, 99 A.2d 236 (1953).

court will scrutinize corporate acts closely when it is alleged that their purpose violates the fiduciary duty owed to minority stockholders.⁷³ Those who control the corporate machinery owe a fiduciary duty to the minority in the exercise of that control, and the use of such power merely to perpetuate control is a violation of that duty.⁷⁴ *Singer* held that “[a] merger, made for the sole purpose of freezing out minority shareholders, is an abuse of the corporate process; and the complaint, which so alleges in this suit, states a cause of action for violation of a fiduciary duty.”⁷⁵ The court went even further and stated that although a proper business purpose is found to exist, “the fiduciary obligation of the majority to the minority stockholders remains and proof of a proper business purpose, without more, will not necessarily discharge it.”⁷⁶ The concurring opinion in *Singer* argued that the “business purpose” test was too vague and that a more concrete test would be to require the takeover bidder to show a compelling corporate need to “go private.”⁷⁷ Consideration should be given to the “economic necessity, desirability and feasibility involved, [the] evidence of self-serving [actions], manipulation, or over-reaching, and all other relevant factors of intrinsic fairness or unfairness.”⁷⁸

In a March 23, 1977 United States Supreme Court decision, *Santa Fe Industries, Inc. v. Green*,⁷⁹ the Court also followed the business purpose test and held that in a “going-private” situation,⁸⁰ where no claim of misrepresentation was made, no remedy was available to a complaining shareholder under section 10(b) of the 1934 Act.⁸¹ The share-

73. *Singer v. Magnavox Co.*, 380 A.2d 969, 979 (Del. 1977).

74. *Id.*

75. *Id.*

76. *Id.* at 980.

77. In a lecture by Professor F. Hodge O'Neal, given at the Symposium on Minority Shareholder Squeezeouts, in Tulsa, Oklahoma (Nov. 16, 1977) (transcribed tape recording in *Tulsa Law Library*), discussing *Singer* and the term “going private,” Professor O'Neal described the concept as the reverse of going public. Basically, the company is seeking, through a tender offer, to buy back its shares at a certain price. Purchases of shares are usually obtained from minority shareholders and at a premium price so that the corporation may obtain a high percentage of the shares. The ultimate goal is to get the number of shareholders below 300 so that the company need no longer adhere to the S.E.C. Act regarding disclosure and registration requirements under 15 U.S.C. § 78l(g)(4) (1976). The minority shareholder is threatened by a squeezeout in this instance by the lack of protection from the securities laws and by the fact that no public market would ultimately exist for their shares if retained. What shares the corporation does not obtain through the tender offer may then be obtained through additional squeezeout procedures such as a reverse stock split, or by a consolidation of existing shares by amendment of the corporate charter.

78. *Singer v. Magnavox Co.*, 380 A.2d at 982.

79. 430 U.S. 462 (1977).

80. For a detailed discussion of “going private,” see Note, *Going Private*, 84 YALE L.J. 903 (1975).

81. 15 U.S.C. § 78j(b) (1970). See also 17 C.F.R. § 240.10b-5 (1977) (Rule 10b-5).

holder in *Green* claimed that insiders had caused the corporation to engage in a squeeze-out merger for no valid business purpose but solely to eliminate minority shareholders. The Court stated that such a shareholder had to look to state law for any possible remedy. Thus *Green* gave a renewed importance to state takeover laws by leaving the responsibility of governing the internal affairs of corporate life to the states.⁸²

Current Trend in Tender Offer Regulation by State Takeover Statutes

Several states have recently passed what have come to be known as takeover statutes. The principal purpose of these statutes is to provide advance warning to management and shareholders of a tender offer,⁸³ and many of these new laws provide for hearings before the states'

82. See *Cort v. Ash*, 422 U.S. 66, 84 (1975).

83. See DEVELOPMENTS IN TENDER OFFERS, *supra* note 4, at 207; Royalty, *State Takeover Statutes and New Takeover Strategies—A Panel*, 32 BUS. LAW. 1459 (1977); Robinson, *Tender Offers; Some Facts & Fancies* (pt.2), 175 N.Y.U.L. REV. 96 (1976); Wilner & Landy, *Tender Trap*, *supra* note 3, at 3-4; Subcommittee on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Committee, American Bar Association, STATE TAKEOVER STATUTES AND THE WILLIAMS ACT 5-6, reprinted in 32 BUS. LAW. 187, 189 (1976).

As of July 1, 1977, thirty states had adopted takeover acts, while several more are considering such legislation. The acts, their effective dates, and the states which have adopted them include: Alaska Takeover Bid Disclosure Act, ALASKA STAT. §§ 45.57.010-20 (Supp. 1977) (effective June 8, 1976); Arkansas Corporate Takeover Act (to be codified); Colorado Investor Protection Act, COLO. REV. STAT. §§ 11-51.5-101 to 5-108 (Supp. 1976) (effective July 1, 1975); Connecticut Tender Offer Act, CONN. GEN. STAT. ANN. § 36-347(a) to 347(m) (West Supp. 1978) (effective June 2, 1976); Delaware Tender Offer Act, DEL. CODE tit. 8, § 203 (Supp. 1976) (effective May 1, 1976); Georgia Corporate Takeover Statute, GA. CODE §§ 22-1901 to 1915 (1977) (effective March 23, 1977); Hawaii Take-Over Bids Law, HAW. REV. STAT. §§ 417E-1 to 15 (Supp. 1975) (effective 1975); Idaho Corporate Take-Over Law, IDAHO CODE §§ 30-1501 to 1513 (Supp. 1977) (effective July 1, 1975); Indiana Business Take-Over Law, IND. CODE ANN. §§ 23-2-3-1 to 12 (Burns Supp. 1977) (effective June 1, 1976); Kansas Take-Over Bids Law, KAN. STAT. §§ 17-1276 to 1285 (1974) (effective July 1, 1974); Kentucky Take-Over Bid Disclosure Act, KY. REV. STAT. §§ 292.560 to 991 (Supp. 1976) (effective July 1, 1976); Louisiana Business Take-Over Offers Act, LA. REV. STAT. §§ 51:1500-1512 (West Supp. 1977) (effective June 28, 1976); Maryland Corporate Take-Over Law, MD. CORP. & ASS'NS CODE ANN. §§ 11-901 to 908 (Supp. 1977) (effective July 1, 1976); Massachusetts Regulation of Take-Over Bids in the Acquisition of Corporations Law, MASS. GEN. LAWS ANN. ch. 110C, §§ 1 to 13 (West Supp. 1978) (effective May 22, 1976); Michigan Take-Over Offer Act, MICH. COMP. LAWS ANN. §§ 451.901-917 (Supp. 1978) (effective July 1, 1976); Minnesota Corporate Take-Over Law, MINN. STAT. ANN. §§ 80B.01 to 13 (Supp. 1978) (effective Aug. 1, 1974); Mississippi Business Takeover Law of 1977 (to be codified); Nebraska Takeover Act, NEB. REV. STAT. §§ 78.376-378 (1973) (effective 1969); Nevada Takeover Bid Disclosure Law, NEV. REV. STAT. §§ 78.376 to 3778 (1973) (effective 1972); New Hampshire Takeover Act N.H. REV. STAT. ANN. §§ 421.A:2 VI (1977) (effective 1976); New Jersey Takeover Bid Disclosure Law of 1977 (to be codified); New York Security Takeover Disclosure Act, N.Y. BUS. CORP. LAW §§ 1600-1613 (McKinney Supp. 1977-78) (effective Nov. 1, 1976); Ohio Take-Over Bids-Requirements, OHIO REV. CODE ANN. § 1707.041 (Page Supp. 1973) (effective Oct. 9, 1969); Pennsylvania Takeover Disclosure Law, PA. STAT. ANN. tit. 70, §§ 71-85 (Purdon Supp. 1978) (effective March 3, 1976); South Dakota Corporate Take-Over Offers Law, S.D. COMP. LAWS ANN. §§ 47-32-1 to 47-32-47 (Supp. 1977) (effective 1975); Tennessee Investor Protection Act, TENN. CODE ANN. §§ 48-2101 to 2115 (Supp. 1977) (effective Mar. 17, 1976); Texas Administrative Guidelines for Mini-

securities department. This statutory protection for management involved in a tender contest contradicts the construction which many courts have given to the Williams Act.⁸⁴ These courts have applied the state takeover acts principally to prevent attempts to freeze out minority shareholders. Although these statutes have been said to support weak management,⁸⁵ shareholders have also used them to their benefit.⁸⁶ The main impact of such statutes has been to prevent what have come to be known as "Saturday night specials,"⁸⁷ where tender offers are consummated within the minimum possible time under the Williams Act—as little as one week—and effectively deprive both management and stockholders of the target company of the opportunity to respond intelligently to a tender offer. Management was unable to discharge its duties when confronted with such a "blitz offer," and shareholders were being stampeded into accepting questionable or inadequate offers because there was insufficient time to obtain a better offer. Therefore, the states set out to draft their own protection, custom-tailored to remedy defects that were perceived in the Williams Act.⁸⁸

The legitimacy of such statutes may be questionable on constitutional grounds as a violation of the commerce clause⁸⁹ or on grounds that the statutes are preempted by the Williams Act.⁹⁰ Recently a federal district court found such preemption of a state takeover statute in *Great Western United Corp. v. Kidwell*,⁹¹ where the Idaho takeover stat-

num Standards in Tender Offers (to be codified); Utah Take-Over Disclosure Act, UTAH CODE ANN. §§ 61-4-1 to 13 (1977 Supp.) (effective Feb. 5, 1976); Virginia Take-Over Bid Disclosure Act, VA. CODE §§ 13.1-528 TO 541 (1973 & SUPP. 1977) (effective Mar. 5, 1968); WISCONSIN CORPORATE TAKE-OVER LAW, WIS. STAT. ANN. §§ 552.01-.25 (West 1977) (effective July 1, 1972). Bills in two other states, Florida and Illinois, were passed by the legislatures and were awaiting signatures by governors.

84. See, e.g., cases cited, *supra* note 36.

85. Royalty, *State Takeover Statutes and New Takeover Strategies—A Panel*, 32 BUS. LAW. 1459 (1977).

86. *Id.*

87. Arshnt, *The Delaware Takeover Statute—Special Problems for Directors*, 32 BUS. LAW. 1461 (1977) [hereinafter cited as Arshnt, *Delaware Takeover Statute*]; Bartell, *The Wisconsin Takeover Statute*, 32 BUS. LAW. 1466 (1977).

88. Arshnt, *Delaware Takeover Statute*, *supra* note 87, at 1462.

89. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); see generally DEVELOPMENTS IN TENDER OFFERS, *supra* note 4, at 225-32; Wilner & Landy, *Tender Trap*, *supra* note 3, at 15.

90. Wilner & Landy, *Tender Trap*, *supra* note 3, at 23; DEVELOPMENTS IN TENDER OFFERS, *supra* note 4, at 225-32.

91. 439 F. Supp. 420, 437 (N.D. Tex. 1977) held that:

There is a conflict of purpose between the Williams Act and the Idaho statute: the Williams Act regulates the making of tender offers for the benefit of shareholders, while the Idaho statute regulates the making of tender offers primarily for the benefit of the management of the target company. By weighing the scales so heavily in favor of management of target companies, the Idaho statute has destroyed the delicate balance reached

ute was said to conflict with the clear purpose of the Williams Act. Nevertheless, these conflicts can easily be avoided by the passage of a mild take-over regulation statute which does not call for burdensome disclosure beyond that already required by the Williams Act. Delaware has recently passed the mildest of all state takeover statutes,⁹² the Delaware Act is a notice-type statute.⁹³ It does not provide for a hearing by any state administrative agency, nor is there even a required filing of the proposed tender offer with a state office. Delaware eliminates the possibility of a "Saturday night special" by requiring that the tender offer remain open for a period of at least twenty days after it is made to the holders of the equity securities, during which period any stockholder may withdraw any of the securities tendered to the offeror.⁹⁴ Further, a written statement of the offeror's intention to make the tender offer must be delivered to the corporation at its registered office.⁹⁵ Such provisions indicate a strong legislative intent to give corporate directors time to react intelligently to a proposed tender offer without narrowly limiting the scope of the protection to the prevention of minority shareholder squeezeouts. The directors should use the time provided to do what is in the best interests of the corporation *and* its shareholders.

The state takeover statutes' most obvious effect is delay, particularly if a state securities commission hearing is required. Although a state securities commission may ultimately approve the tender offer, the target company will have succeeded in eliminating the offeror's critical advantages of surprise and speed. This may be illustrated by the Indiana takeover statute⁹⁶ which requires that a hearing be held within twenty days of the hearing order (which can be issued within twenty days of filing by the offeror), and that a determination must be made within sixty days of the hearing's conclusion. Therefore, a target company could conceivably delay the tender offer by approximately three and one-half months simply by requesting a hearing.⁹⁷ The target company may exercise this option in the hope of causing the tender offer to

by the Williams Act. Because of the conflict that exists, this court is of the opinion that the Idaho takeover statute is preempted by the Williams Act.

See also Comment, *State Takeover Statutes Versus Congressional Intent: Preempting the Maze*, 5 HOFSTRA L. REV. 857, 860 (1977).

92. DEL. CODE ANN. tit. 8, § 203 (Supp. 1976).

93. Arshnt, *Delaware Takeover Statute*, *supra* note 87, at 1462.

94. *Id.*; *see* DEL. CODE ANN. tit. 8, § 203(a)(2) (1976).

95. DEL. CODE ANN. tit. 8, § 203(a)(1) (1976).

96. IND. CODE §§ 23-2-3-2(e), (f) (Burns Supp. 1977).

97. *Id.* Substantial delays are not unusual. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 110C, §§ 6-7 (West Supp. 1978) (150 days); OHIO REV. CODE ANN. § 1707.041(b)(4) (1975) (100 days).

die a natural death, or as a delaying tactic to gain time to develop a defense to the tender offer.⁹⁸ This gives a target company a very effective parry, stalling for time, and allows market forces to make it economically undesirable for shareholders to relinquish their securities.⁹⁹ Such delay can also increase the likelihood of wide price fluctuations in the target company's stock. Sufficient fluctuations in the market sometimes cause the SEC to halt trading in the target security between the time the offer is filed and when it is published.¹⁰⁰ Thus, uncertainty and conflict among the provisions of present takeover statutes have already caused delays, price fluctuations, and possible suspensions of trading. The enactment of takeover statutes by more states may well impede the SEC's control and supervision of the market, and increase the uncertainty of shareholders.¹⁰¹ This uncertainty generated by the state statutes is most easily demonstrated by a review of a few recent cases which have applied the statutes.

Prior to 1975, only one unfriendly tender offer had been substantially delayed because of a state takeover statute.¹⁰² But now, the of-

98. Once a tender offer is underway, a target company may use a number of defensive measures to block the takeover. The target may buy its own stock to raise the market price, declare an inflated dividend, merge with a friendly corporation, or solicit allied corporations to purchase its securities. The target may also attack the tender offer on antitrust grounds. *See, e.g.*, *Muskegon Piston Ring Co. v. Gulf & W. Indus., Inc.*, 328 F.2d 830 (6th Cir. 1964); *Boyertown Burial Casket Co. v. Amedco, Inc.*, 407 F.Supp. 811 (E.D.Pa. 1976); *Corenco Corp. v. Schiavone & Sons*, 362 F.Supp. 939 (S.D.N.Y.), *modified* [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,108 (S.D.N.Y.), *aff'd in part and rev'd in part*, 488 F.2d 207 (2d Cir. 1973). The offer may also be challenged on the ground of nonconformity with other applicable regulatory statutes. *See Fleischer & Mundheim, Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317, 322 (1967). Indeed, potential antitrust problems may be arranged at the last moment by a potential target. *See, e.g., Ruthlessness by the Rules*, 117 FORBES 24, 26-27 (Feb. 1, 1976).

99. *Ruthlessness by the Rules*, 117 FORBES 24, 28 (Feb. 1, 1976) (urges statutory delays); *Robinson, Tender Offers: Some Facts and Fancies*, 175 N.Y.L.J. 1 (1976). Such delay time may be used advantageously by target company management, since public announcement of a tender offer will stimulate open-market purchase of the target's securities by present shareholders or speculators expecting to realize a quick profit on their short term investment. *See E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL* 173-91 (1973). Indeed, arbitrageurs may have a decisive role in the success of tender offers. *See Ruthlessness by the Rules, id.* at 25. Active trading will raise the price of the target's securities, and, as the market price draws closer to the tender offer price, the economic incentive for shareholders to sell their stock fades. *See WALL ST. J.*, Aug. 20, 1968, at 32, col. 1. As a result, when the margin narrows between the market and tender offer prices, shareholders may be more receptive to management's appeals not to sell and to support the status quo through a combination of loyalty and lack of economic incentive. *See Comment, Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 SO. CAL. L. REV. 1133 (1974).

100. A New York Stock Exchange Review of the Ohio Takeover Statute, *as summarized in BNA SEC. REG. & L. REP.* No. 1, at A-12 (June 4, 1969).

101. *See Comment, Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 SO. CAL. L. REV. 1133 (1974).

102. *See In Re E Z Painter Corp. & Newell Cos., Inc.*, [1973] 3 BLUE SKY L. REP. (CCH) ¶ 71,063, where an offer was first filed in Wisconsin on December 5, 1972. After a review and five

feror in a tender contest must be concerned with one or more state takeover statutes which may have an adverse delaying effect upon the offer.¹⁰³ In *Copperweld Corp. v. Imetal*,¹⁰⁴ the shareholders of Copperweld, a Pittsburgh-based producer of specialty steel, were tendered an offer for their shares by Societe Imetal, a French concern. Copperweld was not required to be licensed to do business in Ohio merely because of its ownership of shares in two Ohio corporations, nor because it was the owner of operating assets in Ohio.¹⁰⁵ Although it did have two Ohio subsidiaries, approximately a year after their incorporation Copperweld itself surrendered its license to transact business as a foreign corporation in Ohio.

At the time the tender offer was made by Imetal, Copperweld "fought hard to stave off a takeover . . . [;] Copperweld executives opposed the bid in court, [and] employees staged placard-waving demonstrations pleading that the company stay American-owned."¹⁰⁶ But the Ohio takeover statute was by far the strongest weapon the target had, and the statute was used to obtain considerable delays.

The Ohio takeover statute covers tender offers for a company which has either incorporated in Ohio or has its principal place of business in Ohio, and which has substantial assets within Ohio.¹⁰⁷ Therefore, it can be argued that the statute was inapplicable in this case, since the target company, Copperweld, was not incorporated in Ohio nor had its principal place of business nor substantial assets in the state. Even so, the attorney general of Ohio sued to enjoin Societe Imetal from pursuing its tender offer until it complied with the Ohio statute.¹⁰⁸

days of hearings before the Commissioner of Securities, the offer became effective on January 30, 1973. The offer, though opposed by the target company, was ultimately registered and effective.

103. *Copperweld Corp. v. Imetal*, 403 F. Supp. 579 (W.D. Pa. 1975). See generally *Otis Elevator Co. v. United Technologies Corp.*, 405 F. Supp. 960 (S.D.N.Y. 1975); Wysocki, *The Delaying Game*, WALL ST. J., Nov. 19, 1975, at 1, col. 6.

104. 403 F. Supp. 579 (W.D. Pa. 1975).

105. See e.g., *Golden Dawn Foods, Inc. v. Cekuta*, 1 Ohio App. 2d 464, —; 205 N.E.2d 121, 123-24 (1964).

106. *Takeovers Applying "Unfriendly" Persuasion*, TIME, Dec. 15, 1975, at 58.

107. OHIO REV. CODE ANN. § 1707.041(A)(1) (Page Supp. 1976). This Ohio Act is designed "to protect [all] shareholders [wherever located] of Ohio and Ohio-based corporations by requiring public announcement and fair, full, and effective disclosures to shareholders in regard to takeover bids." See Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722, 740 (1970); see also Vorys, *Ohio Tender Offers Bill*, 43 OHIO BAR J. 65 (1970).

108. Suit was commenced in the Court of Common Pleas. *Ohio v. Imetal*, No. 75 Civ. 09-3868 (C.P. Franklin County, Ohio, Oct. 9, 1975). At the time this suit was instituted, a suit based upon federal law was being litigated in the Federal District Court in Pittsburgh. *Copperweld Corp. v. Imetal*, 403 F. Supp. 579 (W.D. Pa. 1975). Although Societe Imetal was successful in the federal case, the tender offer was delayed pending the adjudication of the Ohio suit.

Copperweld was able to invoke Ohio's jurisdiction because the company's substantial assets and operations of its two subsidiaries were considered tantamount to the principal place of business of the parent.¹⁰⁹

In a similar case where a state statute was asserted to delay a tender offer, *Otis Elevator Co. v. United Technologies Corp.*,¹¹⁰ applied the Indiana takeover statute. United Technologies Corp. made a tender offer for fifty-five percent of the shares of Otis Elevator Company, a New Jersey corporation, after Otis had filed a motion for a preliminary injunction in the United States District Court for the Southern District of New York. The motion alleged violations of the Williams Act, namely, failure to disclose the plan of merger.¹¹¹ The Indiana takeover statute was invoked because a "substantial portion of the total assets" of United was located in the state.¹¹² Numerous motions and orders were pursued in state and federal courts in Indiana,¹¹³ but the applicability and constitutionality of the Indiana statute had still not been adjudicated, and eventually, United announced termination of its offer and its intent to make a new offer at a higher price.¹¹⁴

In another case illustrating the impact of the Ohio state tender offer statutes, *In re Thrall Car Mfg. Co., The Youngstown Steel Door Co.*,¹¹⁵ Thrall made a tender offer for Youngstown and was defeated. Thrall's proposed offer was for fifty-two percent of Youngstown's stock at a thirty percent premium over the market price of the shares. Thrall filed information with the Ohio Division of Securities as required by the Ohio statute, but the next day, Youngstown's management re-

109. This argument was apparently based upon a test set forth in *Kelly v. United States Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960). However, in *Kelly*, the issue was location of defendant's principal place of business, and the court resolved the question by looking to the place where most executive decisions were made. The court did not mention the existence or location of subsidiaries.

110. 405 F. Supp. 960 (S.D.N.Y. 1975).

111. 15 U.S.C. § 78(d)(1)(C) (1976).

112. 405 F. Supp. at 960. Under the Indiana statute, "substantial assets" within the state provide a sufficient jurisdictional basis. IND. CODE § 23-2-3-1(j) (Supp. 1976).

113. These motions and orders included: (1) a cease and desist order by the Indiana Securities Commissioner, (2) a lawsuit commenced by Otis in state court resulting in a temporary restraining order, (3) an action by United in the federal district court challenging the constitutionality of the Indiana statute, (4) a subsequent ruling by the Indiana Securities Commissioner dissolving the cease and desist order on the ground that the statute did not apply to Otis, (5) an action by Otis in state court to review the Commissioner's ruling, (6) the expiration of the state court's temporary restraining order, (7) United's removal of all state court proceedings to the federal district court in Indianapolis, and (8) the remand of Otis' action to the state court to review the Commissioner's ruling.

114. Trough, *Purchased Affection: A Primer on Cash Tender Offers*, 1976 HARV. BUS. REV. 79, 82-83 (July-Aug.).

115. Ohio Dept. of Commerce, Division of Securities, File No. 041-10 (Aug. 2, 1976); see also DEVELOPMENTS IN TENDER OFFERS, *supra* note 4, at 222-25, 254-55.

quested that the Division of Securities hold a hearing to investigate the offer. The hearing lasted nearly a month. Finally, sixty days after Thrall had filed its proposals with the division, and on the last day permitted by statute, the Division of Securities issued its order.¹¹⁶ The Division found that the offeror's ten-day limit was "inherently unfair" to shareholders, that the price offered for the Youngstown shares was inadequate because it bore "no relationship to the intrinsic value of the [Youngstown] stock,"¹¹⁷ and that the offer had not been shown to be fair and equitable.¹¹⁸

The disclosures made by Thrall were also found to be deficient for several reasons, and based upon those findings the Division of Securities ruled that the tender offer violated the Ohio tender offer statute.¹¹⁹ The Ohio Commissioner of Securities informed Thrall that proposed amendments to its offer should be submitted to Youngstown for comment, and that hearings would be held to determine whether the amended offer complied with the Division's order. Thrall then filed suit in the Federal District Court for the Southern District of Ohio seeking a declaratory judgment that the Ohio tender offer statute was unconstitutional and an injunction restraining enforcement of the statute in connection with Thrall's tender offer.

Twenty-five days after the Commission issued its order against Thrall's tender offer, the management of Youngstown received an announcement of another tender offer for 55.8 percent of its shares from Lamson & Sessions Company, at a price slightly higher than that offered by Thrall. However, Lamson gave Youngstown a shorter period of time within which to tender the shares. Since the second tender offer was supported by the management of Youngstown, it was exempt from regulation by the Ohio Division of Securities and was allowed to become effective,¹²⁰ despite the fact that it contained a number of the same deficiencies that were found in the Thrall offer. Ultimately, Lamson & Sessions Co. purchased ninety-two percent of the Youngstown shares, making futile any attempt by Thrall to continue with its own

116. Ohio Dept. of Commerce, Division of Securities, File No. 041-10 (Aug. 2, 1976).

117. *Id.*

118. *Id.*

119. *Id.*

120. See OHIO REV. CODE ANN. § 1707.041(A)(1)(d) (Supp. 1976) stating that a takeover bid does not include

[a]ny tender offer or request or invitation for tender to which the target company consents, by action of its board of directors, if such board of directors has recommended acceptance thereof to shareholders and the terms thereof, including any inducements to officers or directors which are not made available to all shareholders, have been furnished to shareholders.

proposed offer.¹²¹

Although the offerors in *Imetal*¹²² and *United Technologies*¹²³ were both eventually successful in their takeover efforts, they illustrate, as does *Youngstown Steel Door*,¹²⁴ the practical effects of the state statutes' elimination of secrecy and speed, two traditional virtues of the tender offer technique of acquiring corporate control.¹²⁵ As these three cases illustrate, state takeover statutes remain unclear in their application and effect; yet they operate as a strong deterrent to potential offerors¹²⁶ and protect management from unwanted takeover bids. Another obvious effect is the delay that occurs, particularly if a state agency hearing procedure is invoked. Such delay may result in upward price fluctuations in the shares of the target company. Consequently, potential offerors are hindered in their takeover attempts, and the target remains protected from unwanted acquisition attempts.

As states continue to enact more restrictive takeover statutes, the use of this technique to acquire a company will become less attractive.¹²⁷ Eventually, the tender offer tactic may become useless, as an offeror may be forced to comply with the most restrictive of the state acts to avoid injunctions and other penalties.¹²⁸

121. A similar result occurred in the tender offer by Bethlehem Copper Corp. for Valley Camp Coal Co. See *Quaker State Oil and Valley Agree on Merger*, WALL ST. J., Mar. 9, 1976, at 2, col. 2; *Bethlehem Copper Drops Valley Camp Tender Offer*, N.Y. TIMES, Mar. 13, 1976, at 37, col. 4.

122. *Copperweld Corp. v. Imetal*, 404 F. Supp. 579 (W.D. Pa. 1975).

123. *Otis Elevator Co. v. United Technologies Corp.*, 405 F. Supp. 960 (S.D.N.Y. 1975).

124. *In Re Thrall Car Mfg. Co.*, The Youngstown Steel Door Co., Ohio Dept. of Commerce, Division of Securities, File No. 041-10 (Aug. 2, 1976).

125. When a delay is obtained, more options become available to the target. In a recent bid delayed by the Ohio procedure, Microdot, Inc. was able to arrange a friendly merger with a third party at \$21 per share while the tender offer of General Cable at \$17 per share was still in court. N.Y. TIMES, July 6, 1976, at 42, col. 4. Similarly, a target has greater opportunity to mount a propaganda campaign of its own against the offeror's motives and abilities. See e.g., N.Y. TIMES, July 14, 1976, at 53, Col. 1-2; advt., *id.* at 57 (campaign in opposition to exchange offer, which was required to be announced before its effective date).

126. N.Y. TIMES, July 6, 1976 at 42, col. 4.

127. See e.g., WALL ST. J., March 18, 1976, at 26, col. 2, where it is stated that the tender "[o]ffer is not being made to . . . holders of [s]hares in any jurisdiction of the United States . . . in which the [o]ffer or the acceptance thereof would not be in compliance with the securities laws of such jurisdiction." Cf. WALL ST. J., Nov. 21, 1975, at 33, col. 2 (an offeror gave its opinion, as part of advertised offering information, that the Indiana takeover statute was inapplicable to the offer); see also N.Y. TIMES, July 6, 1976, at 42, col. 4.

128. Some acts, indeed, purport to apply even where an offeror makes some kind of disclaimer. For example, the Ohio act was criticized in testimony before the Senate Committee on Banking, Housing, and Urban Affairs by SEC Commissioner Philip A. Loomis, Jr. The Commissioner said in essence that the statute seemed "designed to prevent an offer from being made outside of Ohio unless and until the Ohio Act has been complied with if there are shareholders in Ohio." [1976] FED. SEC. L. REP. (CCH) No. 630 (Feb. 25, 1976). See also, e.g. the Indiana act, which provides that "[a]n offeror may not make a take-over offer involving a target company

In addition, the application of state takeover statutes creates a myriad of constitutional problems relating to the overlapping of the state statutes with the federal legislation in the area.¹²⁹ When construing a state takeover statute, courts must now consider whether the statute is in violation of the commerce clause of the Federal Constitution, and whether the Williams Act has preempted the states' authority to regulate the area.¹³⁰

IV. FUTURE REGULATION OF TENDER OFFERS: THE SEC TENDER OFFER RULES

Tender offer regulation has been developing with a common aim to provide the target company advance notice of the proposed offer and to require the bidder to make additional disclosures.¹³¹

The SEC's proposed tender offer rules, published in the summer of 1976,¹³² take into consideration the original purpose of the Williams Act to require full and fair disclosure of material information not only for the benefit of shareholders, but also for the benefit of the bidder and the target.¹³³ Although recent cases appear to apply the Williams Act only in favor of minority shareholders,¹³⁴ the SEC proposals hopefully will re-establish a balance of protection, as well as result in additional

which is not made to the owners of equity securities of the target company who are residents of this state." IND. CODE § 23-2-3-5(e) (Supp. 1976).

129. See Wilner & Landy, *Tender Trap*, *supra* note 3, at 15-25; *accord*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (applying a legitimate local public interest test to state statutes which affect interstate commerce). See also DEVELOPMENTS IN TENDER OFFERS, *supra* note 4, at xix, 232-33, stating that state tender offer statutes "are an unfortunate step backward in the orderly development of the federal securities laws."

130. See *Great W. United Corp. v. Kidwell*, 439 F. Supp. 420 (N.D. Tex. 1977); see also Wilner & Landy, *Tender Trap*, *supra* note 3, at 23.

131. See 15 U.S.C. § 18a (1976) (This act, entitled the Hart-Scott-Rodino Antitrust Improvements Act of 1976, places certain filing requirements, waiting periods and notice requirements in the premerger stages of a tender offer contest); see also *State Takeover Statutes*, cited at note 83 *supra*.

132. See 17 C.F.R. §§ 240.14d-1 to 14d-101 (1977); Appelton, *The Proposed SEC Tender Offer Rules—A Panel*, 32 BUS. LAW. 1381, 1382 (1977) [hereinafter cited as Appelton, *Proposed Rules*].

133. See 17 C.F.R. §§ 240.14d-1 to 14d-101 (1977). The SEC also plans to regulate a company's purchase of its own shares. Such rules would parallel the proposed SEC regulations of offers for the stock of another company. The proposal includes the following requirements: (1) a tender offer would have to remain open for at least fifteen business days; (2) a shareholder tendering his stock would have the right to withdraw within the first ten business days after the offer is announced and after forty business days following the announcement; (3) and officers, directors and major shareholders of the offering company would have to disclose all of their transactions in the company's stock during the forty business days before the purchase offer. See WALL. ST. J., Dec. 9, 1977, at 5, col. 1.

134. See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976); *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505 (Mass. 1975); *Singer v. Magnavox*, 380 A.2d 969 (Del. 1977).

disclosures, adequate communications to shareholders, and a longer time in which to evaluate the tender offer. Such improvements would benefit shareholders, management, and investors alike. The proposals contain important changes, including:

(1) Communication of a cash tender offer by full advertisement or mailing to shareholders.¹³⁵

(2) Notice to shareholders of the tender offer bid in the form of a direct mail communication to all shareholders whose identity is available to the bidder.¹³⁶

(3) As to past relationships, transactions or negotiations with the target company during the three-year period prior to the tender offer, new disclosures are required which are intended to further the purposes of the Williams Act. This may include disclosure of conflicts of interest and disclosure of the nature and approximate dollar amount of business relationships, including transactions between bidder and the target company or its affiliates, plus a description of contacts, relationships, transactions or negotiations between such persons concerning a merger or consolidation with, or acquisition of, the target or any of its subsidiaries. Such disclosures apply to a tender offer for, or acquisition of, the target or any of its subsidiaries; a tender offer for, or other acquisition of, securities of the target; an election of directors of the target; and the sale or other transfer of a material amount of assets by the target or any of its subsidiaries.¹³⁷

(4) Disclosures concerning the source and amount of funds or other consideration to be used by the bidder in the tender offer are to be increased.¹³⁸ This would require disclosure of material terms and conditions of any loan agreements if any part of the funds or other consideration is to be borrowed, directly or indirectly, as well as a description of any plans or arrangements to finance or repay such loans.

(5) Disclosure is to be required whether control of the target company is sought or not. This would require disclosure of a bidder's plan regarding any extraordinary corporate transaction involving the target or any of its subsidiaries such as: a sale or transfer of a material amount of the assets of the target or any of its subsidiaries; changes in the present board of directors or management; material change in the present capitalization, dividend policy, business or corporate structure;

135. Appelton, *Proposed Rules*, *supra* note 132, at 1383.

136. *Id.*

137. *Id.* at 1388.

138. *Id.*

and delisting of a class of securities from a national securities exchange or termination of the registration of a class of securities.¹³⁹ Such disclosures will apply not only to bidders but also to any executive officer, director, affiliate or subsidiary of such person.

(6) A materiality test is to be applied to determine whether an average prudent investor ought reasonably to be informed of such information in deciding whether to sell, tender, or hold the securities being sought.¹⁴⁰

V. CONCLUSION

In the aftermath of the decisions in *Piper v. Chris Craft Industries*, *Singer v. Magnavox Company*, and *Santa Fe Industries, Inc. v. Green*, wherein the courts construed the main purpose behind the Securities and Exchange Act to be the protection of minority shareholders from squeezeouts by tender offerors, and with the increasing number of state and federal regulations of tender offer takeover bids, the tender offer may soon become extinct as a form of corporate takeover. One of the easiest ways to restrict the use of a certain procedure is to make compliance with the rules and regulations controlling such a procedure so complex and confusing that the average company will choose another alternative to avoid the threat of litigation or the expense of compliance. What was once the most convenient and expeditious method of acquiring another company is now fraught with uncertainties. The validity of the sale is subject to question by federal law, state statutes, inconsistent court decisions, and SEC rules.

Congress must clarify which groups of persons are to be given standing to bring suits under the Williams Act and provide corrective legislation to insure that enforcement is accomplished uniformly and in a manner calculated to effectuate the original purposes of the Act. If partial or total frustration of the federal laws is to be avoided, the SEC and its state counterparts must cooperate to assure more coordination and less conflict in the interpretation and administration of tender offer regulation. If these ends are not accomplished, Congress should pass legislation, expressly following the district court decision in *Great Western United Corp. v. Kidwell*, to preempt conflicting state regulation of tender offers. Such legislation will prevent increasing litigation concerning tender offer regulation and dispell some of the mounting hesi-

139. *Id.* at 1388-89.

140. *Id.*

tation which corporate investors have toward engaging in tender contests.

Everette D. Hull