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"Highly Confident" Letters and Tender Offer Financing

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"HIGHLY CONFIDENT" LETTERS AND TENDER OFFER FINANCING

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I. Introduction

The selling of corporate America has proceeded unabated.[1] How this phenomenon persists is clear — all hesitancy by acquirors to mount a hostile cash tender offer to any or all security holders of any publicly held corporation has vanished. Why this phenomenon persists largely unchecked is less obvious. Apparent, however, is the effect of such unsolicited raids on American corporations.[2] It is well documented

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1. See Tables A-F (setting forth the largest acquisitions between 1985 and the fourth quarter of 1989).

2. In the 1987 Senate hearings on possible reforms to tender offer legislation, Senator Donahue addressed the impact of hostile takeover bids on American labor:

> Those injuries generally fall into three basic categories. First, the takeovers and takeover attempts have led to the elimination of jobs, often those jobs held by long service employees. It is a sad commentary that there is no comprehensive data available to quantify that job loss. But at a minimum, roughly 30,000 members of unions that are affiliated with the AFL-CIO have been thrown out of work as a direct result of corporate restructuring. And clearly, hundreds of thousands more have been thrown out as an indirect result of those closures and reorganizations.
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> Business Week estimated over ½ million people have been displaced or, in Business Week's phrase, 'asked to take a walk,' in the past 3-½ years. The job loss that inevitably adversely affects those workers adversely affects their communities just as much at a time when the community confronts an increasing demand for public services and its tax base is reduced.
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> Second, corporate reorganization leads to a reduction of wage and fringe benefits, through raids on pension funds and workers are forced to try to lower their standard of living to get by on less and their retirement income is jeopardized, all in order to finance the employer's acquisitions or restructuring.
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> Third, by substituting a new employer for a preexisting employer, takeovers destroy seniority and other expectations that employees build up in their jobs over a period of years. Now employers are not bound to honor the expectations of those employees and those new employers all too often are ready to take advantage of their power in that regard. And the morale of affected workers goes to an all-time low, all the while they listen to increasing lectures about labor-management cooperations.

Hostile Takeovers: Hearings Before the Comm. on Banking, Housing, and Urban Affairs, 100th Cong., 1st Sess. 262 (1987); *see also Safeway Deal Renews Fees Debate; Bankers, Lawyers and Advisors to Reap $150 Million,* L.A. Times, Aug. 13, 1986, that the continuing rage of hostile cash offers has the effect of converting corporate equity into hundreds of millions of dollars. These staggering sums reflect payments to (1) security holders who receive cash offers at substantial premiums over the current market price of a target's stock and (2) banks, financial advisors, investment bankers, broker-dealers, and attorneys who receive fees for professional services rendered to implement or to defend against cash offers.[3] To fund the massive amounts necessary to put forth a takeover bid, offerors are turning to a combination of commercial bank financing,[4] bridge loans,[5]

Part IV, at 2, col. 4 [hereinafter *Safeway Deal Renews Fees Debate*]; Bianco, *Power on Wall Street: Drexel Burnham is Reshaping Investment Banking - and U.S. Industry*, BUS. WEEK, July 7, 1987, at 56.

3. While a takeover attempt will cost millions of dollars for the acquiror, often the target is also forced to spend millions of dollars to defend against the takeover. For example:

COMPANY SOUGHT ACQUIROR	AMOUNT SPENT TO DEFEND (IN HUNDRED THOUSANDS)
Consolidated Gold Minorco S.A.	$4,950.00
Fields PLC Homestake Mining Co. Mesa, Ltd.	1,800.00
Prime Computer, Inc. MAI Basic Four, Inc.	1,550.00
TW Services, Inc. SWT Associates, L.P.	1,430.00
Ransburg Corp. LCF Financial Corp.	133.00

Wall Street J., Dec. 19, 1988, at 2, col. 4; *see also Safeway Deal Renews Fees Debate, supra* note 2, at 2.

4. Commercial bank financing is utilized for well over half the financing for corporate mergers and acquisitions. Unlike other financing techniques, commercial bank financing involves a bank commitment letter which sets forth a contract for a commitment to loan a certain sum of money for a specified term and transaction. Although contractual in nature and, therefore, theoretically carrying legal penalties for nonperformance, bank commitment letters are replete with conditions. Indeed, commitment letters often condition the bank's duty to lend upon conditions precedent to be satisfied by the borrower. Such escape clauses absolve the lender from liability in the event of nonperformance by the borrower. However, if the terms and conditions to the contract are fulfilled by the borrower, penalties may be enforced against the lending institution.

A range of fees is paid by the acquiror to a bank which provides a commitment letter. Typical of these fees is a commitment fee of one percent of the aggregate value of the acquisition and a credit facility fee for the right to a bank line of credit. Both commitment and credit facility fees are payable whether or not the transaction goes forward. In addition, would-be offerors generally are obligated to pay the bank's administrative and legal expenses and costs as well as an agent's fee which is payable upon the signing of the commitment letter.

5. A bridge loan is a short-term extension of credit to an acquiror by a registered broker-dealer or its affiliate to provide financing to complete a merger, leveraged buyout, or financial restructuring which generally follows the purchase of control acquired through a tender offer. The lending party provides equity funds for the transaction with the expectation that the surviving corporate entity will place high-yield, high-risk bonds to repay the lender's outlay soon after the merger or other acquisition related transaction is consummated. Often, the participating broker-dealer underwrites the subsequent bond offering.

junk bonds,[6] highly confident letters,[7] and other interim and long-term

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This type of financing was developed by First Boston as a method of competing for merger and acquisition business with investment bankers like Drexel Burnham Lambert, which used highly confident letters to finance takeover bids. The First Boston bridge financing is also referred to as merchant banking. Merchant banking is the direct commitment of funds to a corporate transaction by an investment banker whether on a long-term equity basis or as a short-term creditor. Merchant banking is distinct from investment banking in that merchant bankers act as principals in the transaction and, thus, assume all entreprenurial risks. Investment bankers, on the other hand, perform agency or advisor functions for which a fee is paid. *See* Information Memorandum, Division of Corporation Finance and Division of Market Regulation of the Securities and Exchange Commission at 2 [hereinafter SEC Information Memo]. *See generally,* Madden, *Investment Banks Adopt New Role With Bridge Financing,* 197 N.Y.L.J. 29 (1987); Widder, *U.S. Investment Bankers Taking Merchant Route,* Chicago Tribune, Jan. 25, 1987, at 2.

Bridge financing provides an attractive alternative to conventional investment financing in that bridge financing substantially shortens the time period necessary for completion of a transaction. This shortening results from the elimination of conditions to an offer that financing be available to consummate the transfer of control — availability which is determined by a contemporaneous placement of high risk bonds by an investment banker acting as agent. Bridge financing also permits an immediate "any and all" cash offer for a target since federal margin requirements are not implicated. With regards to a bridge loan creditor, bridge financing generates substantial fees in connection with the initial loan, as well as advisory and underwriting fees. For example, the following bridge loan fees resulted from the $800 million bridge loan made by First Boston to Campeau to facilitate Campeau's acquisition of Allied Stores: a one percent commitment fee; a one percent "take down" fee to provide the financing; a $10 million advisory fee; $50 million in interest fees for the loan itself; and a three percent "take down" fee to place high yield bonds to repay First Boston its principal loan amount.

Although bridge financing creates immediate capital for takeovers, there are several negative aspects of this financing technique. First, bridge financing gives an investment banker an economic stake in an acquisition and, thus, propels the lender into a potential conflict of interest between its role as banker and advisor to its client. Second, bridge financing requires commitment of substantial amounts of cash. For example, since April 1986, commitments have exceeded $1 billion in five cases and have approached $2 billion in two more. *See* SEC Information Memo, *supra,* at 3. Such outlays of capital generate potential credit problems for the borrower and ultimately lead to the downgrading of securities of publicly-held investment firms. *See, e.g.,* Forde, *Moody's Weighs Downgrading $6 Billion of Merrill Lynch's Long-Term Debt,* THE BOND BUYER, Dec. 10, 1986, at 5. See Table G for a listing of bridge loan transactions between April 3, 1986, and April 1, 1987.

6. The term junk bond refers to a debt instrument which encompasses both high-risk and high-yield. Such high yield bonds include issues not rated by the major bond rating agencies or rated below investment-grade; for example, rated below BAA as rated by Moody's or below BBB as rated by Standard and Poor's. Due to their riskiness, junk bonds offer returns of 15-18%.

The term junk bond referred initially to the securities of companies that were issued with investment-grade ratings but were subsequently downgraded as a result of financial hardship experienced by the corporate issuer. Once the ratings dropped, the bonds traded at a discount with increased rates of return as a result of their added credit and default risk. These downgraded securities then became known as junk bonds financing techniques.

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or fallen angels.

A second category of junk bond is the security that is originally issued as non-investment-grade debt. These new issuances of high-yield, low-rated debt were largely developed by Drexel Burnham Lambert in 1977. The most controversial of these types of bonds were those issued solely for the purpose of financing corporate control transactions. From their debut in 1977, when takeover junk bonds accounted for less than four percent of all outstanding corporate debt, junk bonds in 1987 rose to 20% of all corporate debt.

The use of non-investment grade debt, or so-called junk bonds, is the source of continuing controversy and debate in Congress. This controversy stems, in large part, from the role of junk bonds in takeovers such as Ted Turner's acquisition of MGM/UA Entertainment — an acquisition which was accomplished by using junk bonds as the sole source of financing. Proponents of junk bond financing argue that the securities eliminate size as a barrier to takeovers. Thus, such takeover specialists contend, even blue chip companies may be acquired through the tender offer process. This position is justified in part by the notion that non-productive management results in unproductive use of resources — resources which are better served through a reallocation of assets via a reallocation of management. Those favoring junk bonds also note the favorable returns to investors in these securities over the last few years.

Critics of junk bond financing advocate legislation against such securities on two grounds. First, junk bonds infuse risky debt into an already highly-leveraged economy. The fallout of such over-leveraging, the critics maintain, is the high risk of default on interest payments and the subsequent impact of these defaults on our financial markets in the next period of recession. Second, critics argue that elimination of size as a hurdle to takeovers places well-managed, productive companies at risk of defending against a hostile offer. Forcing these companies into a defensive posture, it is argued, is counterproductive because personnel time and resources are lost and no new jobs or products compensate for this loss.

7. A highly confident letter is a letter issued by an investment banker to a client stating that, based upon a review of the client's proposed transaction and current market conditions, the investment banker is highly confident that financing can be raised to enable the client to complete an acquisition. The highly confident letter is often used by the bidder to close negotiated transactions or to initiate a hostile takeover. The actual financing is raised, in general, by the placement of junk bonds issued by the bidder through investment bankers. These bonds are usually purchased by select, sophisticated investors.

Highly confident letters, like fairness opinions issued by investment firms, typically are quite short. In general, these letters contain sections describing the supposed acquisition, certain conditions and contingencies factored into the commitment, a statement of the investment firm's confidence that financing will be available and, possibly, a reference to prior transactions consummated by the investment banker in which a highly confident letter was given. Routine language for highly confident letters include:

> We are pleased to confirm that . . . is willing to act as agent in connection with placement of senior promissory notes, convertible senior debentures . . . etc.
>
> We have a high degree of confidence in our ability to obtain commitments for the securities contemplated herein, based on current conditions.

A range of fees is paid by the bidder in connection with an investment banker's highly confident letter. Fees paid to the investment banker include a commitment fee of one-half of one percent of the aggregate amount of funds made available to the offeror and a commitment fee of three-eighths of one percent of the total amount of funds

Offerors are not, however, placing their own cash or equity at risk in these transactions. For example, most cash takeovers proceed with the acquiror committing only one percent of the total acquisition cost.[8] This one percent typically reflects administrative costs and filing fees. The next fifty percent is financed through commercial bank loans with the acquired securities being pledged as collateral.[9] Federal margin regulations limit the acquiror to fifty percent bank financing.[10] Combining the acquiror's one percent commitment with the fifty percent put forth by commercial banks, the acquiror is able to purchase control

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made available for the acquisition for the account of third-party investors who actually provide the funds.

If the offer proceeds and tender offer documents are filed with the SEC, additional fees paid to the investment banker include: (1) a dealer/manager fee payable to the investment banker upon the filing of the Schedule 14D-1; (2) an acquisition fee of three-eighths of one percent of the transaction value should the offer proceed within 18 months of the 14D-1 filing; (3) a participation or termination fee of 10% of the offeror's before-tax profits if the offeror disposes of its target company securities within 18 months of the 14D filing; and (4) a "take-down" fee paid to the investment banker if the offeror uses the investment banker's financing to consummate the buyout. Brancato, *Takeover Bids and Highly Confident Letters,* CRS Report for Congress, Aug. 28, 1987, at 13-14.

8. For example, in the tender offer documents filed by Ivanhoe Acquisition Corporation, it was disclosed that of approximately $3.3 billion necessary to purchase 28 million shares of Newmont Mining common stock, $600 million would be provided in cash equity contributions from Ivanhoe stockholders, $1.5 billion would be borrowed pursuant to a bank margin credit facility, and $1.1 billion of increasing rate notes would be underwritten by Drexel Burnham Lambert Company. Newmont Mining Corp. v. Pickens, 831 F.2d 1448, 1449 (9th Cir. 1987).

9. *Id.*

10. Regulation G, as implemented by the Federal Reserve Board, sets margin requirements which are intended to curb market speculation by limiting the amount of debt which a buyer of stock can incur in connection with the purchase. The relevant portion of Regulation G states: "No lender . . . shall extend any purpose credit (credit extended for the purpose of buying margin stock) secured directly or indirectly by margin stock in an amount that exceeds the maximum loan value of the collateral securing the credit." 12 C.F.R. § 207.3(b) (1990).

The maximum loan value of margin stock under Regulation G is 50%. On January 8, 1986, the Federal Reserve Board announced the adoption of an interpretative rule which would apply the 50% credit limitation to junk bonds issued by a shell corporation set up by offerors to purchase stock of a target company. The rationale by the Federal Reserve Board for the reinterpretation of Regulation G was that shell corporation's "have virtually no business operations, no significant business functions other than to acquire and hold the shares of the target company, and substantially no assets or cash flow to support the credit other than the margin stock that it has acquired or intends to acquire." H. SHERMAN AND R. SCHRAGER, JUNK BONDS AND TENDER OFFER FINANCING 12 (1987). Consequently, according to the Federal Reserve Board, the debt securities of shell corporations are indirectly secured by the stock to be acquired and thus are margin securities. The Regulation G proposal would not apply, however, where debt securities are guaranteed by a parent of the shell corporation due to the fact that the parent guarantee becomes the security and not the stock to be acquired. *Id.*

of the target corporation.

If the acquiror initiates an offer with only fifty-one percent financing, the bid is in effect a pure "partial" offer which only seeks to acquire voting control. Despite the ostensible advantage of financing only the fifty-one percent necessary to attain control, pure partial offers are subject to stringent state court review due to their coercive nature. Moreover, fiduciary duties limit the acquiror's ability to leverage one hundred percent of the target's assets. Consequently, offerors "follow up" a first step takeover bid with a second-step, state regulated merger which cashes out the remaining shareholder interests. Since the follow-up merger eliminates shareholder equity interests in the corporation, and is thus material information to target security holders, would-be offerors must disclose any intent to effect a second-step merger at the beginning of the bid.

An announced combination tender offer and merger is referred to as a "two-step" takeover. Like the pure partial offer, which seeks voting control only, two-step takeovers are considered coercive to target shareholders. The coerciveness results from the pressure imposed upon target shareholders to tender into the first step transaction, either for fear of losing the offered premium — whether or not it is deemed fair — or of remaining a minority shareholder in a highly leveraged company. Acquirors, therefore, cast their bids as "any and all" offers for cash, with the remaining forty-nine percent financed through bridge loans, highly confident letters, or the sale of junk bonds. The repayment of such borrowed or contingent funds is expected to come primarily from the sale of the assets of the target company. If the offeror is unsuccessful in its bid and, thus, unable to reach the target company's assets, the offeror is still obligated to remit fees to its lenders and advisors who provided commitment and highly confident letters which enabled the acquiror to launch the bid. The unsuccessful offeror is not, however, necessarily a loser as the acquisition costs and fees are largely deductible for income tax purposes.

If, on the other hand, the offer is successful, equity is purchased with cash raised through bank financing, bridge loans, and the sale of junk bonds. The result of successful takeovers is the wholesale conversion of equity into debt.[11] This restructuring of the corporate community in the United States deteriorates American industry[12] because it

11. The conversion of equity into debt first requires a conversion from equity, *i.e.* the security holder's common stock, into cash — the cash received by security holders who tender into a successful offer. The conversion from cash into debt results from the placement of bonds or similar debt instruments to finance the cash out of all remaining security holders who did not tender into the offer. Debt also replaces the cash borrowed for the tender offer proper since the borrowed funds are, for the most part, immediately subject to refinancing through the placement of bonds or other debt instruments.

12. *See generally* R. JENNINGS & H. MARSH, SECURITIES REGULATION 685 n.6

infuses risky debt into an already over-leveraged economy, turns American workers out of jobs,[13] and impairs long-term corporate planning and growth. It is suggested that these ills are caused by overuse of the credit markets for the purpose of short-term speculation.

Recent data indicates that the largest takeovers of the last five years were accomplished almost exclusively through the use of bridge loans, highly confident letters, and junk bonds as the primary source of financing.[14] Those who use and support these techniques argue that interim and contingent financing permits takeovers that were previously considered infeasible due to their sheer size. This argument reflects the theory that takeovers aid the economy by eliminating ineffective management. Critics of the takeover craze, however, have expressed concern with creative financing arrangements, particularly the device known as a highly confident letter, on three grounds. First, industry professionals contend interim financing allows offerors to "put companies into play" by announcing bids based on highly confident letters. This tactic permits a bidder who is not serious to manipulate the market of the target company securities and forces management to waste time and resources defending against the illusory offer. Such "offers" may be followed by an unsuccessful bidder's demand for payment of greenmail from target management. Second, critics warn that borrowing devices which facilitate hostile takeovers compound the risk of default and might cause grave harm to American financial markets in the event of an economic downturn. Finally, critics express concern for the American workers who are ousted from jobs when acquirors sell target company assets to pay takeover debt obligations.

To date, Congress has refused to adopt a policy concerning hostile tender offers. In the absence of such direction, it is imperative that measures be taken to ensure good faith takeover bids and to curb potential abuses in the use of creative financing techniques in takeovers by members of the financial community.

The focus of this Article is the highly confident letter currently issued by investment bankers. It is proposed that such commitment letters encourage acquirors to initiate bids, thereby putting target companies and their security holders "into play," without having firm commitments for all of the tenders being sought. To curtail potential abuses, and the resulting harm to security holders and the American economy from these contingent bids, courts must enforce the explicit disclosure and timing conditions contained in the Williams Act.[15]

(6th ed. 1987).

13. *See supra* note 2 for a reference to the impact of cash offers on the labor force.

14. *See supra* notes 4-7 for relevant data on current tender offer financing techniques.

15. The 1968 amendments to the Securities Exchange Act of 1934 [hereinafter

Currently, five courts have addressed the issue of tender offer financing.[16] In each case the court refused to recognize an obligation on the part of offerors to disclose, and, therefore, to have in place, financing commitments to cover the acquisition of all securities sought under the offer. It is urged that the plain language of the federal securities laws imposes such a requirement on bidders. Enforcement of this mandate would provide the check on tender offers that recent market trends have desperately needed.

To that end, this Article first examines the present regulatory framework for issuer and third party tender offers. Next, recent case law which addresses the question of tender offer financing as implemented by federal disclosure and timing regulations is presented, followed by a commentary on the case law and congressional intent concerning regulation of tender offers. Finally, the article explores the need for congressional protection of securities markets due to the excessive use of credit in hostile takeovers and proposes that the solution be a requirement that bidders have firm financial arrangements in place before announcing an offer for tenders.

II. THE REGULATORY FRAMEWORK FOR TENDER OFFERS - THE WILLIAMS ACT

In 1968 Congress amended the Securities Exchange Act of 1934[17] ("Exchange Act") to provide a statutory construct for the regulation of cash tender offers.[18] This framework, commonly known as the Williams Act ("Williams Act" or "Act"), is embodied in five sections: 13(d),[19] 13(e),[20] 14(d),[21] 14(e),[22] and 14(f).[23]

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the "Exchange Act"] added sections 13(d)-(e) and 14(d)-(f). 15 U.S.C. § 78m(d)-(e) (1968), 15 U.S.C. § 78n(d)-(f) (1968). These sections were further amended in 1970.

16. *See* IU Int'l Corp. v. NX Acquisition Corp., 840 F.2d 220 (4th Cir. 1988), *aff'd on reh'g en banc,* 840 F.2d 229 (4th Cir. 1988); Newmont Mining Corp. v. Pickens, 831 F.2d 1448 (9th Cir. 1987); Damon Corp. v. Nomad Acquisition Corp., [1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,041 (D. Mass. Sept. 20, 1988); Plaza Sec. Co. v. Fruehauf Corp., 643 F. Supp. 1535 (E.D. Mich. 1986); Warnaco, Inc. v. Galef, No. B-86-146 (D. Conn. Mar. 3, 1986), *aff'd by summary order,* No. 86-7270 (2d Cir. Apr. 11, 1986).

17. *See supra* note 15.

18. Exchange tender offers, unlike cash tender offers, are also regulated under the Securities Act of 1933. 15 U.S.C. § 77a -77b [hereinafter the "Securities Act"]. Under the Securities Act, an issuer/offeror must file a registration statement with the Securities and Exchange Commission [hereinafter the "SEC" or "Commission"] containing detailed information about the financial and business status and prospects of the offering and target companies. Securities Act, § 5, 15 U.S.C. § 77e (1988); Securities Act, § 7, 15 U.S.C. § 77g (1988); Securities Act, § 10, 15 U.S.C. § 77j (1988); Schedule A, 15 U.S.C. § 77aa (1988).

19. 15 U.S.C. § 78m(d) (1988).

20. 15 U.S.C. § 78m(e) (1988).

21. 15 U.S.C. § 78n(d) (1988).

Section 13(d) sets forth a general post-acquisition filing requirement. Under section 13(d)(1), any person who, after acquiring beneficial ownership of a section 12 equity security,[24] is the owner of more than five percent of the subject class must send a statement containing certain information to the issuer of the security and to each exchange upon which the stock is listed.[25] The specific disclosures required under section 13(d)(1) include:

(1) the background and identity of the buyers;[26]

(2) the source and amount of the funds to be used in making the acquisition;[27]

(3) a description of financing transactions and the parties thereto where any part of the purchase price is to be represented by borrowed funds;[28]

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22. 15 U.S.C. § 78n(e) (1988).

23. 15 U.S.C. § 78n(f) (1988).

24. 15 U.S.C. §78l(g)(1)-(4) (1988). Section 13(d)(1) of the Williams Act also applies to equity securities issued by an insurance company and a closed-end investment company registered under the Investment Company Act of 1940. *Id.*

25. 15 U.S.C. § 78m(d)(1)(A)-(E) (1988).

26. Williams Act § 13(d)(1)(A) requires disclosure of "the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected." 15 U.S.C. § 78m(d)(1)(A) (1988).

27. Williams Act § 13(d)(1)(B) requires disclosure of:

> [T]he source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public.

15 U.S.C. § 78m(d)(1)(B) (1988).

28. 15 U.S.C. § 78m(d)(1)(B) (1988). If, however, the source of funds is a loan given by a bank in the ordinary course of business, the person filing the disclosure statement may request that the name of the bank not be made available to the public. *Id.*

As of the 1970s, banks have provided an increasing amount of funds for corporate acquisitions. Indeed, commercial bank financing, which generally involves bank commitment letters, represents over 50% of all financing for mergers and acquisitions. This move to bank financing for corporate acquisition purposes reflects an end to the active new-issue market of the 1960s. This departure from prior corporate acquisition techniques treats banks as a new figure in the securities markets.

Banks that undertake to finance the purchase of one company by another might face serious potential conflicts of interest. The most acute possibility for such a conflict is presented when both the acquiror and target companies are clients of the lending institution and the lender grants a loan based upon nonpublic information of the target garnered through bank records. Banks that provide funds for the acquisition of public companies also face potential aider and abetter liability under the federal securities

(4) any plans by the buyer to effect major changes in the issuer's business or corporate structure;[29]

(5) the number of shares beneficially owned by the buyers;[30] and

(6) information as to any contracts, arrangements or understandings with any person with respect to any securities of the issuer.[31]

The issuer and exchange information requirements must be filed with the SEC.[32] Williams Act section 13(d)(2) obligates the buyer to

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laws where the bank's borrowers are charged with securities violations. *See generally* Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution,* 120 U. PA. L. REV. 597 (1972).

The risks and potential abuses in bank financed buyouts have not gone unnoticed. According to the SEC, the purpose of the banking reference in Williams Act § 13(d)(1)(B) was to prevent "a subject company from exerting pressure on the bank to withhold financing for a tender offer." Memorandum of the Securities and Exchange Commission to the Senate Committee on Banking, Housing and Urban Affairs on Bank Financing of Tender Offers, *reprinted in* 542 Sec. Reg. & L. Rep. (BNA) No. 9 (February 27, 1980) (Feb. 15, 1980, statement of SEC Chairman Harold M. Williams to Senators William Proxmire, Harris A. Williams, Jr., and Paul S. Sarbanes) [hereinafter SEC Memorandum].

In 1980, the SEC proposed an amendment to Williams Act § 13(d)(1)(B) that would require offerors to disclose the identity of banks providing funding for a tender offer if the bank had, within a period of two years, a commercial relationship with the target company. *Id.* The SEC proposal has not been adopted. It does, however, intend to discourage bank loans to acquirors where the target company is a client of the lender. The bank's conflict of interest is curbed by the identification of the lender and the litigation pressure attendant with such disclosure.

29. Williams Act § 13(d)(1)(C) requires disclosure:

> [I]f the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure.

15 U.S.C. § 78m(d)(1)(C).

30. Williams Act § 13(d)(1)(D) requires disclosure of:

> [T]he number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate.

15 U.S.C. § 78m(d)(1)(D).

31. Williams Act § 13(d)(1)(E) requires disclosure of:

> [I]nformation as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

15 U.S.C. § 78m(d)(1)(E).

32. 15 U.S.C. § 78m(d).

amend these disclosure documents in the event of any material change to the facts contained in the filings.[33] All Williams Act section 13(d) filings are to be made within ten days of the five percent triggering acquisition;[34] hence, additional purchases may be effected during the ten-day filing window. As a post-acquisition disclosure provision, section 13(d) does not regulate tender offers for issuer equity securities. Section 13(d), however, allows "creeping acquisitions" of securities during the ten-day acquisition and disclosure gap. Such toe-hold purchases, often utilized as a preliminary step to a tender offer for control, were reviewed by Congress in 1987.[35]

Wholly apart from the initial "investment" purchases of section 13(d), the Williams Act regulates tender offers for certain issuer equity securities. Such non-investment acquisitions are monitored by the prefiling disclosure conditions of sections 13(e)[36] and 14(d),[37] the antifraud provision of section 14(e),[38] and the rules and regulations enacted thereunder.[39]

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33. 15 U.S.C. § 78m(d)(2). The amendment is to be sent to the issuer and the exchange and is to be filed with the SEC. *Id.*

34. 15 U.S.C. § 78m(d)(1).

35. S. 227, 100th Cong., 1st Sess. § 2 (1987) (introduced January 6, 1987 by Senator D'Amato) (amending § 13(d) by requiring public disclosure of the five percent acquisition within 24 hours and halting purchases of additional securities for two business days); S. 1323, 100th Cong., 1st Sess. §§ 3-5 (1987) (introduced June 4, 1987 by Senators Proxmire, Riegle, Cranston, Sarbanes, Dodd, Dixon, Sasser, Sanford, and Wirth) (amending § 13(d) by halting purchases over the five percent threshold for two business days after such acquisition and by requiring disclosure of the five percent acquisition within 24 hours); S. 1324, 100th Cong., 1st Sess. §§ 3-5 (1987) (introduced June 4, 1987 by Senator Sanford) (amending § 13(d) by lessening the five percent threshold to three percent, closing the three day window to 24 hours and requiring more explicit disclosure of purchase financing arrangements); H.R. 2172, 100th Cong., 1st Sess. § 4 (1987) (introduced April 27, 1987 by Representatives Dingell, Markey, Slattery, Bryant, Cooper, and Eckart) (amending § 13(d) by lowering the five percent threshold to 2.5 percent, halting purchases of additional securities for two business days after the five percent acquisition, requiring disclosure of the triggering purchase within one business day and requiring greater disclosure of financial arrangements); H.R. 2668, 100th Cong., 1st Sess. § 101 (1987) (introduced June 11, 1987 by Representatives Lent, Rinaldo, Moorhead, Whittaker, Tauke, Ritter, Coats, Bliley, Fields, Oxley, Nielson, Bilirakis, Schaefer, and Callahan) (amending § 13(d) by requiring disclosure of the five percent acquisition transaction by noon of the next business day and detailed disclosure of the impact of such acquisition on the issuer, its management, employees, labor organizations, and the community in which it operates).

36. 15 U.S.C. § 78m(e).

37. 15 U.S.C. § 78n(d).

38. 15 U.S.C. §78n(e).

39. Rules 13e-1, 13e-3, 13e-4 and Schedule 13E-3 and 13E-4 have been enacted under section 13(e). 17 C.F.R. §§ 240.13e-1-24C.13e4 (1980), §§ 240.13e-100 to 240.13e-101 (1980). Regulation 14D, embodying rules 14d-1 to 14d-10 and Schedule 14D-1, was enacted pursuant to § 14(d). 17 C.F.R. §§ 240.14d-1 to 240.14d-10 (1980), § 240.14d-100 (1980).

Section 13(e)(1) makes it unlawful for an issuer to tender for its equity securities in contravention of the rules and regulations prescribed by the SEC concerning fraudulent, deceptive, and manipulative practices.[40] Rules 13e-1,[41] 13e-3,[42] and 13e-4,[43] adopted pursuant to section 13(e), categorize issuer disclosure obligations according to the nature of the subject corporate act. For example, rule 13e-1[44] prohibits the acquisition by an issuer of its equity securities during the pendency of a third-party tender offer unless the issuer files with the SEC a statement identifying the manner, purpose, and source of funds to be used for the purchase program.[45] By its terms, rule 13e-1 directs only

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40. 15 U.S.C § 78m(e)(1). Section 13(e)(1) provides:

> It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 12 of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

In addition to federal regulation under § 13(e), issuer "self-tenders" are scrutinized under state corporate law. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). A decision by corporate directors to effect a self-tender goes to the internal functioning of a corporation and, thus, is not regulated under federal law. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 78 (1987); Edgar v. Mite Corp., 457 U.S. 624, 645 (1982). State law, however, safeguards against directorial abuses by imposing upon corporate directors fiduciary obligations of loyalty and due care. *See* Revlon v. MacAndrews & Forbes Holdings, 506 A.2d 173, 179 (Del. 1986).

41. 17 C.F.R. § 240.13e-1 (1990).
42. 17 C.F.R. § 240.13e-3 (1990).
43. 17 C.F.R. § 240.13e-4 (1990).
44. 17 C.F.R. § 240.13e-1 (1990).
45. *Id.* The required disclosures under rule 13e-1 include:

> (1) The title and amount of securities to be purchased, the names of the persons or classes of persons from whom, and the market in which, the securities are to be purchased, including the name of any exchange on which the purchase is to be made;
>
> (2) The purpose for which the purchase is to be made and whether the securities are to be retired, held in treasury of the issuer or otherwise disposed of, indicating such disposition; and
>
> (3) The source and amount of funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading the securities, a description of the transaction and the names of the parties

those issuer repurchases which do not correspond to tender offers.[46]

Rule 13e-3[47] governs "going private" transactions by issuers and their affiliates.[48] Going private under the federal securities laws encompasses a range of corporate maneuvers. Defined as a "rule 13e-3 transaction," taking a corporation private includes: (1) purchases by an issuer or its affiliates of the issuer's equity securities;[49] (2) tender offers by the issuer or an affiliate for such securities;[50] or, (3) solicitations subject to regulations 14A[51] or 14C[52] in connection with a merger, sale of assets, or reverse stock split of any class of issuer equity securities involving the purchase of fractional interests.[53] These corporate acts become rule 13e-3 transactions if they have a reasonable likelihood or purpose of (1) causing the securities of the issuer to be held of record by less than 300 persons, thus terminating the issuer's reporting obligations under sections 12(g)[54] and 15(d)[55] of the Exchange Act,[56] and (2) causing the class of securities to be delisted or not authorized to be quoted on an interdealer quotation system.[57] Due to the inside nature[58] and ultimate effect[59] of going private purchases, rule 13e-3 requires stringent issuer disclosure.[60]

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thereto. . . .

17 C.F.R. § 240.13e-1(a) (1990).

46. *See* 17 C.F.R. § 240.10b-18 (1990) (imposing limitations on the price, volume, and timing of market purchases by an issuer).

47. 17 C.F.R. § 240.13e-3 (1990).

48. 17 C.F.R. § 240.13e-3(a)(3) (1990).

49. 17 C.F.R. § 240.13e-3(a)(3)(i)(A) (1990).

50. 17 C.F.R. § 240.13e-3(a)(3)(i)(B) (1990).

51. 17 C.F.R. §§ 240.14a-1 to 240.14b-1 (1990).

52. 17 C.F.R. §§ 240.14c-1 to 14c-101 (1990).

53. 17 C.F.R. § 240.13e-3(a)(3)(i)(C) (1990).

54. *See* 15 U.S.C. § 78l(g) (1988).

55. *See* 15 U.S.C. § 78o(d) (1988).

56. 17 C.F.R. § 240.13e-3(a)(3)(ii)(A) (1990).

57. 17 C.F.R. § 240.13e-3(a)(3)(ii)(B) (1990).

58. *See supra* note 40.

59. *See supra* notes 54-57.

60. 17 C.F.R. § 240.13e-100. For example, rule 13e-100, item 6 requires enhanced disclosure of the source and amount of funds to be utilized in consummating a going private transaction. Item 6 states:

> (a) State the source and total amount of funds or other consideration to be used in the Rule 13e-3 transaction.
>
> (b) Furnish a reasonably itemized statement of all expenses incurred or estimated to be incurred in connection with the Rule 13e-3 transaction including, but not limited to, filing fees, legal, accounting and appraisal fees, solicitation expenses and printing costs and state whether or not the issuer has paid or will be responsible for paying any or all of such expenses.
>
> (c) If any part of such funds or other consideration is, or is expected to be, directly or indirectly borrowed for the purpose of the Rule 13e-3 transaction,
>
> (1) Provide a summary of each loan agreement containing the identity

Rule 13e-4[61] generally regulates tender offers by issuers or their affiliates.[62] Rule 13e-4(d)(1) outlines the disclosure strictures for issuer tender offers. Specifically demanded under rule 13e-4(d)[63] are the scheduled termination date of the tender offer and whether it may be extended,[64] the dates prior to which shareholders may withdraw from

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> of the parties, the term, the collateral, the stated and effective interest rates, and other material terms or conditions; and
>
> (2) Briefly describe any plans or arrangements to finance or repay such borrowings, or, if no such plans or arrangements have been made, make a statement to that effect.
>
> (d) If the source of all or any part of the funds to be used in the Rule 13e-3 transaction is a loan made in the ordinary course of business by a bank as defined by section 3(a)(6) of the Act and section 13(d) or 14(d) is applicable to such transaction, the name of such bank shall not be made available to the public if the person filing the statement so requests in writing and files such request, naming such bank, with the Secretary of the Commission.

17 C.F.R. § 240.13e-100, item 6 (1990). *Compare* 15 U.S.C. § 78m(d)(1)(B) *with* 17 C.F.R. § 240.13d, Schedule 13D, item 3 (1990). *See supra* note 27 for the text of Williams Act § 13(d)(1)(B).

Rule 13e-100, item 8 departs from other Williams Act requirements by mandating the fairness of the going private transaction. Item 8(a) requires the issuer to:

> State whether the issuer or affiliate filing this schedule reasonably believes that the Rule 13e-3 transaction is fair or unfair to unaffiliated security holders. If any director dissented to or abstained from voting on the Rule 13e-3 transaction, identify each such director, and indicate, if known, after making reasonable inquiry, the reasons for each dissent or abstention.

17 C.F.R. § 240.13e-100, item 8(a) (1990).

The instruction to item 8(a) makes clear that neutrality by the issuer on the question of fairness is not adequate disclosure for purposes of item 8. "A statement that the issuer or affiliate has no reasonable belief as to the fairness of the Rule 13e-3 transaction to unaffiliated security holders will not be considered sufficient disclosure in response to Item 8(a)." 17 C.F.R. § 240.13e-100, item 8(a) (1990)); *see also* 17 C.F.R. § 240.13e-100, item 9 (1990) (requiring disclosure of reports, opinions, appraisals and certain other negotiations); 17 C.F.R. § 240.13e-100, item 10 (requiring disclosure of certain parties' interests in the issuer's securities); 17 C.F.R. § 240.13e-100, item 11 (requiring disclosure of certain contracts, arrangements or understandings with respect to the issuer's securities, whether or not legally enforceable); 17 C.F.R. § 240.13e-100, item 12 (requiring disclosure of intentions and recommendations of certain persons regarding the 13e-3 transaction); 17 C.F.R. § 240.13e-100, item 13 (requiring disclosure of other relevant provisions of the transaction); 17 C.F.R. § 240.13e-100, item 14 (requiring disclosure of certain financial data concerning the issuer); and 17 C.F.R. § 240.13e-100, item 15 (requiring disclosure of certain persons and assets employed, retained or utilized in connection with the 13e-3 transaction).

61. 17 C.F.R. § 240.13e-4 (1990).

62. 17 C.F.R. § 240.13e-4(a)(2) (1990). Issuer tender offer is defined as "a tender offer for, or a request or invitation for tenders of, any class of equity security, made by the issuer of such class of equity security or by an affiliate of such issuer." *Id.*

63. 17 C.F.R. § 240.13e-4(d) (1990).

64. 17 C.F.R. § 240.13e-4(d)(1)(i) (1990).

the offer,[65] and information concerning proration in the event the offer is for less than all securities of the class.[66] Rule 13e-4(d)(2) obligates the issuer to promptly amend this information if any material change occurs in the disclosures as previously submitted to security holders.[67]

The manner of issuer tender offers is governed by rule 13e-4(f).[68] Rule 13e-4(f) is designed to enhance investor disclosure objectives by outlining specific procedural and timing conditions. For instance, rule 13e-4(f)(1) requires issuer tender offers to remain open for at least twenty business days after dissemination to the security holders,[69] and an additional ten days after any notice of an increase or decrease in the size or price[70] of the offering or the dealer's solicitation fee.[71] Such a timing requirement provides security holders with adequate opportunity to assess whether or not to tender. Rule 13e-4(f)(2) grants similar protection by permitting security holders who have tendered to withdraw their securities during the life of the issuer offer[72] or after forty business days from its commencement.[73] The forty-day withdrawal provision, however, is not applicable to the extent an issuer has accepted tendered securities for payment.[74] Rule 13e-4(f)(5), also securing investor welfare, requires the issuer either to pay the offered consideration or to return the deposited securities promptly after the termination or withdrawal of the offer.[75]

In July 1986, the SEC adopted two rules amending issuer tender offer obligations.[76] The amendments, enacted at rule 13e-4(f)(8), incorporate "all-holders"[77] and "best-price"[78] requirements into issuer offers. These rules require that an issuer tender offer be extended to all holders of the class of securities being sought[79] and that all such hold-

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65. 17 C.F.R. § 240.13e-4(d)(1)(ii) (1990).

66. 17 C.F.R. § 240.13e-4(d)(1)(iii) (1990); 17 C.F.R. § 240.13e-4(f)(3) (1990).

67. 17 C.F.R. § 240.13e-4(d)(2) (1990).

68. 17 C.F.R. § 240.13e-4(f) (1990).

69. 17 C.F.R. § 240.13e-4(f)(1)(i) (1990).

70. Rule 13e-4(f)(4) requires an issuer to pay any *increase* in consideration to all security holders whose deposited securities are accepted for payment. 17 C.F.R. § 240.13e-4(f)(4) (1990). There is no corresponding provision covering a decrease in the consideration offered. Tender Offers by Issuers, Exchange Act Release No. 33-6618, 51 Fed. Reg. 3031 (Jan. 23, 1986).

71. 17 C.F.R. § 240.13e-4(f)(1)(ii) (1990).

72. 17 C.F.R. § 240.13e-4(f)(2)(i) (1990).

73. 17 C.F.R. § 240.13e-4(f)(2)(ii) (1990).

74. *Id.*

75. 17 C.F.R. § 240.13e-4(f)(5) (1990).

76. 17 C.F.R. § 240.13e-4(f)(8)(i),(ii) (1990); Tender Offers by Issuers, Exchange Act Release No. 33-6618, 51 Fed. Reg. 30,301 (Jan. 23, 1986).

77. 17 C.F.R. § 240.13e-4(f)(8)(i) (1990).

78. 17 C.F.R. § 240.13e-4(f)(8)(ii) (1990).

79. 17 C.F.R. § 240.13e-4(f)(8)(i) (1990).

ers be paid the highest consideration remitted under the offer.[80] The SEC defended its rulemaking authority for rule 13e-4(f)(8)[81] by likening the new "substantive" amendments to the "substantive" pro rata and equal price requirements of sections 14(d)(6)[82] and 14(d)(7)[83] relating to third-party tender offers.[84] The SEC also found ample author-

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80. 17 C.F.R. § 240.13e-4(f)(8)(ii) (1990).

81. Tender Offers by Issuers, Exchange Act Release No. 33, 6596, 50 Fed. Reg. 28,210 (July 11, 1985).

82. 15 U.S.C. § 78n(d)(6).

83. 15 U.S.C. § 78n(d)(7).

84. Amendments to Tender Offer Rules; All-Holders and Best-Price, Exchange Act Release No. 33-6653, 51 Fed. Reg. 25,873 (July 17, 1986). The SEC reasoned:

> The substantive provisions of the Williams Act also support the Commission's rulemaking authority to require that all security holders subject to a tender offer be treated alike. For example, in promulgating both the pro rata and equal price provisions of sections 14(d)(6) and (d)(7), Congress intended, *inter alia,* to assure fair treatment among security holders who may desire to tender their shares. The pro rata provisions of section 14(d)(6) were promulgated in order to give all security holders an equal opportunity to participate in a tender offer for less than all the outstanding shares of the target. [footnote omitted] Specifically, that section provides that where a greater number of securities are deposited than the offeror is bound or willing to take up, the securities deposited must be taken up pro rata according to the number of securities deposited by each person. Although section 14(d)(6) recognizes that a tender offeror may accept less than all the securities of a particular class, that section does not authorize tender offers to be made to less than all security holders of the particular class of securities sought.
>
> Similarly, section 14(d)(7) assures equality of treatment among all security holders who tender their shares by requiring that any increase in consideration offered to security holders be paid to all security holders whose shares are taken up during the offer. One of Congress' purposes in promulgating the provision was "to assure equality of treatment among all shareholders who tender their shares." [footnote omitted] These substantive provisions assume that offers will be made to all security holders and not just to a select few, and that offers will not be made to security holders at varying prices. Without the all-holders requirement and best-price provision, the specific protections provided by sections 14(d)(6) and (d)(7) would be vitiated because an offeror could simply address its offer either to a privileged group of security holders who hold the desired number of shares or to all security holders but for different considerations. The all-holders requirement and best-price provision are both consistent with Congressional intent and complement the pro rata and equal price protections of the Williams Act.
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> * * *
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> Thus the requisite authority to promulgate the all-holders requirement and best-price provision for third-party tender offers. Section 13(e) of the Exchange Act provides additional authority for the all-holders and best-price requirements in connection with tender offers. [footnote omitted] When it adopted section 13(e), Congress determined that, notwithstanding that share repurchases by an issuer were regulated by state corporation law, there was a need for federal regulation. Those who argue that adoption of the all-holders rule would preempt state corporation law fail to recognize

ity for the all-holders and best-price rules as they were "necessary or appropriate" to implement the disclosure objectives of the Williams Act.[85] The adoption of the new requirements was, however, shortly followed by an SEC "concept release" soliciting comments on an opt-out exemption, which would permit corporate directors and shareholders to decide whether the protections of the Williams Act are necessary to effectuate their best interests.[86]

As with issuer tender offer regulation, third party offers are monitored through a combination of disclosure, procedure, and timing conditions. Section 14(d)[87] of the Williams Act, and its corresponding rules and regulations,[88] provide the primary backdrop for the regulation of third-party offers.

Section 14(d) is designed to make material facts known to security holders so that those investors have a fair opportunity to make an investment decision whether to tender, hold, or sell their securities. To that specific end, section 14(d)(1) makes it unlawful for any person to initiate a "tender offer for, or a request or invitation for tenders of," certain equity securities if consummation of the offer would render the offeror the beneficial owner of more than five percent of the class — unless the offeror files with the SEC, simultaneous with the first publication of the offer, request, or invitation for tenders, disclosure documents mandated by section 13(d)[89] and by rule.[90] Required third-party

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that Congress made that decision when it enacted section 13(e). Regulation of issuer tender offers in the same manner as third-party tender offers is entirely consistent with Congressional intent.

85. Proposed Amendments to Tender Offer Rules, Exchange Act Release No. 33-6595, 50 Fed. Reg. 27,976 (July 9, 1985); Tender Offers by Issuers, Exchange Act Release No. 33-6596, 50 Fed. Reg. 28,210 (July 1, 1985).

86. Concept Release on Takeovers and Contest for Corporate Control, Exchange Act Release No. 34-23486, 51 Fed. Reg. 28,096 (Aug. 5, 1986).

87. 15 U.S.C. § 78n(d).

88. 17 C.F.R. § 240.14d-1; 17 C.F.R. § 240.14d-2; 17 C.F.R. § 240.14d-3; 17 C.F.R. § 240.14d-4; 17 C.F.R. § 240.14d-5; 17 C.F.R. § 240.14d-6; 17 C.F.R. § 240.14d-7; 17 C.F.R. § 240.14d-8; 17 C.F.R. § 240.14d-9; 17 C.F.R. § 240.14d-10; 17 C.F.R. § 240.14d-100; 17 C.F.R. § 240.14d-101.

89. *See supra* notes 25-30 for text of the § 13(d) disclosure provisions. Section 14(d) disclosures also include any additional information as prescribed by SEC rule or regulation. 15 U.S.C. § 78n(d).

90. 15 U.S.C. § 78n(d). Section 14(d)(1) provides:

> It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such

disclosures include:

(1) the identity and background of the offeror;[91]
(2) the identity of the target company;[92]
(3) the terms of the tender offer, including the amount of and consideration for securities being sought;[93]
(4) the scheduled expiration date of the tender offer and whether it may be extended;[94]
(5) the sources and amount of funds to be used;[95]
(6) summaries of loan agreements if any part of the purchase price is to be represented by borrowed funds;[96]
(7) plans to finance or repay any borrowings or a statement that no such arrangements have been made;[97]
(8) any plans by the buyer to effect major changes in the target's business or corporate structure;[98] and
(9) financial information concerning the bidder, if it is material to the security holder's decision to sell or hold securities subject to the offer.[99]

Consistent with the disclosure objectives of the Williams Act, the SEC has exercised its rulemaking authority under section 14(d) to prescribe additional disclosure requirements for the third party bidder. For

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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, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

91. 17 C.F.R. § 240.14d-6(e)(i) (1990); 17 C.F.R. § 240.14d-100, item 2.
92. 17 C.F.R. § 240.14d-6(e)(ii) (1990); 17 C.F.R. § 240.14d-100, item 1.
93. 17 C.F.R. § 240.14d-6(e)(iii) (1990); 17 C.F.R. § 240.14d-100, item 1(b).
94. 17 C.F.R. § 240.14d-6(e)(iv).
95. 17 C.F.R. § 240.14d-100, item 4(a).
96. 17 C.F.R. § 240.14d-100, item 4(b)(1).
97. 17 C.F.R. § 240.14d-100, item 4(b)(2).
98. 17 C.F.R. § 240.14d-100, item 5.
99. 17 C.F.R. § 240.14d-100, item 9.

example, rule 14d-2 provides that a tender offer will commence upon the first publication or public announcement of the offeror's bid.[100] Likewise, rule 14d-4 requires transmission of the tender offer statement to all security holders.[101] Also consistent with a disclosure intent, section 14(d)(4) authorizes the SEC to enact "necessary or appropriate" measures to protect investors or the public interest in matters concerning any solicitation or recommendation to security holders to accept or reject the offer or request for tenders.[102] The SEC exercised its authority under section 14(d)(4) by promulgating rule 14d-101,[103] which generally regulates disclosures attendant to any information concerning recommendations or solicitations of tenders, whether by bidders, subject companies, or others.[104]

Third-party tender offers are governed to a large extent by the substantive conditions of sections 14(d)(5)-(7) and their accompanying rules and regulations.[105] As with the pure disclosure provisions of sections 14(d)(1) and 14(d)(4), the substantive third-party requirements are designed to maximize protection of security holders who are faced with an investment decision. Accordingly, section 14(d)(5) permits security holders who have tendered to withdraw securities during the first seven days of the offer or after sixty days from the original request, invitation, or offer for securities, unless the SEC otherwise acts by rule or regulation.[106] In 1986, the SEC amended section 14(d)(5) by enacting rule 14d-7, which extends security holder withdrawal rights to the entire offering period.[107] The Williams Act similarly protects security

100. 17 C.F.R. § 240.14d-2.

101. 17 C.F.R. § 240.14d-4.

102. 15 U.S.C. § 78n(d)(4). Section 14(d)(4) provides:

> Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

103. 17 C.F.R. § 240.14d-101.

104. *Id.*

105. 15 U.S.C. § 78n(d)(5)-(7) (1990).

106. 15 U.S.C. § 78n(d)(5). Section 14(d)(5) provides:

> Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in public interest or for the protection of investors.

107. 17 C.F.R. § 240.14d-7. Rule 14d-7(a) provides that: "In addition to the provisions of section 14(d)(5) of the Act, any person who has deposited securities pursuant to a tender offer has the right to withdraw any such securities during the period such offer, request or invitation remains open." 17 C.F.R. §240.14d-7(a) (1990).

holders by providing proration rights in the event of certain oversubscribed offerings. Thus, under section 14(d)(6), all shares deposited within ten days after the first publication of an offer for less than 100% of the outstanding securities must be taken up by the bidder on a pro rata basis if less than all deposited shares are purchased.[108] The SEC also extended the ten-day proration period to the duration of the third-party offer.[109] The final statutory provision, section 14(d)(7), protects investors by mandating that security holders whose shares are taken and paid for by the bidder are paid any increase in consideration announced before the expiration of the offer.[110]

In 1986, the SEC enacted corresponding amendments to section 14(d) which make "all-holders" and "best-price" rules applicable to third-party offers.[111] The SEC deemed the all-holders and best-price amendments "necessary or appropriate" to implement the investor protection objectives of the Williams Act because these amendments expressly preclude offerors from discriminating among security holders who are subject to a tender offer.[112] The remaining third-party offering requirements are governed by rules enacted under section 14(e) of the

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108. 15 U.S.C. § 78n(d)(6). Section 14(d)(6) provides:

> Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

109. 17 C.F.R. § 240.14d-8. Rule 14d-8 provides:

> Notwithstanding the pro rata provisions of section 14(d)(6) of the Act, if any person makes a tender offer or request or invitation for tenders, for less than all of the outstanding equity securities of a class, and if a greater number of securities are deposited pursuant thereto than such person is bound or willing to take up and pay for, the securities taken up and paid for shall be taken up and paid for as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor during the period such offer, request or invitation remains open.

110. 15 U.S.C. § 78n(d)(7). Section 14(d)(7) provides:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

111. 17 C.F.R. § 240.14d-10 (1990).

112. *Id.*

Williams Act.[113]

Section 14(e) incorporates a new anti-fraud provision into the scheme of tender offer regulation.[114] Section 14(e) makes it "unlawful for any person to make any untrue statement of a material fact or . . . to engage in any fraudulent, deceptive, or manipulative acts or practices" in connection with an offer, request, or invitation for tenders or any solicitation regarding the tender offer.[115] In addition, section 14(e) specifically empowers the SEC to prescribe rules and regulations designed to prevent acts and practices that are fraudulent, deceptive, or manipulative.[116]

Acting under its section 14(e) authority, the SEC has adopted several amendments to its third-party tender offer rules.[117] These rules impose certain timing and procedural requirements designed to protect the integrity of mandated disclosures. For example, rule 14e-1 currently requires that a tender offer remain open for twenty business days

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113. 15 U.S.C. § 78n(e).

114. Additional tender offeror prohibitions are governed by section 10(b) of the Exchange Act and its corresponding rules. 15 U.S.C. § 78j(b). Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails or of facility of any national securities exchange . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Pursuant to SEC rulemaking authority under section 10(b), as well as sections 13(d) and 14(d) of the Williams Act, the SEC in 1969 adopted rule 10b-13 which prohibits the purchase by the tender offeror of any securities which are the subject of the third-party bid during the pendency of the outstanding offer. 17 C.F.R. § 240.10b-13 (1990). The prohibition against purchasing "alongside the offer" protects the integrity of the offer as proposed to security holders but is only applicable from the date of its commencement to the time of its expiration.

The SEC also exercised its rulemaking authority to adopt rule 10b-4, which generally prohibits short-tendering of securities in tender offers. 17 C.F.R. § 240.10b-4 (1990).

115. 15 U.S.C. § 78n(e). Section 14(e) provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statement made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

116. *Id.*

117. 17 C.F.R. § 240.14d-1 (1990).

from the date the offer is first published or sent to security holders.[118] Rule 14e-1 further requires that a tender offer be held open an additional ten business days upon an increase or decrease in the percentage of securities being sought, the consideration offered, or the dealer's solicitation fee.[119] The ten-day extension effectuates a disclosure intent by granting security holders adequate time to consider material changes in the offer. The additional ten-day period, however, is triggered only to the extent changes are effected by the bidder.[120] Moreover, the tender offeror will not be required to meet the ten-day extension if, at the expiration of the offer, the bidder accepts for payment an additional amount of securities not exceeding two percent of the class of securities being sought.[121] A similar protective provision requires bidders to issue a notice by press release or public announcement of any extension of time of the offer.[122]

Finally, rule 14e-1 provides that failure to pay the consideration offered or to return deposited securities promptly upon the termination or withdrawal of a tender offer constitutes a fraudulent, deceptive, or manipulative act within the meaning of section 14(e).[123] The prompt payment provision is currently construed as meaning within five days, thereby coming into accord with the practice of the financial community for settlement of transactions.[124]

Section 14(f),[125] the last provision of the Williams Act, regulates the practice in tender offers of working a reconstitution by private agreement of the issuer's board of directors. For example, a new board may be installed when control is transferred by utilizing directorial authority to fill vacancies. Such vacancies occur when the board resigns after a shift in control and may be filled without the solicitation of

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118. 17 C.F.R. § 240.14e-1(a).

119. 17 C.F.R. § 240.14e-1(b).

120. *Id.*

121. *Id.*

122. 17 C.F.R. § 240.14e-1(d).

123. 17 C.F.R. § 240.14e-1(c).

124. Tender Offers, Exchange Act Release No. 16,384 [1979-80 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 88,373 (Nov. 29, 1979); *see also* Interpretative Release Relating to Tender Offer Rules, Exchange Act Release No. 16,623 (Mar. 5, 1980), [1980 Transfer Binder] 3 Fed. Sec. L. Rep. (CCH) ¶24,2841, at 17,758 (Mar. 5, 1980). In a release adopting rule 14e-1, the SEC stated that the question of prompt payment "will be affected by the practices of the financial community and the following factors: current settlement, handling and delivering procedures . . ., procedures to cure technical defects in tenders, and the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the rules promulgated thereunder." *Id.* The adopting release also stated that the period for payment would generally comply "with the practices of the financial community for settlement of transactions" which would usually be within five days. *Id.* The release further provided that an offeror must "use all reasonable efforts to pay promptly . . . ." *Id.*

125. 15 U.S.C. § 78n(f) (1990).

proxies when the ownership of a majority of shares renders solicitation unnecessary. Section 14(f) addresses this absence of notice to shareholders and now requires the issuer to file information with the SEC concerning any new directors prior to the time the individuals take office.[126] This information is transmitted to all holders of record of securities of the issuer who would be entitled to vote at a meeting for the election of directors.[127]

III. Recent Case Law Interpreting Financing Statutes and Regulatory Provisions Under The Williams Act

The Williams Act is designed to provide security holders faced with a tender offer sufficient information and time to judge the merits of the transaction and, thus, to make an informed investment decision to hold, sell, or tender their securities. The SEC explained the Act's design in a memorandum to the Senate Subcommittee considering the proposed Williams Act legislation: "[T]he principal purpose of S.510 is . . . to provide *investors with a means of obtaining the information necessary for informed and unhurried decision* on tender offers and *to enhance confidence in the securities market* by reducing the public confusion which currently attends many take-over bids."[128] The House Investment and Foreign Commerce Committee Report on the proposed bill explained its purpose somewhat differently: *"The persons seeking control . . . have information about themselves and about their plans which, if known to investors, might substantially change the assumptions on which the market price is based.* This bill is designed to make the relevant facts known so that *shareholders* have a fair opportunity to make their decision."[129]

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126. Section 14(f) provides:

> If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 13 of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

127. *Id.*

128. *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency,* 90th Cong., 1st Sess. 210 (1967) (emphasis added).

129. H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968) (emphasis added).

It is clear that Congress intended to ensure full disclosure to security holders confronted with a tender offer.[130] By requiring that this information be provided to the investor, Congress did not, however, seek to forestall tender offer activity, whether or not hostile.[131] Rather, Congress sought to preserve a neutral forum for investors. The forum provided by Congress allows security holders to respond in an informed manner to a tender offer as well as to the arguments put forth by the "warring factions" to that offer; namely, the offeror seeking control of the target corporation and incumbent management who may seek to prevent the offer to the possible detriment of shareholders.[132] The Williams Act, therefore, is designed to be neutral in order to protect investor autonomy.[133]

A. *The Disclosure Provisions*

Although Congress intended to ensure full disclosure, at least one court has found that the Williams Act does not require publication of all information that a bidder possesses concerning itself or the target company.[134] Instead, disclosure has been found to include only those material facts which a reasonable stockholder would consider important in reaching an informed investment decision.[135] In the event an offeror fails to disseminate all material facts, a target company may pursue a private cause of action, including one to obtain corrective disclosures

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130. Senator Harrison Williams, sponsor of the Williams Act in the Senate, addressed this issue in the hearings on the legislation: "S.510 is designed solely to require full and fair disclosure for the benefit of *investors*." See Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 31 (1977) (emphasis in original), *reh'g denied*, 430 U.S. 976 (1977) (quoting and relying upon 113 CONG. REC. 24664 (1967)).

131. The House Committee Request on the Williams Act bill states:

> It was urged during the hearings that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management. It was also recognized that these bids are made for many other reasons, and do not always reflect a desire to improve the management of the company. The bill avoids tipping the balance of regulation either in favor of management or in the favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.

H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4 (1968).

132. *Id.*

133. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987) (quoting Edgar v. MITE, 457 U.S. 624, 639-40 (1982)).

134. Weeks Dredging & Contracting Inc. v. American Dredging Co., 451 F. Supp. 468, 482 (E.D. Pa. 1978).

135. Berg v. First Am. Bankshares, Inc., 796 F.2d 489, 494-95 (D.C. Cir. 1986); Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1, 5-6 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984).

from the bidder.[136]

Therefore, under the Williams Act, a party making an offer for tenders of more than five percent of the outstanding securities of the target company must file with the SEC a statement containing disclosures necessary to a security holder's decision whether to sell or hold the subject shares.[137] Section 14(d)(1), the statute regulating third-party offers,[138] specifically requires a statement containing the information specified in section 13(d)[139] of the Williams Act and all additional information prescribed by SEC rule or regulation as necessary or appropriate to the public interest or for the protection of investors.[140] To meet the section 13(d) obligations for filing under section 14(d)(1), a tender offeror must disclose arrangements for funding the proposed acquisition. Financial disclosures required by section 13(d) include "the source and amount of the funds or other consideration used or to be used in making the purchases,"[141] and, if any part of the acquisition price is or is expected to be represented by borrowed funds, "a description of the transaction and the names of the parties thereto."[142] A tender offeror complies with its independent section 14(d) obligations by including in its offering statement the information set forth in Schedule 14D-1.[143] The SEC adopted Schedule 14D-1 in 1977 specifically to "implement the intent of Congress in enacting sections 14(d) and 14(e)" of the Williams Act.[144]

Item 4 of Schedule 14D-1[145] governs additional financing information[146] required to satisfy the financial disclosure aspects of section

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136. Florida Commercial Banks v. Culverhouse, 772 F.2d 1513 (11th Cir. 1985).

137. *See supra* note 90 for the complete text of the Williams Act.

138. 15 U.S.C. 78n(d). Each of the cases deciding the issue of tender offer financing primarily addressed target company challenges of a third-party offer that was initiated with minimal financial disclosures. *See* IU Int'l Corp. v. NX Acquisition Corp., 840 F.2d 220 (4th Cir. 1988); Newmont Mining Corp. v. Pickens, 831 F.2d 1448 (9th Cir. 1987); Damon Corp. v. Nomad Acquisition Corp., [1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,041 (Sept. 20, 1988); Plaza Sec. Co. v. Fruehauf Corp., 643 F. Supp. 1535 (E.D. Mich. 1986); Warnaco Inc. v. Galef, No. B-86-146 (D. Conn. Mar. 3, 1986), *aff'd by summary order,* No. 86-7270 (2d Cir. Apr. 11, 1986). This author will confine in-depth analysis to statutory provisions relating to offers by third-parties. Parallel provisions are applied to issuer tender offers and are considered *supra* in notes 31-81 and accompanying text.

139. 15 U.S.C. § 78m(d).

140. 15 U.S.C. § 78m(d)(1).

141. 15 U.S.C. § 78m(d)(1)(B).

142. *Id.*

143. 17 C.F.R. § 240.14d-100.

144. 42 Fed. Reg. 38,341, 38,342 (1977).

145. 17 C.F.R. § 240.14d-100, item 4.

146. Schedule 14D-1 contains two additional items which directly or indirectly pertain to financial disclosures. Item 7 of Schedule 14D-1 requires inclusion in the offering statement of a description of:

[A]ny contract, arrangement, understanding or relationship (whether or not

14(d)(1) — the section covering initiation of third-party tender offers. Item 4, unlike section 13(d), imposes stringent financial disclosure obligations upon third-party offerors.[147] The different treatment of financial information under sections 13(d) and 14(d) of the Act reflects the apparent intent by the SEC that greater disclosure is compelled for security holders subject to "surprise" by third party tender offers than for security holders subject to a post-acquisition filing. Moreover, as an implementing regulation for third-party tender offers, item 4 of Schedule 14D-1 directly sets forth the additional financial information the SEC deems to be "necessary to the public interest and for the protection of investors."[148] Item 4 of Schedule 14D-1 provides in particular:

> (a) *State the source and the total amount of funds or other consideration for the purchase of the maximum number of securities for which the tender offer is being made.*
>
> (b) *If all or any part of such funds* or other consideration *are or are expected to be, directly or indirectly, borrowed* for the purpose of the tender offer:
>
> (1) *Provide a summary of each loan agreement or arrangement containing the identity of the parties, the term, the collateral, the stated and effective interest rates, and other material terms or conditions relative to such loan agreement*; and
>
> (2) *Briefly describe any plans or arrangements to finance or repay such borrowings, or if no such plans or arrangements have been made, make a statement to that effect.*
>
> (c) If the source of all or any part of the funds to be used in the tender offer is a loan made in the ordinary course of business by a bank as defined by section 3(a)(6) of the Act, the name of such bank shall not be made available to the public if the person filing the statement so requests in writing and files such request, naming such

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> legally enforceable) between the bidder . . . and any person with respect to any securities of the subject company (including, but not limited to, any contract, arrangement, understanding or relationship concerning . . . loan or option arrangements, puts or calls, guarantees of loans, . . .) naming the persons with whom such contracts, arrangements, understandings or relationships have been entered into and giving the material provisions thereof.

17 C.F.R. § 240.14d-100, item 7. Similarly, item 9 of Schedule 14D-1 generally requires financial statements concerning the bidder — which may be a controlling person of the offeror — where the bidder is other than a natural person and the financial status of the bidder is material to a target security holder's decision whether to sell or hold the shares. 17 C.F.R. § 240.14d-100, item 9. For cases considering the question of who constitutes a bidder for purposes of the Williams Act and when bidder financial statements are material, see MAI Basic Four, Inc. v. Prime Computer, Inc., 871 F.2d 212 (1st Cir. 1989); City Capital Assoc. Ltd. v. Interco, Inc., 860 F.2d 60 (3rd Cir. 1988); Koppers Co., Inc. v. American Express Co., 689 F. Supp. 1371 (W.D. Pa. 1988); and Arkansas Best Corp. v. Pearlman, 688 F. Supp. 976 (D. Del. 1988).

147. 15 U.S.C. § 78n(d)(1); 17 C.F.R. § 240.14d-100, item 4.

148. *Id.*

bank, with the Secretary of the Commission.[149]

B. *Provisions for Amendments, Extensions, Withdrawal and Prompt Payment for Securities Pursuant to Tender Offers*

1. Withdrawal

Section 14(d)(5) grants tendering shareholders the right to withdraw their securities during the first seven days of a tender offer or more than sixty days from the date of the original offer unless the Commission otherwise prescribes withdrawal by rule.[150] In 1980, the SEC adopted rule 14d-7(a)(2) to extend the seven day withdrawal period to fifteen business days commencing with the initiation of an offer for tenders.[151] Currently, withdrawal rights are extended to security holders for the entire offering period.[152] The offering period for tenders includes: (1) a twenty business day segment commencing from the date an offer is first published, sent, or given to security holders;[153] and (2) an additional ten business day period, which is triggered by notice of a modification to the amount of securities sought, the consideration offered, or the dealer's solicitation fee.[154]

Rule 14d-7(b) further requires that tendering security holders provide notice of withdrawal to the bidders in a timely writing.[155] Notice is sufficient when received by the bidder's depositary.[156] Other reasonable

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149. *Id.* (emphasis added).

150. 15 U.S.C. § 78(n)(d)(5). Section 14(d)(5) provides:

> Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except the Commission may otherwise prescribe by rules, regulation or order as necessary or appropriate in the public interest or for the protection of investors.

151. 17 C.F.R. § 240.14d-7(a) (1986), *repealed by* 17 C.F.R. § 240.14d-7(a) (1990).

152. 17 C.F.R. § 240.14d-7(a); *see* 17 C.F.R. § 240.14d-7(b); 17 C.F.R. § 240.14e-1(a); 17 C.F.R. § 240.14e-1(b). Withdrawal rights pursuant to issuer tender offers are governed by rule 13e-4(f)(2). Currently, paragraph (f)(2) requires an issuer to permit withdrawal of tendered securities "[a]t any time during the period such issuer tender offer remains open." 17 C.F.R. § 240.13e-4(f)(2)(i) (1990).

153. Rule 14e-1(a), 17 C.F.R. § 240.14e-1(a) (1990).

154. Rule 14e-1(b), 17 C.F.R. § 240.14e-1(b) (1990). Acceptance for payment by the bidder of two percent or less of the class of securities sought is not deemed to be an increase warranting application of rule 14e-1(b). *Id.* The offering periods for issuer tender offers are identical to that of third party offers. *See* 17 C.F.R. § 240.13e-4(f)(1) (1990).

155. Rule 14d-7(b), 17 C.F.R. § 240.14d-7(b) (1990).

156. *Id.*

requirements for withdrawal may be enforced by the bidder and are deemed to be conditions precedent to the actual release of tendered securities.[157]

2. Prompt Payment

The SEC exercised its rulemaking authority to prevent fraudulent, deceptive, or manipulative acts or practices when it adopted rule 14e-1.[158] Pursuant to this rule, the SEC determined that the failure of any bidder to promptly pay for deposited securities after termination or withdrawal of a tender offer constitutes an unlawful tender offer practice.[159] What constitutes prompt payment is not addressed in current tender offer regulation. According to Commission counsel, however, present SEC practice considers payment to be prompt when made within five days after the expiration of an offer.[160]

3. Amendments and Extensions

Information frequently changes or becomes available during the pendency of an offer for tenders. The Williams Act addresses such information fluxes by requiring amendments to tender offer statements whenever material developments occur. Section 13(d)(2) sets forth the general procedure for amendment:

> If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[161]

SEC enforcement regulations similarly require prompt disclosure and publication of significant changes in tender offer materials.[162]

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157. *Id.*

158. 17 C.F.R. § 240.14e-1 (1990).

159. 17 C.F.R. § 240.14e-1(c) (1990).

160. *See supra* footnote 124 for a discussion of the SEC position concerning prompt payment for securities upon the termination or withdrawal of a tender offer; *see also* IU Int'l Corp. v. NX Acquisition Corp., 840 F.2d 220, 223, 225 n.1 (4th Cir. 1988).

161. Section 13(d)(2); 15 U.S.C. § 78m(d)(2).

162. Under rule 14d-6(d), "a material change in the information published or sent or given to security holders shall be promptly disclosed to security holders in additional tender offer materials." 17 C.F.R. § 240.14d-6(d). *See also* 17 C.F.R. § 240.13e-4(d)(2). The requirement for publication of material changes is set forth at rule 14d-4(c):

> If a tender offer has been published or sent or given to security holders by one or more of the methods enumerated in paragraph (a) of this section,

Extension of the offering period may be necessary to guarantee security holders adequate time in which to assimilate amended facts or terms.[163] In the Commission's view, however, the requirement for — or length of extensions for — subsequent disclosures rests within the SEC's discretion.[164] Further, according to recent Commission statements, a protracted notification period is applicable only if the material changes affect items contained in offering documents that were previously provided to security holders.[165] Currently, the SEC also applies the mandate of extended notice to circumstances when additional information becomes available and is disclosed "at or near the end of the period when the tender offer was originally set to expire."[166] The Commission seemingly concedes the failure of the Williams Act or implementing regulations to prevent post-offer disclosures for which security holders receive neither prolongated notification nor withdrawal rights.[167]

C. *Recent Case Law*

Several courts have addressed the issue of whether section 13(d)(1) and rule 14d-100 of the Williams Act require that tender offer financing[168] be in place at the commencement of a bid for a publicly held corporation.[169] Each of these courts rejected the premise that the

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> a material change in the information published or sent or given to security holders shall be promptly disseminated to security holders in a manner reasonably designed to inform security holders of such change; *Provided, however,* That if the bidder has elected pursuant to rule 14d-5(f)(1) of this section to require the subject company to disseminate amendments disclosing material changes to the tender offer materials pursuant to Rule 14d-5, the bidder shall disseminate material changes in the information published or sent or given to security holders at least pursuant to Rule 14d-5.

17 C.F.R. § 240.14d-4(c) (1990) (emphasis in original); *see also* 17 C.F.R. § 240.13e-4(e)(2).

163. Exchange Act Release No. 34,296, 52 Fed. Reg. 11,458 (Apr. 9, 1987).

164. *See IU Int'l,* 840 F.2d at 228 n.5 (citing 52 Fed. Reg. 11458 (1987)).

165. *IU Int'l,* 840 F.2d at 228 n.5; Newmont Mining Corp. v. Pickens, 831 F.2d 1448, 1452.

166. *Newmont Mining,* 831 F.2d at 1452 (citing the SEC Amicus Curiae Brief at 17).

167. *IU Int'l,* 840 F.2d at 228 nn.5-6; *Newmont Mining,* 831 F.2d at 1452, 1455-56.

168. For the purposes of this Article, tender offer financing is defined as the financial arrangements required to be in place at the time a tender offeror commences its bid for securities pursuant to the Williams Act and its implementing rules and regulations.

169. *IU Int'l,* 840 F.2d 220 (4th Cir. 1988); *Newmont Mining,* 831 F.2d 1448 (9th Cir. 1987); Damon Corp. v. Nomad Acquisition Corp., [1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,041 (Sept. 20, 1988); Plaza Sec. Co. v. Fruehauf Corp., 643 F.Supp. 1535 (E.D. Mich. 1986); Warnaco Inc. v. Galef, No. B-86-146 (D. Conn. 1986).

disclosure or substantive provisions of the Williams Act necessitate the

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In Plaza Sec. Co. v. Fruehauf Corp., 643 F. Supp. 1535 (E.D. Mich. 1986), the Edelman Group ("Edelman") commenced a cash tender offer for all outstanding shares of Fruehauf Corporation ("Fruehauf") stock at a price of $44 per share. *Plaza Securities,* 643 F. Supp. at 1537. The offer was contingent upon Edelman obtaining sufficient financing. At the commencement of the offer, members of the Edelman Group agreed to contribute $100 million to the transaction. *Id.* Edelman also secured confident and highly confident commitments for $275 million from financial advisors and banks. *Id.*

Realizing that transfer of control was inevitable, management proposed and adopted a leveraged buyout plan. *Id.* at 1538-40. Management then entered a merger agreement with LMC Acquisitions. The agreement provided for a joint tender offer for 75-77% of Fruehauf's outstanding stock at an offering price of $48.50 per share. To finance the tender offer, management was to contribute $10 million and the company was to pay $100 million. The $1 million debt needed to complete the offer fell due at the time of the merger. No plans to refinance this debt were disclosed. *Id.* at 1540.

In response to the management buyout, the Edelman Group proposed a merger or, in the alternative, a tender offer for all common stock at $49.50 per share. Again, the offer was contingent upon obtaining financing. *Id.*

Fruehauf sought a preliminary injunction to restrain the Edelman Group tender offer. *Id.* at 1541. Fruehauf claimed that the Edelman tender offer was "illusory" and a "sham," and that the Edelman Group failed to make the financial disclosures required by the Williams Act under sections 13(d), 14(d), and 14(e). *Id.* In denying Fruehauf's motion for preliminary injunction, the court found the Edelman offer not to be illusory. *Id.* The court stated that the contingency of obtaining financing does not render an offer illusory. *Id.* The court further found there to be no requirement that financing be in hand to commence a tender offer. *Id.* (citing Warnaco, Civ. No. B-86-146 (D. Conn. 1986)). The court also noted that management's buyout was still not fully financed at the time of the hearing. *Id.* at 1541.

In *Damon,* [1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,041 (Sept. 20, 1988), Nomad Acquisition Corporation ("Nomad") launched a tender offer for all outstanding shares of Damon Corporation. *Id.* at 90,875. Through Nomad's continued negotiations with Drexel, Burnham, Lambert ("Drexel"), Drexel stated that it was highly confident it could secure the borrowed funding for the tender offer. As required, Nomad filed Schedule 14D-1 with the SEC and disclosed its general financing plans and the parties to those plans. *Id.*

Damon brought an action for a preliminary injunction restraining Nomad from continuing with its offer. Damon made two claims. First, that Nomad violated the Williams Act by failing to secure at least preliminary financial plans which would enable the disclosure of the amount of funds to be used, the expected source of those funds, and the parties to those arrangements. Second, that Nomad did not fully disclose then existing financial plans. *Id.* at 90,875.

The United States District Court for the District of Massachusetts denied the motion for preliminary injunction. The court stated that the Williams Act does require disclosure of funds to be used in the tender offer, but that the Act does not insist that the financial plans be in any specific form. The court cited *IU International* as authority for this proposition. *Id.*

With respect to the existing financial plans, Nomad claimed they were still in the negotiation stage and need not be disclosed. *Id.* at 90,876. Damon argued that Drexel would not have issued a highly confident letter if the financing terms with Nomad had not been fixed. *Id.* Damon relied on a Drexel internal memorandum that disclosed interest rates and terms of the financing arrangements with Nomad. *Id.* Since this document was never shown to Nomad, the court found that the financial plans were still arrangement of some financing commitments at the time of an initial bid.[170] Reasoning that the text of the Williams Act, and its implementing rules and regulations, are silent concerning the terms and timing of a tender offeror's financing proposals,[171] these courts have repudiated every attempt by a target company to enjoin a tender offer for its se-

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unsettled and, therefore, need not be disclosed. *Id.* Thus, Nomad did not violate the disclosure requirements of the Williams Act. *Id.*

An interesting analysis of a takeover challenged on financial grounds appears in CRTF Corp. v. Federated Department Stores, 683 F. Supp. 422 (S.D.N.Y 1988). In that decision, CRTF corporation ("CRTF") commenced a cash tender offer for all outstanding Federated Department Stores ("Federated") common stock, at a price of $47 per share. *CRTF Corp.*, 683 F. Supp. at 425. The offer was contingent upon CRTF obtaining financing. The day CRTF filed its tender offer, it brought an action against Federated for injunctive relief. CRTF claimed Federated breached fiduciary duties and violated § 14(e) of the Securities and Exchange Act of 1984. Federated moved to dismiss the action on the grounds that CRTF lacked necessary financing commitments, which precluded standing. *Id.*

In denying the motion to dismiss, the court first noted the tentativeness of an opening bid in a tender offer. *Id.* at 428. Next, the court emphasized that the SEC has never regarded an opening bid as a final offer because it is subject to adjustments according to market forces. *Id.* The court stated that it cannot deal only in concrete terms when the financial community recognizes the tentativeness of the offer. *Id.*

In its amicus curiae brief, the SEC took the position that "the substantial efforts and expenditures necessary for a person to commence a tender offer establish a 'personal stake' in the controversy sufficient to satisfy that standing requirement." *Id.* at 429. Thus, to the SEC, mere compliance with the Williams Act confers standing. The SEC further noted that, at this point in the tender offer process, CRTF had undertaken a substantial financial stake in the tender offer. *Id.* at 430. Specifically, CRTF had paid $1.5 million to its investment bankers and $850,336 in connection with filing its Schedule 14D-1 statement. *Id.* Lastly, the SEC stated that standing will not be conferred to sham offers, which it felt was not the case at bar. *Id.* at 431.

In determining whether the offer was made in good faith and was realistic, the court looked at surrounding facts and circumstances. The court began its analysis with CRTF's past experience. *Id.* This factor weighed in favor of CRTF, inasmuch as the bidder had recently completed a takeover of Allied Stores. *Id.* at 431-32. Next the court considered the financial resources available to CRTF. *Id.* at 432. Campeau Corporation, CRTF's parent, announced that it had secured definitive equity financing arrangements necessary for the transaction. The financing included a $400 million loan and an agreement by another party to purchase $260 million of Campeau Corporation equity securities. The court noted that this did not cover the $5 billion needed to complete the tender offer, but it was a substantial amount of money. The court also noted that the financial advisors retained by CRTF were experienced in this type of transaction and had access to appropriate funds. Lastly, the court stated that the substantial costs already incurred by CRTF, as noted in the SEC brief, further weighed in CRTF's favor. *Id.* Based on these considerations, the court determined that the offer was made in good faith and held that CRTF had standing. *Id.*

170. *IU Int'l,* 840 F.2d at 225; *Newmont Mining,* 831 F.2d at 1453; *Damon,* [1988 Transfer Binder] Fed. Sec. L. Rep. at 90,875; *Plaza Securities,* 643 F. Supp. at 1541; *Warnaco,* No. B-96-146 (slip opinion).

171. *IU Int'l,* 840 F.2d at 222-25; *Newmont Mining,* 831 F.2d 1450-53; *Plaza Securities,* 643 F. Supp. at 1541; *Warnaco,* No. B-86-146 (slip opinion).

curities where the offeror, at the initiation of the bid, makes minimal or no disclosure to target company security holders concerning how or when the offeror will pay for all the tenders being sought. The two circuit court decisions determining the effect of Williams Act provisions on tender offer financing are *IU International Corp. v. NX Acquisition Corp.*[172] and *Newmont Mining Corp. v. Pickens*.[173] In split decisions, the circuit courts predicated their holdings upon examination of the Williams Act and its legislative history.

In *Newmont Mining*, Ivanhoe Acquisition Corporation ("Ivanhoe") began a partial tender offer to purchase twenty-eight million of the total outstanding shares of the common stock of the Newmont Mining Corporation ("Newmont").[174] The amended acquisition price for the twenty-eight million shares was $105 per share. The estimated cost of the entire transaction was $3.3 billion. As required by the Williams Act, Ivanhoe filed a Schedule 14D-1 disclosure statement with the SEC on September 8, 1987, the day the offer began.[175] The Ivanhoe filing informed Newmont security holders of Ivanhoe's inability at that time to pay for all the shares for which it sought tenders.[176] Ivanhoe disclosed this uncertainty to Newmont shareholders by stating that the estimated $3 billion acquisition cost was to be funded by (1) $600 million in cash equity contributions by Ivanhoe shareholders, (2) $1.5 billion in funds borrowed pursuant to a bank secured credit facility, and (3) the sale of $1.1 billion increasing rate notes to be placed by Drexel Burnham Lambert, Incorporated ("Drexel Burnham" or "Drexel").[177] Ivanhoe further disclosed the existence of a letter from Drexel, stating that Drexel was "highly confident" that it could arrange the placement of the $1.5 billion in notes to provide financing for the offer to purchase.[178]

On September 14, 1987, Newmont moved for a preliminary injunction to stem continuance of the offer to its security holders.[179] Newmont maintained that the Williams Act precludes commencement of an offer until the terms of and parties to borrowed funds are disclosed. At issue was the sufficiency of the Drexel Burnham highly confident letter to meet these disclosure requirements. The motion was denied on September 15, 1987, and was affirmed on appeal in November 1987.

In affirming the denial of relief against Ivanhoe's initial offer, the

172. 840 F.2d 220 (4th Cir. 1988).
173. 831 F.2d 1448 (9th Cir. 1987).
174. *Newmont Mining*, 831 F.2d at 1448-49.
175. *Id.*
176. *Id.* at 1449.
177. *Id.*
178. *Id.*
179. *Id.*

Ninth Circuit held that an offeror need not arrange and, thus, need not disclose, "firm financing" for its tender offer at the initiation of the bid to security holders.[180] The court did not give adequate attention to the express financial disclosure mandates of section 13(d)(1)(B) and rule 14d-100, item 4, and failed to give adequate consideration to an application of these specific conditions to the Ivanhoe financial disclosures. The court supported its holding relating to the statutory financial provisions by stating: "The *text* of the Williams Act is *silent* as to when financing arrangements must be made in relation to the disclosure requirements. *Nothing* in the *history* of the statute or the regulations indicates that all information must be provided at the outset of the offer."[181]

The "silence" upon which the majority relied was deafening to Judge Pregerson in his dissent.[182] Judge Pregerson found, as a matter of law, that the Williams Act requires that an offeror disclose, at the time of a bid, the identity of the parties and the material terms and conditions to borrowed funds.[183] With regard to these requirements and the Ivanhoe offering statement, Judge Pregerson concluded that identification of Drexel Burnham and the Drexel highly confident letter failed to satisfy the dictates for disclosures of borrowed funds.[184] Judge Pregerson based his conclusion upon two principal grounds: (1) Drexel Burnham's role as broker to the note offering excluded it from the category of "lender," for which the Williams Act seeks specific disclosure; and (2) the offering circular lacked information concerning the material terms of the borrowing, including the stated and effective interest rates and the collateral to be used.[185] The dissent noted that:

> This information might tell the shareholders something about the qualifications and intentions of the offeror and could bear on the probable value of Newmont stock should the offeror succeed in gaining control of the company. Such full disclosure is particularly important where, as here, the offer is for less than all of the outstanding shares of a company and therefore some of the shareholders will retain their holdings under the new management.[186]

Judge Pregerson further noted that "[w]hile certainty as to every detail of the tender offer's financing is not required when the offer is first made, it is hard to understand how the SEC can ignore the plain lan-

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180. *Id.* at 1453. The court did not define the term firm financing nor did it characterize the nature of "firm," as opposed to, contingent financing in tender offers. For a reference to contingent financing, see *id.* at 1451.

181. *Id.* at 1450 (emphasis added).

182. *Newmont Mining,* 831 F.2d at 1453 (Pregerson, J., dissenting).

183. *Id.* at 1453 (relying on 15 U.S.C. § 78m(d)(1)(B) (1981)).

184. *Id.* at 1453-54 (citing 17 C.F.R. § 240.14d-100 (1987)).

185. *Id.* at 1454.

186. *Id.*

guage of its own regulation."[187] The regulation to which Judge Pregerson referred is applicable when borrowed funds are used and requires disclosure of the *purchasers* of the notes and the terms, collateral, and interest thereto.[188]

On substantially similar facts, in *IU International*,[189] the Fourth Circuit Court of Appeals adopted the majority ruling from *Newmont Mining*. In *IU International*, NX Acquisition Corporation ("NX"), a wholly-owned subsidiary of NEOAX, Inc. ("NEOAX"),[190] commenced a tender offer to purchase any and all shares of IU International Corporation ("IU") common stock for $17.50 per share in cash. The NX offer began on January 6, 1988, after NX filed required disclosure documents with the SEC and disseminated its Offer to Purchase to IU shareholders. The Offer to Purchase contained material disclosures concerning the bid,[191] including an estimate of $675 million that represented the approximate acquisition cost for the IU transaction.[192] The Offer to Purchase further disclosed the contingency of the bid; specifically, that the bid would not proceed in the event NX was unable to obtain financing sufficient to purchase the desired shares.[193]

NX explained to IU security holders that it expected to gain the necessary financing from two primary sources. The first source disclosed by NX was a group of banks that would lend up to $416 million to NEOAX under the acquisition portion of a secured credit facility.[194] NX disclosed a commitment letter for the $416 million, of which $311 million was to be used to purchase IU shares and $105 million was to refinance certain indebtedness of NEOAX. NX stated that the remaining funds needed to purchase the IU securities would be arranged by Drexel Burnham, NX's investment advisor.[195] The NX-Drexel agreement obligated Drexel to place up to $360 million of NEOAX debt securities and up to $40 million of NEOAX cumulative preferred stock to fund the non-bank portion of the NX offer.[196] NX and Drexel Burn-

187. *Id.* (referring to 17 C.F.R. § 240.14d-100 (1987)).

188. *Id.*

189. IU Int'l Corp. v. NX Acquisition Corp., 840 F.2d 220 (4th Cir. 1988).

190. As is customary, NX Acquisition was formed solely for the purpose of making the bid for and purchasing IU shares. Appellees' Brief In Support of Affirmance Of The District Court's Order Denying Appellants' Motion For A Preliminary Injunction at 10, *IU Int'l*, 840 F.2d 220 (4th Cir. 1988).

191. Record at 10-11, *IU Int'l*. The Offer to Purchase disclosed other material terms: (1) the offer would expire on February 3, 1988, unless extended; (2) shareholder withdrawal rights would extend throughout the offer; (3) promptly after termination of the offer, NX would either pay for or return the shares tendered; and (4) the purpose of the bid was to acquire control of the entire equity interest of IU.

192. *Id.* at 12.

193. *Id.* at 15.

194. *IU Int'l*, 840 F.2d at 221.

195. *Id.*

196. *Id.* at 225 (Winter, J., dissenting).

ham anticipated that some of the debt securities would bear interest at an increasing rate and some portion of these would be subordinated to other NX indebtedness.[197]

By January 6, the day the offer commenced, Drexel Burnham had received a commitment from the Dyson-Kissner-Moran Corporation ("D-K-M") to purchase $10 million of the preferred stock to be sold by NEOAX in connection with the NX offer. Drexel Burnham was, at this time, "highly confident" it could arrange the placement of the remaining securities. A letter to this effect was sent to NX. NX disclosed the Drexel Burnham agreement, the highly confident letter, and the D-K-M commitment in its Offer to Purchase.[198] Seeking to enjoin the consummation of the offer, IU claimed that NX violated sections 14(d) and 14(e) of the Williams Act by failing to disclose the expected sources and terms of the non-bank financing.[199] As in *Newmont Mining*, the issue focused on whether the Drexel Burnham highly confident letter satisfied NX's disclosure obligations for borrowed funds.

In a split decision, the Fourth Circuit affirmed the denial of a preliminary injunction prohibiting execution of the NX tender offer.[200] The court so ruled despite NX's failure to arrange, at the opening of its bid, firm commitments for 100% of the financing to purchase the shares for which it solicited tenders. By refusing to require commitments for the non-bank lending arrangements, the Fourth Circuit apparently aligned itself with the *Newmont Mining* rule.[201] This rule rejects a requirement to disclose "expected sources" and material "terms" of financing consisting of funds borrowed prior to the initiation of a tender offer.[202]

The Fourth Circuit presented two bases for its position. The court reasoned that IU could not succeed on the merits of its claim because (1) the Williams Act imposes no condition that financing exist in a particular form at the commencement of a tender offer,[203] and (2) IU failed to present evidence that a nondisclosure by NX would cause irreparable harm to its security holders if a preliminary injunction was not granted.[204] However, unlike the court in *Newmont Mining*, the Fourth Circuit based its rule on the language and legislative history of the Williams Act.

Focusing on section 13(d)(1)(B), the court noted that the Williams Act requires an offeror to inform target shareholders of the

197. *Id.*
198. *Id.* at 220.
199. *Id.* at 221.
200. *Id.* at 220.
201. *Id.* at 221-222.
202. *Id.* at 221.
203. *Id.* at 222.
204. *Id.*

source and amount of funds to be utilized in the purchase of tendered securities.[205] The court determined that section 13(d)(1)(B) conditions include the specific obligation of an acquiror to provide names of the parties to the borrowings, as well as a description of any lending arrangements obtained to acquire solicited tenders.[206] Because NX expected to purchase IU shares with monies acquired through borrowed funds, the court found section 13(d)(1)(B) to be applicable to the NX acquisition disclosures.[207] However, because NX described the proposed sale of NEOAX securities by Drexel Burnham, the court adjudged NX to have satisfied its section 13(d)(1)(B) obligations.[208] In particular, the court interpreted section 13(d)(1)(B) only to require information of existing financial plans, not that financing occur in a particular state at the announcement of a bid for securities.[209] The court summed up its section 13(d)(1)(B) position thusly: "A transaction that does not yet exist or unascertained parties thereto simply cannot be disclosed."[210]

The court explained its position in three parts. First, the court posited three interpretations of the Williams Act provision regarding lending commitments. The first interpretation, the court reasoned, would require the existence of financing arrangements at the initial bid for tenders.[211] The mandate for present financial plans flows from the condition of section 13(d)(1)(B) that lending arrangements be specifically described, including identification of the parties to the transaction.[212] Included in this disclosure requirement, the argument continues, is the presence of financing plans at the time of an offer for tenders.

The second interpretation, continued the court, would impose no obligation on tender offerors to arrange and, therefore, to disclose any lending commitments before the initiation of a bid.[213] Underlying this reading is the principle that only those facts in existence and known to an offeror can be included in an offering statement. Section 13(d)(1)(B) requires borrowing arrangements for a cash tender offer to be revealed to security holders. Yet, until the arrangements are made, there is no requirement that disclosure occur at a particular time under the second interpretation. Implicit in this construction, therefore, is that funding agreements need never coalesce during the pendency of a

205. *Id.* at 221-222. As the parties amended NX's compliance with regard to the disclosed bank commitments, the issue was only the non-bank portion of the NX disclosures. *Id.*

206. *Id.* at 222.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 221-22.

213. *Id.* at 222.

bid.

The third interpretation advanced by the court would require bidders to know and reveal "expected sources and expected terms" of borrowed funds prior to an offer.[214] The thesis supporting this construction hews to that of the first. The court adopted the second interpretation.

In the second part of its analysis, the court set forth five factors leading to its conclusion. The factors were: (1) the disclosure orientation of the Williams Act; (2) the intent of Congress to maintain neutrality between an offeror and target management in the event of a cash tender offer; (3) the lack of prejudice to IU security holders in the court's construction of the financing provision; (4) the failure of the alternative interpretations to address perceived harm to target shareholders where funding plans are not initially revealed; and (5) the conformance of the court's reading to current SEC interpretation.[215]

In the final portion of its decision, the majority considered and rejected IU's request for relief based upon perceived harms to its shareholders. According to IU, target shareholders would not have sufficient time to assess the terms of the tender offer financing if such details were not disclosed on the day the offer began. In addition, IU maintained that without contemporaneous disclosures, bidders were under no obligation to negotiate final financing arrangements prior to the expiration of the offer. The court found that IU's alleged harms neither existed in the present case nor generally occurred in contested offers.[216]

Chief Judge Winter, in his dissenting opinion, expressly rejected the majority interpretation of the Williams Act financing provisions. Instead, Chief Judge Winter believed that NEOAX violated the Williams Act and corresponding regulations by its failure to disclose, on commencement of the tender offer, expected sources and terms of all funds to be borrowed in connection with the financing of the acquisition.[217] The dissent set forth two bases for its position.

First, according to the dissent, the Williams Act is unambiguous in its requirement of financial disclosure for borrowed funds.[218] The dissent specifically noted item 4 of Schedule 14D-1, which mandates acknowledgement by offerors of any loan agreement for funds to be borrowed, including the identity of the parties and material terms to the arrangement.[219] Because NEOAX described only the proposed sale of securities by its financial advisor, Drexel Burnham, the dissent found that NEOAX had violated the plain language of item 4.[220]

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214. *Id.*
215. *Id.*
216. *Id.* at 223.
217. *Id.* at 225-228 (Winter, J., dissenting).
218. *Id.* at 225-26.
219. *Id.* at 226.
220. *Id.* at 226-27.

Second, the dissent would have held NEOAX in violation of the "substantive" condition imposed on bidders, which requires that offers remain open twenty business days from their announcement or dissemination to security holders.[221] In this portion of the dissent, Chief Judge Winter focused upon the intent of the Williams Act to provide security holders with sufficient opportunity to assimilate required disclosures within the context of their own best interest and that of the target corporation.[222] By allowing offers to go forward without publication of all Schedule 14D-1 information, the dissent reasoned that the majority rendered impotent the twenty-day "neutral forum" provided to security holders by Congress.[223]

IV. Commentary

A. *A Need for Shareholder Protection - The Williams Act, Newmont Mining, and IU International*

The majority opinions in *Newmont Mining* and *IU International* ignored the straightforward language of the Williams Act, which requires that a corporate acquiror provides "a description of the transaction and the names of the parties thereto" with respect to any funds borrowed or "to be" borrowed.[224] The courts' erroneous interpretation permits a corporate acquiror to proceed with a public bid, without disclosing who is lending funds for the acquisition and upon what terms financing is arranged. Presumably, the rationale of both majority opinions is that financing need not exist in any form when an offer is announced, since a bidder can comply with the foregoing Williams Act directive by amending its tender offer documents if and when financial arrangements are made. In addition, the majority opinions rely upon prompt payment and withdrawal provisions to support this rationale. Such reasoning, however, begs the statutory question. By blinding themselves to direct congressional intent, the courts are allowing acquirors to announce public offers that lack material terms. The combined effect of these decisions is that productive companies are "put into play" and substantial confusion is injected into the public market for target securities. A critical examination of the problem and of the case law follows.

1. Tender Offers and The Williams Act

A well-established goal of the Williams Act is to ensure full and fair disclosure of material information to investors confronted with a

221. *Id.* at 227-28.
222. *Id.*
223. *Id.*
224. Section 13(d)(1)(B), 15 U.S.C. § 78m(d)(1)(B).

tender offer for the purchase of their securities.[225] Another, though less cited, goal of the Act is to protect the public interest in securities markets.[226] The dual purposes of tender offer legislation are discharged through statutes and implementing regulations[227] that require bidders to inform target security holders, at the outset of an offer, of *de minimis* facts necessary to initiate a legally viable "offer" for securities. Tender offer regulation likewise provides a mechanism for policing and maintaining[228] the integrity of the bidder's offer. The provisions and rules promulgated under the Williams Act may be marshalled into two categories: (1) those that reflect congressional and administrative recognition of the need by target shareholders and the investing public for a legally sufficient offer to which they may respond; and (2) those that accord to security holders and public investors timing and equal treatment directives with which to assess a legitimate offer for securities as received by the market.[229]

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225. Section 14(d)(1), 15 U.S.C. § 78 n(d)(1); § 13(d)(1), 15 U.S.C. § 78m(d)(1); *see also* Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 8 (1985) ("It is clear that Congress relied primarily on disclosure to implement the purpose of the Williams Act."); *Newmont Mining,* 831 F.2d at 1450 ("We do know that the purpose of the Act is to require disclosure to permit shareholders to make an informed decision, and that the statute was not intended to impose substantive restrictions on the actual terms of tender offers."); Dan River, Inc. v. Icahn, 701 F.2d 278, 288 (4th Cir. 1983) (purpose of the Act is full disclosure to security holders).

226. Section 13(d)(1), 15 U.S.C. § 78n(n)(d)(1); § 14(d)(1), 15 U.S.C. § 78m(d)(1). Sections 13(d)(1) and 14(d)(1) conclude that subject individuals must provide "such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate *in the public interest* or for the protection of investors" (emphasis added).

227. *See* § 13(d), 15 U.S.C. § 78n(d); § 14(d)(1), 15 U.S.C. § 78m(d)(1); Rule 14d-2(c), 17 C.F.R. § 240.14d-2(c); Rule 14d-100, Schedule 14D-1, 17 C.F.R. § 240.14d-100.

228. Section 14(d)(6), 15 U.S.C. § 78n(d)(6) (pro rata purchase of shares where fewer than all shares tendered are acquired by offeror); § 14(d)(5), 15 U.S.C. § 78n(d)(5); Rule 14d-7, 17 C.F.R. § 240.14d-7 (withdrawal rights accorded to all security holders during period the offer remains open); Rule 14(d)(10)(a)(2), 17 C.F.R. § 240.14d-10(a)(2) (offeror must pay "best price" to all shareholders whose securities are accepted for payment); Rule 14(d)(10)(a)(1), 17 C.F.R. § 240.14d-10(a)(1) (tender offer must be made to all holders of the class of securities being solicited); Rule 14e-1(a), 17 C.F.R. § 240.14e-1(a) (tender offer must remain open for twenty business days from date of publication); Rule 14e-1(b), 17 C.F.R. § 240.14e-1(b) (tender offer must be extended for ten business days from date of notice of increase or decrease in number of shares sought or price offered or dealer's solicitation fee); Rule 14e-1(c), 17 C.F.R. § 240.14e-1(c) (offeror must either return deposited securities or pay for same promptly upon termination or withdrawal of offer); Rule 14e-2, 17 C.F.R. § 240.14e-2 (target company must disclose its position vis-a-vis offer within ten business days of announcement of bid).

229. *See supra* notes 224 and 225. It has been suggested that the Williams Act and its implementing rules are divided into substantive and procedural regulation. For example, the Ninth Circuit in *Newmont Mining* stated: "We do know that the purpose of the Act is to require disclosure to permit shareholders to make an informed decision,

The first category of regulatory provisions, which establish the offer for tenders to which security holders may rejoin, is premised on basic contract theory as applied to the economic realities of our securities markets. To begin, contract law defines an offer as:

> [A]n act whereby one person confers upon another the power to create contractual relations between them . . . . [T]he act of the offeror operates to create in the offeree a power . . . . [T]hereafter the voluntary act of the offeree alone will operate to create the new relations called a contract . . . . What kind of act creates a power of acceptance and is therefore an offer? *It must be an expression of will or intention. It must be an act that leads the offeree reasonably to believe that a power to create or contract is conferred upon him . . . . It is on this ground that we must exclude invitations to deal or acts of mere preliminary negotiation, and acts evidently done in jest or without intent to create legal relations.* All these are acts that do not lead others reasonably to believe that they are empowered to close the contract.[230]

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and that the statute was not intended to impose substantive restrictions on the actual terms of tender offers." *Newmont Mining,* 831 F.2d at 1450. *But see* L. Loss, Fundamentals of Securities Regulation, 509-510 (2d ed. 1988) ("As with the scheme of proxy regulation, neither the statutory provisions nor the rules [of tender offer regulation] are limited to disclosure."); SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 948 (9th Cir. 1985), stating:

> This policy [of full and fair disclosure] is reflected in section 14(d), which governs third-party tender offers, and which prohibits a tender offer unless shareholders are provided with certain procedural and substantive protections including: full disclosure; time in which to make an investment decision; withdrawal rights; and pro rata purchases of shares accepted in the event the offer is over subscribed.

For purposes of this Article, a classification of tender offer legislation into substantive or procedural regulation adds nothing to the question of the sufficiency or legality of financing disclosures. Instead, this author posits that categorizing the subject provisions into those which define the "offer" and those which protect its integrity aid in interpreting financing disclosure provisions as well as mirroring economic practicalities of the market place and basic tenets of contract law.

230. Corbin, *Offer and Acceptances and Some of the Resulting Legal Relations,* 26 Yale L.J. 169, 181-82 (1917) (emphasis added); *see also* Restatement (Second) of Contracts § 24 (1979). Section 24 defines an "offer" as "the manifestation of willingness to enter into a bargain so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." With regard to preliminary negotiations, the Restatement provides that: "A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." Restatement (Second) of Contracts § 26 (1979).

Implicit in the contract principle of offer — which creates a protected expectation interest in the offeree — is the requirement that the offer be sufficiently definite to be enforced. *See* Restatement (Second) of Contracts § 33 (1979); U.C.C. § 2-204(3) (1987). Thus it has been said, "If parties choose to leave important terms open and nevertheless 'intend a contract,' I think their only reliance should be on business

In the context of economic practicalities, target and public security holders clearly can, and probably will, accept[231] any offer for securities which is made at a premium over historic or current share value. To accept, these investors need only possess those facts which outline the critical terms of the offer and the manner in which acceptance is invited. On the other hand, the same security holders are without the power to accept and, therefore, the ability to form a legally binding commitment for the purchase of their securities where an offeror merely provides information constituting an "invitation to deal" for the acquisition of the subject shares. In the former circumstance, receipt of a valid offer for tenders creates an expectation, or interest, in the offeree which is saleable in the market. To the contrary, notice of an "invitation to deal," or legally deficient tender offer, produces no economic expectancy in the target shareholder. Indeed, the latter offer lacks all substance — it is, quite simply, illusory. It may be said, therefore, that offerees to an illusory solicitation of securities enjoy the mere anticipation of contracting, unmatched by a legal intent on the part of the offeror to supply the reasonably expectable.

What, then, is the purpose of an illusory offer to the public securities market? First, initial "invitations" for target securities provide an offeror an indication of interest by subject investors and the financial markets without imposing upon the bidder any corresponding financial risk associated with the announcement of a public bid for securities. Simply stated, illusory offers provide potential acquirors with a market test of the economic realities of the announced acquisition plan before the offeror is bound to perform the very terms of its offer.

Second, illusory offers for tenders arouse in the target seller and the marketplace an expectancy of procuring considerable profits upon the tender of subject securities to the bidder. Since this prospect is legally unenforceable, confusion governs the public trading of target shares. The resulting market muddle, according to financial participants, serves to "put companies into play," manipulates the price of target stock, coerces target management to accede to a bidder's demands, promotes requests for greenmail, causes confusion in the securi-

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honor." Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 576 (1950).

231. Acceptance of an offer is defined at § 50 of the RESTATEMENT (SECOND) OF CONTRACTS (1979):

> (1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.
>
> (2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.
>
> (3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.

See also RESTATEMENT (SECOND) OF CONTRACTS, § 24 (1979).

ties markets, and otherwise engenders trades on inside information.[232] Illusory offers to the market, therefore, confer a benefit solely to the bidder while simultaneously undermining the dual goals of Williams Act legislation and corresponding SEC regulations.

Crucial to an efficient market for tenders of public securities, therefore, is a set of rules by which financial participants may immediately discern valid offers from illusory offers for shares. The fundamental question becomes: What constitutes a viable tender offer within the meaning of section 14(d) of the Williams Act?

Prior to 1968, offers made to stockholders of a publicly-held corporation were not subject to affirmative disclosure requirements.[233] These offers were unregulated because they were offers to buy securities and not offers to sell — the latter was policed through the registration procedures of the Securities Act of 1933 ("Securities Act"). The Williams Act was intended to protect investors and the public from unrestricted cash tender offers for control at substantial premiums over historical or current market value of the target stock and which involved total acquisition costs soaring into the billions of dollars. Congress did not, however, explicitly provide a definition of the tender offer method of acquisition.

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232. One highly publicized criticism of an illusory offer concerned Carl Icahn's attempt in 1988 to purchase all the Texaco stock which he did not own at that time. Icahn presented a proposal to Texaco's board of directors in May 1988, in which Icahn offered to pay stockholders $60 a share, or $12.4 billion, for the 85.2% of Texaco he did not own. In his communication to Texaco management, Icahn represented that certain Texaco assets would be sold to help finance the acquisition. Wall Street professionals reacted to Ichan's offer with skepticism:

> Many Wall Street professionals doubt whether Mr. Icahn is seriously trying to take over Texaco even if Texaco permits a shareholder vote. They suspect he may be hoping instead to be outbid by, say, another big oil company so that he can make a profit on the shares he already owns.

Texaco Up Only to $50 Despite Bid, N.Y. Times, May 27, 1988, at D1, col.6. Texaco management apparently agreed with Wall Street, amending a lawsuit against Icahn to include the charge of making "a completely illusory offer to acquire Texaco as a means of manipulating the price of Texaco stock and coercing Texaco to accede to his demands." *Id.* Texaco further asserted that the offer was not serious because of its short timing and because Icahn had no financing in place. *Id.* at D2, col. 1. Allegations regarding demands for greenmail were also raised by Texaco. *Id.*

As for the market reaction to Icahn's offer, confusion reigned supreme. Comments by stock analysts, institutional investors, and shareholders included: "The market seems to be cautious about the offer;" the proposal is "an offer for the two of them to go to the bank together" so that Icahn can use Texaco's assets to buy Texaco; "It's not a real offer — it's an offer for an offer, for Texaco to give up the company to him;" "Although the financing is not in place, I don't have the slightest doubt it could be in place. A man with as much at stake as Icahn has does not make representations frivolously;" "If it isn't a phony offer, it is certainly something we ought to consider." *Id.* at D2, col. 1-4.

233. Cash tender offers were subject to the existing fraud and insider trading provisions of § 16 and rule 10b-5 of the 1934 Securities Exchange Act.

In general, a tender offer is an offer to target company shareholders to purchase a specified number of their securities at a fixed price.[234] The offer is communicated to shareholders by means of widespread advertisement or through mailings to all shareholders appearing on the target company stocklist. In *Wellman v. Dickinson,*[235] the District Court for the Southern District of New York proposed an eight-factor test for determining the existence of a tender offer.:

> (1) active and widespread solicitation of public shareholders for the shares of an issuer;
> (2) solicitation made for a substantial percentage of the issuer's stock;
> (3) offer to purchase made at a premium over the prevailing market price;
> (4) terms of the offer are firm rather than negotiable;
> (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;
> (6) offer open only a limited period of time;
> (7) offeree subjected to pressure to sell his stock;
> (8) public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of large amounts of the target company's securities.[236]

In 1979, the Commission sought to inject an objective standard into the otherwise ad hoc test for tender offers. The objective resolution ventured by the Commission was proposed rule 14d-1(b)(1).[237] The Commission's stated goal for proposed rule 14d-1(b)(1) was to reflect

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234. A public tender offer is fundamentally different from merger transactions. In a merger, a board of directors plays a crucial role in rejecting or recommending a proposed merger to the shareholders. In the context of tender offers, a bid for public securities is made directly to target shareholders and, thus, usurps from the board of directors the power of "corporate" action to defeat a change in control of the target company. The public tender offer seeks only separate shareholder interests and does not involve directorial or majority shareholder votes. Because the public offer is, therefore, a purely market transaction, it is touted as a minority shareholder's best check on arguably inefficient management.

235. 475 F. Supp. 783 (S.D.N.Y. 1979), *aff'd on other grounds,* 682 F.2d 355 (2d Cir. 1982), *cert. denied,* 460 U.S. 1069 (1983).

236. *Id.* at 823-24; *see also* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945 (9th Cir. 1985) (adopting Wellman eight-factor test); Hanson Trust PLC v. SCM Corp., 774 F.2d 47 (2d Cir. 1985) (adopting Wellman eight-factor test). *But see* S-G Sec., Inc. v. Fuqua Inv. Co., 466 F.Supp. 1114, 1126-27 (D. Mass. 1978) (proposing the test that a tender offer is present if there are "(1) A publicly announced intention by the purchaser to acquire a substantial block of the stock of the target company for purposes of acquiring control thereof, and (2) a subsequent rapid acquisition by the purchaser of large blocks of stock through open market and privately negotiated purchases.")

237. *See* Proposed Amendments to Tender Offer Rules, Exchange Act Release No. 16,385, [1979-80 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,373 (Nov. 29, 1979).

the SEC's long-standing position that the term tender offer embraced not only "classic" offers — consisting of general, publicized bids for securities of a publicly-traded company — but also certain offers involving privately negotiated transactions, widespread solicitation of family members, or substantial purchases of shares on the open market.[238] To meet its goal, the SEC divided its proposal into two tiers, with each tier adopting an independent test as to what constitutes a tender offer.

Under tier one, four elements must be satisfied to find a tender offer. A solicitation constitutes a tender offer if there are (1) one or more offers to purchase or solicitations of offers to sell securities of a single class, (2) during any forty-five day period, (3) directed to more than ten persons, and (4) seeking the acquisition of more than five percent of the class of securities.[239]

The second tier, unlike tier one, is not defined in terms of a specific percentage test, time for solicitation or numbers of offerees. Rather, a tender offer is established under tier two if three conditions are present: (1) wide-scale dissemination of the offer to sell or solicitation of an offer to buy; (2) an offered premium of five percent or two dollars above the security's current market value; and (3) no meaningful opportunity to negotiate the price or terms of the offer.[240]

Included in the 1979 SEC release was a further amendment to Regulation 14D that would have overruled the decision in *Hanson Trust PLC v. SCM Corp.*[241] In *Hanson Trust*, Hanson Trust PLC, HSCM Industries Inc., and Hanson Holdings Netherlands B.V. (collectively referred to as "Hanson") terminated its ongoing tender offer for any and all outstanding shares of the SCM Corporation when Hanson determined that defensive tactics used by SCM management depleted and severely damaged the target company.[242] Minutes after announcing the termination of its bid, Hanson issued a press release to SCM security holders that all shares tendered into the offer would be promptly returned to their owners. A very few hours later, Hanson acquired approximately twenty-five percent of SCM's outstanding stock by effecting one open-market purchase and five privately-negotiated cash transactions.[243] In the early evening of the same day, SCM ap-

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238. *Id.* at 1092-1093.

239. *Id.* at 1108.

240. *Id.*

241. 774 F.2d 47 (2d Cir. 1985); *see also* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945 (9th Cir. 1985) (target found not to be in violation of Williams Act despite its purchase of 25% of its stock by five private transactions and an open market purchase hours after terminating its tender offer in the face of a hostile offer for its securities).

242. Hanson Trust PLC v. SCM Corp., 774 F.2d at 52.

243. *Id.*

plied for a restraining order barring Hanson from reentering the market for a period of twenty-four hours. SCM took the position that Hanson's cash purchases immediately following the termination of its tender offer constituted a de facto continuation of the earlier offer, which must, therefore, comply with the strictures of section 14(d).[244] Preliminary injunctive relief was granted to SCM by the district court, but was reversed on appeal.[245]

In its release, the Commission overruled the *Hanson Trust* opinion by requiring a ten-day cooling off period following the termination or withdrawal of a tender offer. According to the SEC release, an offeror, during the ten-day moratorium, is prohibited from purchasing additional securities targeted in the takeover. The proposals to amend Regulation 14D have been pending without further action by the SEC since 1979, with the exception of the *Hanson Trust* amendment that is still under consideration by the Commission.

In 1980, the Commission attempted a legislative solution to the tender offer dilemma. The 1980 proposal, however, simply stated that any purchases in excess of ten percent of a target's securities must be made through a public tender offer.[246] Four years after the submission to Congress, the Commission decided that the matter required further analysis.[247]

Despite the failure of Congress and the SEC to define the nebulous tender offer, the intent underlying the Williams Act is clear: Investors responding to offers for tenders must receive full and fair disclosure of the terms comprising the offer and must have adequate time to reach an unhurried and unpressured investment decision.[248] The tender offer contemplated in the Congressional debates, hearings, and reports on the Williams Act was the traditional, highly publicized bid that initially appeared in a full page advertisement in the *Wall Street Journal.* Congress understood in 1968 that, absent express legislation for cash tender offers, a surprise bid could await unwary executives and security holders with no corollary obligation on the offeror to make material information available concerning the offer. The Senate Committee on Banking and Currency recounted the abuses of the pre-1968 cash tender offer:

> [B]y using a cash tender offer the person seeking control can operate in almost complete secrecy. *At present, the law does not even require that he disclose his identity, the source of his funds, who his associates are, or what he intends to do if he gains control of the*

244. *Id.* at 53.
245. *Id.* at 61.
246. S. 3188, 96th Cong., 2d Sess. (1980).
247. H.R. REP. NO. 1028, 98th Cong., 2d. Sess. 12 (1984).
248. *See* H.R. REP. NO. 1711, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. CODE, CONG. & ADMIN. NEWS 2811.

corporation.[249]

With these abuses in mind, Congress drafted those requirements of the Williams Act that broadly fix, or define, the minimum legal offer for public securities and those that ensure an adequate time and procedure for acceptance by shareholders subject to the offer.

An offer is sufficient under current tender offer regulation if it identifies:

(1) all members of the acquisition group;[250]

(2) the identity of the subject company;[251]

(3) the amount and class of securities being solicited;[252]

(4) the price to be paid for tendered shares;[253]

(5) the date on which the offer will expire and how or when the offer may be extended;[254]

(6) *the source and material terms of any funds or moneys to be borrowed for the purpose of acquiring the securities*;[255]

(7) the purpose for the offer or proposals of the offeror to engage in extraordinary corporate transactions of the target company's securities;[256] and

(8) other information which is material to the offer under consideration.[257]

These items need not exist in final form at the initiation of the offer for securities. Indeed, a tender offer announced on day one will likely address competing offers by third-party bidders, or defensive strategies adopted by target management, throughout the twenty business days accorded to shareholders to assimilate all tender offer information before any offer expires.[258] Congress recognized the impact of these competing market forces on existing bids for securities and imple-

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249. *See* S. 510, 90th Cong., 1st Sess. (1968) (emphasis added).

250. Section 13(d)(1)(A), 15 U.S.C. § 78m(d)(1)(A); § 14(d)(1), 15 U.S.C. § 78n(d)(1); Rule 14d-2(c)(1), 17 C.F.R. § 240.14d-2(c)(1); Rule 14d-5(e)(1), 17 C.F.R. § 240.14d-5(e)(1); Rule 14d-6(e)(1)(i), 17 C.F.R. § 240.14d-6(e)(1)(i); Rule 14d-100, item 2, 17 C.F.R. § 240.14d-100, item 2.

251. Rule 14d-2(c)(2), 17 C.F.R. § 240.14d-2(c)(2); Rule 14d-6(e)(i)(ii), 17 C.F.R. § 240.14d-6(d)(1)(ii); Rule 14d-100, item 1, 17 C.F.R. § 240.14d-100, item 1.

252. Rule 14d-2(c)(3), 17 C.F.R. § 240.14d-2(c)(3); Rule 14d-5(e)(2), 17 C.F.R. § 240.14d-5(e)(2); Rule 14d-6(e)(1)(iii), 17 C.F.R. § 240.14d-6(e)(1)(iii).

253. Rule 14d-2(c)(3), 17 C.F.R. § 240.14d-2(c)(3); Rule 14d-6(e)(1)(iii), 17 C.F.R. § 240.14d-6(e)(1)(iii).

254. Rule 14d-6(E)(iv); 17 C.F.R. § 240.14d-6(e)(iv).

255. Section 13(d)(1)(B), 15 U.S.C. § 78m(d)(1)(B) (emphasis added); 14(d)(1), 15 U.S.C. § 78(n)(d)(1); Rule 14d-100, item 4, 17 C.F.R. § 240.14d-100, item 4.

256. Section 13(d)(1)(B), 15 U.S.C. § 78m(d)(1)(B); § 14(d)(1), 15 U.S.C. § 78n(d)(1); Rule 14d-100, item 5, 17 C.F.R. § 240.14d-100, item 5.

257. Rule 14d-100, 17 C.F.R. § 240.14d-100, item 10.

258. Rule 14e-1(a), 17 C.F.R. § 240.14e-1(a).

mented procedures to amend offers for material changes that occur during the pendency of an offer.[259] By the explicit language of the Act, then, Congress did not envision the *nonexistence* of those essential terms which mold the offer as proposed to security holders. Instead, Congress delineated key disclosures that shareholders must possess at the time an offer is published or otherwise announced to the market, as well as the process by which such information is updated in the course of the offer. Congress thus compelled acquirors to pre-arrange and disclose, in good faith, all basic information creating the offer; namely, the composition of the bidding group, the price offered, the closing date, the number of shares sought, and the proposed method for purchasing solicited securities. By implicit statutory direction, then, Congress intended the existence and disclosure of financial backing for the bid to be a necessary element to create a tender offer.

The second category of Williams Act directives was designed to protect shareholders and the public welfare by affording an opportunity for full examination of all relevant facts without subjecting security holders and investors to unwarranted pressure to exit or enter the market.[260] These enactments, unlike those comprising category one,[261] are not disclosure oriented. Instead, in drafting the category two requirements, Congress and the Commission sought to grant shareholders timing and equal treatment guidelines within which investment decisions concerning a subject offer could be assessed. Some courts and members of the bar have referred to the category two mandate as substantive or procedural regulation of cash tender offers.[262] Whether the second category of regulation is substantive or procedural is not evident from Congressional debates, hearings, or reports on the Williams Act. What is clear, however, is the intent by the drafters of the Act to (1) elucidate the pre-1968 cash offer for securities and (2) furnish relevant market participants with a vehicle to adjudge the merits of a widespread offer

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259. Section 13(d)(2), 15 U.S.C. § 13(d)(2); § 14(d)(1), 15 U.S.C. § 78m(d)(1); Rule 14d-3(b), 17 C.F.R. § 240.14d-3(b); Rule 14d-4(c), 17 C.F.R. § 240.14d-4(c); Rule 14d-6(d), 17 C.F.R. § 240.14d-6(d).

260. *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 210 (1967); *see supra* note 228 for a listing of these requirements.

In a memorandum to the Senate Subcommittee charged with reviewing the Williams Act legislation, the Commission stated:

> [T]he principal purpose of S. 510 is . . . to provide investors with a means of obtaining the information necessary for informed and unhurried decisions on tender offers and to enhance confidence in the securities market by reducing the public confusion which currently attends many take-over bids.

261. *See supra* note 228 for a listing of these requirements.

262. *See supra* notes 227-28 and accompanying text for a brief discussion of the "substantive" concept of tender offer regulation.

to buy public securities.

2. Financial Disclosure Provisions of the Williams Act

It was against the background of the first and second categories of tender offer regulation that the Fourth and Ninth Circuit Courts of Appeals considered the efficacy of highly confident letters to fulfill explicit disclosure and timing conditions for tender offer financing as set forth in the Williams Act.[263] The Williams Act provision addressed by the circuit courts was the demand on offerors to inform security holders and the public of the *source of funds* to be utilized to purchase tendered securities and, if the funds are or are expected to be borrowed, the identities of parties, the term, the collateral, the effective interest rates, and all other material facts relevant to financing arrangements necessary to the solicited acquisition.[264]

Section 13(d)(1)(B) of the Act requires disclosure of:

> *The source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the* purpose of acquiring, holding or trading such security, *a description of the transaction and the names of the parties thereto*, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public . . . .[265]

In addition to section 13(d)(1)(B), item 4 of Schedule 14D-1 requires that:

> (b) *If all or any part of such funds or other consideration are or are expected to be, directly or indirectly, borrowed for the purpose of the tender offer: (1) Provide a summary of each loan agreement or arrangement containing the identity of the parties, the term, the collateral, the stated and effective interest rates, and other material terms or conditions relative to such loan agreement, and (2) Briefly describe any plans or arrangements to finance or repay such borrowing or if no such plans or arrangements have been made, make a statement to that effect.*[266]

Item 9 of the Schedule further demands:

> *Where the bidder is other than a natural person and the bidder's*

263. *See IU Int'l*, 840 F.2d 220 (4th Cir. 1988); *Newmont Mining*, 831 F.2d 1448 (9th Cir. 1987).

264. *See* § 13(d)(1)(B), 15 U.S.C. § 78m(d)(1)(B); § 14(d)(1), 15 U.S.C. § 78n(d)(1); Rule 14d-100, item 4, 17 C.F.R. 240.14d-100, item 4.

265. 15 U.S.C. § 78m(d)(1)(B) (emphasis added).

266. 17 C.F.R. § 240.14d-100, item 4 (emphasis added).

> *financial condition is material to a decision by a security holder* of the subject company whether to sell, tender or hold securities being sought in the tender offer, *furnish current, adequate financial information concerning the bidder,* Provided, that if the bidder is controlled by another entity which is not a natural person and has been formed for the purpose of making the tender offer, furnish current, adequate financial information concerning such parent.[267]

Finally, item 10 of the Schedule requires:

> *If material to a decision by a security holder whether to sell, tender or hold securities being sought in the tender offer, furnish information as to the following:*
>
> * * *
>
> (f) *Such additional material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.*[268]

Under these unambiguous demands, the Fourth and Ninth circuit courts found disclosure of highly confident letters to supply sufficient information concerning borrowed financing to initiate a valid offer for public securities.

3. *Newmont Mining*

The Ninth Circuit in *Newmont Mining* stated the issue of law raised by the highly confident letter as "whether the disclosure requirements of the Williams Act mean that the tender offeror must have the *terms* of its financing *settled* at the time that the tender offer commences."[269] Target management framed the issue as whether a tender offer can legally commence where financing arrangements are so incomplete that the parties and terms of notes or borrowed funding are either unknown or nonexistent at the commencement of a public offer.[270] Apparently, the issue turned on the adequacy of the disclosure by the acquiror that approximately forty-nine percent of the funds needed to purchase target shares and to pay related fees and expenses would be obtained through the sale of $1.1 billion of increasing rate notes by Drexel Burnham and that Drexel was highly confident it could place the subject notes in connection with the outstanding offer.[271] The

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267. 17 C.F.R. § 240.14d-100, item 9 (emphasis added).
268. 17 C.F.R. § 240d.14d-100, item 10 (emphasis added).
269. *Newmont Mining,* 831 F.2d at 1449 (emphasis added).
270. *Id.* at 1450.
271. The Schedule 14D-1 filed by the offeror in *Newmont Mining* provided the following overall description of its financing for the offer to buy Newmont securities:

> Source and Amount of Funds. The total amount of funds required by the Purchaser and Holdings to purchase 28,000,000 Shares pursuant to the Offer, to repay previously incurred margin debt and to pay related fees and expenses is estimated to be approximately $3,000 million. Pursuant to the

court's decision on the issue was that current tender offer regulations do not require complete financial arrangements and, therefore, no disclosure of *firm financing* at the announcement of a public offer for securities was required.[272]

The majority analysis in *Newmont Mining* is both incorrect and incomplete. First, the majority held that current tender offer regulation does not require the existence of *firm financing* at the time an offeror presents a public bid for target securities. Ostensibly, the court's decision embraced the financing disclosure language of section 13(d)(1)(B) and item 4 of Schedule 14D-1.[273] The majority apparently also addressed the required amendatory procedure for material changes that develop in facts set forth in tender offer documents.[274] In the face of such explicit statutory and regulatory mandates, the *Newmont* court found that disclosure of a Drexel Burnham highly confident letter fully met the Williams Act demand of information regarding the parties to

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> Offer Agreement, Ivanhoe Partner II will contribute $600 million of such funds to Holdings. Ivanhoe Partner II will receive such $600 million from the Partners in the form of capital contributions as described herein. The Offer Agreement also provides that upon completion of the Offer, Ivanhoe Partners will contribute the Shares it presently owns to Holdings, subject to approximately $227 million of previously incurred margin debt and certain accrued expenses. Holdings expects to obtain the balance of the funds needed to purchase Shares and pay related fees and expenses from (i) borrowings of $1,500 million pursuant to an up to $2,000 million margin credit facility expected to be arranged by Wells Fargo Bank, N.A. ("Wells Fargo") and (ii) the sale of $1,100 million of increasing rate notes of Holdings (The "Increasing Rate Notes") expected to be arranged by Drexel. A portion of the proceeds of such borrowings will be sued to repay the previously incurred margin debt and expenses.
>
> * * *
>
> Ivanhoe Partners and the Purchaser have entered into separate engagement letters (The "Drexel Letter Agreements") with Drexel and Drexel Burnham Lambert Company B L.P. (which are collectively referred to in this Section 17 as "Drexel") pursuant to which Drexel is acting as financial advisor to Ivanhoe Partners and the Purchaser in connection with the transactions described in this Offer to Purchase and as Dealer Manager for the Offer. Drexel has also entered into a dealer manager agreement in connection with the Offer. Ivanhoe Partners will pay Drexel a $500,000 engagement and financing retainer, and the Purchaser will pay Drexel a fee of $1 million (against which the $500,000 retainer fee will be credited) for acting as Dealer Manager in connection with the Offer. The Purchaser will also pay Drexel a fee of $1.5 million in connection with the delivery of Drexel's letter stating that it is highly confident that it can arrange $1.1 billion of financing in connection with the Offer.

Newmont Mining, 831 F.2d at 1449-50.

272. *Id.* at 1453.
273. *Id.* at 1449.
274. *Id.* at 1452.

and terms of borrowed funds in initial tender offer filings.[275] This decision was reached despite the nonexistence of parties, at the onset of the Ivanhoe bid, to purchase the increasing rate notes. The decision also ignored the absence of any information relative to material terms of the notes. Possibly, the majority's opinion rests upon its confusion of plain Williams Act directives with a requirement under the Act for "firm" financing.

Second, the issue pressed by Newmont management was not that all financing terms be firm upon publication of a bid.[276] Indeed, the distinction between firm and contingent financing was raised, but never answered, by the court.[277] Target management in *Newmont* sought only the disclosure of those financial arrangements *compelled by the Williams Act* — specifically, the terms of and parties to the increasing rate notes to be placed by Drexel in completing the Ivanhoe offer. Newmont conceded that such terms and parties to borrowing may be contingent at the opening of an offer.[278] It was management's position that contingencies in offering terms do not, by themselves, render public offers for shares either harmful or confusing. Any detriment to target shareholders or the public arising from contingent tender offer facts is prevented because of the amendatory process for material changes that arise during the course of an outstanding offer.[279] Management's concern was the *non-existence*, even in preliminary form, of financial arrangements directly bearing on Ivanhoe's ability to acquire almost forty-nine percent of the securities solicited under its "any and all" offer.[280] In essence, Newmont simply demanded a valid offer which its shareholders could either accept or reject.

Third, the majority opinion lacks any legal analysis of pertinent Williams Act provisions. For example, the Pickens Group in *Newmont* commenced a public offer for twenty-eight million shares of Newmont common stock.[281] Under the Williams Act, the Pickens Group bid constitutes a third-party offer, which cannot legally commence absent a simultaneous section 14(d) filing. Yet, in analyzing target management's right to preliminarily enjoin this offer, the majority failed *even to address* the statutory language of section 14(d)(1) or its implementing regulations.

Finally, the majority reasoning was legally deficient in its application of the history of the Act to the *Newmont* appeal. For instance, the court's analysis of Williams Act legislative history made reference to a

275. *Id.* at 1453.
276. *Id.* at 1449.
277. *Id.* at 1451-52.
278. *Id.* at 1449.
279. *Id.* at 1452.
280. *Id.* at 1450.
281. *Id.* at 1448.

Supreme Court opinion which observed that the purpose of the Williams Act is to "insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the *qualifications and intentions of the offering party*."[282] Clearly the court was correct in focusing on this Congressional concern. Investors should know the qualifications of the offeror who seeks to acquire their shares and the acquiror's intentions towards the target company should the offer be successful. In *Newmont*, the question of the use of a highly confident letter by a corporate acquiror went directly to the qualifications of the Pickens Group even to close its offer. Arguably, the information sought by target management for its shareholders exactly paralleled congressional concerns in 1968. The majority was silent as to this quotation.

The majority's next reference to the legislative history concerns an exchange that occurred during the hearings on the Williams Act between Senator Williams and Phillip Loomis, then General Counsel of the SEC. Senator Williams and Mr. Loomis were discussing a proposal to the bill that would have required an offeror to file its offering statement with the SEC five days *before* commencement of an offer. During the colloquy, mention was made of financing arrangements.[283] The court correctly noted that the exchange concerned a proposal that Congress did *not* adopt.[284] More interestingly, however, is that this passage was followed by a comment from the court that Mr. Loomis' reply to Senator Williams "appears to suggest that an offer could commence with *contingent financing*."[285] The discussion to which the majority refers reads in relevant part:

> Mr. LOOMIS: [A] man would file his papers while he was getting ready to make his tender offer, deciding whether he was going to do it, *arranging his financing*, deciding on what the price is going to be, and it would not delay the making of an offer when the man was ready to make it. So I think the exchange's point on their assumptions was a very reasonable one, but it just would not work that way.
> Senator WILLIAMS: Wait a minute. You are saying that during the 5-day period he can go ahead and make his financing arrangements. Are not the financing arrangements one of the requirements of disclosure?
> Mr. LOOMIS: Yes
> Senator WILLIAMS: So that must all be accomplished first.
> Mr. LOOMIS: *He might have to supplement it, or he might not*. If he

282. *Id.* at 1450 (quoting Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58-59 (1975))(emphasis added).
283. *Id.* at 1451 (quoting *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 191 (1967)).
284. *Id.*
285. *Id.*

> said it was going to be bank loans, he could say that earlier while making his deal with the bank.[286]

In the first sentence of its next paragraph, though, the court states that: "This is the only mention of *firm financing* in the legislative history of the original Williams Act."[287] Apparently, the majority confused or considered synonymous the terms "firm" and "contingent" financing.

The majority's final reference to legislative history concerns hearings, which occurred in 1970 to address an amendment to section 14(e), the antifraud provision of the Act.[288] The amendment was to provide the SEC with rulemaking authority under section 14(e), which prohibits fraudulent and deceptive practices during tender offers.[289] During the hearings, then SEC Chairman Hamer Budge was asked to provide examples of illegal practices occurring in tender offers that the proposed rulemaking powers could prevent.[290] Chairman Budge provided a memorandum to the Senate Committee listing "problem areas" that could be proscribed by SEC regulation.[291] Among the problem areas was the situation where an offeror commenced a bid without having *funds in hand to pay* for the securities or a *legally enforceable commitment to borrow* those funds.[292]

The majority opinion sets forth the SEC's position, in 1970, regarding having "funds in hand" or at least a "legally enforceable commitment" to acquire a loan for funds to pay for securities.[293] The court follows this background information with a single, summary sentence: "Although the amendment expanding the rulemaking authority under 14(e) was enacted, the *SEC has never promulgated a regulation dealing with this problem.*"[294] In fact, however, in 1977 — seven years after the Budge testimony — the SEC adopted Schedule 14D-1, item 4, which deals with *financial dislosures* for all funding pertaining to a tender offer.[295] Possibly, the court was unaware of the 1977 amendments.

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286. *Id.* (emphasis added).

287. *Id.* (emphasis added).

288. *Id.* at 1451-52.

289. 15 U.S.C. § 78n(e).

290. *Newmont Mining,* 831 F.2d at 1452 (citing *Additional Consumer Protection in Corporate Takeovers and Increasing the Securities Act Exemptions for Small Businessmen: Hearings on S. 336 and S. 3431 Before The Subcomm. on Securities of the Senate Comm. on Banking and Currency,* 91st Cong., 2d Sess. 11 (1970)).

291. *Id.*

292. *Id.*

293. *Newmont Mining,* 831 F.2d at 1452.

294. *Id.* (emphasis added).

295. 17 C.F.R. § 240.14d-100, item 4.

4. *IU International*

The Fourth Circuit, in *IU International*, framed the legal issue presented by the use of a Drexel Burnham highly confident letter as whether a bidder must complete "more substantial steps in acquiring financing, specifically to have known and disclosed 'expected sources and expected terms' of the financing."[296] Target management stated the issue as whether the Williams Act requires that financing contingencies — namely, expected parties and terms to funds borrowed or to be borrowed — *while subject to subsequent amendment*, must exist and, therefore, be identified in initial offering documents.[297] The factual issue concerned an offeror who revealed actual funding for only fifty-one percent of the shares sought under its "any and all" cash offer. The remaining forty-nine percent was subject to Drexel's high confidence that the forty-nine percent minority could be purchased at some later time with monies raised through Drexel's placement of non-investment-grade securities of the acquiror.

As in *Newmont Mining*, the Fourth Circuit interpreted the Williams Act and its legislative history as permitting an offer to proceed without the bidder identifying all the financial arrangements necessary for the purchase of solicited securities. The majority analysis in *IU International*, like the Ninth Circuit opinion in *Newmont*, is confounding.

First, a critical factor in each majority opinion is the amendatory procedure available to bidders for informational changes that arise during the twenty day pendency of a bid for tenders.[298] The Williams Act amendment process foresees the need for continual updating of key terms to an offer in order to reflect current market conditions and the impact of such conditions on the outstanding market offer to target security holders. In recognition of this need, the Act provides a vehicle by which offerors may modify initial offering documents. Moreover, where informational amendments are deemed material to the offer, the Williams Act may necessitate an extension of the offer to give security holders time to assimilate and to act upon the new information. Withdrawal rights are likewise extended to enable shareholders to tender or withdraw their shares for the modified offering period. The determination of material amendments, which require the lengthening of time and withdrawal rights, is meted out by the SEC on a facts and circumstances basis.

According to the Fourth Circuit, a bidder complies with section 14(d) and 13(d) financial disclosure provisions by utilizing the amendment process some time during the viability of the offer. Tender offer filings, to this court, are legally sufficient where they reveal financing

296. *IU Int'l*, 840 F.2d at 221.
297. *Id.* at 223.
298. *Id.* at 223-24.

arrangements *when, and if*, actually made and *if* such financial terms are found by the SEC to be material to the offer. The court concedes that these two dramatic contingencies underpin its analysis. Analysis, and resolution, of a bidder's *failure* to satisfy these contingencies was lacking and of no apparent judicial concern. Thus, pursuing the *IU International* rationale, ambiguities or silence regarding an offeror's ability to acquire approximately forty-nine percent of the target's shares does not harm shareholder interests due to the Act's requirements for amendment and extended withdrawal rights. The court continues that, even if funding is not firmed up before the offer closes, shareholders are not harmed because of the SEC regulation that prompt payment be forthcoming for all securities accepted by the offeror at the termination of the bid or that tendered shares be returned to security holders where the bidder chooses not to proceed with the offer.[299]

Examples of the *IU International* court's "analysis" of these contingencies as they occur in "any and all" cash offers funded by highly confident letters, as well as this writer's comments, follow:

1. "[I]f terms become known or change *during the course of the offer*, they will *very likely* be material changes for which an amendment is required and *possibly* necessitate an extension of the offer."[300]

Comment: What recourse is available to a security holder where the offeror fails to arrange all remaining financial obligations before the offer expires or where the offeror chooses to drop the bid altogether once the now twenty-day "market test" reveals unfavorable terms to the bidder? What remedy may a shareholder pursue if information becomes known during the offer but is found, *after litigation*, not to be material, or, the SEC, on an *ad hoc* basis, determines an extension to be unnecessary? Are shareholder interests harmed then? And, if such harm is later established in court, what relief may be secured by a nontendering shareholder whose company has incurred debt in defense of the under-financed tender offer? What relief is available to a tendering shareholder whose securities are returned by an offeror who closed a bid at the end of twenty days for lack of funding? Is there a defendant? A cause of action? A remedy? Clearly a harm exists to the shareholder-victim the Williams Act was designed to protect. Were these potentialities of no concern to the *IU International* majority? Did the majority tacitly conclude that these harms would not occur in the marketplace? What then of the offers that *have failed* for lack of financing?[301]

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299. Payment is prompt under current SEC practice if made within five days of the closing. Where a bidder chooses not to proceed with the offer, shares must be returned to tendering security holders.

300. *IU Int'l*, 840 F.2d at 223 (emphasis added).

301. See Table H (setting forth mergers and acquisitions that were cancelled because of reported financial difficulties).

2. "It is *highly unlikely* that a bidder could delay the finalizing of financing until after expiration of the offer or, *if it could*, would undertake that risk."[302]

Comment: If a bidder did delay financing, would a court find the offeror to have engaged in securities fraud as a matter of law? Is relief available to a security holder on a motion for a preliminary injunction at the outset of a bid, or must shareholders wait and see what path an offeror chooses and litigate if delay is the chosen option? And, even if delay constitutes a manipulative act or practice, what remedy is available to tendering or non-tendering shareholders? What recourse is available if the delay results in the bid being dropped after twenty days? Where is the statutory twenty day period in which target security holders are to make investment decisions based on *all material facts*? Is the true decision period twenty days plus litigation?

3. "An amendment to a statement of 'expected sources and expected terms' is equivalent to an amendment to a statement of nothing."[303]

Comment: What was contemplated by Congress when it demanded disclosure of the parties and terms to borrowed funds *at the time* an offer for tenders is announced? Did Congress intend for disclosure to be necessary only if the *offeror* decides to negotiate these terms before the offer is concluded? Assuming an offeror complies with the plain language of the Act — and commits itself to more than the high confidence of an investment banker that money can be raised at some future time — but discloses less than a firm bank commitment, is not an amendment to such disclosure the best way to inform security holders of the market affecting the bidder's ability to close the acquisition? Is it not true that a material misrepresentation or omission as to this updated information constitutes securities fraud for which shareholders have an immediate remedy?

4. "[T]here is a fundamental difference between the date, price, quantity and identity of the buyer on the one hand and a financing contingency on the other. The terms of the first four are essential to an offer, but the terms of the last is not."[304]

Comment: It is conceded that the first four terms help to define a legal offer for tenders to which security holders may rejoin, that is, the absence of one or more of these terms would render the offer illusory. The question is whether financing arrangements equally define a legal tender offer to the market.

What is an "offer" that discloses date, price, quantity, and identity of the bidder, but that can never be consummated due to a lack of financing for all securities solicited in the bid or a lack of intent by the

302. *IU Int'l*, 840 F.2d at 223-24 (emphasis added).
303. *Id.* at 223.
304. *Id.*

offeror to ever secure such financial commitments? Is it not also an illusory offer — a mere solicitation of interest? Was not this solicitation, this stampeding of shareholder action, precisely the type of decision-making abyss Congress sought to eradicate? Is it possible Congress meant what they penned when "expected sources and expected terms" to borrowed funds was included in the enumerated disclosures mandated before an offer could legally commence? Such an interpretation provides security holders with the best investment information and reflects exactly the shareholder protection intent of the Act.

5. "Counsel for defendants represented *at oral argument that defendants will firm up their financing*, amend their SEC disclosure, and disseminate the terms of the financing to IU shareholders at least *five days prior* to the expiration of the offer, permitting any stockholder to revoke existing tenders."[305]

Comment: Was the court at all confounded by defendants' self-serving representation at oral argument — specifically, *why* defendants chose not to disclose this information at the outset of the offer? Would an answer to this question have aided in the resolution of the legality of a highly confident letter for tender offer financing?

Did defendants *purposely* avoid securing commitments for one hundred percent of the target shares? Did defendants intentionally elect not to place themselves at any financial risk with regard to the forty-nine percent minority interest until confronted by target management at oral argument? Would initiating an "any and all" cash offer with only fifty-one percent funding be advantageous to an offeror? Furthermore, if fifty-one percent funding is available, why not negotiate the remainder? Was it the intent of the Williams Act that target shareholders have *five* days, or *however few days an offeror chooses to give*, to make an informed investment decision? Where in the legislative history of the Act did Congress evidence a desire that *offerors* determine when and what disclosures are made?

5. Highly Confident Letters — The Abuse to Shareholders

It seems obvious that offerors are utilizing highly confident letters to announce "any and all" cash tender offers that are, in all substantive respects, illusory bids. These offers are properly characterized as illusory in the sense that a majority, but not one hundred percent, of the target securities may be purchased by the bidder when the offer opens. If, at the time of announcement, any and all shares cannot be paid for, and no plans as to their financing are disclosed or mandated to be disclosed, why are offerors labeling and structuring buyouts in this manner?

305. *Id.* (emphasis added).

First, purchase of an absolute majority of target shares transfers voting control of the corporation. Second, control is acquired by funds provided through bank loans for which the offeror need only pledge as collateral the securities to be acquired. Third, control vests in the offeror the ability to cash out remaining minority interests through a second-step merger. Fourth, financing for the follow-up merger generally flows from the systematic sale of the target company assets. Fifth, once the merger is completed and all state corporate fiduciary duties to minority shareholders are terminated, the acquiror may liquidate corporate assets, pay corporate debts, reimburse lenders for acquisition costs and expenses, and pocket all remaining monies. Sixth, the offer and purchase of target stock is effected wholly by the leveraging of the target company's assets. Seventh, if the offer fails, in that less than a majority of shareholders tender into the bid, the acquiror may sell its previously purchased target securities in the market or exact greenmail from target management. Finally, most costs and expenses associated with the bank financed portion of an unsuccessful tender offer may be deducted by an offeror for income tax purposes.

If corporate control may be purchased with such advantageous terms to a bidder, what is the abuse of highly confident letters for tender offer financing? Foremost, letters of confidence transform legitimate "any and all" cash offers into two-step tender offers. For example, in a classic, two-step offer, acquirors seek to purchase fifty-one percent of the shares of the target company in one step. Acquisition of this absolute majority interest transfers voting control and, therefore, management of the corporation, of the target company to the bidder. Once control has vested in the offeror, a state merger transaction may be effected to cash out the minority shareholders who did not tender into step one. Thus, in two steps — a tender offer which secures control followed by a squeeze-out merger — target security holders lose all equity interest in the subject corporation. As there are no remaining public stockholders at the conclusion of steps one and two, the offeror is free to liquidate corporate assets or maintain the corporate enterprise without regard to fiduciary duties to minority shareholders or reporting requirements under the federal securities laws.

Such two-step offers have long been considered coercive to shareholders because public stockholders are forced out of their equity stake in the target company — whether or not the offering price is fair.[306]

306. *See, e.g.*, BNS, Inc. v. Koppers Co., Inc. 683 F. Supp. 458, 464 (D. Del. 1988) ("Business combination restrictions shield shareholders from the coerciveness of front-end loaded, two-step offers by preventing the offeror from effecting the second step of the offer unless the target's board of directors and, in some instances, the target's shareholders, approve the transaction."); RP Acquisition Corp. v. Staley Continental, Inc., 686 F. Supp 476, 481 (D. Del. 1988) ("In other words, states, to protect shareholders, can deter hostile tender offers, especially those that threaten to culminate

The inevitability of this outcome emanates from the diversity of share holdings in publicly-held corporations and the relatively few share groupings necessary to sell control. Two-step offers, therefore, coerce shareholders into tendering into the first step for fear of the price, or nature, of the security to be paid in step two.

The connection between coercive two-step offers and highly confident letters is critical. First, offerors have, for the most part, abandoned the use of announced bifurcated acquisitions. This transformation was, in effect, forced upon offerors by state courts' careful scrutiny of offers structured in a manner to harm shareholders.[307] State court emphasis on shareholder interests is proper under traditional corporate dogma.[308]

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in two-step coercive takeovers."); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1342 (Del. 1987) ("This Court has recognized the coercive nature of two-step partial tender offers."); Moran v. Household Int'l., Inc., 500 A.2d 1346, 1356 (Del. 1985) ("Household has adequately demonstrated . . . that the adoption of the Rights Plan was in reaction to what it perceived to be the threat in the market place of two-step tender offers."); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985) ("It is now well recognized that such offers are a classic coercive measure designed to stampede shareholders into tendering at the first tier, even if the price is inadequate, out of fear of what they will receive at the back end of the transaction."); City Capital Assoc. v. Interco Inc., 551 A.2d 787, 797 (Del. Ch. 1988), *appeal dismissed,* Interco Inc. v. City Capital Assoc., 556 A.2d 1070 (Del. 1988) ("the 'front-end' loaded partial tender offer is the most extreme example of an offer that is voluntary in form but mandatory in substance"); Tate & Lyle PLC v. Staley Continental, Inc., [1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,764, at 98,586 (Del. Ch. 1988) ("The Supreme Court [of Delaware] held that the adoption of a rights plan prior to any specific takeover threat was a balanced response to the climate of coercive two-step offers." (citing Moran v. Household Int'l, 500 A.2d 1346, 1346-47 (Del. 1985)).

307. *IU Int'l,* 840 F.2d at 222.

308. An insightful expression of current corporate dogma was set forth by Chancellor Allen in TW Serv. v. SWT Acquisition Corp., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,334 (Mar. 2, 1989). Chancellor Allen stated:

> I take it as non-controversial that, under established and conventional conceptions, directors owe duties of loyalty to the corporation and to the shareholders; that this conjunctive expression is not usually problematic because the interests of the shareholders as a class are seen as congruent with those of the corporation in the long run; that directors, in managing the business and affairs of the corporation, may find it prudent (and are authorized) to make decisions that are expected to promote corporate (and shareholder) long run interests, even if short run share value can be expected to be negatively affected (footnote omitted) and thus directors in pursuit of long run (and shareholder) value may be sensitive to the claims of other 'corporate constituencies.' Thus, broadly, directors may be said to owe a duty to shareholders as a class to manage the corporation within the law, with due care and in a way intended to maximize the long run interests of shareholders.
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> * * *
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> Questions of this type [a board's decision to maximize long term over short term shareholder interests] call upon one to ask, What is our mode of corporate governance? "Shareholder democracy" is an appealing phrase, and the notion of shareholders as the ultimate voting constituency of the board has

The impact of heightened scrutiny on behalf of shareholders is that acquirors now must structure buyouts in a manner that ostensibly conforms to the practice of corporate protectionism for equity stakeholders. This illusion by offerors is imperative in order that a preliminary injunction by management or shareholders is avoided at the outset due to an obviously coercive bid. The answer to the perfect illusion is the two-step tender offer, which masquerades as an "any and all" cash offer funded by a highly confident letter. Such an "any and all" offer accomplishes the offeror's objectives by (1) not being coercive per se, (2) permitting a change of control by leveraging off the target company assets, and (3) leaving open the possiblity of profit by greenmail in the event the bid is terminated.

Highly confident letters further abuse the tender offer process by allowing would-be offerors to put companies "into play" without exposing the bidder to any substantial financial risk. The harm to shareholders in such maneuverings is two-fold. First, stock prices fluctuate as a result of market reaction to non-synergistic takeover bids. Second, debtor expenses are added to corporate balance sheets by target management who defend against, or undertake to expose, the lack of good faith of unsolicited offers.

The majorities in *IU International* and *Newmont Mining* evidenced an alarming lack of sensitivity to the foregoing ramifications of highly confident letters for takeover financing. More alarming, however, is that the interpretation afforded by these courts to the plain statutory dictate of disclosure for "expected terms and expected sources" for borrowed funds grants to security holders the *least information* before a tender offer decision. By their own reasoning, these courts had available three plausible readings of the Williams Act financing provisions: (1) That lending commitments necessary to effectuate the entire offer exist and be revealed at the initiation of the bid; (2) That the Williams Act sets forth no requirement concerning the status of financial obligations prior to an offer; and (3) That the Act demands disclosure and, therefore, the existence of "expected sources and expected terms" of the acquirors borrowings.[309]

Even assuming that these courts failed to appreciatiate the significance of the highly confident letter, it is perplexing that the majorities would adopt alternative number two — by all accounts the *most restrictive interpretation of the Act*. The legislative history of the Wil-

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> obvious pertinence, but that phrase would not constitute the only element in a well articulated model. While corporate democracy is a pertinent concept, a corporation is not a New England town meeting; directors, not shareholders, have responsibilities to manage the business and affairs of the corporation, subject, however, to a fiduciary obligation.

Id. at 92,178, 92,180 n.14.

309. *IU Int'l*, 840 F.2d at 222.

liams Act and the stated desire by Congress to protect target shareholders directly contradict this reading of the statute.

B. *A Need for Protection of Securities Markets — Public Policy Concerns*

The previous section focused on majority decisions by the Fourth and Ninth Circuits, which held that the use of highly confident letters for initiation of tender offer bids neither violates the plain financial disclosure language of the Williams Act nor contradicts the legislative purpose of the Act — to foster *shareholder autonomy* by providing a neutral forum for market offers. In addition to the deficiencies discussed above, these courts were silent concerning the impact of creative financing techniques on the integrity of securities markets — the second stated purpose of the Act. The remaining section explores this topic and concludes by proposing a solution to existing financing abuses.

Integral to federal regulation of our securities markets is full disclosure to security holders and non-manipulation of interests in securities. Recent development of highly confident letters and other hybrid financing arrangements undercut these basic concepts. The culprit, however, is greed — greed engendered by a desire on the part of institutional investors, market professionals, investment bankers, and attorneys to realize many thousands of dollars of paper profits through speculation in target company securities. This feverish speculation is permitted in large part because Congress has not adopted a policy regarding the hostile takeover bid. In 1968, the year of adoption for the Williams Act, Congress purposely remained neutral on whether unsolicited tender offers are beneficial or detrimental to the American economy. At that time, congressional neutrality was arguably justified by a lack of market data regarding the impact of these bids. Today, twenty-two years after passage of the Act, such a stance cannot be countenanced. The choices for the 1990s are simple: (1) if hostile battles for corporate control are advantageous to shareholders and the economy, steps must be taken to ensure and to facilitate their use, possibly through deregulation of the securities markets; (2) if these offers are wholly harmful to American equity holders and public securities markets, restraints must be implemented to prohibit all such offers; or (3) if hostile offers serve both positive and negative functions for security holders and the American markets, lawmakers must legislate against only the abusive aspects of hostile bids.

Proponents of unfettered takeovers cite inefficient, non-responsive management and low share values as arguments for permitting hostile offers. These parties, therefore, support funding arrangements which facilitate all tender offers, particularly those offers that previously were not possible due to their excessive size. Advocates of legislative restraints emphasize nine primary abuses which result from unsolicited acquisitions: (1) offerors put companies "into play" for personal, speculative purposes alone; (2) non-investment-grade debt is infused into an already highly-leveraged economy; (3) the risk of default on takeover borrowing is increased in the event of a slight economic downturn; (4) jobs are terminated by the breakup of target companies; (5) greenmail is exacted from subject companies by unsuccessful bidders; (6) shareholders and the securities markets are harmed by inside trading on non-public takeover information; (7) neither jobs nor products are created from hostile buyouts; (8) long range research and development is jeopardized; and (9) subject companies exist afterwards on the verge of bankruptcy.[310] Assuming that market professionals on both sides of the takeover question are correct, the issue is whether steps are available to maximize the positive aspects of each argument and to terminate only their abuses. This writer suggests a solution: Permit the continuation of hostile offers while imposing a requirement for one hundred percent financing commitments before a tender offer may commence.

First, acquirors today generally purchase a toehold interest in the target company as a precursor to a takeover bid. This action serves the important function of providing standing to the offeror in the event of a subsequent state court challenge to target management's good faith in fending off the unwanted combination. Once this acquisition is effected, would-be acquirors create a shell corporation that initiates an "any and all" cash tender offer for target shares. This offer is often announced with only fifty-one percent of the total funding for the buyout in place — the remaining forty-nine perent being covered by a highly confident letter. As previously discussed, financing arrangements that are backed by highly confident letters effectively transform "any and all" offers into two-step takeovers.

The abuses of two-step tender offers are both structural and economic. Shareholders are coerced into tendering into the first step for fear of receiving lesser consideration in the second step. Moreover, two-step bids favor professional securities traders. That two-step bids favor professional traders is apparent from bids that are announced subject to financing. These financial contingencies, which are generally directly or indirectly funded by subsequent placement of non-investment-grade

310. Three major buyouts in the last few years, Revco R.S., Inc., Campeau Corporation, and RJR Nabisco, have experienced serious financial difficulty in servicing takeover debt. *See* Joseph, *Improperly Structured Deals Showed Risk in LBO's*, BARRON'S, Dec. 19, 1988, at 35; Phillips, *Revco: Anatomy of an LBO that Failed*, BUS. WK., October 3, 1988, at 58. Revco filed for Chapter 11 under the Bankruptcy Code in 1988. On January 15, 1990, Campeau filed for Chapter 11 reorganization. At the close of 1989, RJR Nabisco was struggling, but was earning enough to cover its interest costs. The default rate on junk bonds issued in other major takeovers has yet to be determined.

debt, permit bidders and arbitrageurs to manipulate and speculate in subject company securities with little or no financial risk. The interdependency of raiders and market professionals to the success of a takeover bid creates the potential for collaboration between the parties, with the sole purpose of putting a company into play or liquidating its assets in order to create non-asset producing profits. A requirement of properly financed "any and all" cash offers obviates these abuses while simultaneously allowing fair offers to proceed.

Next, hostile takeovers place target management in the position of defending the corporate enterprise. Defensive tactics, arguably, are equally objectionable to shareholders and the economy when fair offers are curtailed or inefficient management is entrenched. For example, an increasingly popular defensive maneuver is large scale restructuring. Such restructuring creates new pools of corporate debt and reduces equity, with the intended goal of increasing share prices. The immediate result is excessive debt-to-equity ratios. If the proposed combination is fair to target shareholders — that is, a bid which offers a fair price on fair terms — theoretically, only the shareholders should determine its success. Defensive restructurings, however, often transfer this decision from the shareholders to the corporate directors due to the show-stopping effect of restructured target companies. Moreover, if management has historically minimized share values, the restructuring also takes from the shareholders their right to receive a premium for ostensibly undervalued stock. Restructurings, therefore, add debt to the corporate balance sheet and deny shareholders the right to vote on the chosen defense. Fully funded, non-coercive tender offers lessen the need for debt-defenses and thus provide the best and most efficient shareholder check on non-responsive management.

Further, state legislatures enter the takeover scene when substantial local businesses fall prey to a bust-up raid. The major categories of state takeover legislation include disclosure statutes, control share statutes, freeze-out statutes, and fair price statutes. Thirty-nine jurisdictions have adopted one or more of these statutes.[311]

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311. ALASKA STAT. § 45.57-10-120 (Michie 1986); ARIZ. REV. STAT. ANN. § 10-1201 - 23 (West 1990); ARK. STAT. ANN. § 23-43-101-17 (Michie 1987); CONN. GEN. STAT. ANN. § 36-456 - 68 (West Supp. 1990); DEL. CODE ANN. tit. 8 § 203 (Michie Supp. 1988); FLA. STAT. ANN. § 607.0901 - .0902 (West Supp. 1990); GA. CODE ANN. § 14-2-1110 - 1202 (Michie Supp. 1989); HAW. REV. STAT. tit. 23 § 415-171 - 72, § 417E-1 - 11 (Supp. 1989); IDAHO CODE § 30-1601 - 14, § 30-1701 - 10 (Michie Supp. 1990); ILL. ANN. STAT. ch. 32, ¶ 7.85, ch. 32 ¶ 11.75 (Smith-Hurd Supp. 1990); IND. CODE ANN. § 23-1-42-1 - 11, § 23-1-43-1 - 24, § 23-2-3.1-1, 3.1-8.4 (West Supp. 1990); IOWA CODE ANN. § 502.211 - .214 (West Supp. 1990); KAN. STAT. ANN § 17-1286 - 98 (1988); KY. REV. STAT. ANN. § 271B.12-200 - 30 (Baldwin Supp. 1989); LA. REV. STAT. ANN. § 12:132 - 140.17 (West Supp. 1990); ME. REV. STAT. ANN. tit. 13A, § 611 A- 910 (West Supp. 1989); MD. CORPS. & ASS'NS CODE ANN. § 3-601 - 03, 3-701-09 (Michie Supp. 1990); MASS. GEN. LAWS ANN. ch. 110C - D, F (West 1990);

For the most part, state disclosure acts parallel Williams Act provisions. Increasingly, however, anti-takeover legislation has focused on "other parties" affected by hostile buyouts — employees, consumers, creditors, and local communities. To date, twenty states allow directors to consider long- and short-term interests of shareholders, interests of employees, the impact on the state economy, or policy concerns of debt financing.[312] Twenty-one states require financial disclosures more stringent than those now set forth in the Williams Act.[313] Five states demand identification of definitive financing arrangments.[314] Twenty-five states require a statement of the bidder's financial capacity and ability to effectuate the proposed buyout.[315] Clearly, these states consider increased disclosure to be the best protection against abuse of shareholders who face tender offer decisions.

On the other hand, states that have adopted control share statutes apparently consider hostile offers to be harmful per se. For example, control share legislation typically denies voting rights to, or disenfranchises existing votes by, a would-be acquiror.[316] Voting rights are

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MICH. STAT. ANN. § 21.200 (776-784), § 21.200 (790-799) (Callaghan Supp. 1990); MINN. STAT. ANN. § 302A.671 - 673, § 80B (West Supp. 1990); MISS. CODE ANN. § 79-25-7, 79-27-1-11 (Supp. 1989); MO. REV. STAT. § 351.407, 459, § 409.516 (West Supp. 1990); NEB. REV. STAT. § 21-2431 - 53 (Supp. 1990); NEV. REV. STAT. ch. 410 (Advance Sheets 1989); N.H. REV. STAT. ANN. § 421-A:1 - 17 (Supp. 1989); N.J. STAT. ANN. § 14A:10-1-6, 49:5-1 - 19 (West Supp. 1990); N.Y. BUS. CORP. LAW § 912, 1603 (McKinney Supp. 1990); N.C. GEN. STAT. § 55-9A-01 (Michie Supp. 1990); OHIO REV. CODE ANN. § 1701.01, 1707.041 (Anderson Supp. 1989); OKLA. STAT. ANN. tit. 18, § 1145 - 55, tit. 71 § 451 - 62 (West Supp. 1991); PA. CONS. STAT. ANN. tit. 15, § 2541 - 48, 2551 - 56 (Purdon 1989); S.C. CODE ANN. § 35-2-101 - 11, 35-2-201 - 26 (Law. Co-op. 1989); S.D. CODIFIED LAWS ANN. § 47-33-8 - 19 (Michie Supp. 1990); TENN. CODE ANN. § 48-35-101 - 13, § 48-35-201 - 09, § 48-35-301 - 12 (Michie 1988); UTAH CODE ANN. § 61-6-1-12 (Michie 1990); VA. CODE ANN. § 13.1-716 - 728.0 (Michie 1989); WASH. REV. CODE ANN. § 23B.19.010 - .050 (West Supp. 1990); WIS. STAT. ANN. § 180.1134 - .1150, § 552.01 - .25 (West Supp. 1990); WYO. STAT. § 17-18-301 - 09 (Michie Supp. 1990).

312. Arizona, Florida, Hawaii, Idaho, Indiana, Kentucky, Maine, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, Ohio, Pennsylvania, South Dakota, Tennessee, Washington, Wisconsin, and Wyoming.

313. Alaska, Arizona, Arkansas, Hawaii, Idaho, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, and Wisconsin.

314. Arizona, Idaho, Louisiana, Michigan, and Minnesota.

315. Alaska, Arizona, Florida, Hawaii, Indiana, Iowa, Louisiana, Maine, Massachusetts, Maryland, Mississippi, Missouri, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia, Washington, Wisconsin, and Wyoming.

316. Twenty-six states have enacted control share statutes: Arizona, Florida, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Wisconsin, and Wyoming.

restored to the successful offeror only upon a majority vote by disinterested shareholders. Since acquirors are not willing to risk substantial outlays of cash for the acquisition of shares for which the right to vote is unknown, the impact of such statutes is to forestall all takeovers. It is suggested that states which have implemented control share statutes for the purpose of *preventing* any hostile tender offer are pursuing extremist measures which not only harm shareholders, but also do not conform with main-line corporate practice. Consequently, any proposal that would allow a hostile offer to proceed would conflict with the legislative intent of control share laws.

Freeze-out provisions, on the other hand, target the use of leveraged buyouts, two-step tender offers, and under-financed bids as the abuses in hostile takeovers. For example, in Delaware, an acquiror is unable to effect a business combination with the target company for a period of three years upon the purchase of a certain percentage of the target's stock.[317] This freeze on further share purchases is waived on a vote by disinterested shareholders or the acquiror's ability to take down eighty-five percent of the target's stock in the offer. The apparent concern to Delaware legislators was the ongoing takeover practice of mounting two-step offers with little equity at stake, and financing the first and second step purchases by the immediate sale of target assets. Thus, Delaware does not prohibit all hostile tender offer activity — only particular abusive aspects of unsolicited bids.

Fair price statutes,[318] like freeze-out provisions, protect minority shareholders against the second step of a two-step transaction. Fair price legislation generally grants second step tendering shareholders a fair, or the same, cash price as that received by tendering stockholders in the first step of a two-step buyout. This right is triggered when a follow-up merger is undertaken. The abuse targeted by fair price provisions is, therefore, the stampeding effect in the first step of two-step takeover bids.

With the exception of control share statutes — which curtail all takeover bids — it is apparent from the intended goals of state takeover legislation that a requirement for one hundred percent tender offer financing directly or indirectly obviates the harms of two-step offers, excessive use of credit, and sham offers for speculation purposes. Although preemption of patchwork state rulemaking has been suggested, it seems the more uniform, less invasive resolution is compliance with existing federal financing statutes. Indeed, state legislation may become unnecessary if Williams Act language is construed to reflect the legisla-

317. DEL. CODE ANN. tit. 8, § 203 (Michie Supp. 1988).

318. Twenty-four states have enacted fair price statutes: Arizona, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Wisconsin, and Wyoming.

tive purpose of tender offer regulation.

C. *A Proposed Solution*

The predominant results of hostile battles for corporate control include: (1) the proliferation of speculation and short-term profit-taking in publicly traded securities; (2) the replacement of corporate equity with non-investment-grade debt; (3) the practice by institutional investors, pension funds, and savings and loans of acquiring risky investments in order to maintain performance levels; and (4) the vesting of power over securities markets in the hands of a few market professionals and institutional investors. If the bottom line of unsolicited buyouts is the unfettered use of credit with cascading effects from management's defensive tactics, demands for greenmail, inside trading, and state anti-takeover legislation, should not the answer to the resulting harms focus on our current credit practices? Recent proposals for legislative or regulatory action include: tax deductibility of interest on junk bond purchases; limitations on the amount of non-investment grade securities which may be purchased by state or federally insured institutions; prohibitions on greenmail; heightened scrutiny of directorial actions in response to tender offers; preemption of state anti-takeover legislation; extension of the tender offer period to sixty days; definitions for tender offer and inside trading; requirements for a one-price, one hundred percent offer to all security holders upon the purchase of twenty percent of the target's stock; or a requirement for one hundred percent financing commitments before an offer may be announced.[319] These solutions, with the exception of the last, speak only to the consequent effects of hostile offers. Their failure to attack the cause of these effects — the overuse of credit for short-term speculation — is their flaw. Therefore, assuming that a majority of investing Americans is unwilling to sacrifice the potential premiums realized from bona fide tender offers, attention must be directed to the implementing factor from which these effects flow; namely, use of our credit markets for non-productive purposes.

A requirement for fully financed tender offers, while subject to subsequent market amendments, provides a proposed solution to recent credit abuses. Such a proposal serves multiple functions. Benefits from such a requirement include: (1) protecting shareholders from uninformed investment decisions; (2) stemming rampant short-term speculation; (3) leaving intact state takeover legislation; (4) undercutting the need for debt-defensive measures; (5) utilizing existing federal securities regulation; (6) removing the ability to control securities markets from a few market professionals and entrepreneurs; (7) allowing corpo-

319. See Table I (setting forth recent proposed and enacted legislation relating to takeovers and leveraged buy-outs).

rate management to use credit for growth, subject only to fiduciary duties imposed by state corporate law; and (8) protecting our financial institutions from risky investment practices to maintain high levels of performance. These effects are addressed by the proposed solution because the cause — the impetus, so to speak — of tender offer abuses is that non-serious, non-synergistic hostile takeovers are permitted to proceed through the misuse of our credit markets by professional speculators. Ironically, the proposed solution needs for its implementation only a straightforward interpretation of the Williams Act and its legislative history.

V. Conclusion

Securities regulation for the 1990s must protect the national economy as well as address shareholder needs. To do so, Congress must reconsider federal disclosure provisions with a view to: (1) aiding shareholder investment decisions; (2) maintaining the integrity of American markets; (3) securing the safety of financial institutions; and (4) fostering the use of capital for growth of American corporations. Each of these goals may be met under present Williams Act legislation if courts are directed to mandate compliance with statutory funding dictates in light of the dual purposes of the Act. Whether or not the highly confident letter remains a viable financing alternative for corporate acquisitions, a Congressional statement on present credit practices is necessary to stem the *next* financial cycle fostered by institutional investors and market professionals. It is simply not enough to suggest that the abuses of highly confident letters or bridge financing will disappear with the recent lessening of merger and acquisition activity. A new financial cycle will occur and a national policy must be in place to answer the short-term profit-taking techniques that will be developed by market professionals.

TABLE A

LARGEST ACQUISITIONS BETWEEN 1985 AND THE FOURTH QUARTER OF 1989

Fourth Quarter 1989 by Dollar Volume

Acquiring Company	Financial Advisers	Acquired/Merged Co.	Financial Advisers	Value (Millions)
Bristol-Myers Co.	Goldman, Sachs	Squibb Corp.	Morgan Stanley	$12,526.2
Dow Chemical Co.	Morgan Stanley	Marion Laboratories, Inc.	Shearson Lehman; George K. Baum	7,079.4
Sony Corp.	Blackstone Group	Columbia Pictures	Allen & Co.	3,477.8
Ford Motor Co.	Goldman, Sachs	Associates First Capital	Lazard Freres; Morgan Stanley	*3,350.0
American Home Products	Not Available	A.H. Robins Co. Inc.	Drexel Burnham; Rothschild Inc.; First Boston	3,186.4
Pennzoil Corp.	In-house	Chevron Corp. (8.8%)	Goldman, Sachs	2,100.0
SIBV/MS Holdings, Inc.	Morgan Stanley; First Boston	Jefferson Smurfit Corp.	Solomon Brothers; First Boston	•1,655.5
Procter & Gamble Co.	Goldman, Sachs	Noxell Corp.	Alex. Brown & Sons	1,424.4
SWT Associates LP	Donaldson, Lufkin & Jenrette Securities	TW Services Inc.	First Boston; Merrill Lynch	•1,335.7
Dai-Ichi Kangyo Bank	Dai-Ichi Kangyo Bank	CIT Group Holdings Inc.	Goldman, Sachs	1,280.0
Anheuser-Busch Cos. Inc.	Dillon, Read	Harcourt Brace Jovanovich [theme parks]	First Boston	*1,100.0
Societe Nationale Elf Aquitaine	Morgan Stanley	Pennwalt Corp.	Goldman, Sachs	1,069.6
Chicago & North Western Holdings	Anestis & Co.; First Boston; Donaldson, Lufkin; Blackstone	CNW Corp.	Solomon Brothers; Goldman, Sachs	•933.4
Polly Peck International PLC	First Boston	Del Monte Tropical Fruit Co.	Goldman, Sachs	875.0
Cooper Industries Inc.	Not Available	Cameron Iron Works Inc.	Goldman, Sachs; Wasserstein, Perella; First Boston	700.0
New World Development Co. Ltd.	Morgan Stanley; Montgomery Securities	Ramada Inc. [hotel business]	Salomon Brothers	*540.0
Primerica Corp.	Smith Barney	A.L. Williams Corp.	Salomon Brothers	532.7
Sweethart Holdings Inc.	Morgan Stanley	Fort Howard Corp. [foodservice products]	In-house; Morgan Stanley	•*532.3
AHSC Holdings Corp.	Citicorp; Drexel Burnham; NTC Group	Alco Health Services Corp.	First Boston; Drexel Burnham	•527.4
Jefferson Smurfit Corp.	Salomon Brothers; First Boston	Container Corp. of America	Morgan Stanley; Smith Barney	500.0
CAL Holdings Inc.	Odyssey Partners	Caldor Inc.	Morgan Stanley	•*500.0
Cie Machines des Bull	Blackstone Group; Cie Financiere de Suez	Zenith Electronics Corp. [data processing assets]	Lazard Freres	*496.4
Texaco Inc.	In-house	Tana Production Corp.	Morgan Stanley	*476.5
Seagate Technology Inc.	Salomon Brothers	Imprimis Technology Inc.	First Boston	*437.8
News Corp. Ltd.	Not Available	Scott, Foresman & Co.	Salomon Brothers	*407.0

• = leveraged buyout; * = divestiture

24 MERGERS & ACQUISITIONS, 124 (March/April 1990).

TABLE B

15 LARGEST ACQUISITIONS, FIRST QUARTER 1989

ACQUIRED/MERGED	ACQUIROR	VALUE OF TRANSACTION (IN MILLIONS)
RJR Nabisco Inc.	Kohlberg Kravis Roberts & Co.	$24.7 billion**
Pillsbury Co.	Grand Metropolitan PLC	5,757.9
Hospital Corp. of America	TF Investments Inc.	3,685.8*
Utah Power & Light Co.	PacifiCorp.	1,848.8
GAF Corp.	Newco Holdings Inc.	1,325.6*
Triangle Industries Inc.	Pechiney SA	1,281.5
Coca-Cola Co. (6.3%)	Berkshire Hathaway Inc.	1,130.0
Procter & Gamble Co. (New issue of convertible preferred stock.)	Procter & Gamble ESOP	1,000.0
Chicago Pacific Corp.	Maytag Corp.	845.6
Tiger International Inc.	Federal Express Corp.	808.6
Koito Manufacturing Co.	Boone Co.	800.0
Horizon Bancorp	Chemical New York Corp.	659.4
Lorimar Telepictures Corp.	Warner Communications Inc.	634.7
Texaco Inc. (additional 5%)	Carl Icahn	616.5
US Sprint Communications (additional 30.1%)	United Telecommunications Inc.	585.0

** This transaction, approved by shareholders on April 27, 1989, is the largest acquisition in history to date. The leveraged buyout ("LBO") was structured in two steps. In the first step, KKR bought 165.5 million shares of RJR common stock for $109 each and nearly 1.2 million preferred shares for $108 each. The total cash price of the first step amounted to $18.2 billion. In the second step, shareholders of still outstanding common stock received 2.8 cumulative exchangeable preferred shares and $31.14 principle amount of senior converting debentures due 2009, for each common share.

To finance the front-end of the deal, a $13.6 billion tender offer facility was available through a consortium of banks, $5 billion in increasing rate notes were sold through Drexel Burnham Lambert and another $500 million of debt securities were sold to a partnership affiliated with KKR. KKR interests made an equity contribution of $1.424 billion and Drexel and Merrill Lynch & Co. contributed $76 million in equity. Of the $13.6 billion supplied by banks, more than $5 billion was supplied by Japanese banks and other portions originated in Europe. Also included in the tender offer facility was a $6 billion bridge loan.

In the refinancing stages of the deal, a record high $4 billion worth of junk bonds were sold publicly.

* Leveraged Buyout

24 MERGERS & ACQUISITIONS 61, 81 (July/August 1989).

TABLE C

50 LARGEST ACQUISITIONS 1988

ACQUIRED/MERGED	ACQUIROR	VALUE OF TRANSACTION (IN MILLIONS)
Kraft Inc.	Philip Morris Cos. Inc.	$12,644.2
Federated Department Stores Inc.	Campeau Corp.	6,506.2
Farmers Group Inc.	B.A.T. Industries PLC	5,168.7
Sterling Drug Inc.	Eastman Kodak Co.	5,093.1
Dome Petroleum Ltd.	Amoco Corp.	3,766.1
Fort Howard Corp.	FH Acquisition Corp.	3,589.3*
Triangle Publications Inc.	News Corp. Ltd.	3,000.0
Firestone Tire & Rubber Co.	Bridgestone Corp. of Japan	2,661.5
Macmillan Inc.	Maxwell Communications Corp. PLC	2,642.1
Tenneco Inc. (Gulf of Mexico reserves)	Chevron Corp.	2,600.0
Lucky Stores Inc.	American Stores Co.	2,508.6
Jim Walter Corp.	Hillsborough Holdings Corp.	2,436.5*
First Boston Inc.	CS First Boston Inc.	1,677.4
Koppers Co. Inc.	BNS Inc.	1,661.5
Kidde Inc.	Hanson Trust PLC	1,605.4
I.M.S. International Inc.	Dun & Bradstreet Corp.	1,588.8
Irving Bank Corp.	Bank of New York Co. Inc.	1,535.0
Primerica Corp.	Commercial Credit Group Inc.	1,507.2
Staley Continental Inc.	Tate & Lyle PLC	1,452.1
Seven-Up Holding Co.	Dr. Pepper Holding Co.	1,300.0
G. Heileman Brewing Co. Inc.	Bond Corp. Holdings Ltd.	1,296.0
Cain Chemical Inc.	Occidental Petroleum Corp.	1,250.0
Stop & Shop Cos. Inc.	Kohlberg Kravis Roberts & Co.	1,227.6*
J.P. Stevens & Co. Inc.	West Point-Pepperell Inc.	1,216.3
E-II Holdings Inc.	American Brands Inc.	1,054.5
Gould Inc.	Nippon Mining Co.	1,047.1
Singer Co.	Bilzerian Partners LP 1	1,035.4*
Norstar Bancorp Inc.	Fleet Financial Group Inc.	973.6
E.F. Hutton Group Inc.	American Express Co.	962.3
AFG Industries Inc.	Clarity Holdings Corp.	940.9*
Telex Corp.	Memorex International NV	911.3
Payless Cashways Inc.	PCI Acquisition Corp.	908.8*
Amfac Inc.	JMB Realty Corp.	904.1
PACE Industries Inc.	Paloma Industries Inc.	850.0
Fidelcor Inc.	First Fidelity Bancorporation	846.1
Triangle Industries Inc.	CJI Industries Inc.	825.6
KaiserTech Ltd.	MCO Holdings Inc.	825.1
First Jersey National Corp.	National Westminster Bank PLC	820.0
Charter Medical Corp.	WAF Acquisition Corp.	819.1*
Insilco Corp.	INR Holdings Inc.	812.8
Stanadyne Inc.	Forstmann Little & Co.	796.5
Brockway Inc.	Kohlberg Kravis Roberts & Co.	752.5*
Intermedics Inc.	Sulzer Bros. Ltd.	743.2
Diamandis Communications Inc.	Hachette SA	712.0
J.C. Penny Co. (9%)	American General Corp.	700.0
Best Products Co.	Adler & Shaykin	684.8*
Playtex Holdings Inc.	Private Investors	680.0*
Shawmut Corp.	Hartford National Corp.	679.3
Central Bancorporation Inc.	PNC Financial Corp.	663.5
First Kentucky National Corp.	National City Corp.	627.9

* Leveraged Buyout

23 MERGERS & ACQUISITIONS 47 (May/June 1989).

TABLE D

50 LARGEST ACQUISITIONS 1987

ACQUIRED/MERGED	ACQUIROR	VALUE OF TRANSACTION (IN MILLIONS)
Standard Oil Co. (remaining 45%)	British Petroleum Co. PLC	$7,564.7
Borg-Warner Corp. (90%)	AV Holdings Corp.	4,359.2*
Southland Corp.	Thompson Co.	4,004.4*
Owens-Illinois Inc.	Kohlberg Kravis, Roberts & Co.	3,688.0*
Viacom International Inc.	National Amusements Inc.	3,299.1
Chesebrough-Pond's Inc.	Unilever NV	3,095.2
Celanese Corp.	Hoechst AG	2,723.5
Burlington Industries Inc.	Burlington Holdings Inc.	2,155.7*
Cadillac Fairview Corp. Ltd.	JMB Realty Trust	1,973.6
Supermarkets General Corp.	SMG Acquisition Corp.	1,812.6*
Avis Inc.	Avis ESOP	1,750.0*
Lear Siegler Inc.	L Acquisition Corp.	1,689.4*
American Motors Corp.	Chrysler Corp.	1,646.0
Newmont Mining Corp. (additional 23.37%)	Consolidated Gold Fields PLC	1,550.0
HIMONT Inc. (38.5%)	Montedison SpA	1,487.5
Manpower Inc.	Blue Arrow PLC	1,339.9
Piedmont Aviation Inc.	USAir Group Inc.	1,280.0
Rainier Bancorporation	Security Pacific Corp.	1,223.2
Taft Broadcasting Co.	TFBA LP	1,214.7*
Texas Commerce Bancshares Inc.	Chemial New York Corp.	1,201.0
Collins & Aikman Corp.	Wickes Cos. Inc.	1,156.9
Big Three Industries Inc.	L'Air Liquide SA	1,053.7
Texaco Inc. (12.3%)	Carl Icahn	988.8
DHI Corp.	TW Services Inc.	858.0
Heritage Communications Inc.	Heritage Merging Co.	847.2*
UCCEL Corp.	Computer Associates International Inc.	822.9
Hughes Tool Co.	Baker International Corp.	816.3
Marine Midland Banks Inc. (remaining 48%)	Hongkong & Shanghai Banking Corp.	751.9
Smith Barney Inc.	Primerica Corp.	750.0
Revlon Group Inc.	MacAndrews & Forbes Holdings Inc.	727.0
Southwest Forest Industries Inc.	Stone Container Corp.	705.8
Salomon Inc. (12.3%)	Berkshire Hathaway Inc.	700.0
Britoil PLC (21.25%)	Atlantic Richfield Co.	696.8
Citizens Fidelity Corp.	PNC Financial Corp.	694.4
Tracor Inc.	Westmark Systems Inc.	693.4
North American Philips Corp. (remaining 42.1%)	Philips NV	684.8
Continental Bancorp Inc.	Midlantic Banks Inc.	673.6
Petro-Lewis Corp. (72%)	FPCO Inc.	644.6
Conifer Group Inc.	Bank of New England Corp.	643.3
Rexnord Inc.	Banner Industries Inc.	635.0
Kenner Parker Toys Inc.	Tonka Corp.	632.7
Joy Manufacturing Co.	Joy Technologies Inc.	621.1*
ACCO World Corp.	American Brands Inc.	601.7
Santa Fe Southern Pacific Corp. (additional 9.67%)	Henley Group Inc.	601.0
Rent-A-Center Inc.	THORN EMI PLC	593.9
Caremark Inc.	Baxter Travenol Laboratories Inc.	579.8
Turner Broadcasting Systems Inc. (37%)	Several multiple cable operators	562.5
Zale Corp.	PS Associates CV	561.7
American Fletcher Corp.	Banc One Corp.	551.2
Shearson Lehman Brothers Inc. (13%)	Nippon Life Insurance Co. of Japan	538.2

* Leveraged Buyout

22 MERGERS & ACQUISITIONS 39 (May/June 1988).

TABLE E

50 LARGEST ACQUISITIONS 1986

ACQUIRED/MERGED	ACQUIROR	VALUE OF TRANSACTION (IN MILLIONS)
Beatrice Cos. Inc.	Kohlberg, Kravis, Roberts & Co.	$6,250.0*
RCA Corp.	General Electric Co.	6,141.9
Safeway Stores Inc.	Kohlberg, Kravis, Roberts & Co.	5,335.5*
Sperry Corp.	Burroughs Corp.	4,432.1
Allied Stores	Campeau Corp.	3,608.0
American Broadcasting Cos. Inc.	Capital Cities Communications Inc.	3,529.9
R.H. Macy & Co. Inc.	Macy Acquiring Corp.	3,501.1*
Texas Oil & Gas Co.	U. S. Steel Corp.	2,996.6
MidCon Corp.	Occidental Petroleum Corp.	2,686.4
Associated Dry Good Goods Corp.	May Dept. Stores Co.	2,386.2
National Gypsum Co.	Aancor Holdings Inc.	1,600.4*
Jack Eckerd Corp.	Eckerd Holdings Inc.	1,581.7*
MGM/UA Entertainment Co.	Turner Broadcasting System Inc.	1,507.0
Revco D.S. Inc.	Anac Holding Corp.	1,486.2*
JTL Corp.	Coca-Cola Co.	1,400.0
Overnight Transportation Co.	Union Pacific Corp.	1,210.3
Sanders Associates Inc.	Lockheed Corp.	1,176.7
Fruehauf Corp.	LMC Holdings Inc.	1,169.6*
Hammermill Paper Co.	International Paper Co.	1,083.3
Big Three Industries Inc.	L'Air Liquide SA	1,053.7
Ex-Cell-O Corp.	Textron Inc.	1,029.5
Toledo Edison Co.	Cleveland Electric Illuminating Co.	945.8
Republic Airlines	NWA Inc.	890.6
Western Air Lines Inc.	Delta Air Lines Inc.	860.0
Pacific Lumber Co.	MAXXAM Group Inc.	828.9
Crown Zellerbach Corp.	James River Corp. of VA	798.0
Key Pharmaceuticals Inc.	Schering-Plough Corp.	788.5
Sea-Land Corp.	CSX Corp.	743.7
White Consolidated Industries Inc.	Electrolux Group	742.7
Magic Chef Inc.	Maytag Co.	734.5
Blue Bell Holdings Co. Inc.	VF Corp.	732.0
Evening News Association	Gannett Co. Inc.	717.0
Thrifty Corp.	Pacific Lighting Corp.	707.2
MEI Corp.	PepsiCo Inc.	683.0
Cessna Aircraft Co.	General Dynamics Corp.	671.3
Quotron Systems Inc.	Citicorp	657.6
USX Corp. (11.4%)	Carl Icahn	651.7
Third National Corp.	SunTrust Banks Inc.	651.1
Eastern Air Lines Inc.	Texas Air Corp.	648.8
Anderson, Clayton & Co.	Quaker Oats Co.	611.7
Kidder, Peabody & Co. Inc. (80%)	General Electric Co.	600.0
A.S. Abell Co.	Times Mirror Co.	600.0
Jackson National Life Insurance Co.	Prudential Corp. PLC	597.0
Signode Industries Inc.	Illinois Tool Works Inc.	550.0
Capital Cities Communications Inc. (18.8%)	Berkshire Hathaway Inc.	517.5
Anixter Bros. Inc.	Itel Corp.	509.6
SCM Corp.	Hanson Trust PLC	503.5
Goldman, Sachs & Co. (12.5%)	Sumitomo Bank Ltd. of Japan	500.0
Goodyear Tire & Rubber Co. (11.5%)	Sir James Goldsmith	500.0
Saga Corp.	Marriott Corp.	499.9
Sheller-Globe Corp.	NEAC Inc.	486.0*

* Leveraged Buyout

21 MERGERS & ACQUISITIONS 47 (May/June 1987).

TABLE F

50 LARGEST ACQUISITIONS 1985

ACQUIRED/MERGED	ACQUIROR	VALUE OF TRANSACTION (IN MILLIONS)
Shell Oil Co. (Remaining 30.5%)	Royal Dutch/Shell Group	$5,670.0
General Foods Corp.	Philip Morris Cos. Inc.	5,627.6
Nabisco Brands Corp.	R.J. Reynolds Industries Inc.	4,904.5
Signal Cos. Inc.	Allied Corp.	4,850.8
American Hospital Supply Corp.	Baxter Travenol Laboratories Inc.	3,702.6
Carnation Co.	Nestle SA	2,893.6
G.D. Searle & Co.	Monsanto Co.	2,717.1
American Natural Resources Inc.	Coastal Corp.	2,454.4
Houston Natural Gas Corp.	InterNorth Inc.	2,260.4
Revlon Inc.	MacAndrews & Forbes Holdings Inc.	1,741.6
Union Texas Petroleum Holdings Inc. (50%)	Investors led by Kohlberg, Kravis, & Roberts & Co.	1,700.0*
Allen-Bradley Co.	Rockwell International Corp.	1,651.0
Storer Communications Inc.	SCI Holdings Inc.	1,496.7*
Avco Corp.	Textron Inc.	1,380.0
McGraw-Edison Co.	Cooper Industries Inc.	1,377.0
Cox Communications Inc.	Cox Enterprises Inc.	1,265.2
Richardson-Vickes Inc.	Procter & Gamble Co.	1,245.7
United Energy Resources Inc.	MidCon Corp.	1,241.9
Stauffer Chemical Co.	Chesebrough-Pond's Inc.	1,218.0
Northwest Industries Inc.	Farley Industries Inc.	1,158.5*
Levi Strauss & Co.	HHF Corp.	1,110.1*
Unocal Corp. (13.6%)	Mesa Partners II	1,052.0
Trust Co. of Georgia	Sun Banks Inc.	869.0
Uniroyal Inc.	CDU Acquisition Inc.	836.0*
Denny's Inc.	DHI Corp.	753.5*
First Atlanta Corp.	Wachovia Corp.	729.9
Southland Royalty Co.	Burlington Northern Inc.	694.4
Gulfstream Aerospace Corp.	Chrysler Corp.	637.8
SCOA Industries Inc.	THL Holdings Inc.	636.5*
AMF Inc.	Minstar Inc.	577.4
Colonial Penn Group Inc.	FPL Group Inc.	565.2
Parsons Corp.	Employee stock ownership plan of Parsons	556.2*
Hoover Co.	Chicago Pacific Corp.	533.9
KTLA-TV	Tribune Co.	510.0
Scovill Inc.	First City Properties Inc.	490.2
Pay Less Drug Stores Northwest Inc.	K mart Corp.	487.6
NI Industries Inc.	Nimas Corp.	483.1
Southern Progress Corp.	Time Inc.	480.0
Transway International Corp.	International Controls Corp.	476.4
Landmark Banking Corp. of Florida	Citizens & Southern Georgia Corp.	473.9
Hoover Universal Inc.	Johnson Controls Inc.	467.5
Donaldson, Lufkin & Jenrette Inc.	Equitable Life Assurance	460.0
Atlantic Bancorporation	First Union Corp.	443.9
National Can Corp.	Triangle Industries Inc.	428.4
SFN Cos. Inc.	New SFN Corp.	424.5*
Conwood Corp.	Dalfort Corp.	401.4
Automatic Switch Co.	Emerson Electric Co.	364.9
Diversifoods Inc.	Pillsbury Co.	361.3
Union Carbide Corp. (9.9%)	GAF Corp.	355.3
Northwestern Financial Corp.	First Union Corp.	355.2

* Leveraged Buyout
20 MERGERS & ACQUISITIONS 33 (May/June 1986).

TABLE G

BRIDGE LOAN TRANSACTIONS BETWEEN APRIL 1986 AND APRIL 1987

Target	Acquiror	Transaction/Date	Total Cost	Max.Bridge	Takedown
		Merrill Lynch			
Triangle Pacific	Edward Scarff	Tender Offer 4/3/86	$230 Million	$106 Million	$106 Million
PT Components	First Chicago, ML & Co.	Merger (LBO) 9/10/86	$162 Million	$ 48 Million	$ 48 Million
Freuhauf	Freuhauf Holdings	Tender Offer 9/22/86	$1.4 Billion	$370 Million	$370 Million
T.V. Stations	Home Shopping	Asset Purchase 10/86	$180 Million	$ 65 Million	$47.9 Million
Goodyear	Goldsmith	13D Announcement (Tender Offer 10/31/86)	$4.7 Billion est.	$1.9 Billion	None, Withdrawn
Anixter	Itel	Tender Offer 11/21/86	$600 Million	$475 Million	$475 Million
Amstar	AHI	Merger (LBP) 11/21/86	$681 Million	$275 Million	$275 Million
Synthetic Industries	SI Holding	Stock Purchase & Merger (LBO) 12/4/86	$151.75 Million	$96.5 Million	$96.5 Million
Graphic Controls	Brentwood Assoc.	Merger (LBO) 12/86	$123.7 Million	$61 Million	$61 Million
Clinton Mills	CMI Holdings	Merger (LBO) 12/30/86	$118.4 Million	$32 Million	$32 Million
Dayton Walther	Varity	Merger 12/31/86	$127.8 Million	$75 Million	$75 Million
Bagcraft, PST	Sage Group	Asset & Stock Purchase (LBO) 8/86, 12/86, 1/87	$180 Million	$183.6 Million	$183.6 Million
		First Boston			
Allied Stores	Campeau	Market Purchase (Tender Offer) 10/24/86	$1.7 Billion	$1.8 Billion	$865 Million
Union Carbide	Union Carbide	Debt Tender 11/6/86	$2.5 Billion	$1.1 Billion	$976 Million
Dyersburg	Wesray	Merger (LBO) 12/30/86	$147 Million	$50 Million	$50 Million
Southdown	Southdown	Stock Purchase 2/4/87	$88.9 Million	$87.5 Million	None, Backup Only
Allegheny Intl.	Sunter	Tender Offer 3/13/87	$512 Million	$500 Million	Pending
		Shearson Lehman			
Dr. Pepper	Dr. Pepper Hldgs.	Asset Purchase (LBO)	$402.7 Million	$180 Million	$180 Million
Peebles	Peebles Holdings	Merger (LBO) 10/1/86	$75 Million	$45 Million	$45 Million
Allied Stores	DeBartolo	Tender Offer 10/8/86	$3.75 Billion	$1.57 Billion	None, Withdrawn
Joy Mfg.	Pullman-Peabody	Tender Offer 12/2/86	$520 Million	$200 Million	None, Withdrawn
Ponderosa	Edelman	Tender Offer 12/2/86	$265 Million	$165 Million	$150 Million
GenCorp.	Wagner & Brown, AFG Industries	Tender Offer 3/18/86	$2.5 Billion	$1.25 Billion	Pending
		Kidder Peabody (Donaldson Lufkin*)			
SFN Comm.	Pegasus	Asset Purchase 10/9/86	$162.5 Million	$64 Million	$64 Million
*Joy Mfg.	Adler & Shaykin	Tender Offer 12/24/86	$640 Million	$225 Million	$225 Million
Lumber Mills	WTD Industries	Assets & Stock Purchase 2/87	$17.8 Million	$10 Million	$10 Million
		Salomon Brothers			
Penn Traffic	Miller Tabak	Tender Offer 1/30/87	$122 Million	$61 Million	$61 Million
		Dean Witter			
Furr's Bishop	Calvalcade Foods	Stock Purchase (LBO) 12/30/86	$253 Million	$65 Million	$65 Million
		Morgan Stanley			
Owens Illinois	Kohlberg Kravis	Tender Offer 2/17/87	$3.8 Billion	$600 Million	$600 Million

TABLE G (Continued)

Target	Acquiror	Transaction/Date	Total Cost	Max.Bridge	Takedown
		Drexel Burnham			
Revlon	Perelman, MacAndrews & Forbes	Tender Offer 4/1/87	$800 Million	$800 Million	Pending, Backup Only

SEC Information Memo at Attachment A.

Bridge loan financing also was provided in the following transactions:

Acquired/Merged	Acquiror	Transaction Costs (In Millions)
Essex Industries	Merrill Lynch Capital Partners	$370.0
Bozell, Jacobs Kenyon Eckhardt, Inc.	Investor Group (Funding by Merrill Lynch)	$133.0
Redkin Laboratories	Investor Group (Funding by Merrill Lynch)	$ 93.2
Signal Capital Corp. Equilease	ITEL Corp. (Funding by Merrill Lynch)	$1,200.
Ann Taylor Unit of Allied Stores Corp.	M-KL Capital Partners (Funding by Merrill Lynch)	$430.0
Loehmann's Inc.	Selfinco, Ltd. & The Sprout Group of Donaldson, Lufkin & Jenrette, Inc. (Funding by Merrill Lynch)	$170.0
Insilco Corp.	Wagner & Brown (Funding by Merrill Lynch)	$1,100
York Intl. Inc.	Investor Group (Funding by Merrill Lynch)	$750.0
Federated Department Stores, Inc.	Campeau Corp. (Funding by First Boston)	$6,600.0 ($1,337.0 M was in the form of a bridge loan)
American Standard, Inc.	Kelso & Co. (Funding by First Boston)	$2,500.0 ($920.0 M was in the form of a bridge loan)
Arkansas Best Corp.	Kelso & Co. (Funding by First Boston)	$316.0 ($121.0 M was in the form of a bridge loan)

TABLE H

MERGERS AND ACQUISITIONS CANCELLED BECAUSE OF REPORTED FINANCING DIFFICULTIES — 1984 - 1987

Buyer	Firm Sought	Price (In Millions)	Reason for Cancellation
		Cancellations in 1987	
Dart Group Corp.	Dayton Hudson Corp.	$ 6,292.00	Dart Group abandoned unsolicited offer because of uncertain financing after market crash in October, 1987
MLX Corp.	Rheem Mfg. Co.	$ 825.00	Unable to arrange financing due to market conditions
22 MERGERS & ACQUISITIONS 55 (May/June 1988).			
		Cancellations in 1986	
Wickes Cos., Inc.	Lear Siegler, Inc.	$ 1,694.30	Terminated after Wickes was unable to arrange bank financing on satisfactory terms.
21 MERGERS & ACQUISITIONS 67 (May/June 1987).			
		Cancellations in 1985	
Investor Group led by Kelly Briggs & Assoc.	Northwest Industries	$ 1,300.00	Investor Group unable to obtain financing
Investor Group including AMSTED senior management and its ESOP	AMSTED Industries	$ 528.00	Unable to arrange financing
20 MERGERS & ACQUISITIONS 54 (May/June 1986).			
		Cancellations in 1984	
Investor Group organized by Morgan Stanley	Southwest Forest Industries	$ 650.00	Terminated by Southwest after expression of concern by banks over Southwest's ability to finance the buyout
Subsequent merger proposed by Jefferson Smurfit	Southwest Forest Industries		Cancelled by Southwest due to uncertain financing
Investor Group led by Kelso & Co.	U.S. Industries	$ 533.00	Unable to obtain timely financing to compete with bid by Hanson Trust PLC
Investor Group led by Allen & Co.	Diversified Foods, Inc.	$ 524.40	Unable to arrange financing

MERGERS & ACQUISITIONS, Almanac & Index Editions, 1985-1987.

TABLE I

Recent Proposed or Enacted Legislation Relating to Takeovers and Leveraged Buy-Outs

Bill	Sponsor	Description
H.R. 615, 101st., 1st Sess. (1989).	Rep. Bennett	A bill to amend the Internal Revenue Code of 1986 to deny the deduction for interest on certain corporate stock acquisition indebtedness.
H.R. 954, 101st., 1st Sess. (1989).	Rep. Rose	A bill to amend the Internal Revenue Code of 1986 to limit the interest deduction on corporate stock acquisition indebtedness.
H.R. 2354, 101st., 1st Sess. (1989).	Rep. Dorgan	A bill to amend the Internal Revenue Code of 1986 to deny the deduction for interest on indebtedness incurred in certain takeovers of major airlines.
*H.R. 2402, 101st., 1st Sess. (1989).	Rep. Whitten	A bill making supplementary appropriations for the Department of Veterans Affairs for the fiscal year ending September 30, 1989, and for other purposes.
H.R. 3556, 101st., 1st Sess. (1989).	Rep. Panetta	A bill to amend the Internal Revenue Code of 1986 to reduce the occupational tax on retail dealers in liquors and beer, to limit the period during which such tax may be assessed, and to offset any resulting reduction in Federal revenues by denying the deduction for interest on certain corporate stock acquisition indebtedness

TABLE I (Continued)

S. 325, 101st., 1st Sess. (1989).	Sen. Sanford	A bill to amend the Internal Revenue Code of 1986 to limit the interest deduction on corporate stock acquisition indebtedness.
S. 1794, 101st., 1st Sess. (1989).	Sen. Specter	A bill to amend the Securities Exchange Act of 1934 with respect to mergers and corporate tender offers, and for other purposes.
S. 1886, 101st., 1st Sess. 1989).	Sen. Kassebaum	A bill to amend the Securities Exchange Act of 1934 to provide for corporate integrity and full disclosure.
S. 2169, 101st., 2d Sess. (1990).	Sen. Sanford	A bill to amend the Securities Exchange Act of 1934 to promote longer term investment, to provide for more effective disclosure with respect to the conduct of leveraged buyouts and tender offers, and for other purposes.
**H.R. 29, 101st., 1st Sess. (1989).	Rep. Fish	A bill to amend the Clayton Act regarding interlocking directorates and officers.
H.R. 158, 101st., 1st Sess. (1989).	Rep. Dorgan	A bill to amend the Internal Revenue Code of 1986 to provide that the deemed sale rules shall apply in the case of hostile stock purchases and to deny any deduction for interest incurred in connection with a hostile stock purchase.

TABLE I (Continued)

H.R. 679, 101st., 1st Sess. (1989).	Rep. Coyne	A bill to require community impact statements by certain corporations involved in mergers that will result in reducing the number of persons employed in any community by at least one hundred individuals, and for other purposes.
H.R. 954, 101st., 1st Sess. (1989).	Rep. Rose	A bill to amend the Internal Revenue Code of 1986 to limit the interest deduction on corporate stock acquisition indebtedness.
H.R. 1030, 101st., 1st Sess. (1989).	Rep. Penny	A bill to amend the Securities Exchange Act of 1934 to improve the protection of the public interest and of investors in corporate takeovers, and for other purposes.
H.R. 2321, 101st., 1st Sess. (1989).	Rep. Carr	A bill to amend the Federal Aviation Act of 1958 to limit acquisitions of control of air carriers to ensure fitness.
H.R. 2343, 101st., 1st Sess. (1989).	Rep. Tauke	A bill to extend the jurisdiction of the Interstate Commerce Commission to include approval of the acquisition of control of certain rail carriers by persons that are not carriers.
H.R. 2364, 101st., 1st Sess. (1989).	Rep. Luken	A bill to amend the Rail Passenger Service Act to authorize appropriations for the National Railroad Passenger Corporation, and for other purposes.

TABLE I (Continued)

H.R. 2513, 101st., 1st Sess. (1989).	Rep. Dingell	A bill to extend the jurisdiction of the Interstate Commerce Commission to include approval of the acquisition of control and are not controlled by carriers.
H.R. 2891, 101st., 1st Sess. (1989).	Rep. DeFazio	A bill to amend the Federal Aviation Act of 1958 to prohibit the acquisition of a controlling interest in an air carrier unless the Secretary of Transportation has made certain determinations concerning the effect of such acquisition on aviation safety.
H.R. 3443, 101st., 1st Sess. (1989).	Rep. Oberstar	A bill to amend the Federal Aviation Act of 1958 to provide for review of certain acquisitions of voting securities of air carriers, and for other purposes.
S. 995, 101st., Sess. (1989).	Sen. Metzenbaum	A bill to amend the Clayton and Sherman Acts regarding antitrust procedures.
S. 1005, 101st., Sess. (1989).	Sen. Harkin	A bill relating to the sale, purchase, or other acquisition of certain railroads.
S. 1161, 101st., Sess. (1989).	Sen. Shelby	A bill to amend the Internal Revenue Code of 1986 to allow a deduction for dividends paid by corporations.
S. 1244, 101st., Sess. (1989).	Sen. Metzenbaum	A bill to amend the Securities Exchange Act of 1934 with respect to tender offers, and for other purposes.

TABLE I (Continued)

S. 1277, 101st., Sess. (1989).	Sen Ford	A bill to amend the Federal Aviation Act of 1958 to prohibit the acquisition of a controlling interest in an air carrier unless the Secretary of Transportation made ceratin determinations concerning the effect of such acquisition on aviation safety.
S. 1658, 101st., Sess. (1989).	Sen. Shelby	A bill to amend the Securities and Exchange Act of 1934 to impose additional disclosure and fairness requirements with respect to corporate tender offers.

* Act of June 30, 1989, 103 Stat. 97 (1989).

** Antitrust Amendments Act of 1990, 104 Stat. 2879 (1990).