

## IV. REGULATION OF TENDER OFFERS

Since the mid-1960's, tender offers<sup>478</sup> increasingly have been used as a means of effecting corporate acquisitions.<sup>479</sup> When compared with the more traditional forms of acquiring corporate control, notably mergers, purchases of assets, and proxy contests,<sup>480</sup> the tender offer's appeal becomes apparent.<sup>481</sup> The chief advantage of a tender offer is its cost.

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478. Congress enacted the Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968), amending 15 U.S.C. §§ 78m-n (1964) (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1970)), to regulate tender offers, but did not define the term in the Act. It has been suggested that this omission

apparently derives from the fact that the Congress and the Commission were of the view that a tender offer for purposes of the federal regulatory scheme may well encompass transactions yet unborn which are not considered tender offers in general custom and usage. Thus the question of just what is encompassed by the term tender offer has been intentionally left open, in an ostensible effort to preserve the flexibility of both the Commission and the courts in making a determination on a case-by-case basis.

E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* 70 (1973) [hereinafter cited as ARANOW & EINHORN]. Aranow and Einhorn give the following definition of a tender offer:

A public offer or solicitation by a company, an individual or a group of persons to purchase during a fixed period of time all or a portion of a class or classes of securities of a publicly held corporation at a specified price or upon specified terms for cash and/or securities.

*Id.*

479. See Hayes & Taussig, *Tactics of Cash Takeover Bids*, HARV. BUS. REV., Mar.-Apr. 1967, at 137 (study of 83 contested cash tender offers from 1956-1966). See also D. AUSTIN & J. FISHMAN, *CORPORATIONS IN CONFLICT—THE TENDER OFFER* (1970) (analyzing 191 cash offers and 41 exchange offers involving New York Stock Exchange-listed companies from 1956-1966 and all tender offers for which data were available for 1967). A *Wall Street Journal* article announcing an SEC investigation into the adequacy of its regulation of tender offers cited the following statistics: "In the 12 months ended in June [1974], 105 tender offers were filed with the SEC, including 25 on behalf of foreign bidders, up from 75 the year before, when eight were on behalf of foreigners." *Wall Street J.*, Sept. 10, 1974, at 3, col. 3.

480. See Berle, *The Price of Power: Sale of Corporate Control*, 50 CORNELL L.Q. 628 (1965); Jennings, *Trading in Corporate Control*, 44 CALIF. L. REV. 1 (1956); Leech, *Transactions in Corporate Control*, 104 U. PA. L. REV. 725 (1956).

481. There are three kinds of tender offers:

- (1) the cash tender offer, *i.e.*, a cash-for-stock exchange;
- (2) the exchange tender offer, *i.e.*, stock of the tender offeror exchanged for stock of the target corporation; and
- (3) the combination cash and exchange tender offer.

See note 478 *supra*. See also SEC rule 10b-13(b), 17 C.F.R. § 240.10b-13(b) (1974) (defining exchange tender offers). The use of exchange offers is discouraged by the

The expense of achieving a takeover by means of a tender offer is essentially limited to paying a price for the shares of the target corporation sufficiently above the market price to attract tenderors.<sup>482</sup> The tender offer procedure also eliminates the often complicated and time-consuming preliminary negotiations which accompany both mergers and sales of assets, and it obviates the need for the acquiring corporation to obtain the acquiescence of the incumbent management and shareholder ratification of the transaction.<sup>483</sup> Moreover, in a merger or a sale of assets, the acquiring company pays for all or most of the assets of the acquired company, whereas a tender offeror pays for only that portion of a company's outstanding shares needed to gain control,<sup>484</sup> and retains the option of merging with the acquired corporation at a later date.<sup>485</sup> Proxy contests are not as satisfactory a tactic for acquiring corporate control as tender offers because they are expensive and not always successful.<sup>486</sup>

Certain characteristics have been isolated as means of identifying corporations especially vulnerable to takeover by tender offer.<sup>487</sup> The first of these characteristics is the price/earnings ratio of the target company; the lower this figure, the greater the possibility is that the

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registration and prospectus requirements of the 1933 Act. See generally ARANOW & EINHORN 46.

482. The following is an example of a cash tender offer, subsequently leading to substantial litigation:

Offer to Purchase Common Stock and 5% Convertible Subordinated Debentures of Electronic Specialty Co. by International Controls Corp. at \$39 per share and \$1,236 per \$1,000 Debenture net (without brokerage charge and free from transfer taxes) to the Seller.

Wall Street J., Aug. 26, 1968, at 17. See text accompanying notes 552-60 & 575-78 *infra*. Other tender invitations made in connection with the same transaction can be found in Wall Street J., Aug. 19, 1968, at 15, and N.Y. Times, Sept. 4, 1968, at 67 (announcing an extension of the quoted tender offer).

483. See sources cited note 480 *supra*.

484. See ARANOW & EINHORN 65-66; Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317, 318-19 (1967). See also Hayes & Taussig, *supra* note 479; Schmults & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 BUS. LAW. 115 (1967).

485. See Fleischer & Mundheim, *supra* note 484, at 318; Schmults & Kelly, *supra* note 484.

486. See Aranow & Einhorn, *Essential Ingredients of the Cash Tender Invitation*, 27 BUS. LAW. 415 (1972); Young, *Judicial Enforcement of the Williams Amendments*, 27 BUS. LAW. 391, 392 n.3 (1972).

487. See ARANOW & EINHORN 1-9. See generally Aranow & Einhorn, *supra* note 486; Cohen, *Tender Offers and Takeover Bids*, 23 BUS. LAW. 611 (1968); Fleischer & Mundheim, *supra* note 484; Hayes & Taussig, *supra* note 479; Young, *supra* note 486.

offeror will realize a return on its investment. A second element is the target company's low or declining earnings when compared with its competitors. When this situation exists, an offeror can be expected to argue that the target's poor performance has been due to the ineptitude of incumbent management. Thirdly, a corporation with liquid assets substantially in excess of amounts needed for operating expenses is particularly attractive, since such surplus liquidity can be used to cover the costs of the tender offer if the successful offeror subsequently merges with the target company.<sup>488</sup> Fourthly, since tender offers require the solicitation of individual shareholders, corporations with concentrated share ownership are desirable targets due to reduced solicitation expenses. The fifth major factor indicating susceptibility is the total assets of the proposed target. Smaller corporations are more vulnerable, since there is an increased likelihood of antitrust problems when two larger corporations are involved.<sup>489</sup>

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488. For a case holding a tender offeror liable to a non-tendering plaintiff for failure to disclose post-tender offer merger plans, see *Fabrikant v. Jacobellis*, [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,686 (E.D.N.Y. 1970). This factor makes a takeover by means of a tender offer especially attractive because it enables a corporation with limited liquidity to acquire a target with greater liquidity.

489. One tender offer that caused considerable controversy in Congress was Mobil Oil Corporation's offer for the common and preferred shares of Marcor, Inc. The chief element of congressional criticism, leading to a Justice Department investigation of the transaction, was the alleged violation of antitrust laws. Mobil was a major gasoline retailer and Marcor's major enterprise was Montgomery Ward & Co., a retail chain which includes some 600 auto-service centers. On September 10, 1974, Mobil announced it would accept, on a pro-rata basis, 51.86% of the tendered shares, conditional on Marcor's disposing of its controlling interest in Pioneer Trust & Savings Bank of Chicago before October 11, 1974. *Wall Street J.*, Sept. 10, 1974, at 3, col. 2. For a discussion of the acceptance of tendered shares on a pro-rata basis, see notes 509-10 *infra* and accompanying text.

Aranow and Einhorn list additional characteristics indicating susceptibility to a tender offer:

- (1) Nominal stock ownership by management in comparison with the total outstanding shares and trading volume;
- (2) Substantial cash flow from depreciation;
- (3) Undervalued fixed assets;
- (4) Nominal debt and contingent liability;
- (5) Poor shareholder and professional investment community relations;
- (6) Cumulative voting where all directors come up for reelection at the same time;
- (7) Unwillingness to consider merger proposals;
- (8) Declining dividends;
- (9) Poor market performance of the target's stock;
- (10) Absence of strong leadership in management; and
- (11) Absence of extensive federal or state regulation of the target's business.

Against this background Congress passed the Williams Act in 1968.<sup>490</sup> Congress recognized that judicial interpretations had rendered rule 10b-5<sup>491</sup> an inadequate remedy in the burgeoning area of tender offers.<sup>492</sup> The language of section 14(e)<sup>493</sup> of the Williams Act, however, is patterned after the antifraud concept contained in section 10(b) of the 1934 Act and rule 10b-5<sup>494</sup> and reaffirms the full-

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490. Pub. L. No. 90-439, 82 Stat. 454 (1968), amending 15 U.S.C. §§ 78m-n (1964) (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1970)).

491. 17 C.F.R. § 240.10b-5 (1974).

492. When Senator Harrison A. Williams of New Jersey initially proposed the legislation in October 1965, see S. 2731, 89th Cong., 1st Sess. (1965), his purpose was to protect the incumbent management of "proud old companies" from "industrial sabotage." See 111 CONG. REC. 28, 256-60 (1965) (remarks of Sen. Williams). From this early and, for federal securities laws, unique emphasis on protecting issuers, the objective turned to closing a "gap" in the securities laws for the benefit of investors. While new issues and proxy solicitations were governed by substantial disclosure requirements and exchange tender offers were included under the 1933 Act provisions, cash tender offers were relatively unregulated. See H.R. REP. NO. 1711, 90th Cong., 2d Sess. (1968); S. REP. NO. 550, 90th Cong., 1st Sess. (1967); *Hearings on H.R. 14475, S. 510, Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. (1968); *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. (1967). See generally ARANOW & EINHORN 64-69; BROWN, *The Scope of the Williams Act and its 1970 Amendments*, 26 BUS. LAW. 1627 (1971); FLEISCHER & MUNDHEIM, *supra* note 484; GRIFFIN & TUCKER, *The Williams Act, Public Law 90-439—Growing Pains? Some Interpretations with Respect to the Williams Act*, 16 HOWARD L.J. 654 (1971); HAMILTON, *Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269 (1969); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973); Note, *Cash Tender Offers*, 83 HARV. L. REV. 377 (1969). See also 6 L. LOSS, *SECURITIES REGULATION* 3658-69 (2d ed. 1961, Supp. 1969) [hereinafter cited as Loss]. Early litigation growing out of contested tender offers demonstrated the inadequacy of reliance on the section 10(b) antifraud provision and its implementing SEC rule 10b-5 largely as a result of the purchaser-seller requirement enunciated in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). *Birnbaum* cited the "in connection with the purchase or sale of any security" language of rule 10b-5 and limited its application to defrauded purchasers or sellers. Despite what appeared to be the continuing erosion of the *Birnbaum* doctrine, a defeated tender offeror was held to lack standing because it could not meet the *Birnbaum* purchaser-seller criterion. *Iroquois Indus., Inc. v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970). Recently, the *Birnbaum* doctrine was reaffirmed in *Blue Chip Stamps v. Manor Drug Stores*, 95 S. Ct. 1917 (1975). Section 14(e), the antifraud provision of the Williams Act, was phrased to cover fraudulent conduct "in connection with any tender offer . . . or solicitation . . . in opposition to or in favor of any such offer," instead of using the SEC rule 10b-5 "in connection with the purchase or sale of a security" language.

493. 15 U.S.C. § 78n(e) (1970).

494. 17 C.F.R. § 240.10b-5 (1974). Professor Loss points out the apparently inad-

disclosure policy underlying the entire 1934 Act. Section 14(e) provides a remedy when there has been fraudulent conduct "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."<sup>495</sup> The disclosure rules for the enforcement of the prohibitions enumerated in section 14(e) are found in two other provisions of the Williams Act, sections 13(d)<sup>496</sup> and 14(d),<sup>497</sup>

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vertent omission of the traditional interstate commerce language in section 14(e) and cautions counsel to include such allegations in their pleadings to preclude jurisdictional problems. 6 Loss 3661.

495. 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 statements 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.

15 U.S.C. § 78n(e) (1970).

496. (1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78l 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 78l(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, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, 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—

(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

(B) 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 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 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;

(C) if 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;

authorizing and requiring the filing of a report, now known as Schedule

(D) the 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 name and address of each such associate; and

(E) information 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.

(2) 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.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

15 U.S.C. § 78m(d) (1970).

497. 15 U.S.C. § 78n(d) (1970) provides in part:

(1) 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 fa-

13D.<sup>498</sup> Section 13(d) becomes operative after five percent<sup>499</sup> of any class of registered securities is acquired by any person, while section 14(d) governs a proposed five percent<sup>500</sup> acquisition of such shares. Moreover, pursuant to section 14(d)(4)<sup>501</sup> and its corresponding rule,<sup>502</sup>

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cility 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 78l 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 78l(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 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 78m(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.

498. 17 C.F.R. § 240.13d-101 (1974). Schedule 13D calls for a detailed description of the offer and offeror. Among the required items of disclosure are (1) the identity and background of the offeror including its principal place of business and data concerning its officers and directors, (2) the consideration to be paid for the securities and the sources of funds so paid, (3) the purpose of the transaction and any plans that the offeror will initiate if successful, and (4) data concerning any interest in the issuer already held or controlled by the offeror.

499. The SEC has proposed that the cutoff figure be lowered to 1%. Wall Street J., Sept. 10, 1974, at 3, col. 3.

500. The SEC has proposed that this cutoff figure as well be lowered to 1%. *Id.*

501. 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.

15 U.S.C. § 78n(d)(4) (1970).

502. 17 C.F.R. § 240.14d-4 (1974) provides in part:  
Filing of Schedule 14D.

(a) No solicitation or recommendation to the holders of a security to accept or reject a tender offer or request or invitation for tenders subject to section

a Schedule 14D<sup>503</sup> must be filed by persons making solicitations or recommendations regarding a particular tender offer.<sup>504</sup> Additional investor

14(d) of the Act shall be made unless, at the time copies of the solicitation or recommendation are first published or sent or given to holders of the security, the person making such solicitation or recommendation has filed with the Commission a statement containing the information specified by schedule 14D: *Provided, however,* That this section shall not apply to (1) a person required by § 240.14d-1(a) to file a statement, or (2) a person, other than the issuer or the management of the issuer, who makes no written solicitations or recommendations other than solicitations or recommendations copies of which have been filed with the Commission pursuant to this section or § 240.14d-1: *And, provided further,* That any person making a solicitation or recommendation to the holders of a security to accept or reject a tender offer or request or invitation for tenders which solicitation or recommendation commenced prior to July 30, 1968 shall, if such solicitation or recommendation continues after such date, file the statement required by this section on or before August 12, 1968.

503. 17 C.F.R. § 240.14d-101 (1974). Schedule 14D requires a detailed description of anyone making a recommendation with regard to a tender offer. Among the required items of disclosure are (1) the identity of the securities, issuer, and tender offer involved, (2) the identity of the person making the recommendations and his relation to the issuer or offeror, and (3) copies of all recommendations and solicitations which will be used.

504. Pursuant to SEC rule 14d-2, the Schedule 14D filing provision, *inter alia*, does not cover brokers and dealers who merely transmit copies of solicitations or recommendations on behalf of an offeror:

Certain communications to which rules do not apply.

<sup>a</sup>The sections contained in this regulation (§ 240.14d-1 et seq.) do not apply to the following communications:

(a) Offers to purchase securities made in connection with a distribution of securities permitted by §§ 240.10b-6, 240.10b-7, and 240.10b-8.

(b) The call or redemption of any security in accordance with the terms and conditions of the governing instruments.

(c) Offers to purchase securities evidenced by a script certificate, order form or similar document which represents a fractional interest in a share of stock or similar security.

(d) Offers to purchase securities pursuant to a statutory procedure for the purchase of dissenting shareholders' securities.

(e) The furnishing of information and advice regarding a tender offer to customers or clients by attorneys, banks, brokers, fiduciaries or investment advisers, who are not otherwise participating in the tender offer or solicitation, on the unsolicited request of a person or pursuant to a general contract for advice to the person to whom the information or advice is given.

(f) A communication from an issuer to its security holders which does no more than (1) identify a tender offer or request or invitation for tenders made by another person, (2) state that the management of the issuer is studying the matter and will, on or before a specified date (which shall be not later than 10 days prior to the date specified in the offer, request or invitation, as the last date on which tenders will be accepted, or such shorter period as the Commission may authorize) advise security holders as to the management's recommendation to accept or reject the offer, request or invitation, and (3) request security holders to defer making a determination as to whether or not they



protection is made available by the Williams Act through the disclosure demands placed on issuers by sections 13(e) and 14(f). Section 13(e)<sup>505</sup> imposes specific disclosure requirements on issuers purchasing their own securities while an outside tender offer is pending. Section 14(f)<sup>506</sup> applies in a situation where the incumbent management of the target approves and facilitates the takeover and, therefore, arranges

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should accept or reject the offer, request or invitation until they have received the management's recommendation with respect thereto.

(g) Offers to purchase securities in transactions exempt from registration under the Securities Act of 1933 pursuant to section 3(a)(10) thereof.

17 C.F.R. § 240.14d-2 (1974).

505. (1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78l 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.

(2) For the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

15 U.S.C. § 78m(e) (1970).

506. 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 78m 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.

15 U.S.C. § 78n(f) (1970).

for a majority of the positions on the board of directors to be turned over to the offeror's nominees. An issuer is required to notify its shareholders that such a transfer is imminent.<sup>507</sup>

The Williams Act also regulates the mechanics of a cash tender invitation. The tender invitation or announcement is the basic soliciting mechanism and generally contains the following information: (1) the basic terms of the offer; (2) the method for the delivery of tendered shares; and (3) the information required by rule 14d-1(c).<sup>508</sup>

Certain terms and conditions are basic to all tender offers. The most obvious is the offering price for each class of securities sought to be acquired. A second term is the number of shares the offeror will purchase. Section 14(d)(6) governs the situation in which the offeror intends to purchase less than all of the target corporation's outstanding shares and requires pro-rata purchases from all tendering shareholders.<sup>509</sup> Thus it is customary for a tender invitation to include one of the following conditions on the number of shares the offeror intends to purchase:

1. The offeror will purchase all shares tendered; or
2. The offeror will purchase a specified number of shares if at least that number of shares is tendered. If the shares tendered do not equal the number of shares the offeror seeks to purchase, the offeror will invariably reserve the right to purchase all, a part, or none of the shares tendered. Similarly, where the shares tendered exceed the number of shares the offeror seeks to purchase, the offeror may purchase all, a part, or none of such excess shares; or

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507. Presumably, this notification would enable alerted shareholders to seek injunctive relief prior to the actual changeover in the composition of the board of directors. See Ratner, *Section 14(f): A New Approach to Transfers of Corporate Control*, 54 CORNELL L. REV. 65 (1968).

508. ARANOW & EINHORN 46.

509. 15 U.S.C. § 78n(d)(6) (1970):

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.

3. The offeror will purchase any and all shares tendered up to a specified maximum number of shares. If the shares tendered exceed the maximum number of shares the offeror commits itself to purchase, the offeror will reserve the right to purchase all, a part, or none of such excess shares.<sup>510</sup>

Pursuant to rule 14d-1(c), there must also be provision for the return of shares not purchased when the benefits of the pro-rata rule are invoked, as well as a statement of the date and time of the tender offer's expiration. Additionally, there must be compliance with the withdrawal privileges for a tendering shareholder pursuant to section 14(d)(5).<sup>511</sup>

In the six years since the passage of the Williams Act, the courts have had frequent opportunity to interpret its language in practical situations. Whether the case law has effectuated the stated goal of this regulatory

510. ARANOW & EINHORN 48-49.

511. 15 U.S.C. § 78n(d)(5) (1970):

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 the public interest or for the protection of investors.

The purpose of this provision was stated thus:

This subsection would give shareholders who tender their shares immediately after the offer is made a short period within which to reconsider. At the other end of the spectrum it would prevent tendered securities from being tied up indefinitely awaiting a decision by the person making the offer as to whether or not he will purchase them.

H.R. REP. NO. 1711, 90th Cong., 2d Sess. 10 (1968). Other information frequently included in tender invitations is discussed in ARANOW & EINHORN 52-60. All these requirements are mandated by SEC rule 14d-1(c), promulgated under the rule-making authority given to the SEC under section 14(d)(1). Rule 14d-1(c) states:

All tenders offers for, or requests or invitations for tenders of, securities published or sent or given to the holders of such securities shall include the following information:

- (1) The name of the person making the tender offer, request or invitation;
- (2) The exact dates prior to which, and after which, security holders who deposit their securities will have the right to withdraw their securities pursuant to section 14(d)(5) of the Act, or otherwise;
- (3) If the tender offer or request or invitation for tenders is for less than all of the outstanding securities of the class and the person making the offer, request or invitation is not obligated to purchase all of the securities tendered, the date of expiration of the period during which the securities will be taken up pro rata pursuant to section 14(d)(6) [of the Act], or otherwise; and
- (4) The information required by Items 2(a), (c), and (e), 3, 4, 5, and 6 of Schedule 13D, or a fair and adequate summary thereof.

17 C.F.R. § 240.14d-1(c) (1974).

scheme, that is, to close a "gap" in the federal securities laws<sup>512</sup> by requiring full disclosure in connection with tender offers will now be explored.

#### A. *Persons Covered by the Protections of the Williams Act*

The most difficult initial problem facing a prospective offeror is determining when, by whom, and under what circumstances a Schedule 13D must be filed.<sup>513</sup> In *Bath Industries, Inc. v. Blot*<sup>514</sup> several directors of Bath Industries agreed to pool their voting power and acquire additional shares in Bath in order to effect changes in the composition of the board of directors and its policy. The aggregate amount of stock owned by these directors exceeded ten percent of the outstanding stock of Bath,<sup>515</sup> thus, the issue was whether the formation of the group triggered the filing requirements of section 13(d). In holding that a Schedule 13D must be filed, the federal district court in *Bath Industries* reasoned that by deciding to act together to obtain control, the directors became a "group" and thus constituted a "person" within the meaning of section 13(d)(3). Although the court was unable to determine precisely when the group was created, it required the Schedule 13D to be filed within ten days of the group's "formation."<sup>516</sup> In affirming, the Seventh Circuit purported to rely on the legislative history of section 13(d)(3) and held that a Schedule 13D must be filed "when, but only when, any group of stockholders owning more than 10% of the outstanding shares of the corporation agree to act in concert to acquire additional shares."<sup>517</sup> To avoid the necessity of determining at what

512. See note 492 *supra*. See generally Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569 (1973); Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U.L. Rev. 991 (1973).

513. See notes 496-500 *supra*.

514. 427 F.2d 97 (7th Cir. 1970), *aff'g* 305 F. Supp. 526 (E.D. Wis. 1969).

515. See notes 496, 498-99 *supra*.

516. 305 F. Supp. at 537-38.

517. 427 F.2d at 109 (emphasis original). Nonetheless, in using an "additional share" test, the court was going beyond the standard stated in the section of the legislative history cited, *i.e.* an agreement to act in concert. The legislative history indicates:

[Section 13(d)(3)] would prevent a group of persons who seek to pool their voting or other interests in the securities of an issuer from evading the provisions of the statute because no one individual owns more than 10 percent of the securities. The group would be deemed to have become the beneficial owner, directly or indirectly, of more than 10 percent of a class of securities at the time they agreed to act in concert. Consequently, the group would be required to file the information called for in section 13(d)(1) within 10 days after they agree to act together, whether or not any member of the group had

point the Bath group was actually formed, the appellate court posited a rebuttable presumption based on the objective conduct of participants in the group:

[O]nce it is shown that such a group has agreed to pursue a common objective, and once it is further shown that a member of the group has *thereafter* purchased additional shares of the corporation's stock, then a *rebuttable presumption* arises that such purchase was made pursuant to an agreement of the group as of that date to acquire shares in furtherance of its objectives.<sup>518</sup>

Moreover, the court further limited the triggering mechanism of the Schedule 13D filing requirement by suggesting that section 13(d)(6) (B)<sup>519</sup> exempted purchases of additional shares of the same class not exceeding two percent for the twelve-month period prior to the acquisition.<sup>520</sup>

This exemption for additional acquisitions of less than two percent per year was the basis of the decision in *Ozark Air Lines, Inc. v. Cox*.<sup>521</sup> Cox was a non-profit medical center which received a bequest of more than ten percent of Ozark's stock. Pursuant to a written agreement, Cox's board of directors decided to join with other Ozark shareholders to vote their holdings in an attempt to gain control of Ozark. In denying a temporary restraining order sought by the airline on the ground that the group failed to file a Schedule 13D, the federal district court held, *inter alia*, that the mere formation of a group that owns more than a ten percent interest and intends to seek control does not trigger the Schedule 13D filing requirements "absent *further acquisitions*"<sup>522</sup> in excess of two percent per year.

Other courts have refused to follow the restrictive interpretations of *Bath Industries* and *Cox*. For example, in *GAF Corp. v. Mil-*

acquired any securities at that time. This provision is designed to obtain full disclosure of the identity of any person or group obtaining the benefits of ownership of securities by reason of any contract, understanding, relationship, agreement or other arrangement.

H.R. REP. No. 1711, 90th Cong., 2d Sess. 8-9 (1968); S. REP. No. 550, 90th Cong., 1st Sess. 8 (1967). See also *Scott v. Multi-Amp Corp.*, 386 F. Supp. 44, 70 (D.N.J. 1974) (coming together to hold or dispose securities also sufficient).

518. 427 F.2d at 110 (emphasis original).

519. See text quoted note 496 *supra*.

520. 427 F.2d at 111 n.7.

521. 326 F. Supp. 1113 (E.D. Mo. 1971).

522. *Id.* at 118 (emphasis original). *Contra*, *Sisak v. Wings & Wheels Express, Inc.*, [1970-1971 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,991 (S.D.N.Y. 1970) (acquisition by inheritance of 31% interest necessitates the filing of Schedule 13D).

*stein*<sup>523</sup> the Second Circuit held that four related shareholders who had combined holdings of over ten percent of outstanding stock and intended to fight the incumbent management had to register under section 13(d). In finding that the mere formation of a group, regardless of further acquisitions, would trigger the filing requirements, the court reasoned that

[t]he history and language of section 13(d) make it clear that the statute was primarily concerned with disclosure of *potential changes* in control resulting from new aggregations of stockholdings and was not intended to be restricted to only individual stockholders who made future purchases and whose actions were, therefore, more apparent. . . . It hardly can be questioned that a group holding sufficient shares can effect a takeover without purchasing a single additional share of stock.<sup>524</sup>

In *Nicholson File Co. v. H.K. Porter Co.*<sup>525</sup> the court denied a target corporation's motion for a preliminary injunction against the tender offeror on the ground that section 13(d) could not be invoked without further acquisitions of the target's stock. In so holding, the court only further muddled the standards of interpreting section 13(d). While purportedly relying on *GAF Corp.*, the *Nicholson* court nonetheless used the additional acquisition test enumerated in *Bath, Cox*, and the district court opinion in *GAF*, which was reversed on appeal. Citing the language of *GAF* quoted above, the *Nicholson* court emphasized the words "new aggregations" despite the express emphasis in the Second Circuit's *GAF* opinion on the words "potential changes"<sup>526</sup> as the triggering mechanism for section 13(d).

In addition to these judicial interpretations of what constitutes a "person" required to file a Schedule 13D, two SEC rulings also provide guidelines. In *Budd Co.*<sup>527</sup> the SEC ruled that twelve lenders who received warrants to purchase the common stock of Budd pursuant to twelve separate loan agreements would each have to file a Schedule 13D because their aggregate holdings amounted to fourteen percent of

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523. 453 F.2d 709 (2d Cir.), *rev'g in part* 324 F. Supp. 1062 (S.D.N.Y. 1971), *cert. denied*, 406 U.S. 910 (1972).

524. *Id.* at 718 (emphasis original). The Second Circuit did not resolve whether the Milsteins had in fact violated § 13(d), nor, if they had, what relief would be appropriate. *Id.* at 722. See *Water & Wall Associates, Inc. v. American Consumer Indus., Inc.*, [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,943 (D.N.J. 1973).

525. 341 F. Supp. 508 (D.R.I. 1972), *aff'd on other grounds*, 482 F.2d 421 (1st Cir. 1973).

526. See text accompanying note 524 *supra*.

527. [1970-1971 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,115 (SEC 1971).

Budd's outstanding stock. The SEC labeled these lenders a "group" despite the allegations of the lenders that there had been no "pooling of interests" or "concerted action" among them. This liberal interpretation was followed in *American Pepsi Cola Bottlers, Inc.*<sup>528</sup> The SEC required Pepsi to file a Schedule 13D within ten days of acquiring more than five percent of the outstanding stock in another corporation, although Pepsi's holdings were reduced to less than five percent as the result of a public offering by the second corporation eight days after Pepsi's acquisition.

In determining what persons are covered by the Williams Act, it appears that both the SEC and the courts rely upon the Act's failure to define a "tender offer" in order to construe broadly the scope of the Act.<sup>529</sup> Instead of basing their rulings on the technical form of the transaction, decision-makers look to the substantive effects of a change in voting strength as a realistic gauge of corporate power. Since individuals with voting control can adversely affect the interests of public investors, they are required to put the public on notice, by filing a Schedule 13D, that they are in a position to affect corporate decisions as a result of the size of their share ownership.

### B. Defining "Tender Offer"

In the absence of a statutory definition of "tender offer,"<sup>530</sup> the SEC and the courts have cautiously begun to define what does, and does not, constitute a tender offer. Soon after the Williams Act went into effect in July 1968, the SEC took the position that a "special bid," a transaction involving a block of securities too large to handle on the regular auction market system of the national securities exchanges,<sup>531</sup> would ordinarily be a tender offer subject to Williams Act regulation.<sup>532</sup> Judicial constructions soon followed. *Dyer v. Eastern Trust & Banking Co.*<sup>533</sup> held that a shareholder-approved exchange of securities pursuant to a corporate reorganization was not a tender offer. The court reasoned that the provisions of the Williams Act did not govern a trans-

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528. [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,765 (SEC 1972).

529. See note 478 *supra*.

530. *Id.*

531. See NYSE Rule 391, 2 CCH NYSE GUIDE ¶ 2391 (1971); American Stock Exch. Rule 560.

532. SEC Securities Exchange Act Release No. 8392 (Aug. 30, 1968).

533. 336 F. Supp. 890 (D. Me. 1971).

action in which no "outsiders" were involved and no "contest" for control occurred.

In *Cattlemen's Investment Co. v. Fears*,<sup>534</sup> an individual, who had unsuccessfully attempted to merge Cattlemen's with a company he controlled, had sought a ruling from the SEC that the shares he had purchased after negotiations (conducted through use of the mails, telephone calls, and personal visits) with individual shareholders of Cattlemen's did not constitute a tender offer. The SEC disagreed and defined a tender offer in the following terms:

[A tender offer] is not limited to the classical "tender offer" where the person desiring to acquire shares makes a public invitation or written offer to the shareholders to tender their shares. Nor is there a requirement that shares be tendered through a depository. The change in control may be effected by direct purchase from shareholders without a public or a written invitation for tenders having been made. Failure to label the offers to purchase as "invitations for tender" is not determinative of the status of the transactions as a "tender offer" subject to section 14(d).<sup>535</sup>

Cattlemen's then brought suit for injunctive relief as a target corporation injured by the offeror's failure to register his acquisitions.<sup>536</sup> The district court agreed with the SEC and held that widespread solicitation removed the purchases from the realm of private offers.<sup>537</sup> The court

534. 343 F. Supp. 1248 (W.D. Okla. 1972), *vacated per stipulation*, Civil No. 72-152 (W.D. Okla., May 8, 1972).

535. *Cattlemen's Inv. Co.*, [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,775, at 81, 627 (SEC 1972).

536. Cattlemen's complaint asked for three remedies:

- (1) judgment that Fears violated section 14(d);
- (2) preliminary injunction enjoining further acquisitions in Cattlemen's and the voting of shares already owned during the pendency of the action; and
- (3) injunction enjoining additional acquisitions of Cattlemen shares by Fears for a five year period as well as the exercise of voting rights for shares already owned for a like period of time.

343 F. Supp. at 1250.

537. The court reasoned as follows:

The activities of the defendant set out in the complaint and not denied by the defendant, i.e. an active and widespread solicitation of public shareholders in person, over the telephone and through the mails, contain potential dangers which Section 14[d] of the statute is intended to alleviate. The defendant, in not complying with the statute, deprived shareholders of information prescribed by the Rule, which information was material to their investment decisions, and denied to them the fair treatment provided by other parts of Section 14[d]. In truth, the contacts utilized by the defendant seem even more designed than a general newspaper advertisement, the more conventional type of "tender



characterized the Williams Act as a "remedial statute,"<sup>538</sup> and granted a temporary injunction pending a trial on the merits.<sup>539</sup>

In response to a request for a ruling, the SEC, in *Henry Heide, Inc.*,<sup>540</sup> determined that section 14(d) did not govern a proposed invitation for tenders of debentures of an issuer who was neither an insurance company nor required to register under section 12(g).<sup>541</sup> The Commission ruled that section 14(d) was inapplicable because "[t]hese debentures are not equity securities and they do not appear to be convertible into equity securities," but it added that the anti-fraud strictures codified in section 14(e)<sup>542</sup> would nonetheless be enforceable.<sup>543</sup>

*Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.*<sup>544</sup> limited the definition of a tender offer by excluding from the ambit of section 14(d) ordinary securities purchased on the open market even though the purchaser intended to gain control of the issuer. The district court in *Gulf & Western* refused to require a filing of a Schedule 13D when open market purchases are not made in the context of a tender offer: "It appears to this Court that the 5 percent limit included in Section 14(d) permits that amount to be purchased in the open market without regard to any subsequent tender offer."<sup>545</sup>

Thus, in defining a tender offer two approaches appear to be evolving. The SEC looks to changes in voting control of equity interests. The courts, on the other hand, examine facts evidencing the combatant

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offer." to force a shareholder into making a hurried investment decision without access to information, in circumvention of the statutory purpose.

*Id.* at 1251-52.

538. *Id.* at 1251.

539. Soon afterwards the parties vacated the suit per stipulation. Civil No. 72-152 (W.D. Okla., May 8, 1972).

540. [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,838 (SEC 1972).

541. 15 U.S.C. § 78l(g)(1) (1970). No registration under section 12(g) was needed because the issuer's common stock was held by only 25 people. [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,838, at 81,836.

542. See notes 493-95 *supra* and accompanying text.

543. [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,838, at 81,834.

544. 356 F. Supp. 1066 (S.D.N.Y.), *aff'd*, 476 F.2d 687 (2d Cir. 1973).

545. *Id.* at 1074; *accord*, Wilfred P. Cohen Foundation, Inc. v. Prevot, [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 95,057 (S.D.N.Y. 1975); Water & Wall Associates, Inc. v. American Consumer Indus., Inc., [1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,943 (D.N.J. 1973). However, the district court in *Gulf & Western* went on to enjoin temporarily the consummation of the purchase of those shares in fact governed by the tender offer regulations, and in its affirmation the Second Circuit limited its ruling to disclosure violations resulting from the actual tender offer.

nature of corporate takeovers to determine if the transaction is, in fact, a tender offer. The SEC is satisfied when there is a change in control; the courts are demanding that such a change result from "outsiders" seeking to push "insiders" out.

### C. *Standing*

Section 14(e)<sup>546</sup> is the basic statutory antifraud provision affecting tender offers, regardless of the type of security involved or whether the tender offer is subject to section 14(d) requirements.<sup>547</sup> Although it was patterned after the language of sections 10(b) and 14(a) of the 1934 Act, section 14(e) was designed to reach all facets of a tender offer. This is in contrast to section 10(b) and rule 10b-5 which are subject to the *Birnbaum* purchaser-seller limitation<sup>548</sup> and section 14(a) which is restricted to proxy solicitations containing materially misleading representations.<sup>549</sup> As have its models, however, section 14(e) has been construed to provide an implied private right of action,<sup>550</sup> although the courts rarely have given the issue the detailed consideration found in the 10b-5 and section 14(a) cases.<sup>551</sup> Problems have arisen, however, in section 14(e) cases in determining what party may properly use the federally created rights and remedies. Given the nature of a tender offer, the parties who would appear to have standing are the target and its tendering and non-tendering shareholders, as well as the tender offeror and its shareholders. The case law in this area is gradually recognizing the standing of these parties to sue for section 14(e) violations.

546. See source cited note 493 *supra*.

547. See notes 540-43 *supra* and accompanying text.

548. See note 492 *supra*.

549. No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 C.F.R. § 240.14a-9(a) (1974).

550. *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969); *H.K. Porter, Inc. v. Nicholson File Co.*, 353 F. Supp. 153 (D.R.I. 1972), *aff'd on other grounds*, 482 F.2d 421 (1st Cir. 1973).

551. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973), *rev'g* 337 F. Supp. 1128 (S.D.N.Y. 1971), *cert. denied*, 414 U.S. 910 (1973).

*Electronic Specialty Co. v. International Controls Corp.*<sup>552</sup> was the first case to deal with standing under section 14(e). When Electronic Speciality Co. (ELS) refused to merge with International Controls Corp. (ICC), ICC made a tender offer to ELS shareholders. ELS and a non-tendering shareholder responded by seeking an injunction against the merger's consummation on the ground that ICC had made allegedly misleading statements concerning its intention to make the tender offer.<sup>553</sup> The district court granted standing to ELS, the target corporation, by developing an analogy to the standing requirements that had evolved for contesting proxy solicitations under section 14 (a),<sup>554</sup> and granted standing to the non-tendering shareholder as a member of the class protected by section 14(e).<sup>555</sup> The Second Circuit, focusing on the purpose of the Williams Act to elicit full disclosure by both the target and the tender offeror for the protection of investors,<sup>556</sup> affirmed. Thus, the appellate court interpreted the need for protection by both a target and a non-tendering shareholder in the same light:

While a nontenderer suffers no immediate injury from inadequacy of price in the sense that he retains his stock, such inadequacy is likely to have a depressing effect on the market for some time and thus may hurt him if, for one reason or another, he should find it necessary or desirable to sell. Such depression may also harm the target corporation if it should wish to engage in financing or acquisitions, and a still different potential for harm to the corporation will exist where it is claimed that the offeror has evil designs on its treasury or business plans. The rights of the nontendering stockholder and the corporation thus seem sufficiently independent to give standing to both under all the provisions added to § 14.<sup>557</sup>

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552. 409 F.2d 937 (2d Cir. 1969), *aff'g in part* 295 F. Supp. 1063 (S.D.N.Y. 1968).

553. The main argument of the complaint filed by ELS was that in its tender invitation ICC had made false statements about merger plans once the tender offer was completed. 295 F. Supp. at 1066-67. For a detailed statement of the facts, see *Electronic Specialty Co. v. International Controls Corp.*, 296 F. Supp. 462 (S.D.N.Y. 1968) (denying plaintiff's motion to enjoin consummation of tender offer on condition that trial proceed at same court term; condition met four days later). See also notes 574-79 *infra* and accompanying text.

554. 295 F. Supp. at 1069-71, *citing* J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

555. *Id.* at 1072. See *Lowenschuss v. Kane*, Civil Nos. 74-2156, 74-2216 (2d Cir., filed May 27, 1975); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 576 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974).

556. 409 F.2d at 945, *citing* H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2 (1968) (legislative history of Williams Act).

557. *Id.* at 946; *accord*, *Metro-Goldwyn-Mayer, Inc. v. Transamerica Corp.*, [1969-

In *Neumann v. Electronic Specialty Co.*,<sup>558</sup> a second case arising from the same ICC-ELS tender offer, plaintiffs, non-tendering shareholders of ELS, sought damages from the target for fraudulently discouraging them from tendering their shares to ICC. ELS moved to dismiss the complaint on the ground that the 10b-5 purchaser-seller limitation<sup>560</sup> applied to private actions under section 14(e). In denying ELS's motion, the *Neuman* court held that

if the difference in the language of 10b-5 and 14(e) is relied upon to insist that 10b-5 may be invoked only by a plaintiff who consummates an actual purchase or sale while 14(e) relates specially to tender offers and protecting stockholders apart from any purchase and sale, then though the instant 10b-5 claim would have to be dismissed, the claim under 14(e) would nevertheless stand.<sup>560</sup>

In *Fabrikant v. Jacobellis*<sup>561</sup> a non-tendering shareholder was held to have standing to maintain a derivative action for damages on behalf of the target corporation against a tender offeror. The *Fabrikant* court stated that the standing criteria under the Williams Act were intended to be less restrictive than those under section 10(b) and rule 10b-5:

Under 14(e) one may, in the language of the section, qualify for its protection, by showing merely that the manipulative practices were "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."<sup>562</sup>

The court in *Dyer v. Eastern Trust & Banking Co.*<sup>563</sup> granted standing to a shareholder of a tender offeror under section 14(e), following the investor protection concept articulated in *Electronic Specialty*:

Unlike Section 10(b), Section 14(e) contains no hint of a purchaser-seller requirement . . . . Although this Court is aware of no case in which standing was granted under Section 14(e) to one in plaintiff's position, a determination that she has standing is both logical and compatible with the purpose of the statute.<sup>564</sup>

1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,471 (S.D.N.Y. 1969); *Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc.*, 307 F. Supp. 910 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 842 (2d Cir. 1970).

558. [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,591 (N.D. Ill. 1969). 559. *See note 492 supra*.

560. [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,591, at 98,705.

561. [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,686 (E.D.N.Y. 1970).

562. *Id.* at 99,018.

563. 336 F. Supp. 890 (D. Me. 1971).

564. *Id.* at 914.

The class protected by section 14(e) was further expanded when standing was granted to defeated tender offerors in *H.K. Porter, Inc. v. Nicholson File Co.*<sup>565</sup> and *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*<sup>566</sup> In *Porter*, plaintiff alleged that false and misleading statements by the management of Nicholson, the target, to its shareholders resulted in only a small percentage of Nicholson's stock being tendered. Nicholson sought to invoke the rule 10b-5 purchaser-seller requirement for standing<sup>567</sup> and additionally argued that no express or implied right of action existed for a tender offeror seeking damages from a target. The court disagreed and, after citing the portion of the legislative history relied on by the court in *Electronic Specialty*, concluded:

The expenses to which a tender offeror corporation is put in making its tender offer, only to have that offer defeated by fraud or misrepresentations by the target corporation, is of obvious concern to the offeror's shareholders. In some respects plaintiff here is acting to protect the interests of its own shareholders.

. . . Congress did not intend to favor either the offeror or the target corporation by passage of the Williams Act.<sup>568</sup>

With these precedents to guide it, the Second Circuit, in *Chris-Craft*,<sup>569</sup> extensively analyzed the standing requirements for a tender offeror under section 14(e). The court outlined four elements that give rise to standing. First, the court reasoned that by deleting the purchaser-seller language found in section 10(b) and rule 10b-5, Congress clearly intended to broaden the class of potential plaintiffs under section 14(e). Secondly, the court relied on common law tort principles, characterizing the loss incurred to Chris Craft Industries (CCI) as

interference with a "prospective advantage", such as the opportunity to purchase property, [giving] rise to a cause of action in the person in-

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565. 353 F. Supp. 153 (D.R.I. 1972), *aff'd*, 482 F.2d 421 (1st Cir. 1973). For discussion of a connected case arising out of the same tender offer, see source cited note 525 *supra* and accompanying text.

566. 480 F.2d 341 (2d Cir. 1973), *rev'g* 337 F. Supp. 1128 (S.D.N.Y. 1971), *cert. denied*, 414 U.S. 910 (1973). See generally 51 TEXAS L. REV. 1444 (1973).

567. See note 492 *supra*. This was the same argument that was unsuccessfully asserted in *Neumann v. Electronic Specialty Co.*, [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,591 (N.D. Ill. 1969). See text accompanying notes 558-60 *supra*.

568. 353 F. Supp. at 164.

569. 480 F.2d 341 (2d Cir. 1973), *rev'g* 337 F. Supp. 1128 (S.D.N.Y. 1971), *cert. denied*, 414 U.S. 910 (1973).

jured where the means of interference adopted alone is unlawful, even though the purpose in itself may be justifiable. . . . CCI therefore probably could state a claim for relief in most state courts against each of the defendants for tortious interference.<sup>570</sup>

Thirdly, the court stated that since standing had been recognized in targets, tender offerors should be afforded similar protection as a matter of equity. Finally, the court felt that the clear implication of earlier decisions necessitated the extension of standing rights under section 14(e) to defeated tender offerors, for their financial stake in the outcome is easily equal to that of target corporations.

*Washburn v. Madison Square Garden Corp.*<sup>571</sup> is the only case to date that expressly discusses a denial of standing under section 14(e). Plaintiff initiated suit on the basis of shareholdings in a corporation whose wholly-owned subsidiary had substantial holdings in a third corporation, the target of a tender offer. When the parent corporation expended large sums to drive up the target's market price, the shareholder alleged that she was injured by the costs of successfully defeating the tender offer. In dismissing the shareholder's section 14(e) claim, the *Washburn* court ruled that her position in relation to the target was too attenuated to warrant a finding that she had standing:

[The shareholder] was not the target of any tender offer or solicitation, nor is there any specification of false or misleading statements in the alleged tender offer made to Roosevelt shareholders. Plaintiff, of course, has no standing to represent the Roosevelt shareholders, and therefore has no standing to sue under 14(e) in this action.<sup>572</sup>

Thus, in defining standing criteria for the enforcement of rights protected under the Williams Act, the courts have been guided by the interpretations given to the two other 1934 Act sections designed to promote investor protection. This reliance has resulted in the incorporation of the doctrine that there is an implied private right of action arising under a federally created statute, as well as an overall purpose of investor protection. This doctrine has led courts to grant standing to persons vulnerable to immediate economic injury as a result of a tender offer, namely, target corporations and their tendering and non-

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570. *Id.* at 360, citing W. PROSSER & Y. SMITH, CASES AND MATERIALS ON TORTS 1131-52 (1967).

571. 340 F. Supp. 504 (S.D.N.Y. 1972).

572. *Id.* at 509.

tendering shareholders, and tender offerors and their shareholders. The articulated criteria are based on a clear economic analysis of the nature of tender offers; thus the courts have effectuated Congress' stated purpose of closing a "gap" in federal securities regulation.<sup>573</sup>

#### D. Disclosure Violations

Item 4 of Schedule 13D, which requires disclosure of the "purpose of transaction,"<sup>574</sup> has been the major point of contention in the cases interpreting the disclosure standards under section 14(e). The first appellate-level interpretation of this requirement was in *Electronic Specialty Co. v. International Controls Corp.*<sup>575</sup> ELS sought to enjoin<sup>576</sup> ICC, a successful tender offeror, from voting the acquired stock and thus alleged, *inter alia*, that ICC failed to disclose that it had "a fixed and definite plan to merge the target and the offeror on a so-called 'share-for-share' basis."<sup>577</sup> The Second Circuit disagreed; in holding

573. See note 492 *supra*. See generally Comment, *Tender Offers: An Analysis of the Early Development of Standing to Sue Under Section 14(e)*, 5 TEXAS TECH. L. REV. 779 (1974); Comment, *Tender Offers: The Liberalization of Standing Requirements Under Section 14(e)*, 7 U. SAN FRANCISCO L. REV. 561 (1973).

574. 17 C.F.R. § 240.13d-101 (1974):

*Item 4. Purpose of transaction*

State the purpose or purposes of the purchase or proposed purchase of securities of the issuer. If the purpose or one of the purposes of the purchase or proposed purchase is to acquire control of the business of the issuer, describe any plans or proposals which the purchasers may have to liquidate the issuer, to sell its assets or to merge it with any other persons, or to make any other major change in its business or corporate structure, including, if the issuer is a registered close-end investment company, any plans or proposals to make any changes in its investment policy for which a vote would be required by section 13 of the Investment Company Act of 1940 (15 U.S.C. 80a-13).

575. 409 F.2d 937 (2d Cir. 1969), *aff'g in part* 295 F. Supp. 1063 (S.D.N.Y. 1968). See also notes 552-57 *supra* and accompanying text.

576. Generally, in order to obtain a preliminary injunction, the plaintiff must show irreparable harm and the likelihood that he will prevail on the merits. See *e.g.*, *Rondeau v. Mosinee Paper Corp.*, 43 U.S.L.W. 4768 (June 17, 1975); *Lowenschuss v. Kane*, Civil Nos. 74-2156, 74-2216 (2d Cir., filed May 27, 1975); *Sonesta Int'l Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973); *Jewelcor, Inc. v. Pearlman*, [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 95,096 (S.D.N.Y. 1975); *Commonwealth Oil Refining Co. v. Tesoro Petroleum Corp.*, [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 95,081 (S.D.N.Y. 1975); *Scott v. Multi-Amp Corp.*, 386 F. Supp. 44 (D.N.J. 1974).

577. The Company (ICC) intends through this Offer to acquire control of Specialty. It does not presently have any plans or proposals to liquidate Specialty, to sell its assets or merge it with any persons (other than the Company or its subsidiaries), or to make any other change in its business or corporate struc-

that ICC had satisfactorily informed investors of the possibility of merger, the court noted: "It would be as serious an infringement of these regulations to overstate the definiteness of the plans as to understate them."<sup>578</sup> The court outlined the relevant considerations in determining the adequacy of disclosure and the standards of materiality as follows:

The likeness of tender offers to proxy contests is not limited to the issue of standing. They are alike in the fundamental feature that they generally are contests. This means that the participants on both sides act, not "in the peace of a quiet chamber" . . . but under the stresses of the market place. They act quickly, sometimes impulsively, often in angry response to what they consider, whether rightly or wrongly, to be low blows by the other side. Probably there will no more be a perfect tender offer than a perfect trial. Congress intended to assure basic honesty and fair dealing, not to impose an unrealistic requirement of laboratory conditions that might make the new statute a potent tool for incumbent management to protect its own interests against the desires and welfare of the stockholders. These considerations bear on the kind of judgment to be applied in testing conduct—of both sides—and also on the issue of materiality. As to this we reaffirm the test announced in *Symington Wayne [Corp. v. Dresser Industries, Inc.]*, 383 F.2d 840, 843 (2d Cir. 1967)], whether "any of the stockholders who tendered their shares would probably not have tendered their shares" if the alleged violations had not occurred.<sup>579</sup>

In *Metro-Goldwyn-Mayer, Inc. v. Transamerica Corp.*<sup>580</sup> the target successfully enjoined a tender offer before its consummation on the basis of information disclosed in Item 3 of Schedule 13D filed pursuant to section 14(d).<sup>581</sup> Item 3 reveals the "source and amount of

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ture, except that it intends to continue Specialty's stated plans to sell its Space Conditioning Division and will consider the possible liquidation or sale of any other unprofitable divisions. Upon completion of this Offer the Company will give consideration to a merger between itself or a subsidiary and Specialty.

295 F. Supp. at 1079-80, quoting ICC tender offer advertisement, Wall Street J., Aug. 19, 1968, at 15.

578. 409 F.2d at 948.

579. *Id.* *Symington Wayne* is a pre-Williams Act tender offer case illustrating the problems of reliance on rule 10b-5 for tender offer regulation. *General Time Corp. v. Talley Indus., Inc.*, 403 F.2d 159 (2d Cir. 1968), also cited by the *Electronic Specialty* court, held, *inter alia*, that an omission in a proxy statement concerning the holdings of a challenger to incumbent management did not constitute a section 14(a) violation. Defendant corporation had engaged in a proxy fight in an attempt to acquire or merge with the plaintiff corporation.

580. [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,471 (S.D.N.Y. 1969).

581. See notes 497-98 *supra*.



funds" used to finance the tender offer; in this case, the information suggested antitrust and Regulation T and G violations.<sup>582</sup> The court in *Metro-Goldwyn-Mayer*, however, refused to require the tenderor, who had stated an intention to obtain working control of the target, to reveal how it would obtain control even though it did not know who would provide the financing, since such "disclosure" would only be speculation.<sup>583</sup>

*Susquehanna Corp. v. Pan American Sulphur Co.*<sup>584</sup> interpreted the purpose disclosure provisions of Item 4 of Schedule 13D in a manner similar to that propounded by the Second Circuit in *Electronic Specialty* on essentially the same facts.<sup>585</sup> The court in *Susquehanna* held that the tenderor's statement that it hoped to acquire working control of the target and to run it as a subsidiary was adequate. The plaintiff asserted that the tenderor's failure to state that it planned to vote its holdings to elect a majority of the directors at the next shareholder's meeting constituted a violation of section 14(e). Disagreeing, the court reasoned that no further statement was required because control can generally be assumed to be exercised by the board of directors. Moreover, the court ruled that *Susquehanna's* statement in its Schedule 13D that it might ultimately seek a merger if its tender offer succeeded

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582. These allegations were made in the course of two hearings, reported at 303 F. Supp. 1344 (S.D.N.Y. 1969) and [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,471 (S.D.N.Y. 1969).

583. 303 F. Supp. 1344, 1353 (S.D.N.Y. 1969).

584. 423 F.2d 1075 (5th Cir. 1970).

585. *Susquehanna's* amended answer to Item 4 of Schedule 13D read as follows:

Pan American had 4,751,342 shares of common stock issued and outstanding as of October 31, 1968. *Susquehanna* through its offer intends to purchase 1,800,000 shares at \$40 per share, which, if acquired, should in the opinion of *Susquehanna's* Management, give *Susquehanna* working control of Pan American. If control is achieved, it is contemplated that the business of Pan American will be conducted as a subsidiary of *Susquehanna* serving as its natural resources arm.

*Susquehanna* does not plan or propose to liquidate Pan American, to sell its assets to, or merge it with, any other person, or to make any other major change in its business or corporate structure. However, if, at some subsequent time, it should appear the interests of the Pan American stockholders would be better served by any of the foregoing courses of action, *Susquehanna* may propose or adopt such course.

*Susquehanna* does not intend to purchase any shares of Pan American other than pursuant to this Offer during the period of this Offer, or any extension thereof. However, at any time after the expiration of this Offer, or any extension thereof, *Susquehanna* reserves the right to purchase shares of Pan American over the New York Stock Exchange, or otherwise.

*Id.* at 1082.

was sufficient disclosure,<sup>586</sup> thereby avoiding a holding that would require a tender offeror to "walk a tortuous path" so long as it was "careful not to delineate extravagantly or to enlarge beyond reasonable bounds."<sup>587</sup>

In *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.*,<sup>588</sup> the Second Circuit affirmed a preliminary injunction against Gulf & Western's consummation of its tender offer. In holding that Gulf & Western's tender invitation had omitted material information in violation of section 14(e),<sup>589</sup> the court stated that the test to be applied was whether the information omitted was "of such significance that the tendering shareholders would have weighed [it] in their decision whether or not to sell."<sup>590</sup> The court admitted evidence of Gulf & Western's prior business practices vis-a-vis its acquisitions. This evidence was used to determine whether Gulf & Western's failure to state that it intended to participate actively in A & P's management was a material omission.<sup>591</sup>

The Second Circuit had a further opportunity to refine section 14(e) disclosure standards in *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*<sup>592</sup> At the end of a bitterly contested tender offer, CCI, the of-

586. It should be obvious to even the uninitiated that when a corporation takes over control of another corporation having \$60,000 in cash assets, some kind of change in the latter's business or corporate structure will likely occur some time in the future. Susquehanna provided for this possibility by that portion of its Item 4 response above quoted.

*Id.* at 1085.

587. *Id.* The court cited Judge Friendly's opinion in *Electronic Specialty*, discussed in the text accompanying notes 574-79 *supra*, with approval and went on to state:

Though the offeror has an obligation fairly to disclose its plans in the event of a takeover, it is not required to make predictions of future behavior, however tentatively phrased, which may cause the offeree or the public investor to rely on them unjustifiably.

*Id.* at 1085-86.

588. 476 F.2d 687 (2d Cir.), *aff'g* 356 F. Supp. 1066 (S.D.N.Y. 1973).

589. The allegedly material information omitted was statements about:

(1) G&W's intention to acquire a controlling position in A&P or at least to exercise influence over A&P's management and policies; and

(2) G&W's holdings in other companies which indicate that G&W's acquisition of A&P stock is likely to result in violations of the antitrust laws by both companies.

*Id.* at 695.

590. *Id.* at 696. See *Commonwealth Oil Ref. Co. v. Tesolo Petroleum Corp.*, [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 95,081 (S.D.N.Y. 1975) (information that reasonable investor might consider important).

591. *Id.* at 696-97.

592. 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

feror, was left in a minority position after an expenditure of \$44 million. As a defensive tactic against CCI's takeover bid,<sup>593</sup> Piper's management had helped arrange and actively supported a competing tender invitation by Bangor Punta Corporation (BPC). In a suit brought by CCI for damages and an injunction against the voting of stock acquired by the two offerors,<sup>594</sup> the district court had held that both scienter and causation must be proved to sustain an allegation of section 14(e) violations. Additionally, the district court refused to hold the underwriter liable for its client's misconduct, absent fraudulent conduct of its own. In reversing both holdings, the Second Circuit awarded damages to CCI<sup>595</sup> and enjoined BPC from voting its holdings in Piper for five years. The opinion meticulously analyzed the appropriate standards for assessing section 14(e) violations. Expressly following the fraud standards that had evolved under rule 10b-5, the *Chris-Craft* court held that

a violation of § 14(e) is shown when there has been a material misstatement or omission concerned with a tender offer and when such misstatement or omission was sufficiently culpable to justify granting relief to the injured party. The key concepts in this formulation are *materiality* and *culpability*.<sup>596</sup>

Echoing the language in its decision in *Gulf & Western*, the court continued:

The concept of materiality focuses on the weightiness of the misstated

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593. For a discussion of the merits of alternative defense tactics, see ARANOW & EINHORN 219-76; Bradshaw, *Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers*, 21 STAN. L. REV. 1104 (1969); Hayes & Taussig, *supra* note 479; Kelly, *Some Observations on Contested Take-Over Bids*, 15 N.Y.L.F. 619 (1969); Kennedy, *Defensive Take-Over Procedures Since the Williams Act*, 19 CATH. U.L. REV. 158 (1969); Mullaney, *Guarding Against Takeovers—Defensive Charter Provisions*, 25 BUS. LAW. 1441 (1970); Schmults & Kelly, *supra* note 484.

594. This complex litigation began in 1969 when CCI's motion for a preliminary injunction against BPC was denied at both the district and circuit court levels. See *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 303 F. Supp. 191 (S.D.N.Y. 1969), *aff'd sub nom. Chris-Craft Indus., Inc. v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970) (en banc). The Second Circuit, however, remanded the case for further proceedings on defendant's alleged securities laws violations, leading to the decision on which this appeal was based. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973), *rev'g* 337 F. Supp. 1128 (S.D.N.Y. 1971), *cert. denied*, 414 U.S. 910 (1973).

595. The basic formula used to measure damages was the reduction in the appraisal value of CCI's holdings in Piper because CCI now only held a minority interest due to BPC's fraudulent conduct. 480 F.2d at 380.

596. *Id.* at 362 (emphasis original; footnote omitted).

or omitted fact in a reasonable investor's decision to buy or sell. . . .

. . . .

As for the concept of culpability, intent to defraud is not an indispensable element in a private action under Rule 10b-5; knowledge of falsity or reckless disregard for the truth may be sufficient.<sup>597</sup>

The Second Circuit also disagreed with the district court's requirement that both scienter and causation be established:

In sum, and put as simply as possible, the standard for determining liability under § 14(e) on the part of a person making a misleading tender offer, or a responsible officer of a corporation making such an offer, is whether plaintiff has established that defendant either (1) knew the material facts that were misstated or omitted, or (2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort.<sup>598</sup>

The materiality and culpability criteria articulated in *Chris-Craft* have been applied in subsequent opinions. First, in *General Host Corp. v. Triumph American, Inc.*<sup>599</sup> a target's request for a preliminary injunction to restrain further solicitation of shares and consummation of a tender offer was granted. The court held that the foreign tender offeror's failures to state both its intentions concerning liquidation of the target's assets after the tender offer was completed and the applicability of foreign government controls were sufficient omissions to warrant injunctive relief. Also, the court in *Cauble v. White*<sup>600</sup> found that both sides had violated sections 14(d) and (e), under the standards established in *Chris-Craft*, when the offeror failed to disclose its intention to remove the target's president and the target misrepresented the potential value of the stock of the company. The court ordered the parties to begin their respective takeover attempts and defenses anew.

The facts in *Ronson Corp. v. Liquifin Aktiengesellschaft*<sup>601</sup> involved a highly publicized attempted takeover of Ronson by a foreign corporation. Ronson had been granted a preliminary injunction based

597. *Id.* at 362-63.

598. *Id.* at 364. See *Scott v. Multi-Amp Corp.*, 386 F. Supp. 44, 55 (D.N.J. 1974) (inadvertant failure to file schedule 13D alone and without intent to violate law or conceal important facts does not authorize injunctive relief).

599. 359 F. Supp. 749 (S.D.N.Y. 1973).

600. 360 F. Supp. 1021 (E.D. La. 1973).

601. 370 F. Supp. 597 (D.N.J.), *aff'd*, 497 F.2d 394 (3d Cir.) (per curiam), *cert. denied*, 419 U.S. 870 (1974).

on Liquifin's failure to disclose adequately the tenderor's identity, the methods used to fund the offer, the effect of foreign laws on the offer, and the federal administrative problems involved.<sup>602</sup> In denying Ronson's motion for a permanent injunction, the court held that Liquifin's substantial amendments to its Schedule 13D satisfied section 14(e) requirements. The court cited *Chris-Craft* with approval and did not attempt further definition of the materiality and culpability standards applicable to section 14(e).

Thus, in establishing disclosure standards for compliance with the Williams Act, the courts apply the materiality and culpability standards that originated in interpretations of rule 10b-5 and were further developed to gauge proxy solicitation violations under section 14(a). It appears sufficient that an omitted or misstated fact merely has a propensity to affect investor decisions, an easier burden of proof for an injured party to meet than scienter and actual causation. In establishing these standards the courts, as in the case of standing criteria, view the Williams Act as affording greater investor protection by closing a "gap" in federal securities regulation.<sup>603</sup>

### E. Conclusion

A tender invitation constitutes notice that there is an attempt to effectuate a corporate takeover. If the incumbent management agrees that the tender offer is in the target corporation's best interests, the tender offer mechanisms of the Williams Act map out the progression for a successful takeover.<sup>604</sup> When the incumbent management opposes the plan of a tender offeror, the disclosure requirements of the Williams Act are invoked by alleging fraudulent conduct violative of the securities laws.<sup>605</sup> Thus, all litigation pleading Williams Act violations essentially concerns the materiality of disclosures for a particular transaction, subject to the limitation that a tender offer has, in fact, been made.<sup>606</sup> Within the context of the federal securities laws, the target companies generally challenge the adequacy of the disclosure of the purpose of a tender offer<sup>607</sup> and its financing.<sup>608</sup> Due to the complexi-

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602. 483 F.2d 846 (3d Cir. 1973).

603. See note 492 *supra*.

604. See D. AUSTIN & J. FISHMAN, *supra* note 479. See also notes 496-98 *supra*.

605. See notes 493-98 *supra* and accompanying text.

606. See notes 530-45 *supra* and accompanying text.

607. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973), *rev'g* 337 F. Supp. 1128 (S.D.N.Y. 1971), *cert. denied*, 414 U.S. 910 (1973); *Susquehanna Corp. v. Pan Am. Sulphur Co.*, 423 F.2d 1075 (5th Cir. 1970); *Electronic Spe-*

ties of today's business arrangements, non-securities law issues are also argued when appropriate in a particular factual context.<sup>600</sup>

In an increasingly multinational business world, and in view of the annual rise in the number of tender offers made by other domestic and foreign persons,<sup>610</sup> the regulation of tender offers should be regularly reviewed for possible revisions to accommodate emergent business realities. The Williams Act itself was initially a response to a then-unregulated business trend,<sup>611</sup> as the world of business takeovers becomes more sophisticated, Congress is constantly challenged to maintain its much-vaunted goals of investor protection and confidence in the nation's securities markets.

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cialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969), *aff'd in part* 295 F. Supp. 1063 (S.D.N.Y. 1968); General Host Corp. v. Triumph Am., Inc., 359 F. Supp. 749 (S.D.N.Y. 1973); Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 356 F. Supp. 1066 (S.D.N.Y.), *aff'd*, 476 F.2d 687 (2d Cir. 1973).

608. Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973), *rev'g* 337 F. Supp. 1128 (S.D.N.Y. 1971), *cert. denied*, 414 U.S. 910 (1973); Ronson Corp. v. Liquifin Aktiengesellschaft, 370 F. Supp. 597 (D.N.J.), *aff'd* 497 F.2d 394 (3d Cir.) (per curiam), *cert. denied*, 419 U.S. 870 (1974); Metro-Goldwyn Mayer, Inc. v. Transamerica Corp., [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,471 (S.D.N.Y. 1969).

609. Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 356 F. Supp. 1066 (S.D.N.Y.), *aff'd*, 476 F.2d 687 (2d Cir. 1973) (antitrust violations). When alleging that antitrust violations would result if a particular tender offer were consummated, such a violation must be premised on very clear antitrust principles. *See Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *rev'g* 375 F. Supp. 249 (S.D.N.Y. 1974) (alleged Clayton Act violations due to proposed merger between cement manufacturer and grain trader deemed too speculative to warrant injunctive relief); General Host Corp. v. Triumph Am., Inc., 359 F. Supp. 749 (S.D.N.Y. 1973); Ronson Corp. v. Liquifin Aktiengesellschaft, 370 F. Supp. 597 (D.N.J.), *aff'd* 497 F.2d 394 (3d Cir.) (per curiam), *cert. denied*, 419 U.S. 870 (1974) (effect of foreign law).

610. *See* Wall Street J., Sept. 10, 1974, at 3, col. 3.

611. *See* note 492 *supra*.