PROPOSED LEGISLATION TO CLOSE THE 13(d) WINDOW

Congress adopted the Williams Act[1] in 1968 for the broad remedial purpose of protecting shareholders in contests of corporate control.[2] While a majority of the Act addresses stock acquisition by means of a tender offer,[3] section 13(d) of the Act requires disclosure regardless of the method of acquisition.[4] Section 13(d) requires any person who acquires more than five percent of a security registered under section 12 of the Securities Act to disclose certain information within ten days of achieving five percent ownership.[5] The dual purpose of section 13(d) is to alert shareholders to any rapid accumulation of securities that may signal a potential change in control and to provide them with the infor-

1. The Williams Act added tender offer provisions, sections 14(d),(e), and (f) to the Securities Exchange Act of 1934. 15 U.S.C. §§ 78n(d)-(f)(1986). Additionally, the Williams Act added sections 13(d) and (e) which govern acquisitions by methods other than the tender offer. 15 U.S.C. §§ 78m(d)-(e) (1986).

2. Piper v. Chris-Craft Indus., 430 U.S. 1, 22-35 (1977); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1974). Investors are protected by the disclosure and antifraud provisions.

3. A tender offer normally consists of a bid by an individual or group to buy the shares of a company at a premium, usually above the market price. H.R. REP. NO. 1711, 90th Cong., 2d. Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811 [hereinafter H.R. REP. NO. 1711].

4. 15 U.S.C. § 78m(d) (1986).

5. Section 13(d)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d)(1)(1986) provides in pertinent part:

> Any person who, after acquiring directly or indirectly acquiring the beneficial ownership of any equity security . . . is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, by registered 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. . . .

The required disclosure includes information identifying the acquirers, the source of financing, the size of the acquirers' shareholdings, arrangements with other persons with respect to the securities, the purpose of the acquisition, and any plans or proposals to make major changes in the company being acquired. 15 U.S.C. § 78m(d)(1)(A)-(E)(1986). Section 13(d) exempts from disclosure, *inter alia*, de minimis purchases of 2 percent of all outstanding stock within 12 months and acquisitions which the Commission exempts because the purchases do not influence control. 15 U.S.C. § 78m(d)(6)(1986).

Section 13(d), as initially enacted in 1968, imposed disclosure requirements upon the acquisition of 10 percent of an equity security. In 1970, the threshold level was lowered to five percent to provide for a more meaningful level of disclosure. The reduction was a response to open market purchases of eight or nine percent which permitted the acquirer to avoid the disclosure requirements of 13(d). H.R. REP. NO. 91, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5025, 5027. *See generally* Brown, *The Scope of the Williams Act and Its 1970 Amendment*, 26 BUS. LAW. 1637 (1971).

mation necessary to evaluate the worth of their securities when a potential for change in control occurs.[6]

At first blush, Congress' rationale for enacting mandatory disclosure provisions as well as for distinguishing between the requirements of sections 13(d) and 14(d) appears legitimate.[7] This Development, however, suggests that the assumptions upon which the disclosure provisions and the aforementioned distinction are based are, in fact, faulty. Congress should re-evaluate the purposes that the Williams Act serves after examining the practical effect that disclosure requirements and differentiations between tender offer and non-tender offer transactions have on stock purchases. This Development suggests that Congress should repeal the Williams Act disclosure provisions in their entirety, as empirical evidence suggests that shareholders do not benefit from or take advantage of disclosure. Because, however, Congress likely will not take such drastic measures this Development suggests that Congress should at least eliminate the distinction between sections 13(d) and 14(d) by narrowing or closing the 13(d) window in light of a dramatic change in the market for corporate securities.

The Williams Act incorporates Congress' philosophy that mandatory disclosure is beneficial to shareholders. Economic analysis indicates, however, that shareholders seeking protection under the provisions of the Williams Act do not in fact benefit from mandatory disclosure. Efficiency dictates that Congress repeal the Williams Act disclosure provisions.

Empirical evidence demonstrates that target shareholders gain financially from corporate takeovers as do bidding shareholders.[8] Thus, takeovers produce net positive gains to shareholders as a group.[9]

6. *See* G.A.F. Corp. v. Milstein, 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); H.R. REP. No. 1711, *supra* note 3, at 2818; Comment, *Section 13(d) and Disclosure of Corporate Equity Ownership*, 119 U. PA. L. REV. 853, 865-66 (1971).

7. The Act, as originally adopted, was "not aimed at obstructing *legitimate* takeover bids." 113 CONG. REC. 854 (1967) (remarks of Sen. Williams). It was only intended to prevent a corporation from being "financially raped without management or shareholders having any knowledge of the acquisitions." *Id.* at 857 (statement of Sen. Kuchel). The 1970 amendment was aimed only at the prevention of eight and nine percent purchases as a means of avoiding the Act's requirements. 116 CONG. REC. 5027 (1970). *See supra* note 5.

8. *See* Jensen & Ruback, *The Market for Corporate Control: The Evidence*, 11 J. FIN. ECON. 5, 9-22 (1983) (On the average, target shareholders gain 29% and bidder shareholders gain 4%); Jarrell & Bradley, *The Economic Effects of Federal and State Regulations of Cash Tenders Offers*, 23 J. LAW & ECON. 371, 371-403 (1980).

9. *See supra* note 8.

Additionally, a market for corporate control provides a check on inefficient management,[10] primarily through the efficient allocation of resources.[11] Corporate takeovers, therefore, provide benefits to society[12] as well as financial benefits to both bidding and target shareholders.

Takeover regulations operate to deter beneficial business combinations in several ways. First, the imposition of securities regulations that govern takeovers through mandatory disclosure provisions decreases the profitability of a takeover by artificially raising the price of shares.[13] Takeover regulations have the same economic effect as the imposition of a tax on takeovers.[14] An increase in the price reduces the quantity of takeovers attempted. Thus, takeover regulations impose a social cost in the form of foregone valuable corporate combinations.[15]

Second, requiring advance disclosure of potential takeovers creates two types of free rider problems[16] by permitting information known to the potential acquirer to become public knowledge. Information concerning the precise source of gain from a corporate combination is the would-be public good.[17] The potential acquirer only has incentive to

10. Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

11. *See* Gilson & Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549. *But see* Gordon & Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. REV. 761 (1985) (markets are not as efficient as once thought).

12. *See generally* Easterbrook & Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984). *But cf.* Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1445, 1167-1173 (1984) (explaining the empire building and exploitation hypotheses as possible purposes for corporate takeovers).

13. *See* Jensen & Ruback, *supra* note 8, at 28 (federal regulation increases premiums to target shareholders by 20%); Jarrell & Bradley, *supra* note 8, at 372; Crock, *SEC Seeks Takeover Rule Changes to End Controversy, Could Increase Firms' Costs*, Wall St. J., Feb. 20, 1980, at 2, col. 3.

14. Jarrell & Bradley, *supra* note 8, at 373.

15. *Id. But see* Jensen & Ruback, *supra* note 8, at 29 (raising transactions costs simply truncates the distribution of takeovers).

16. A free rider is someone who obtains a benefit for which another has paid. Free rider problems often occur with respect to public goods. Public goods are products which can be used by many parties without decreasing their value. For example, public television is a public good because its value is not decreased by an additional person watching. Thus, a free rider is someone who, for example, watches PBS without contributing to the cost of its broadcast. *See* Jarrell & Bradley, *supra* note 8, at 372-73.

17. *Id.* Proponents of disclosure mandates agree that the information is like a public good in nature. They assert that because of its public nature, mandatory disclosure is necessary to increase the quality and amount of information available. Proponents further argue that the excessive search for information in pursuit of trading gains creates a social waste. *See* Coffee, *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717 (1984).

search for information that would lead him to economic gain if he knows the information will not be shared with others. Section 13(d) forces the potential acquirer to purchase, theoretically, the remaining ninety-five percent of a target corporation's stock. This diminishes the benefits that would accrue to the potential acquirer who obtained information. Because section 13(d) destroys incentives to search for information, less information that would lead to valuable corporate combinations and a more efficient allocation of resources will be discovered.

Moreover, to the extent that disclosure decreases the probability that an aquirer will wage a successful takeover by attracting bidders who use the acquirer's information, fewer initial bids will be made. Thus, although disclosure requirements may facilitate auctioning, their usefulness is negated by their chilling effect upon bids.[18]

Third, disclosure requirements may be economically wasteful. Empirical evidence indicates that security prices reflect information already contained in SEC filings prior to the disclosure's filing date under section 13(d).[19]

Finally, evidence indicates that regulations increase the returns to target shareholders at the expense of bidding shareholders.[20] Congress designed the Act to shift the gain to target shareholders by affording them protection not found on the market. This regulatory shift, however, harms shareholders, who as a group typically hold diversified portfolios. Because shareholders do not know in advance whether the shares they hold are target or bidder shares, they should prefer a rule that maximizes the number of takeovers because they receive a higher price for their shares. *Ex ante* shareholders benefit the most from a rule that maximizes the incentive to bid on shares and take over corporations.[21] Thus, mandatory disclosure harms shareholders despite the Williams Act's attempt to protect them.

One could argue that the pressure of increases in the returns which target shareholders receive indicates that disclosure requirements prevent shareholder prisoners' dilemma[22] by providing shareholders with time

18. *See* Banoff, *The Securities Commission's Takeover Proposals: A "Law and Economics" Perspective*, 2 CANTERBURY L. REV. 299, 300-01 (1985).

19. Gilson & Kraakman, *supra* note 11, at 638. But disclosure requirements do reduce the cost of acquiring the information and, thus, benefit informed traders. *Id.*

20. Jensen & Ruback, *supra* note 8, at 29.

21. *See* Banoff, *supra* note 18, at 300-01; Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

22. Prisoners' dilemma refers to a situation where two parties, who are unable to collectivize

during which they may collectivize their actions.[23] The increased activity of intermediaries in the market,[24] however, results in arbitrageurs, for example, buying the stock of target corporations and, thereafter, tendering the shares to bidders.[25] The large concentrations of stock in the hands of arbitrageurs (and institutional investors) gives them the bargaining power that prevents a prisoners' dilemma.[26] One of the arbitrageur's primary roles in the market is to shoulder the risk that a tender offer will be unsuccessful.[27] The competition between arbitrageurs provides a mechanism that transfers a large portion of the economic gains to target shareholders.[28] Although shareholders' financial interests often conflict with the financial interests of intermediaries, the two interests do not diverge to the same extent that shareholders' interests diverge from an entrenched management's interests. Thus, although the prisoners' dilemma may have provided a rationale for disclosure requirements in 1968, the new market of intermediaries nullifies that concern.

The Williams Act disclosure requirements as they now exist are inefficient. Simply narrowing the 13(d) window would only compound the

their action, would both be better off if they could act jointly. The term is derived from a hypothetical situation involving two criminal co-conspirators. A prosecutor places the two prisoners in separate rooms where they are unable to communicate. The prosecutor cannot prove the crime without a confession from one of the offenders. The prosecutor offers each prisoner the following deal: if you confess, you will only get two years, but if you do not confess and your partner does, you will get ten years. Unable to collude, each prisoner confesses and they serve a total of four years. Had the prisoners been able to act jointly, however, neither would have confessed and both would have been set free. Graphically, this dilemma may be characterized as follows:

A,B	A confesses	A does not confess
B confesses	2, 2	10, 2
B does not confess	2, 10	0, 0

Shareholders are faced with prisoners' dilemmas when they must choose between selling at a price which they consider inadequate or remaining a minority shareholder and being squeezed out. If the shareholders act jointly they can command a higher price and, therefore, avoid the prisoners' dilemma.

23. Shareholders can avoid the prisoners' dilemma by adopting defensive measures such as supermajority provisions.

24. *See infra* note 36 and accompanying text for a discussion of this change in the market.

25. *See* Securities and Exchange Commission Response to Congressman Wirth's Letter of January 25, 1985 Concerning Tender Offers, *reprinted in 1985 Hearings*, *infra* note 34, at 453-54.

26. "Institutions often have the resources and market expertise to develop sophisticated investment strategies. These attributes place institutional investors in a position, if they so desire, . . . to prevent steps they believe would adversely affect the company." *Id.* at 451.

27. *Id.* at 454-55. Additionally, the arbitrageur provides liquidity and assumes the risk of proration. *Id.*

28. *Id.*

existing inefficiencies. Requiring disclosure before a takeover offer increases the cost of takeover because the bidder must fend off other suitors and battle with incumbent management for a longer time period. Early disclosure also decreases the incentive for potential acquirers to seek information because the finder must share the information prematurely. This, in turn, results in fewer takeover attempts. Thus, inefficient management will be further protected from takeover attempts which results in an efficient allocation of capital.

Because Congress will not, in all likelihood, repeal the disclosure provisions in the Williams Act, Congress should at a minimum delineate the distinction drawn between section 13(d) and section 14(a) transactions. The distinction between the regulation of tender offers and other methods of acquisition represented a deliberate and careful Congressional decision.[29] Section 13(d), as originally introduced in Congress, provided for pretransaction disclosure similar to that required by 14(d) for tender offers for all methods of acquisition.[30] Later, in response to suggestions made by the Securities and Exchange Commission, Congress modified section 13(d) of the bill to apply only to tender offers.[31] The current Act incorporates this modification and requires pretransaction disclosure only for section 14(d) tender offers.[32] Congress reasoned that "disclosure after the transaction avoids upsetting the free and open auction negotiations between market where buyer and seller normally do not disclose the extent of their interest and avoids prematurely disclosing the terms of privately negotiated transactions."[33]

Since 1980, Congress and the SEC have considered various proposals that would narrow the 13(d) ten-day "window" period between five percent acquisition and the 13(d) filing requirements.[34] Narrowing the win-

29. *See* Fogelson, Wenig & Friedman, *Changing the Takeover Game: The Securities and Exchange Commission's Proposed Amendments to the Williams Act*, 17 HARV. J. ON LEGIS. 409, 427 (1980).

30. 112 CONG. REC. 19,003-06 (1966).

31. *Id.*

32. 113 CONG. REC. 854, 856 (1967). Section 14(d) requires disclosure by any person launching a tender offer which, if consummated, would raise her ownership above the 5% threshold. 15 U.S.C. § 78n(d)(1) (1986).

33. 113 CONG. REC. 854, 856 (1967).

34. *See* 542 SEC. REG. & LAW REP. (Feb. 27, 1980) (SEC asked Congress to enact proposals that would require 5 percent purchasers to disclose the purchase within one day and to prohibit any further purchases by the person or company until filing requirements were met); H.R. 2669, 100th Cong., 1st Sess. (1987) (filing by noon of next business day); *Takeover Tactics and Public Policy: Hearings on H.R. 2371, H.R. 5250, H.R. 5693, H.R. 5694, H.R. 5696, H.R. 5697 Before the Sub-*

dow would bring more non-tender offer transactions under the requirements of the Williams Act. The proposed legislation would subject previously unregulated, non-tender offer transactions, made within ten days of the initial five percent acquisition, to section 13(d) disclosure requirements. Furthermore, narrowing the 13(d) window would erode the distinction that the drafters established between pre-acquisition and post-acquisition disclosure.[35] The increasing role of market intermediaries, such as institutional investors and arbitrageurs, and the large concentration of shares that they hold may negate the purposes for which the 13(d)/14(d) distinction was created.[36]

Congress intended section 13(d) to alert shareholders to any potential change in control, which would be evidenced by a rapid accumulation of stock via the open market and privately negotiated purchases. Shareholders are put on notice so that they can reevaluate their stock with the knowledge that it may be the subject of a contest for corporate control.[37] At present, section 13(d) does not provide offerees in non-tender offer transactions with advance notice to permit shareholders to counter the pressure that accompanies the rapid acquisition of stock. Apparently, Congress assumed that a suitor would not acquire control during the ten-day window period. Notice of the potential for a change in control, if received after the occurrence of the change, is valueless.

By comparison, Congress intended section 14(d) to provide shareholders whose stock is the subject of an attempt to gain control by tender offer with sufficient knowledge to make an informed decision as to whether to sell.[38] To provide this knowledge, Congress requires that

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comm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess. 25-26 (1984) (immediate public announcement and next day filing); *Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 418-23 (1985) [hereinafter *1985 Hearings*] (filing within two days; Ingersoll, *SEC Seeks to Speed Investor Disclosure of Big Purchases of a Company's Stock*, Wall St. J., Jan. 10, 1986, at 32, col. 1 (public announcement within two days).

35. Combined with requirements that any acquisition of greater than 15 percent of a corporation's outstanding shares can be made only by statutory tender offer, the distinction is virtually eliminated.

36. A 1984 study found that institutional investors, subject to the section 13(f) reporting requirements, owned over 60 percent of the outstanding share of a large number of Fortune 500 companies. *See* COMPUTER DIRECTIONS ADVISORS, INC. SPECTRUM 4: 13(f) INSTITUTIONAL INVESTORS xvi (Dec. 31, 1984).

37. *See supra* note 6 and accompanying text.

38. Piper v. Chris-Craft Indus., 430 U.S. 1, 35 (1977); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1974).

suitors disclose their intent to purchase prior to making a tender offer.[39] Furthermore, Congress intended to protect shareholders from the pressure of coercive tender offers by requiring offerors to provide shareholders with advance notice of a possible tender offer, proration, and minimum time period protections.[40] Congress believed that non-tender offer purchases would not create the same shareholder pressures as tender offer acquisitions. Hence, Congress did not provide these additional protections in non-tender offer transactions.

Thus, the 13(d)/14(d) disclosure distinctions are based upon the assumptions that a suitor would not obtain control during the ten-day window period and that target shareholders in non-tender offer transactions would not be subject to the same pressures as tender offerees. These underlying protections fail because control can be acquired via the open market and privately negotiated transactions in less than ten days. When this occurs, a shareholder will be faced with the decision of whether to sell shares or retain them and become a minority shareholder, the same decision pressure to which tender offerees are subjected without sufficient information on which to base such a decision.[41]

The concentration of shares in the hands of institutional investors and arbitrageurs enables an acquirer to purchase control on the open market in a very brief period of time. Carter Hawley Hale Stores, in the face of a hostile tender offer, repurchased eighteen percent of its outstanding shares in a two hour period, and over fifty percent in seven trading days.[42] Likewise, Hanson Trust PLC acquired twenty-five percent of SCM Corporation's outstanding stock through five privately-negotiated cash purchases and one open market purchase within a two hour period.[43] These sellers were primarily institutional investors, arbitrageurs and other market professionals.[44]

To the extent that an acquirer can achieve control during the ten-day window period, section 13(d) offerees are not protected from the pressures that the Williams Act sought to alleviate. Thus, one could argue that Congress should narrow the window, or, given the very brief period in which an acquirer can obtain control, close it completely by requiring

39. 15 U.S.C. § 78n(d) (1986).

40. *Id.*

41. *See* S.E.C. v. Carter Hawley Hale Stores, Inc., 587 F. Supp. 1248, 1251 (C.D. Cal. 1984).

42. *Id.*

43. Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 52 (2d Cir. 1985).

44. *Id.* at 52-53.

preacquisition notice for large-scale purchases, regardless of the manner in which the transactions are made.[45]

Closing the window may be inconsistent with the drafters' interests which included protecting the free and open auction market.[46] Arguably, however, the drafters intended to protect the market for investment shares, not control shares. Empirical studies demonstrate that control shares and investment shares are different goods in that control shares command a higher price than investment shares.[47] Closing the 13(d) window would primarily affect the control share market which, in turn, would prevent a suitor from obtaining control without disclosing his intentions after achieving five percent ownership. Certainly, a suitor would prefer to avoid this disclosure requirement because the price he must pay for control would increase. Investors could, however, purchase up to five percent of a corporation's shares without having to disclose and, after disclosing that the acquisition was for investment purposes only, could continue to purchase additional shares. Closing the window would only affect investors by requiring them to disclose before they purchase over five percent of the outstanding shares.

Closing the window might also tip the balance of regulation in favor of management by providing the board of directors with earlier notice and, thus, more time to defend against a tender offer.[48] Such tipping is not clearly contrary to the drafters' intent. While the 1968 legislative history reflects Congress' intent that all parties to the tender offer be put on an "equal footing", the history also expressly recognizes that the Act will deter some takeover bids.[49] Indeed, commentators criticized the legislation for protecting management:[50] "Perhaps the committee's silence [in response to the criticism] . . . reflects some philosophical overtones here whose disquieting effect cannot be entirely removed."[51]

Finally, the movement of the market away from investment shares to-

45. The statutory tender offer proposals, in effect, close the window almost completely.

46. *See supra* note 33 and accompanying text.

47. *See* Jensen & Ruback, *The Market for Corporate Control: The Evidence*, 11 J. FIN. ECON. 5, 9-22 (1983).

48. The legislative history of the Williams Act reflects a concern that the regulations balance the interests of management, the bidder, and the target shareholders. *See* 113 CONG. REC. 854 (1967); *Piper*, 430 U.S. at 31.

49. 113 CONG. REC. 854, 855 (1967).

50. *See* Brudney, *A Note on Chilling Tender Solicitations*, 21 RUTGERS L. REV. 609 (1967); Mundheim, *Why the Bill on Tender Offers Should Not be Passed*, 1 INST. INVEST. 24 (May, 1967).

51. L. LOSS, 6 SECURITIES REGULATION 3665 (1969).

wards control shares results in a playing field that favors acquirers. As the Act currently stands, suitors are able to obtain control in ways not contemplated by Congress in 1968. Hence, narrowing the window would merely even the playing field between buyers and shareholders.

Thus, an examination of the current structure of the investor market provides a strong argument for narrowing or closing the 13(d) window. The high concentration of shares in the hands of intermediaries permits acquirers to obtain control of a corporation in a very short time. This exposes 13(d) offerees to the same pressures that 14(d) offerees face.[52] By shortening or completely eliminating the time period between when an acquirer first purchases shares and when he must disclose his intentions, offerees could retain the benefits of section 13(d) protections. The arguments mustered against closing the window depend on ambiguous legislative intent and are, therefore, suspect.[53] Congress would best preserve the original purposes of the Act by narrowing or closing the 13(d) window.

The active role of market intermediaries affects the inquiries that Congress should make when evaluating the effectiveness of mandatory disclosure under section 13(d). The presence of intermediaries blurs the distinction between 13(d) and 14(d) transactions. Thus, Congress should arguably close the 13(d) window to afford both 13(d) and 14(d) offerees the protections of the Act. A reassessment of the underlying reason for affording shareholders *any* protection, however, suggests that Congress should eliminate the disclosure requirements altogether. Economic analysis indicates that disclosure requirements send biased signals to the market and result in an inefficient allocation of resources. Furthermore, disclosure requirements harm shareholders as a group and, ironically, fail to protect the very group the statute was designed to protect. Finally, the strongest argument for retaining disclosure requirements, the prevention of prisoners' dilemma, is vitiated by the presence of market intermediaries through whom shareholder interests are collectivized.

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52. *See supra* note 42 and accompanying text.

53. *See supra* notes 49-51 and accompanying text.