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Rulemaking Under Section 14(e) of the Exchange Act: The SEC Exceeds Its Reach in Attempting to Pull The Plug on Multiple Proration Pools

I. Introduction

Few agencies have had a greater effect upon their areas of expertise through rulemaking than has the Securities and Exchange Commission. In certain areas of the securities industry, in which the inherent complexity of the industry engenders almost constant innovation and change,[1] Congress has chosen to develop a regulatory scheme that depends largely upon the rulemaking of the SEC for clarity and effectiveness. Moreover, in forming this regulatory structure, the SEC aggressively has pursued the role of guardian of the congressional intents underlying the federal securities laws. The Commission, however, recently sought to plumb the limits of its rulemaking authority under sections 14(e) and 23(a) of the Securities Exchange Act of 1934 (Exchange Act) through its adoption of revised rule 14d-8.[2] Because this new rule 14d-8 directly conflicts with section 14(d)(6) of the Exchange Act[3] by altering the statutorily prescribed minimum ten day period for pro rata acceptance by a bidder making a partial tender offer, the SEC's adoption of revised rule 14d-8 raises new questions concerning the rulemaking reach of the Commission under the broad enabling language of sections 14(e) and 23(a).

In 1968 Congress amended the Exchange Act by enacting the Williams Act,[4] which subjects tender offers to the regulatory supervision of the SEC.[5] Before the adoption of the Williams Act, the

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1. *See infra* note 170 and accompanying text.

2. See *infra* notes 15 & 10 for the texts of §§ 14(e) and 23(a) and rule 14d-8, respectively.

3. *See infra* notes 9-15 & 61-65 and accompanying text. For the text of § 14(d)(6), see *infra* note 8.

4. The Williams Act is the popular name for Pub. L. No. 90-439, 82 Stat. 454 (1968), which amended §§ 12, 13, 14(a), 14(c), and 16 and added §§ 14(c), 14(d), and 14(f) of the Securities Exchange Act of 1934. The Williams Act takes its name from Sen. Harrison Williams of New Jersey, one of its prime sponsors and most vocal advocates. Congress subsequently amended §§ 13(d), 13(e), 14(d), and 14(e) of the Exchange Act in 1970 when it adopted Pub. L. No. 91-567, 84 Stat. 1497 (1970).

5. In addition to the provisions of the Williams Act, tender offers are subject to regu-

tender offer was virtually free from scrutiny under the securities laws.[6] One specific congressional concern that helped to prompt such legislation was the tender offer for only part of the target corporation's outstanding shares and the consequential pressure on target shareholders to tender their shares quickly or risk the oversubscription of the offer.[7] To place the shareholders of the target and the acquiring corporation on a more equal footing, Congress adopted section 14(d)(6) of the Exchange Act, which provides that the bidding corporation must accept on a pro rata basis all shares tendered within ten days of the offer.[8]

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lations 14D and 14E, 17 C.F.R. §§ 240.14d-1-.14d-9, .14e-1-.14e-3 (1983), which the SEC has promulgatod to regulato the activities incident to a tender offer. One commentator, however, has noted a challenge to the authority of the Commission to promulgate rule 14e-2. Leiser, *The SEC: A Black Knight for Target Management — An Analysis of Some Recent SEC Rules and Proposed Rules,* 7 J. CORP. L. 21, 36 (1981) ("Some authorities believe that the legislative history and statutory language of the Williams Act require the conclusion that the SEC has exceeded the limits of its rule making power by requiring management to respond to a tender offer with a recommendation and reasons for tbat recommendation." (footnote omitted)). For other commentary on the Commission's activities under the Williams Act, see Fogelson, Wenig & Friedman, *Changing the Takeover Game: The Securities and Exchange Commission's Proposed Amendments to the Williams Act,* 17 HARV. J. LEGIS. 409 (1980); Jupiter, *An Analysis of Efforts to Avoid Williams Act Requirements,* 9 SEC. REG. L.J. 259 (1981) (various methods of making tender offers and avoiding the limitations of the Williams Act); Manges, *SEC Regulation of Issuer and Third-Party Tender Offers,* 8 SEC. REG. L.J. 275 (1981) (comparison of regulation for issuer and third-party tender offers); Thigpen, *Cash Offers, Capital Market Discipline, and the 1968 Legislation Revisited,* 49 TENN. L. REV. 1 (1981); *Current Issues in Tender Offers,* 7 J. CORP. L. 503 (1982); Note, *Expansion of the Williams Act: Tender Offer Regulation for Non-conventional Purchases,* 11 LOY. U. CHI. L.J. 277 (1980) (definition of a tender offer); Note, *Problems in the Regulation of Tender Offers: The Williams Act, State Takeover Statutes, and SEC Rules,* 13 TULSA L.J. 552 (1978); Symposium, *The Federal Scheme of Tender Offer Regulation,* 7 J. CORP. L. 525 (1982).

6. The legislative history of the Williams Act relates that prior to the Act's passage the federal securities laws did not require a party making a cash tender offer to disclose "[its] identity, the source of [its] funds, who [its] associates are, or what [it] intends to do if [it] gains control of the corporation." H.R. REP. No. 1711, 90th Cong., 2d Sess. 2 (1968), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2812 [hereinafter cited as HOUSE REPORT ON WILLIAMS ACT]. Although the Securities Act of 1933 had required extensive disclosure to shareholders in stock-for-stock exchanges and proxy contests, cash tender offers were subject only to "the most minimal disclosure" even though the shareholders of the target still faced the same basic decision whether to tender their shares. *Id.* at 3, 1968 U.S. CODE CONG. & AD. NEWS at 2813.

7. *Id.* at 2, 1968 U.S. CODE CONG. & AD. NEWS at 2812; *see also* Indiana Nat'l Bank v. Mobil Oil Corp., 457 F. Supp. 1028, 1031 (S.D. Ind. 1977), *aff'd,* 578 F.2d 180 (7tb Cir. 1978) ("[Section] 14(d)(6) was enacted to remove the pressures of the first-come, first-purchased practices." (citation omitted)).

8. Section 14(d)(6) provides:

> Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant tbereto within ten days after copies of the offer or

In light of recent developments in the use of partial tender offers in multistep transactions,[9] the SEC adopted a revised version of rule 14d-8[10] that effectively extends the proration period for partial tender offers to twenty days.[11] The Commission — over rare dissenting opinions by Chairman Shad[12] and Commissioner Treadway[13] — determined that the extended proration period was necessary to protect shareholders from the pressures of the bewildering array of multiple proration periods that may characterize a takeover battle.[14] Nevertheless, because the revised rule effectively

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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.

Securities Exchange Act of 1934 § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1976).

9. *See infra* notes 36 & 66-80 and accompanying text.

10. *Pro Rata Rule*, Exchange Act Release No. 19336 [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 83,306 (Dec. 15, 1982) [hereinafter cited as Adoption Release]. Rule 14d-8 provides as follows:

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

17 C.F.R. § 240.14d-8 (1983). For a news account and analysis of the Commission's action, see Greene & Nathan, *The SEC's New Prorationing Rule Will Change 'Partial' Tender Offers*, Nat'l L.J., Jan. 10, 1983, at 38, col. 1.

11. *See infra* notes 27-28 and accompanying text.

12. *See infra* notes 47-60 and accompanying text.

13. *See infra* notes 61-65 and accompanying text.

14. A bidding corporation in a partial tender offer establishes a proration pool when it accepts tendered shares during the period for pro rata acceptance. This quantity of shares is a "pool" because the bidder only purchases from the shareholders on a pro rata basis if the tender offer is over-subscribed. Multiple proration pools develop when the bidder increases the per share price of its offer because § 14(d)(6) states that it "shall also apply to securities deposited within ten days after notice of an increase in the consideration offered." The bidder, however, may determine to give preferential treatment to those shareholders who tendered into the first pool. For example, assume Corporation *B* makes a tender offer for 1,000,000 shares of Corporation *T* (3,000,000 shares outstanding) at $10.00 per share. At the conclusion of the pro rata acceptance period, shareholders of *T* have tendered only 600,000 shares. Consequently, *B* increases its offer to $12.00 per share and establishes a second proration pool. If another 600,000 shares are tendered into the second pool *B* may elect to purchase only 400,000 shares on a pro rata basis from the second pool but all 600,000 from the first. All shareholders, of course, receive $12.00 per share under Securities Exchange Act of 1934 § 14(d)(7), 15 U.S.C. § 78n(d)(7) (1976). For the Commission's discussion of multiple proration pools in the context of a hostile takeover fight among several bidders, see *infra*

contradicts the literal provisions of section 14(d)(6) of the Exchange Act, the Commission's authority to adopt such a provision under sections 14(e) or 23(a)[15] is highly suspect.

This Recent Development first considers the problems that gave rise to the adoption of revised rule 14d-8, the rationale that three members of the Commission articulated in support of the rule,[16] and the rationale of the two members who opposed it.[17] The Recent Development then examines two judicial decisions, one that considers the validity of the current tender offer practices under the Williams Act and rule 14d-8[18] and another that analyzes the rulemaking authority of the SEC under sections 14(e) and 23(a) of the Exchange Act.[19] Relying primarily upon congressional hearings[20] and debates,[21] the Recent Development next discusses the stated congressional purposes underlying both section 14(d)(6) of the Exchange Act and the SEC's rulemaking authority under section 14(e).[22] In light of this legislative history, the cases address-

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note 37.

15. Section 14(e) of the Exchange Act provides as follows:

> It shall be unlawful for any person to make any untrue statement of 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.*

Securities Exchange Act of 1934 § 14(e), 15 U.S.C. § 78n(e) (1976) (emphasis added). The 1970 amendments added the italicized portion of the section. Pub. L. No. 91-567, § 5, 84 Stat. 1497, 1497-98 (1970).

Section 23(a)(1) provides in relevant part as follows:

> The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 78c(a)(34) of this title shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible or for the execution of the functions vested in them by this chapter, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser, or different requirements for different classes thereof. . . .

Securities Exchange Act of 1934 § 23(a)(1), 15 U.S.C. § 78w(a)(1) (1976).

16. *See infra* notes 31-46 and accompanying text.

17. *See infra* notes 47-65 and accompanying text.

18. *See infra* notes 66-80 and accompanying text.

19. *See infra* notes 81-110 and accompanying text.

20. *See infra* notes 113-34 and accompanying text.

21. *See infra* notes 135-42 and accompanying text.

22. This Recent Development focuses primarily upon § 14(e) because the Commission views that section as the principle source of its authority to adopt revised rule 14d-8. *See*

ing multiple proration pools, and the Commission's rulemaking function, this Recent Development concludes that the SEC exceeded its rulemaking authority by promulgating revised rule 14d-8.[23] The Recent Development advocates the presentation to Congress of the competing concerns that the debate over revised rule 14d-8 reflects and recommends congressional consideration and action. In addition, the Recent Development urges the Commission to follow a more cautious approach in its rulemaking activities to avoid endangering the flexibility necessary for effective securities regulation.[24]

II. The Revision of Rule 14d-8

Prior to the Commission's recent revision, rule 14d-8 merely allowed a bidder making a tender offer voluntarily to extend the period for pro rata acceptance to the life of the tender offer.[25] While the SEC's statutory authority to establish that option through the prior rule 14d-8 is unclear, the courts and the various constituencies of the securities industry apparently accepted without protest the optional extension of the proration period. Of course, the nonobligatory nature of prior rule 14d-8 did not give acquisition-minded companies and those persons interested in promoting tender offers any cause for consternation.[26] Nevertheless, regardless of whether the Commission staff viewed the optional extention in the prior rule as a prelude to the mandatory extension of revised rule 14d-8, one now may view the latter as a logical next step from the former.

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infra notes 31-46 and accompanying text.

23. *See infra* notes 169-71 and accompanying text.

24. *See infra* text accompanying notes 169-71.

25. The original version of rule 14d-8 provided:

> The limited pro rata provisions of section 14(d)(6) of the Act shall not apply to any tender offer for less than all the outstanding securities of the class for which the tender offer is made to the extent that the bidder provides in the tender offer materials disseminated to security holders on the date of commencement of the tender offer that in the event more securities are deposited during the period(s) described in paragraphs (a) and/or (b) of this section than the bidder is bound or willing to accept for payment, all securities deposited during such period(s) will be accepted for payment as nearly as practicable on a pro rata basis, disregarding fractions, according to the number of securities deposited by each depositor.
>
> (a) Any period which exceeds ten days from the date of commencement of the tender offer.
>
> (b) Any period which exceeds ten days from the date that notice of an increase in the consideration offered is first published, sent or given to security holders.

17 C.F.R. § 240.14d-8 (1982).

26. *See infra* note 56 and accompanying text.

Because rule 14e-1 provides that a tender offer must remain open for at least twenty days,[27] rule 14d-8's extension of the pro rata period to the life of a tender offer effectively doubles the minimum statutory proration period of ten days that section 14(d)(6) of the Exchange Act established.[28] In adopting revised rule 14d-8 pursuant to sections 14(e) and 23(a) of the Exchange Act,[29] the SEC maintained that the extended proration period "is essential to assure security holders the time necessary to consider the merits of an offer and to obtain sufficient information upon which to base their investment decisions and to minimize the potential security holder confusion and misunderstanding generated by changing proration periods and multiple proration pools."[30]

A. *The Majority's Rationale*

In the release proposing revised rule 14d-8,[31] the SEC acknowledged that an extension of the proration period could entail a decrease in the percentage of tendered securities that the bidder actually purchases and an increase in the probability that target management could block the tender offer through defensive tactics.[32] The SEC cited its adoption of regulation 14E,[33] of which rule 14e-1 is a part,[34] as evidence of the SEC's concern that "security

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27. Rule 14e-1 provides in relevant part:

> As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, no person who makes a tender offer shall:
>
> (a) Hold such tender offer open for less than twenty business days from the date such tender offer is first published or sent or given to security holders: *Provided, however*, That this paragraph shall not apply to a tender offer by the issuer of the class of a securities being sought which is not made in anticipation of or in response to another person's tender offer for securities of the same class.
>
> (b) Increase the offered consideration or the dealer's soliciting fee to be given in a tender offer unless such tender offer remains open for at least ten business days from the date that notice of such increase is first published or sent or given to security holders: *Provided, however*, That this paragraph shall not apply to a tender offer by the issuer of the class of securities being sought which is not made in anticipation of or in response to another person's tender offer for securities of the same class.

17 C.F.R. § 240.14e-1 (1983).

28. *Proposed Pro Rata Tender Offer Rule*, Exchange Act Release No. 18761, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 83,222, at 85,141 n.2 (May 25, 1982) [hereinafter cited as Proposal Release].

29. *See infra* notes 37-41 and accompanying text; *supra* note 15.

30. Adoption Release, *supra* note 10, at 85,651.

31. Proposal Release, *supra* note 28, at 85,140.

32. *Id.* at 85,141; *see infra* note 56.

33. 17 C.F.R. § 240.14e-1-.14e-3 (1983).

34. *See supra* note 27.

holders . . . were compelled to make important investment decisions without adequate time to consider the merits of the offer and without sufficient information upon which to base their choices."[35] In the Commission's view, however, a number of recent "trends" in tender offer tactics have reduced the effectiveness of the investor protection measures in regulations 14D and 14E: (1) the increased use of partial tender offers; (2) the consequential rise in "competing partial tender offers involving a number of price increases"; and (3) the current popularity of the " 'two-step' offers that combine a partial cash tender offer with an offer of the securities of the bidder, usually in a subsequent second or third step merger transaction."[36] Citing the recent takeover battle among Mobil Corp., Jo-

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35. Proposal Release, *supra* note 28, at 85,141. Senator Williams articulated his concern about a "first-come, first-served" offer on the Senate floor:

> If more securities are deposited pursuant to a tender than the person making the offer is willing to buy, the securities to be bought would be required to be taken up as nearly as possible pro rata according to the number of securities deposited by each shareholder. This would outlaw tender offers on a first-come, first-serve basis and thus eliminating [sic] pressure on shareholders to make hasty deposits.

113 CONG. REC. 856 (1967).

36. Proposal Release, *supra* note 28, at 85, 141-42. In the Conoco takeover contest Mobil Corp. had bid $90.00 per share for half of the outstanding shares of Conoco and proposed a follow up merger in which it would exchange $90.00 in Mobile debentures or a new preferred stock for each share of Conoco stock still outstanding. *Mobil's Conoco Bid starts moves by Justice Agency and legislators,* Wall St. J., July 20, 1981, at 3, col. 1.

Messrs. James C. Freund and Edward F. Greene have described succinctly the motivation for the "multistep transaction" that often gives rise to multiple proration pools:

> If the purchaser lacks sufficient funds to purchase all of the seller's shares for cash (or, having the funds, would prefer to employ them for other purposes), or if the purchaser or the seller wants the final-step merger to qualify as a tax-free reorganization under section 368 of the Internal Revenue Code, then the number of shares to be purchased pursuant to the tender offer can be limited to a stated maximum. In the final-step merger, the seller's remaining shareholders would then receive securities of the purchaser having a comparable value to the cash paid to the tendering shareholders.

Freund & Greene, *Substance Over Form S-14: A Proposal to Reform SEC Regulation of Negotiated Acquisitions,* 36 BUS. LAW. 1483, 1503 (1981) (footnotes omitted). In addition, they concluded that the principal advantages of the multistep transaction include: (1) the decreased probability of a rival bid because "when the world discovers what is happening, the purchase has often locked up a substantial block of the seller's stock"; and (2) the removal or at least a reduction in the ability of shareholders to block the merger since the bidder may own enough stock "to authorize the final-step merger single-handedly." *Id.* at 1504. Messrs. Freund and Greene also observed that other attractions of the multistep merger are "improving the likelihood that the premium over market will be preserved up to the time of the initial announcement . . . and conveying the sense of moving a lot faster. . . ." *Id.* at 1504 n.74. On the other hand, the major disadvantages of the multistep transaction include: (1) the uncertainty that the bidder can complete the steps following the tender offer; and (2) the inability of the bidder "to perform the extensive business and legal review that occurs in a traditional acquisition before the purchaser is bound." *Id.* at 1504-05. Other unattractive features are "that it does not lend itself so well to noncash transac-

seph E. Seagram & Sons, Inc., and E.I. DuPont de Nemours for control of Conoco, Inc., as an example of the potential confusion that multiple proration periods and pools engendered,[37] the SEC relied upon section 14(e) of the Exchange Act as one alternative for the necessary statutory authority for promulgating rule 14d-8.[38] Despite its recognition that revised rule 14d-8 contradicts the ten day proration period which section 14(d)(6) established[39] and that Congress expressly rejected proposals extending the proration period over the life of a tender offer when it considered the Williams Act,[40] the SEC interpreted the broad rulemaking provision of section 14(e) as congressional recognition that "the Commission needed full rulemaking authority to deal more effectively with tender offer practices that had the potential to injure investors as these practices developed."[41]

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tions at the block purchase and tender offer stages and that it may be more prone to litigation at the final cash merger. . . . " *Id.* at 1505 n.76. Seagram apparently discovered another disadvantage of a bidding contest through partial tender offers: at the conclusion of the Conoco fight, Seagram ended up with 28 million shares of Conoco which it exchanged for 47.6 million shares or 20% of DuPont. *Seagram Co. to Swap Conoco Stake for 20% of Merged Company*, Wall St. J., Aug. 12, 1981, at 39, col. 3. *See also*, Lewis, *Securities Law Aspects of Multistep Cash-Election Mergers*, 10 INST. ON SEC. REG. 395, 396 (1979) (Acquisition-minded companies find it "highly desirable to integrate the tender offer and the merger in order to nail down the transaction as quickly as possible.").

37. The takeover battle among Mobil, DuPont, and Seagram for control of Conoco during the summer of 1981 confronted the shareholders of Conoco with a myriad of offers and counteroffers. For a chronological summary of the events, see *The Bidding for Conoco*, Wall St. J., Aug. 6, 1981, at 8, col. 2. In a footnote to its Proposal Release, the Commission summarized the complexity of the varying proration and withdrawal periods that developed from the large number of partial tender offers and price increases that characterized the Conoco battle. Proposal Release, *supra* note 28, at 85,144 n.17.

38. Adoption Release, *supra* note 10, at 85,652.

39. Proposal Release, *supra* note 28, at 85,142; *see supra* notes 27-30 and accompanying text.

40. Proposal Release, *supra* note 28, at 85,142; *see infra* notes 113-34 and accompanying text.

41. Proposal Release, *supra* note 28, at 85,142 (footnote omitted). In Mourning v. Family Publications Serv. Inc., 411 U.S. 356 (1973), the Supreme Court upheld the authority of the Federal Reserve Board under the Truth in Lending Act to define the situations that trigger certain disclosure provisions of the Act. Chief Justice Burger's majority opinion appears to describe the broad rulemaking authority that the SEC would advocate in support of revised rule 14d-8:

> The hearings held by Congress reflect the difficulty of the task it sought to accomplish. Whatever legislation was passed had to deal not only with the myriad forms in which credit transaction then occurred, but also with those which would be devised in the future. To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation.

Id. at 365 (footnote omitted).

The SEC maintained that the ten day statutory proration requirement was insufficient to assure that the target shareholders would receive their materials and have time to make an informed decision. Therefore, the statutory proration period presented the possibility that some security holders would not receive even those "tender offer materials sent first class on the first day of a tender offer until after the . . . proration period has expired."[42] The Commission also noted that most unsophisticated investors may not possess the investigative resources available to institutional investors who often can dispatch special messengers to retrieve tender offer materials at the earliest possible moment.[43] In addition, the SEC commented that a shareholder in an "any and all" tender offer has twenty days to make his investment decision while a shareholder considering a partial tender offer effectively has only ten days to accept or reject the offer or risk losing acceptance of his shares on a pro rata basis.[44]

The Commission also expressed its concern that multiple proration pools may create confusion about the extent of a shareholder's pro rata rights. The SEC majority specifically highlighted the situation in which a tender offer becomes oversubscribed during the first proration period but the bidder still increases its bid,[45] presumably in response to a competing bid. The new price increase starts a new proration period, but if the bidder also does not increase the number of shares that it seeks, than "no shares tendered

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42. Proposal Release, *supra* note 28, at 85,143. At the time of the House hearings, however, Mr. Phillip West, a vice president of the New York Stock Exchange and director of the Department of Stock List, argued that the ten day period provided sufficient time for the dissemination of information to shareholders: "With the 10-day period for the pro rata, this is relative. We found that, by and large, it gives everyone in the United States an opportunity, with our rapid means of communication today, to know about the offer and make a decision." *Takeover Bids: Hearing on H.R. 14475, S.510 Before the Subcom. on Commerce and Finance of the House Com. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 54 (1968) [hereinafter cited as *House Hearings on Williams Act]*.

43. Proposal Release, *supra* note 28, at 85,143. In the comment he filed on the proposal to revise rule 14d-8, Professor Easterbrook argued that " '[i]f a short pro rata period deprives [an investor] of gains in one transaction, it works to his advantage by giving him a disproportionately large share of gains in others.' " DIVISION OF CORPORATE FINANCE, SECURITIES & EXCHANGE COMM'N, SUMMARY OF COMMENTS, FILE No. S7-933, at 9 (quoting Letter of Comment from Professor Frank H. Easterbrook) [hereinafter cited as DIVISION OF CORPORATE FINANCE].

44. Proposal Release, *supra* note 28, at 85,144. Under the SEC's rules, a competing bidder merely may publish a notice that invites interested shareholders to request the materials relating to the tender offer. 17 C.F.R. § 240.14d-4(a)(2) (1983).

45. Proposal Release, *supra* note 28, at 85,145.

into the second proration pool will be accepted for purchases."[46] Thus, as a result of the confusion that multiple proration pools engender, a shareholder who tenders into the second pool rather than selling on the open market could realize no benefits from the tender offer.

B. Chairman Shad's Dissent

While concentrating on the merits of revised rule 14d-8 and noting his agreement with Commissioner Treadway's dissent,[47] Chairman Shad stated in his dissenting opinion that the SEC's authority to promulgate the rule "is not clear."[48] Furthermore, Chairman Shad observed that Congress had "considered and explicitly rejected the proration scheme the new Rule 14d-8 implements."[49] The chairman also contended that the SEC, by extending the proration period beyond the expiration of the withdrawal period,[50] has increased the "proration uncertainty" for target shareholders because they must decide on tendering or withdrawing their shares during the withdrawal period without knowing the total number of shares that target shareholders have tendered for pro rata acceptance.[51] He further argued that the additional week which must

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46. *Id.*

47. Commissioner Treadway concentrated on the absence of sufficient rulemaking authority for the SEC to adopt revised rule 14d-8. *See infra* notes 61-65 and accompanying text.

48. Adoption Release, *supra* note 10, at 85,652 (Shad, Chairman, dissenting).

49. *Id.* (Shad, Chairman, dissenting) (footnote omitted). The Senate Report mentioned that the ten day limitation on the period for pro rata acceptance was an addition to the original bill:

> The bill as introduced would also have required that all shares deposited during the tender offer be taken up on a pro rata basis if less than all of the deposited shares were purchased. During the hearings representatives of the New York Steck Exchange testified as to their experience with an exchange policy which requires pro rata acceptance of shares offered for the first 10 days of the offer and suggested an additional 10-day period in case of an increase in price. In view of the experience of the New York Stock Exchange, your committee believes that the pro rata period can be so limited and has amended the bill accordingly.

S. REP. No. 550, 90th Cong., 1st Sess. 4-5 (1967) [hereinafter cited as SENATE REPORT ON WILLIAMS ACT] *cited in* Adoption Release, *supra* note 10, at 85,652 n.1 (Shad, Chairman, dissenting). *See infra* notes 123-34 and accompanying text.

50. Adoption Release, *supra* note 10, at 85,653 (Shad, Chairman, dissenting).

51. *Id.* (Shad, Chairman, dissenting). Chairman Shad complained that because shareholders now "must wait 26-28 calendar days to learn the proration, . . . the withdrawal period expires five business days *before* shareholders know the proration." *Id.* (Shad, Chairman, dissenting) (emphasis in original). Thus, he concluded that the extension of the proration period effectively "nullifies the benefit of the withdrawal period to shareholder." *Id.* (Shad, Chairman, dissenting).

pass before the bidder may purchase the tendered shares increases the danger that "target defensive tactics, 'white knight' and competitive bidders" could increase the cost of the takeover or foil the bid altogether.[52]

In his comments on the merits of revised rule 14d-8, Chairman Shad concentrated on the relationship between the withdrawal and new proration periods[53] and maintained that they would form a trap for the unwary and "[u]nsophisticated" shareholder who would tender early and then become "locked-in upon expiration of the withdrawal period."[54] Echoing some of the concerns that the SEC expressed in the release proposing revised rule 14d-8,[55] Chairman Shad warned that the rule will facilitate and enhance the effectiveness of "dilatory tactics by target companies," "multiple tenders and proration pools," " 'golden parachutes,' " or "two-tier offers or legal and financial maneuvers by bidder and target companies."[56] In light of this consequence, he concluded that revised

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52. *Id.* (Shad, Chairman, dissenting). During the Conoco takeover battle, the *Wall Street Journal* reported that Seagram filed suit alleging "that at a June 29 meeting, Conoco directors weighed certain possible transactions, among them acquisition of Conoco by another company, public or private sales of Conoco stock and the 'completo or partial liquidation' of Conoco." *Seagram Sues Conoco, Accusing Directors of 'Drastic,' Illegal Defense Measures*, Wall St. J., July 6, 1981, at 6, col. 3.

53. *See supra* note 51.

54. Adoption Release, *supra* noto 10, at 85,653 (Shad, Chairman, dissenting).

55. *See supra* note 32 and accompanying text. In the release proposing revisions to rule 14d-8, the SEC demonstrated its awareness of the current criticism of the tender offer regulatory structure. Proposal Release, *supra* note 28, at 85,145. The Commission observed that these critics argue that federal regulation increases "risks and costs to the first bidder" and, therefore, has these consequences: (1)"security holders . . . may have lost opportunities to receive any premiums"; and (2)"some firms may be operated less efficiently than they could be." The Commission concluded by announcing that it "intends to evaluate the entire regulatory scheme applicable to tender offers, including these economic issues." *Id.*

56. Adoption Release, *supra* noto 10, at 85,653 (Shad, Chairman, dissenting). In Donovan v. Bierwirth, 680 F.2d 263, 272 n.9 (2d Cir. 1982), the court stated that the "press currently recounts how high corporate executives are equipping themselves with 'golden parachutes' providing large benefits in the event that the executive is dismissed or even if he quits on his own volition after a takeover."

In his comment on revised rule 14d-8, Professor Easterbrook asserted that the rule change "would 'cause shareholders as a group to be worse off, because [it would] reduce the effectiveness of the tender offer process in generating gains shareholders value [sic].' " DIVISION OF CORPORATE FINANCE, *supra* note 43, at 28 (quoting Letter of Comment from Professor Frank H. Easterbrook). Furthermore, he apparently maintained that "the proposal might deter potential bidders from making offers." *Id.* at 26. If revised rule 14d-8 does increase the frequency of defensive tactics by the management of target companies, Professors Easterbrook and Fischel recently have presented one view of the possible effects. Writing before the SEC proposed its revisions in rule 14d-8, Professors Easterbrook and Fischel maintained that "current legal rules allowing the target's management to engage in defensive tactics in response to a tender offer decrease shareholders' welfare." Easterbrook &

Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1164 (1981) [hereinafter cited as *Responding to a Tender Offer*]. Professors Easterbrook and Fischel started with the premise that the value of a share of stock is the combination of two elements: "the price that will prevail in the market if there is no successful offer (multiplied by the likelihood that there will be none) and the price that will be paid in a future tender offer (multiplied by the likelihood that some offers will succeed)." *Id.* In addition, they have contended that "[t]he most probable explanation for unfriendly takeovers emphasizes their role in monitoring the performance of corporate managers." *Id.* at 1169. Thus, a policy that promotes the use of defensive tactics harms shareholders in two ways: first, the absence of a meaningful takeover threat reduces the value of the shareholder's investment in the market; and second, the shareholders lose the benefits accruing to them from the oversight of management that the threat of a hostile tender offer provides. In their view, a "defensive strategy" that does not consider these two concerns "ignores much that is relevant to shareholders' welfare." *Id.* at 1164. Furthermore, Professors Easterbrook and Fischel believe that "because the process of resistance consumes real resources, shareholders as a whole lose by the amount targets spend in resistance plus the amount bidders and any rivals spend in overcoming resistance. These additional costs can be substantial." *Id.* at 1175 (footnotes omitted). The additional costs acquire significance for Professors Easterbrook and Fischel in their evaluation of defensive tactics that allow or provoke an "auction" for the stock of the target corporation between two or more bidders. Easterbrook & Fischel, *Takeover Bids, Defensive Tactics, and Shareholders' Welfare*, 36 BUS. LAW. 1733, 1737-38 (1981) [hereinafter cited as *Takeover Bids*]. Since the use of defensive tactics will increase the costs of mounting a hostile tender offer, the professors believe that fewer corporations will step forward and make the first bid. Thus, if no one makes the first bid no auction will result and clearly "defensive tactics disserve the interests of shareholders." *Id.* at 1739.

The recent commentary of Mr. Martin Lipton, who has defended the application of the business judgment rule to the decision of the target's directors to fight a takeover bid, Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 124, 131 (1979) [hereinafter cited as *Target's Boardroom*], articulates a different view of the effects of the tender offer on shareholder welfare. In fact, Mr. Lipton and Professors Easterbrook and Fischel have engaged in a rather active debate. *Compare Takeover Bids, supra*, at 1739 ("We think Lipton has erred in this theoretical argument and has either ignored or misunderstood the relevant evidence.") *with* Lipton, *Takeover Bids in the Target's Boardroom: A Response to Professors Easterbrook and Fischel*, 55 N.Y.U. L. REV. 1231, 1233 (1980) ("Absent clear evidence, or broad acceptance of the accuracy of the economic propositions on which they predicate their argument, no basis exists for the dramatic change in the law for which Professors Easterbrook and Fischel argue.") Based on the empirical data he assembled, Mr. Lipton concluded:

> Experience shows that from the standpoint of whether the shareholders win or lose, the decision to accept or reject is about 50/50 on market price alone and, if sale value today as opposed to yesterday's rejected offer price is used as the basis of comparison, the shareholders have profited in the overwhelming majority of defeated takeovers.

Target's Boardroom, supra, at 108-09. Because his empirical data indicates that the acceptance of a takeover bid is not always beneficial for shareholder welfare, *id.* at 106-07, Mr. Lipton has maintained that the business judgment rule should protect the target directers' "reasonable good-faith decision to reject the takeover," *id.* at 124, on one or more of the grounds he outlined, which were "inadequate price," "wrong time to sell," "illegality," "adverse impact on constituencies other than the shareholders," "risk of nonconsummation," "failure to provide equally for all shareholders," and "doubt as to quality of the raider's securities in an exchange offer." *Id.* at 122-23.

In addition, Mr. Lucian Bebchuk has articulated four motives for making a tender offer: (1) the bidder believes it can increase the profits of the target by replacing target manage-

rule 14d-8 will "compound unsophisticated investors' confusion"[57] rather than promote the SEC's stated purpose of alleviating investor confusion.[58] The chairman also argued that the increased risk of "blocking legal actions by the parties involved in the tender offer will depress the market price for nontendering or withdrawing shareholders."[59] Moreover, the Chairman worried about the substantial possibility that fewer tender offers would occur after the first party entered its bid.[60]

C. *Commissioner Treadway's Dissent*

Contrasting sections 14(d)(5) and 14(d)(6) of the Exchange Act, Commissioner Treadway wrote in dissent that the presence of an express authorization for the SEC to alter the withdrawal period of the former demonstrates the importance of the absence of such a provision from the latter.[61] From this comparison Commis-

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ment; (2) synergistic gains from the combination of the bidder and the target; (3) the stock of the target is undervalued; and (4) the management of the bidder may be seeking to maximize growth. Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1030-33 (1982). Furthermore, he advocates "a rule of auctioneering that: (1) provides, by regulating offerors, time for making competing bids; and (2) allows incumhent management to solicit such bids by providing information ahout the target to potential buyers." *Id.* at 1030. Mr. Bebchuk has observed that "[t]he threat of a subsequent freezeout may . . . pressure shareholders to tender their shares for the premium offered, even if the premium is one they would likely reject were they able to organize." *Id.* at 1040 (footnotes omitted). Because his auctioneering rule requires competing hidders if the target shareholders are to realize the advantages of the rule, he supports regulation extending the period after a bidder announces an offer and hefore it purchases the shares. *Id.* at 1051-54. At the same time, however, he has advocated a prohihition on "obstructing tactics" from the management of the target. *Id.* at 1053.

57. Adoption Release, *supra* note 10, at 85,653 (Shad, Chairman, dissenting).

58. *See supra* notes 31-46 and accompanying text.

59. Adoption Release, *supra* note 10, at 85,653 (Shad, Chairman, dissenting). Under the analysis of Professors Easterbrook and Fischel, a lower market price and a decreasing likelihood that a tender offer would succeed combine to impact negatively on the welfare of the shareholders of a potential target. *See supra* note 56.

60. Adoption Release, *supra* note 10, at 85,654 (Shad, Chairman, dissenting). Professors Easterbrook and Fischel also have argued that one of the primary heneficial results of the hostile tender offer is the "monitoring" effect on corporate management that the threat provides:

> [S]hareholders henefit even if their corporation never is the subject of a tender offer. The process of monitoring by outsiders poses a continuous threat of takeover if performance lags. Managers will attempt to reduce agency costs in order to reduce the chance of takeover, and the process of reducing agency costs leads to higher prices for shares.

Responding to a Tender Offer, *supra* note 56, at 1174 (footnote omitted).

61. Adoption Release, *supra* note 10, at 85,654 (Treadway, Comm'r, dissenting). Section 14(d)(5) provides as follows:

> Securities deposited pursuant to a tender offer or request or invitation for tenders

sioner Treadway concluded that "Congress is quite capable of clearly granting us authority to modify expressly stated time frames when that is the intent of Congress."[62] Although the SEC relied upon section 14(e) of the Exchange Act as one source of its authority to promulgate revised rule 14d-8,[63] the commissioner observed that the legislative history of the 1970 amendments to the Williams Act, which added the rulemaking authority that section 14(e) establishes, failed to articulate the relationship between sections 14(d) and 14(e) of the Exchange Act.[64] Furthermore, he concluded that the SEC's reliance on section 14(e) would require "a determination that compliance with the express 10 day period of Section 14(d)(6) either is, or is at least closely akin to, 'fraudulent, deceptive or manipulative' activity."[65] In light of the significant difference of opinion on the Commission concerning the promulgation of rule 14d-8, this Recent Development next focuses upon two recent federal court decisions that deal directly with the legality of multiple proration pools under sections 14(d) and 14(e) and the SEC's rulemaking authority under section 14(e).

III. Recent Judicial Constructions of the Williams Act

A. Jacobs v. G. Heileman Brewing Co.: *The Validity of Multiple Proration Pools*

Two weeks before the SEC promulgated revised rule 14d-8, the United States District Court for the District of Delaware considered the case of *Jacobs v. G. Heileman Brewing Co.*,[66] in which the target corporation Pabst Brewing Co. challenged the use of multiple partial tender offers by a group of Pabst shareholders on the ground that such a practice "unjustifiably discriminate[d]" against the other Pabst shareholders.[67] The JMSL Acquiring Corp.

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.*

Securities Exchange Act of 1934 § 14(d)(5), 15 U.S.C. § 78n(d)(5) (1976) (emphasis added).

62. Adoption Release, *supra* note 10, at 85,654 (Treadway, Comm'r, dissenting).

63. *See supra* note 29 and accompanying text.

64. Adoption Release, *supra* note 10, at 85,654 (Treadway, Comm'r, dissenting).

65. *Id.* (Treadway, Comm'r, dissenting).

66. 551 F. Supp. 639 (D. Del. 1982).

67. *Id.* at 642.

(JMSL), an instrumentality of the bidding group of shareholders,[68] commenced a partial tender offer for 3,000,000 shares of Pabst common stock at $24.00 per share on October 27, 1982, and provided for the ten day statutory proration period which expired on November 5, 1982.[69] A takeover battle developed, however, when HBC Acquisition, Inc. (HBC), a subsidiary of Heileman, made a partial tender offer for seventy-three percent of Pabst common stock at $25.00 per share.[70] As a result of the HBC offer, JMSL extended the withdrawal date for the tendering shareholders of Pabst for ten additional days to November 26, 1982.[71] JMSL then announced two increases in its bid price, the latter of which occurred November 23, 1982. JMSL, however, retained the November 26, 1982, withdrawal deadline.[72]

Although the expiration date for the new proration period for tendering Pabst shareholders became December 2, 1982 after the November 23 price increase, JMSL announced that it first would purchase on a pro rata basis those shares that Pabst shareholders tendered but did not withdraw prior to the first increase in the bid price on November 18, 1982.[73] Thus, JMSL established two proration pools with those Pabst shareholders who tendered before the price increase in the first pool and those who tendered their shares after the increase in the second. Pabst asked the court in *Jacobs* to enjoin any purchases by JMSL until JMSL altered the terms of its tender offer to provide for one proration period extending from October 27 until ten days following the issuance of such an injunction and an extension of the withdrawal period until at least fifteen

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68. JMSL is a subsidiary of PST Acquiring Corp., of which the bidding Pabst shareholders owned 100% of the outstanding shares. *Id.* at 641 n.1.

69. *Id.* at 641. The court observed that the 3,000,000 shares sought were "approximately 37% of the outstanding shares" of Pabst. *Id.*

70. *Id.* Although Pabst shareholders had tendered 5,340,000 shares by the deadline for pro rata acceptance, they had until November 17, 1982, to withdraw their shares, *id.*, pursuant to rule 14d-7(a), which provides in part:

> In addition to the provisions of section 14(d)(5) of tbe Act, any person who has deposited securities pursuant to a tender offer has the right to withdraw any such securities during the following periods:
>
> (1) At any time until the expiration of fifteen business days from the date of commencement of such tender offer; . . . .

17 C.F.R. § 240.14d-7(a) (1983).

71. Jacobs v. G. Heileman Brewing Co., 551 F. Supp. at 642.

72. *Id.* Rule 14d-7, which measures the withdrawal period from the "date of commencement," does not require a new 15 day withdrawal period when a bidder increases its price.

73. Jacobs v. G. Heileman Brewing Co., 551 F.Supp. at 642.

days after the court's order.[74] Relying upon the release proposing revised rule 14d-8,[75] Pabst claimed that the use of these "multiple proration pools" "will 'be perverted into a device for egregious *discrimination* among shareholders.' "[76] Despite Pabst's claim that the court should adopt the SEC's rationale and determine that JMSL's "abusive and manipulative practices"[77] violated sections 14(d) and 14(e) of the Exchange Act,[78] the *Jacobs* court relied upon provisions in the legislative history of section 14(d)(6) that expressly contemplate the "use of multiple proration pools."[79] The Court's reasoning indicates its determination that the use of multiple proration pools in itself did not violate section 14(e).[80]

B. Canadian Pacific Enterprises (U.S.) Inc. v. Krouse: *The Rulemaking Reach of the SEC*

The United States District Court for the Eastern District of Ohio also recently considered the extent of the SEC's rulemaking authority under the Williams Act in *Canadian Pacific Enterprises (U.S.) Inc. v. Krouse.*[81] Plaintiffs in *Krouse* had announced a cash tender offer for the shares of a target corporation with its principal place of business in Ohio.[82] Under the terms of rule 14d-2(b)[83]

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74. *Id.*

75. *See supra* note 28 and accompanying text.

76. Jacobs v. G. Heileman Brewing Co., 551 F. Supp. at 642 (quoting Docket Item 10, at 13).

77. 551 F. Supp. at 643. By relying upon § 14(e) for the authority to promulgate revised rule 14d-8, the SEC apparently maintains that multiple proration pools constitute a practice that is "fraudulent, deceptive, or manipulative." *See supra* note 65 and accompanying text; *infra* text accompanying note 168.

78. Jacobs v. G. Heileman Brewing Co., 551 F. Supp. at 644.

79. *Id.* at 643-44. The court quoted the following excerpt from the Senate Report on the Williams Act:

> Proposed section 14(d)(6) would provide that where a greater number of securities are deposited within the first 10 days after a tender offer is made public than the person making that tender offer is bound or willing to take up, the securities deposited must be taken up pro rata according to the number of securities deposited by each depositor. If the person making the tender offer increases the consideration, a new 10-day pro rata period would be required allowing all shareholders a fair opportunity to participate in the offer. In the event that the consideration is increased, all shares deposited before the increase would be required to be taken up before any shares deposited thereafter, unless all shares deposited pursuant to the tender offer were taken up on a pro rata basis.

SENATE REPORT ON WILLIAMS ACT, *supra* note 49, at 10, *quoted in* Jacobs v. G. Heileman Brewing Co., 551 F. Supp. at 644.

80. *See supra* note 77; *infra* text accompanying note 168.

81. 506 F. Supp. 1192 (S.D. Ohio 1981).

82. *Id.* at 1193.

83. Rule 14d-2(b) provides:

under the Exchange Act, plaintiffs had to commence the tender offer within five days after they publicly announced it.[84] The Ohio Legislature, however, had enacted a law that prevented an offeror from commencing a tender offer within twenty days of the same public announcement.[85] In light of the irreconcilable conflict between rule 14d-2(b) and the Ohio statute, plaintiffs in *Krouse* sought a declaratory judgment that the SEC rule was valid and preempted Ohio law.[86] Although the district court concluded that the provisions of the Administrative Procedure Act[87] did not necessarily control the disposition of plaintiffs' challenge, the court adopted the standards that the Act provides[88] to determine whether, as defendants claimed, the SEC acted in excess of its authority and in an arbitrary and capricious manner.[89]

A public announcement by a bidder through a press release, newspaper advertisement or public statement which includes the information in paragraph (c) of this section with respect to a tender offer in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 shall be deemed to constitute the commencement of a tender offer under paragraph (a)(5) of this section *Except*, That such tender offer shall not be deemed to be first published or sent or given to security holders by the bidder under paragraph (a)(5) of this section on the date of such public announcement if within five business days of such public announcement, the bidder either:

(1)Makes a subsequent public announcement stating that the bidder has determined not to continue with such tender offer, in which event paragraph (a)(5) of this section shall not apply to the initial public announcement; or

(2)Complies with Rule 14d-3(a) (§ 240.14d-3(a)) and contemporaneously disseminates the disclosure required by Rule 14d-6 (§ 240.14d-6) to security holders pursuant to Rule 14d-4 (§ 240.14d-4) or otherwise in which events:

(i)The date of commencement of such tender offer under paragraph (a) of this section will be determined by the date the information required by Rule 14d-6 is first published or sent or given to security holders pursuant to Rule 14d-4 or otherwise; and

(ii)Notwithstanding paragraph (b)(2)(i) of this section, section 14(d)(7) of the Act shall be deemed to apply to such tender offer from the date of such public announcement.

17 C.F.R. § 240.14d-2(b) (1983).

84. Canadian Pac. Enter. (U.S.) v. Krouse, 506 F. Supp. at 1193-94.

85. The Ohio statute provides in part: "No offeror shall make a take-over bid unless at least twenty days prior thereto he announces publicly the terms of the proposed takeover bid and files with the division of securities and the target company copies of all information required by division (B)(3) of this section . . . ." OHIO REV. CODE ANN. § 1707.041(B)(1) (Supp. 1982).

86. Canadian Pac. Enter. (U.S.) v. Krouse, 506 F. Supp. at 1193, 1194.

87. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

88. 506 F. Supp. at 1197-98.

89. *Id.* at 1198. Section 25(b)(4), which establishes the standard for judicial review of the Commission's rules, provides:

(4) The findings of the Commission as to the facts identified by the Commission as

First, the court addressed defendants' assertion that the SEC exceeded its authority by including a definition of the concept of "commencement" in rule 14d-2.[90] The *Krouse* court observed that the SEC merely utilized the concept of "commencement" "to define, summarize, and interpret the statutory phrase 'first published or sent or given to security holders'" that exists in section 14(d)(1).[91] In addition to finding that the Commission had acted consistently with the Exchange Act by merely defining a "technical" term,[92] the court also noted that Congress, in 1975, had expanded the definitional authority of the SEC to include "other terms."[93] Thus, the court sustained rule 14d-2 as a permissible ac-

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the basis, in whole or in part, of the rule, if supported by substantial evidence, are conclusive. The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

Securities Exchange Act of 1934 § 25(b)(4), 15 U.S.C. § 78y(b)(4) (1976).

In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the United States Supreme Court analyzed whether an agency's action was "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'" under Administrative Procedure Act § 706(2)(A), 5 U.S.C. § 706(2)(A) (1976). 401 U.S. at 416. Although the "ultimate standard of review is a narrow one," *id.*, the Court determined that a reviewing court must consider "relevant factors and whether there has been a clear error of judgement." *Id.* In light of *Overton Park*, the *Krouse* court adopted a three part inquiry under which to evaluate new rule 14d-2: "(1) What factors are relevant to challenged rulemaking? (2) Did the SEC consider these factors? (3) Did the SEC expressly and rationally relate the factors to the rule it promulgated?" Canadian Pac. Enter. v. Krouse, 506 F. Supp. at 1201 (footnote omitted). After concluding that the SEC had demonstrated its concern with relevant factors, such as investor protection, "restoration of neutrality between offerors and target management and stabilization of the function of secondary securities markets," by considering these factors in several releases, *id.* at 1201-02, the *Krouse* court determined that the SEC had established a "rational relationship" between the challenged rule and the achievement of the SEC's articulated objectives. *Id.* at 1202-03.

The United States Court of Appeals for the District of Columbia Circuit has expressed concern that the Supreme Court's use of the phrase "clear error of judgment" may confuse the arbitrary and capricious standard of review with the "clearly erroneous" requirement under Rule 52(a) of the Federal Rules of Civil Procedure. Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 34-35 n.74 (D.C. Cir.), *cert. denied sub. nom.* E.I. duPont de Nemours & Co. v. Envirnonmental Protection Agency, 426 U.S. 941 (1976). Under rule 52(a) an appellate court "fairly readily" may reverse the findings of fact by a trial judge who sat without a jury. 541 F.2d at 35 n.74. Nevertheless, the District of Columbia Circuit concluded that the Supreme Court in *Overton Park* did not "sanction review more intrusive than traditional 'arbitrary and capricious' review; rather, the Court has reaffirmed that the reviewing court must defer if the agency has a rational basis for its decision." *Id.*

90. *See supra* note 83.

91. Canadian Pac. Enter. (U.S.) v. Krouse, 506 F. Supp. at 1199.

92. *Id.*

93. *Id.*

tion by the Commission to define the phrase "first published or sent or given to security holders."[94]

Second, defendants contended that the adoption of rule 14d-2 exceeded the SEC's rulemaking authority under section 23(a) of the Exchange Act,[95] which provides that the Commission may adopt rules and regulations "necessary or appropriate to implement the provisions of this chapter for which [the SEC is] responsible or for the execution of the functions vested in [the SEC] by this chapter."[96] Although defendants argued that rule 14d-2 was not "necessary or appropriate" because it was merely an effort to preempt state law for the sake of preemption,[97] the court concluded that no provision of the securities laws would invalidate an action of the Commission on that basis.[98] Furthermore, the court advanced its position on the definitional character of the rule by determining that " 'commencement' constitutes a definition, not a new term itself defined."[99] The *Krouse* court concluded that "[t]he 'functions' of the SEC are not boundless, but they are nevertheless very broad in service of investor protection and the public interest."[100]

Third, the court concluded that section 14(d)(4) "gives the SEC *plenary power* to regulate the conduct of all who solicit acceptances or rejections of tender offers . . . ."[101] Defendants main-

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94. *Id.*

95. *Id.*

96. Securities Exchange Act of 1934 § 23(a), 15 U.S.C. § 78w(a)(1) (1976). In Touche Ross & Co. v. SEC, 609 F.2d 570 (2d Cir. 1979), the Second Circuit considered a challenge to the authority of the SEC to promulgate rule 2(e) of the Commission's rules of practice. The SEC had relied upon section 23(a)(1) of the Exchange Act as its statutery authorization to adopt the rule. *Id.* at 577-78; *see supra* note 15. In other challenges to an agency's rulemaking authority, the Second Circuit observed that "the Supreme Court has held that, if the regulation is in furtherance of a legitimate statutory purpose, the validity of the regulation will be upheld." 609 F.2d at 579. Because "Congress realized that it could not enact express statutory provisions to deal with every possible evil that might develop," *id.* at 580, the *Touche Ross* court sustained the rule as "an attempt by the Commission to protect the integrity of its own processes." *Id.* at 582.

97. Canadian Pac. Enter. (U.S.) v. Krouse, 506 F. Supp. at 1199.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (emphasis added). When it considered the rulemaking authority that section 10(b) of the Exchange Act granted the Commission, the Supreme Court observed, "The rulemaking power granted to an administrative agency . . . is not the power to make law. Rather, it is " 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.' " " Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1975) (quoting Dixon v. United States, 381 U.S. 68, 74 (1965) (quoting Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936))), *quoted in* Canadian Pac. Enter.

tained that the legislative history of the Williams Act indicates that Congress intended section 14(d)(4) to apply only to existing tender offers,[102] but the court refused to adopt this construction.[103] In fact, the court concluded that such a narrow reading "would contradict the plain meaning of the statutory text."[104]

Last, the court concluded that section 14(e) of the Exchange Act[105] "contribute[d]" to the SEC's authority to promulgate rule 14d-2. Defendants "disingenously" claimed they were unable to locate a " 'fraudulent, deceptive, or manipulative' " action within the meaning of section 14(e).[106] The court, however, determined that "considerable potential for manipulation" exists "if an offer is pub-

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(U.S.) v. Krouse, 506 F. Supp. 1192, 1198 (S.D. Ohio 1981). The federal courts, in cases they decided under the securities laws prior to enactment of the Williams Act, had recognized the broad rulemaking authority of the Commission. *E.g.*, Commercial Capital Corp. v. SEC, 360 F.2d 856, 857 (7th Cir. 1966) ("The Securities and Exchange Commission has broad authority to adopt rules and regulatious necessary for the execution of its functions.") (rejecting petitioners' challenge to SEC refusal to allow purchase of transcripts from nonpublic investigation in which petitioners testified); R. A. Holman & Co. v. SEC, 299 F.2d 127, 132 (D.C. Cir. 1962) ("In all the statutes under which the Securities and Exchange Commission operates, Congress has given it broad rulemaking powers . . . . In view of the nature of the subject matter, the grant of such powers was imperative, to protect investors against fraud or deception made possible by constantly changing conditions.") (sustaining SEC suspension of the availability of Regulation A exemption for stock underwritten by plaintiff broker-dealer), *cert. denied*, 370 U.S. 911 (1962).

102. Canadian Pac. Enter. (U.S) v. Krouse, 506 F. Supp. at 1200. Section 14(d)(4) of the Exchange Act provides as follows:

> 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.

Securities Exchange Act of 1934 § 14(d)(4), 15 U.S.C. § 78n(d)(4) (1976).

103. Canadian Pac. Enter. (U.S.) v. Krouse, 506 F. Supp. at 1200. The legislative history of § 14(d)(4) does not appear to support the court's rejection of this contention in *Krouse*. The House Report observes,

> Proposed section 14(d)(4) would authorize the Securities and Exchange Commission to adopt rules and regulations with respect to solicitations or recommendations te accept or reject tender offers or requests or invitations for tenders. Under this provision the Securities and Exchange Commission could specify the information to be included in any recommendation by management or others in favor of or in opposition to a tender offer and could regulate the solicitation of investors by brokers and dealers who are often compensated for shares tendered as a result of their activities. It would also enable the Securities and Exchange Commission to regulate the activities of persons who make competing tender offers or seek to influence the investor's decision on a tender offer.

HOUSE REPORT ON WILLIAMS ACT, *supra* note 6, at 10, 1968 U.S. CODE CONG. & AD. NEWS at 2820.

104. Canadian Pac. Enter. (U.S.) v. Krouse, 506 F. Supp. at 1200.

105. *See supra* note 15.

106. Canadian Pac. Enter. (U.S.) v. Krouse, 506 F. Supp. at 1200. Defendants finally determined that "the SEC has indicted the state tender offer statutes themselves." *Id.*

licly announced, but the shareholders are not afforded the protections of the Williams Act."[107] Thus, the court decided that the "subject matter of Rule 14d-2 [was] . . . well within the scope of regulatory authority conferred by Section 14(e)."[108]

The *Jacobs* and *Krouse* courts, like the SEC in the proposal and adoption of rule 14d-8, depended greatly upon the legislative history of the Williams Act and the 1970 amendments. Cognizant of the Supreme Court's warning in *Piper v. Chris-Craft Industries*[109] that "[r]eliance on legislative history in divining the intent of Congress is . . . a step to be taken cautiously,"[110] this Recent Development now examines generally the legislative history of the Williams Act, with particular emphasis on sections 14(d)(6) and 14(e).

IV. THE LEGISLATIVE HISTORY OF THE WILLIAMS ACT

Advocates for and opponents of revised rule 14d-8 have relied upon the legislative history of the Williams Act to support their respective constructions of the SEC's rulemaking authority under section 14(e). The SEC majority and the *Krouse* court emphasized the legislative materials reflecting the general congressional purpose of investor protection,[111] but the dissenting members of the Commission correctly identified other actions and statements indicating a congressional preference for the ten day proration period of section 14(d)(6).[112] Nevertheless, an analysis of the SEC's expansion of its rulemaking authority through revised rule 14d-8 requires a careful consideration of the legislative history of sections 14(d)(6) and 14(e), not ouly to determine the validity of the rule's adoption, but also to delineate what limits exist on the Commission's rulemaking authority under section 14(e).

A. *The Congressional Hearings*

1. Senate Hearings

The original version of the Senate's pro rata acceptance provision of the 1970 amendments to the Williams Act placed no time

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107. *Id.*
108. *Id.; see infra* notes 140-42 and accompanying text.
109. 430 U.S. 1 (1976).
110. *Id.* at 26.
111. *See supra* notes 31-46 & 81-108 and accompanying text.
112. *See supra* notes 49 & 61-65 and accompanying text.

limit on the period for pro rata acceptance.[113] The Senate Committee on Banking and Currency, however, amended S. 510 to establish the ten day period that eventually became part of section 14(d)(6) of the Exchange Act.[114] In hearings before the Senate Subcommittee on Securities of the Senate Committee on Banking and Currency, the discussions encompassed not only the merits of such a time limitation on the proration period, but also the Commission's proposal that the Committee amend the pro rata acceptance provision of S. 510 by adding this proviso: " 'except as the Commission may otherwise prescribe by rules and regulations as necessary or appropriate in the public interest or for the protection of investors.' "[115] Thus, the hearings before the Subcommittee on Securities are especially significant because the Subcommittee, and eventually the entire Committee on Banking and Currency, consid-

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113. Section 2(5) of S. 510 originally provided as follows:

> 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 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.

Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings Before the Subcom. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 12 (1967) [hereinafter cited as *Senate Hearings on Williams Act*].

114. SENATE REPORT ON WILLIAMS ACT, *supra* note 49, at 4-5.

115. *Senate Hearings on Williams Act, supra* note 113, at 38. (quoting Securities and Exchange Commission Recommended Amendments to S. 510, 90th Congress, First Session). The Commission also added the following explanation for its suggested change:

> We have become convinced that it is not possible to anticipate all of the problems which can arise in connection with tender offers, or to prescribe in the bill itself all the procedures which are necessary to guarantee the equitable treatment of investors that this legislation is intended to achieve, and which some of the comments furnished to us by persons familiar with the techniques in tender offers and the ways of shareholders have indicated are necessary and desirable.

Id. at 39.

Chairman Cohen of the SEC had one exchange with Senator Williams in which Chairman Cohen cited the Commission's proxy rules as an example of the flexibility available through rulemaking:

> Now, I do agree with what you have just said, Mr. Chairman. I think this is an area where vesting in the Commission additional rule-making authority to provide flexibility, even though it places an additional burden on us is probably in the long run the wisest course.
>
> You will remember, Mr. Chairman, that our proxy rules — and they are pretty good rules as I think most people would agree — were developed from a single sentence in section 14(a) of the statute which says, in effect, "Mr. Commissioners, go ahead and write proper rules in the interest of investors and the public interest." That is all there was to it.

Senate Hearings on Williams Act, supra note 113, at 191 (testimony of Mr. Manuel Cohen).

ered and rejected a specific request for the rulemaking authority that would support the adoption of revised rule 14d-8.[116]

During the course of the Subcommittee's hearings, some individuals advocated the adoption of a ten day limitation on the period for pro rata acceptance similar to that which the New York Stock Exchange had adopted.[117] Among those persons were Mr. Francis R. Schanck, first vice president of the Investment Bankers Association of America,[118] Mr. Robert W. Haack, president of the National Association of Securities Dealers, Inc.,[119] and representatives of the New York Stock Exchange.[120] The American Stock Ex-

116. SENATE REPORT ON WILLIAMS ACT, *supra* note 49, at 4-5.

117. The New York Stock Exchange proposed amendment of the pro rata acceptance provision to the following form:

> 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 than such person is beund or willing to take up and pay for, the securities taken up shall, *for a period of ten days after copies of the offer or request or invitation are first published or sent or given to security holders,* 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 apply whenever there is an increase in the consideration offered security holders as described in subsection (6). The ten day pro rata period shall commence when information of the offer of increased consideration is first published or sent or given to security holders.*

Id. at 96 (quoting New York Stock Exchange Memorandum) (emphasis in original).

118. *Id.* at 152. Mr. Schanck observed:

> The proposed requirement that the number of securities taken up must be as nearly as possible pro rata if a greater number of securities is deposited than the person making the offer is willing to take up, would require the prorationing apply for the entire period of the tender offer. This requirement might deter certain holders from accepting the tender offer because those holding large blocks are often unwilling to have their holdings split into fractions and will sell only on an all-or-nothing basis.
>
> We suggest that subsection (5) of section 2 require that, where more securities are offered than the person making the tender offer is willing to take up, the prorationing requirement apply only for 10 days (during which all shareholders would have an opportunity to submit their shares) and that thereafter the shares may be taken up without prorationing.

Id.

119. *Id.* at 108-09.

> We support the provisions of S. 510 in counection with pro rata takeups of securities tendered, although we believe it advisable to limit the period in which the takeup is pro rata in order to conform to existing exchange practices providing for an initial pro rata period followed by a first-come, first-served period of takeups so that depositors will more quickly know their position in respect to the tender offer and so as to prevent volume tenders at the close of the offering.

Id. at 108 (statement of Mr. Robert W. Haack).

120. The prepared statement of Mr. G. Keith Funsten, president of the New York Stock Exchange, outlined the justifications for a limited period for pro rata acceptance:

> It seems appropriate to mention some of the reasons that make both the unlimited pro rata and the combination pro rata, first-come first-served methods useful. The

change, however, supported the Commission's call for rulemaking

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company making a tender offer might wish to make it on a pro rata only basis in order to have as many shares as possible on deposit pending its determination of the number that will be purchased. On the other hand, stockholders might prefer the ten day pro rata followed by a first-come first-served period because of the likelihood that their shares will be on deposit a shorter time.

Some stockholders will not tender shares unless they are certain that all will be taken because a pro rata allotment might reduce their holdings below 100 shares. Many people do not wish to hold odd lots.

Market disruptions would also be more likely under a requirement that all tender offers must be made on a pro rata basis. Had there been such a requirement in the past it would have increased both the length of tender offers and the time in which large blocks of stock would have been tied up. Withdrawing a sizable amount of a company's outstanding securities from the market for an extended period can drastically reduce the supply of stock available for trading. A limited supply of stock can produce abnormal price fluctuations.

Senate Hearings on Williams Act, *supra* note 113, at 90. Mr. Donald L. Calvin, vice president of the New York Stock Exchange, Mr. Phillip West, vice president and director of the Department of Stock List, and Mr. Gene Meltam, executive assistant, appeared on behalf of Mr. Funston. *Id.* at 69. Mr. Calvin explained that

[t]he difficulty with the pro rata method when employed for a longer period results in part from the fact that the offeror cannot determine the percentage of shares which it will purchase until the total number of shares tendered has been ascertained at the expiration of the offer. With extensions, offering periods can last for several months. This means that a person tendering his stock may not know for some time how many of his shares—if any—will be purchased by the offeror.

Id. at 77 (testimony of Mr. Donald L. Calvin).

Messrs. West and Calvin also discussed the relationship of the 10-day proration period that they advocated and an increase in the offer by the offeror.

MR. CALVIN. Under the amendatory language we will submit to you, the way we have it drawn, all that is required is that there be a pro rata period for a minimum period of 10 days. For listed companies in the New York Stock Exchange, this is the type of thing that has been worked out on an informal basis over a period of years. I don't know whether it would be necessary to incorporate something beyond what we have suggested in the bill however.

SENATOR BENNETT. Even in the event of a change of price?

MR. CALVIN. Mr. West may answer that, Senator.

MR. WEST. I think it would be incumbont upon the person making the offer to extend the period for at least 10 days after they change the price. Yes. As to incorporation in the bill, that is another consideration. I think it is essential that that be done.

SENATOR BENNETT. And the exchange would permit the extension of 10 days under those circumstances?

MR. WEST. We would insist on it.

MR. CALVIN. Our period is a minimum period.

SENATOR BENNETT. That is a good idea.

SENATOR WILLIAMS. To go a little further — as opposed to making the pro rata period mandatory for another 10 days when there is a price change, would you rather give the SEC rulemaking power to extend the pro rata period after the first 10 days?

MR. CALVIN. I would prefer to reserve comment on that. We will comment on this in the memorandum that we will submit (see p. 92). However this is not our present position, to indicate an answer of the moment.

Senate Hearings on Williams Act, *supra* note 113, at 85-86. Professor Samuel L. Hayes III

authority on the subject of pro rata acceptance.[121] After the discussions on the Commission's proposal for rulemaking authority, several proponents of the ten day limitation advised the subcommittee of their opposition to the SEC's request.[122]

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of the Columbia University Graduate School of Business testified in support of the 10-day pro rata period of the New York Stock Exchange. Extending the period for pro rata acceptance would "cause most investers to delay their decisions for an unnecessarily long period and thus give the incumbent management an unfair time advantage for launching the powerful counteroffensive moves which are available to it." *Senate Hearings on Williams Act, supra* note 113, at 59 (testimony of Professor Samuel L. Hayes III).

121. Mr. Ralph S. Saul, president of the American Stock Exchange, stated the following:

> Balancing the various considerations, we would suggest that thought be given to requiring pro rata treatment for a reasonable period while permitting acceptance on a first-come, first-served basis, during the balance of the tender period or any extension, if the terms of the tender offer so provided.
>
> In this connection we note that Chairman Cohen of the Commission suggested a proposed amendment to the bill which would give the Commission rulemaking power in this area. I think it is our view, at least on taking a very cursory look at the proposed amendment, that we would agree with this amendment of Chairman Cohen. We think this is an area where the Commission probably would need and should have a good deal of flexibility. . . .
>
> SENATOR WILLIAMS. I am unclear as to just how we could prevent chaos if rulemaking were allowed during these time periods. I have consummate faith in the judgment and wisdom of the Securities and Exchange Commission and in the Chairman of the Commission, but wouldn't there be some kind of potential chaos if different time periods were applied to different situations?
>
> MR. SAUL. I would answer that question this way, Mr. Chairman: I think, as I mentioned, this is an area where there may be questions which we now can't foresee that will come up in connection with the various time periods in these tender offers.
>
> It would seem to me that by giving the Commission rulemaking power, it gives them the necessary flexibility to deal with these unforeseen questions. . . .
>
> It seems to me this is an area that the Commission, with its expertise, with its continuing knowledge of what is going on in the market and how tender offers work, where rulemaking power would be useful.

Senate Hearings on Williams Act, supra note 113, at 100 (statement of Mr. Ralph S. Saul). In his prepared statement, Mr. Saul had called for "pro rata treatment for a reasonable period while permitting acceptance on a first-come, first-served basis, during the balance of the tender period or any extension, if the terms of the tender offer so provided." *Id.* at 106 (statement of Mr. Ralph S. Saul).

122. In a supplemental memorandum to the Senate Subcommittee on Securities from Messrs. Calvin and West, the New York Stock Exchange responded to the Commission's call for rulemaking authority regarding the length of the pro rata period:

> We agree with the remarks at the hearings to the effect that to allow the Commission to promulgate rules and regulations covering this aspect of tender offers would, in all likelihood, cause more problems than it would solve.
>
> Most of the witnesses at the hearings endorsed the current Exchange procedures. We believe that our practical administrative experience and concentrated studies of tender offers are assurance that the Exchange's minimum ten day pro rata procedure is fair to all concerned.
>
> During our recent testimony, we were asked whether the Exchange believes there should be an additional ten day pro rata period whenever an offeror increases the

2. House Hearings

Initially, the structuring of the proration period in the Williams Act was the subject of disagreement between the House and Senate versions of the bill[123] as well as a topic of discussion among witnesses testifying at congressional hearings.[124] At the time of the House hearings, the House version of the Williams Act (H.R. 14475) provided for the proration of purchases by a bidder but failed to specify a time limit.[125] Prior to those hearings, however, the Senate Committee on Banking and Currency had amended S. 510 to adopt the ten day period that section 14(d)(6) now establishes.[126] This difference between the two bills attracted attention during hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Com-

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tender price. In dealing with tender offers for listed stocks, we have asked that a new ten day pro rata period he instituted if the offering price is increased. We believe inclusion of this procedure in S. 510 would be beneficial.

Senate Hearings on Williams Act, supra note 113, at 93 (quoting Memorandum to Subcommittee on Securities of the Senate Committee on Banking and Currency from Messrs. Donald L. Calvin and Phillip L. West).

In comments submitted to the Subcommittee on March 22, 1967, we did object to the first recommended amendment relating to withdrawal of tendered shares and indicated our continued support of the Bill in its original form as to pro rata takeups. We wish to reiterate these positions and to add that we do not believe sufficient information has been furnished as to the necessity for Commission rule making authority in respect to pro rata takeups of tendered securities.

Letter from Lloyd J. Derrickson, General Counsel, NASD, to Sen. Harrison A. Williams, Jr., *reprinted in Senate Hearings on Williams Act, supra* note 113, at 112.

Section 2(5) provides that, where a greater number of securities is deposited pursuant to a tender offer than the person making the offer 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. The Commission proposes that this section be changed by adding a provision "except as the Commission may otherwise prescribe by rules and regulations as necessary or appropriate in the public interest or for the protection of investors." We believe that this proposal would give unwarranted administrative authority to the Commission.

Supplementary Statement by Francis R. Schanck, first vice president, Investment Bankers Association of America, *Senate Hearings on Williams Act, supra* note 113, at 164.

123. H.R. 14475 originally would have established section 14(d)(6) as follows:

Where any person makes a tender offer or request or invitation for tender for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto 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, except as the Commission may otherwise prescribe by rules and regulations as necessary or appropriate in the public interest or for the protection of investors.

H.R. 14475, 90th Cong., 2d Sess. (1968), *quoted in House Hearings on Williams Act, supra* note 42, at 4.

124. *See infra* notes 128-34 and accompanying text.

125. *See supra* note 123.

126. *See supra* note 116 and accompanying text.

merce.[127] In his testimony, Donald L. Calvin, then vice president of the New York Stock Exchange, advocated the adoption of the Senate's ten day proration period.[128] Citing what he termed the uncertainty that the open-ended House pro rata period would establish, Mr. Calvin advocated a definite limit to the proration period.[129] In addition, Mr. Calvin observed that a long proration period disadvantages the offeror and the target shareholder, because the "offeror cannot determine the percentage of shares which will be accepted," and the "tendering shareholder's entire holdings may be 'locked in' for months only to have a major portion returned at the end of the pro rata period."[130] He also stated "that a combination of a 10-day pro rata period, followed by a first-come first-serve period, is fair to all concerned. This has been the policy of the exchange which has stood the test of time in practical use."[131] Furthermore, Mr. Calvin maintained that "[w]ithdrawing a sizable amount of a company's outstanding securities from the market for an extended period can drastically reduce the supply of stock available for trading. A limited supply of stock can produce abnormal price fluctuations."[132]

Chairman Manuel Cohen of the SEC, however, testifying in support of the House version of what became the Williams Act, maintained tbat "the House bill provides additional protections for stockholders in this respect [pro rata acceptance] and that, in view of the almost infinite variety in the terms of most tender offers, which are limited only by the ingenuity of the offeror and his counsel, some flexibility through rulemaking is needed."[133] Foreshadowing the concerns that the SEC stated in its release proposing

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127. *See supra* note 42.

128. *House Hearings on Williams Act, supra* note 42, at 49 (statement of Mr. Donald L. Calvin).

129. *Id.* at 50 (statement of Mr. Donald L. Calvin). Mr. Calvin observed that "[t]he SEC does have rulemaking authority in the provision in H.R. 14475, but we think that some degree of certainty would be more desirable, like the S. 510 provision . . . ." *Id.*

130. *Id.* (statement of Mr. Donald L. Calvin). Chairman Cohen disputed Mr. Calvin's contention on the "locking in" of tendered shares:

> Well, if a tender can be revocable at all times it is not locked up and if the market price adjusts, as it does, the shareholder will have a choice whether or not he wants to wait until the end of the tender period or sell, whereas with the provision that after 10 days you are locked up there is no question about it that the offeror can keep that stock locked up and not available to the market for as long as his underlying provision permits him to.

Id. at 51 (testimony of Mr. Manuel Cohen).

131. *Id.* at 50 (statement of Mr. Donald L. Calvin).

132. *Id.* (testimony of Mr. Donald L. Calvin).

133. *Id.* at 18 (testimony of Mr. Manuel Cohen).

revised rule 14d-8, Chairman Cohen emphasized the importance of informed decisionmaking for shareholders of a target corporation:

> Information about a potential change in control can be particularly essential to an informed decision. A change in control brings with it the possibility of different operating results and different investment results, or perhaps the possibility of realizing on a company's liquidation value. This may be either good, or bad, depending on the facts and circumstances involved. But investors and their advisers cannot reach informed conclusions on the possible effects of a change in control until facts are available to them.
>
> It is argued by some that the basic factor which influence [sic] shareholder to accept a tender offer is the adequacy of the price. But, I might ask, how can an investor evaluate the adequacy of the price if he cannot assess the possible impact of a change in control?[134]

B. The Congressional Debates

1. Investor Protection and Congressional Neutrality

In light of the implications of the Williams Act and the 1970 amendments to that Act, the absence of any extensive discussion of the legislation is unfortunate. Nevertheless, some members of Congress did make statements relevant to a determination of congressional intent. For example, when he introduced the Senate version of the Williams Act in 1967, Senator Harrison A. Williams, Jr. of New Jersey explained that "[e]very effort has been made to avoid tipping the balance of regulatory burden in favor of manage-

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134. *Id.* at 12. During Senate hearings on the Williams Act, Chairman Cohen maintained that "the principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare . . . . The investor is lost somewhere in the shuffle." *Senate Hearings on Williams Act, supra* note 113, at 178, *quoted in* Piper v. Chris-Craft Indus., 430 U.S. 1, 27 (1976).

One court recently reiterated that

> [t]he legislative purpose behind the tender offer sections of the Williams Act "is to provide investors who hold equity interests in public corporations, material information with respect to the potential impact of any effort to acquire control of a company, [and] sufficient time within which to make an unhurried investment decision as to whether to dispose of or retain their securities, and to assure fair treatment of the investors.

Ludlow Corp. v. Tyco Laboratories, Inc., 529 F. Supp. 62, 66 (D. Mass. 1981) (quoting Cattlemen's Investment Co. v. Fears, 343 F. Supp. 1248, 1251 (W.D. Okla. 1972)). *See* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975) ("The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party." (footnote omitted)); Kennecott Corp. v. Smith, 507 F. Supp. 1206, 1216 (D.N.J. 1981) ("prime purpose of the Williams Act was to assist investors confronted with a cash tender offer in making an informed decision"); Kirsch Co. v. Bliss & Laughlin Indus., Inc., 495 F. Supp. 488, 501 (W.D. Mich. 1980); MLZ, Inc. v. Fourco Glass Co., 470 F. Supp. 273, 277 (E.D. Tenn. 1978).

ment or in favor of the offeror."[135] The House Report also articulated the congressional intention to treat target management and takeover bidders equally.[136] At the time of the 1970 amendments, however, Representative John S. Monagan, who introduced the

135. 113 CONG. REC. 854-55 (1967) (comments of Sen. Williams). Senator Williams added:

> I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids . . . . The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case. Experience under the Securities Act of 1933 and the Securities Exchange Act of 1934 has amply demonstrated that the disclosure requirements of the Federal securities acts are an aid to legitimate business transactions, not a hindrance.

Id. at 855.

The following exchange between Senators Javits and Williams again concentrated on the avowed evenhanded approach of the Williams Act:

> MR. JAVITS. One other question I should like to ask the Senator: There is no intendment in the measure, or in the fact that the measure is offered, to in any way condemn the practice of making tenders, is there? Sometimes stockholders do very well because of tenders, especially competitive tenders.
>
> MR. WILLIAMS of New Jersey. There is no intention in any way to prohibit tender offers. As a matter of fact, I think it migbt encourage them. Through this legislation people will have more information, and will be able to intelligently decide whether to accept a tender offer and sell their shares to a group which may wish to obtain a controlling interest.

Id. at 24,665. Nevertheless, if Professors Easterbrook and Fischel are correct in their conclusion that delaying tactics by target management increase the cost of tender offers and discourage the first bidders from making the initial offer, then revised rule 14d-8 may inhibit tender offers and the competitive situations of which the senators spoke so highly. *See supra* note 56.

Later that same year, Senator Williams emphasized tbat disclosure must be meaningful to effect the policies underlying the securities laws. In the specific context of the cash tender offer, he stated:

> By use of a cash tender offer the person seeking control can operate in almost complete secrecy. He need not state the source of his funds; who his associates are; why he wants to acquire control of the corporation; and what he intends to do witb it if he gains control.
>
> Today, the public shareholder in deciding whether to reject or accept a tender offer possesses limited information. No matter what he does, he acts without adequate knowledge to enable him to decide rationally what is the best course of action. This is precisely the dilemma which our securities laws are designed to prevent.

113 CONG. REC. 24,664 (1967). *See also* Natomas Co. v. Bryan, 512 F. Supp. 191, 193 (D. Nev. 1981) ("Congress sought to strike a neutral balance between the offeror and the target management.").

136.
> The bill avoids tipping the balance of regulation eitber in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fully present their case.

HOUSE REPORT ON WILLIAMS ACT, *supra* note 6, at 4, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2813.

House version of the 1970 amendments to the Williams Act, did not profess that same policy of neutrality: "I introduced H.R. 4285 because I was seriously concerned with the defenseless position of shareholders *and management* of target companies in a cash takeover bid."[137] The SEC indicated its agreement with Representative Monagan by stating in a memorandum to the committee that the rulemaking authority of the SEC under section 14(e) "would enable the Commission to deal more effectively with the devices sometimes employed on both sides in contested tender offers."[138] On the House floor Representative Monagan added that the securities laws prior to the 1970 amendments did not provide sufficient time for "management to present a defense to the takeover," but he nevertheless insisted that while he

> appreciated the necessity for the SEC to maintain a posture that favors neither the person making the cash tender offer nor the target company, I did not believe that that objective could be achieved under existing law. As the situation stood the moving party had all of the advantages and frequently utilized the element of surprise to the detriment of shareholders and management of the target company . . . . I did not introduce my bill to shift the advantages from the person making the cash takeover offer to the management or to put shareholders in a position to exploit the market impact of a tender offer. I did introduce the bill as a means to balance the equities between the competing parties to prevent unnecessary economic dislocations of particular industries which are frequently occasioned by the looseness of our present laws governing cash takeover bids.[139]

2. SEC Rulemaking Under Section 14(e)

When he introduced the Senate version of the 1970 amendments to the Williams Act, Senator Williams observed that the extension of rulemaking authority to the SEC under section 14(e)

> is of the utmost necessity. The techniques used in corporate takeovers and tender offers have become increasingly sophisticated and change rapidly. This is particularly true in situations where the takeover it resisted by incumbent management — industrial warfare develops. Claims and counterclaims, charges and countercharges are hurled back and forth. Efforts are often made to influence the price of the securities involved. The Commission must be given full rulemaking powers in order to deal with these rapidly changing problems.[140]

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137. *Investor Protection in Corporate Takeovers; Increase in 'Regulation A' Exemption: Hearing on H.R. 4285, S. 3431, and S. 336 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 6 (1970) (comments of Rep. Monagan) (emphasis added).

138. *Id.* (Memorandum of Securities Exchange Commission submitted by Chairman Homer H. Budge).

139. 116 CONG. REC. 40,188 (1970) (comments of Rep. Monagan).

140. *Id.* at 3024 (comments of Sen. Williams). Senator Williams explained the

Likewise, Representative William L. Springer expressed confidence and comfort in the rulemaking of the SEC when he spoke to the House:

> To meet these two problems the committee says that the SEC rules must be for the purpose of first defining fraudulent, deceptive, and manipulative practices; and, second, prescribing means to prevent those manipulative practices. As long as the Commission has that power to force disclosure and secondly to be able to define what manipulative, deceptive or fraudulent practices are, then I believe we are safe in this field.[141]

In testimony before the Subcommittee on Securities of the Senate Committee on Banking and Currency, Mr. Homer H. Budge, Chairman of the SEC, produced a memorandum that the Division of Corporation Finance prepared which outlined seven problem areas with which the SEC could deal under its then-proposed rulemaking authority in section 14(e). While these problem areas concern the timeliness and extent of disclosure, no single area includes the prospect of the SEC's alteration of congressionally imposed requirements in response to changing tender offer practice.[142]

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rulemaking provisions of the Williams Act in the following manner when he introduced the Senate bill:

> Additionally, the Commission would be given rulemaking power with respect to solicitations or recommendations to the holders of a security to either accept or reject a tender offer. In the rather common situation where existing management or third parties contest a tender offer, shareholders may be exposed to a bewildering variety of conflicting appeals and arguments designed to persuade them either to accept or to reject the tender offer. The experience of the SEC with proxy fights offers ample evidence that this type of situation can best be controlled, and shareholders most adequately informed, if both sides to the argument are subject to the full and fair disclosure rules of the Federal securities laws.

113 CONG. REC. 855-56 (1967).

141. 114 CONG. REC. 21,483 (1968) (comments of Rep. Springer).

142. MEMORANDUM PREPARED BY DIVISION OF CORPORATION FINANCE

A. PROBLEM AREAS WHICH MAY BE DEALT WITH BY RULE-MAKING AUTHORITY PROPOSED IN SECTION 4 OF S. 3431 WHICH WOULD AMEND SECTION 14(e) OF THE SECURITIES EXCHANGE ACT OF 1934.

1. The person who makes a tender offer may fail (a) to pay for securities purchased, or (b) to return to their owners securities not purchased, promptly upon the termination of the tender offer in accordance with the practices of the financial community for settlement of transactions, usually within five days.

2. The person who makes a tender offer may not have in hand the funds to pay for the securities he offers to purchase (or reasonable additional amounts which he reserves discretion to purchase) or a legally enforceable commitment to borrow such funds from [a] responsible person.

3. The person making a tender bid may fail to make an appropriate announcement or to withdraw such bid promptly after the period for pro rata acceptance has expired and the amount of securities proffered in response to the bid has reached the amount

V. Analysis

Although the SEC acknowledges the controversy currently surrounding the effects of federal regulation on tender offers,[143] the Commission nevertheless has adopted a rule that will impact seriously upon the tender offer practice. In one sense this action merely represents the Commission's articulated concern that the old proration rule disadvantaged shareholders of a target corporation.[144] While the adoption of rule 14d-8 also reflects the SEC's belief in the breadth of its rulemaking authority, the history of the Williams Act indicates that Congress considered and rejected the position which the SEC now takes in adopting revised rule 14d-8.[145] In addition, the Commission's assertion that its actions have insured investor protection[146] presupposes a correct determination of what shareholder interests merit protection. The various and sometimes conflicting concerns of investors, however, complicate the meaning of "investor protection."[147] Thus, ascertaining which

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of securities announced to be purchased.

4. The person who proposes to make a tender bid may omit to disclose, in approaching others to join as members of a "group" as that term is defined in the statute, the identity, financial responsibility and other material facts with respect to other members of the "group."

5. The person who has become aware that a tender bid is to be made, or has reason to believe that such bid will be made, may fail to disclose material facts with respect thereto to persons who sell to him securities for which the tender bid is to be made.

6. Management of the target company in a tender bid may omit to make timely disclosure of its position in favor of or in opposition to such bid or change in such position.

7. A member of management of a target company, or a member of his family, may proffer their securities in response to the tender bid without disclosing to other shareholders the material facts with respect to such action.

Additional Consumer Protection in Corporate Takeovers and Increasing the Securities Act Exemptions for Small Businessmen: Hearings on S. 336 and S. 3431 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 12 (1970).

143. Proposal Release, *supra* note 28, at 85,145 ("The Commission intends to evaluate the entire regulatory scheme applicable to tender offers, including these economic issues."). *See supra* notes 32 & 56 and accompanying text. Of 41 interested parties who filed comments on the proposed revision of rule 14d-8 with the Commission, 26 supported the SEC's position, 13 opposed it, and 2 were neutral on the proposal. Division of Corporate Finance, *supra* note 56, at 4-5. Additionally, three of the ten commentators who considered whether the Commission had the authority to promulgate revised rule 14d-8 maintained that the SEC has the requisite authority, while four said it does not and three "believed that the issue is unclear." *Id.* at 11.

144. *See supra* notes 31-46 and accompanying text.

145. *See supra* notes 123-34 and accompanying text.

146. *See supra* notes 131-46 and accompanying text.

147. *See supra* notes 56 & 135-36 and accompanying text.

investor interests to protect is more appropriate for Congress to determine through debate and legislation than for the Commission to determine through the promulgation of rules. This Recent Development now will analyze the legislative history of the Williams Act and the recent decisions of the *Krouse* and *Jacobs* courts and will argue tbat the SEC exceeded its rulemaking authority when it adopted revised rule 14d-8.

A. *The Legislative History of the Williams Act*

While the congressional debates are sufficiently general in nature to preclude a clear conclusion on the intended scope of the SEC's rulemaking authority,[148] the discussions never indicate tbat Congress considered the SEC's rulemaking power to be "plenary" in the sense tbat the Commission could alter statutory requirements.[149] Similarly, the House and Senate reports on the 1970 amendments mention the rulemaking authority of section 14(e) without specifying tbe limitations on SEC action. The Commission, like Senator Williams, emphasizes the importance of requiring sufficient disclosure during the rulemaking process.[150] Indeed, one may argue that meaningful disclosure does not occur unless the proposed beneficiaries of that disclosure have sufficient time to carefully consider the disclosed information. Nevertheless, given that the express purpose of the Williams Act is to avoid providing any advantages to target management at the expense of the bidder,[151] the evaluation of revised rule 14d-8 must accommodate the rule's detrimental effects on bidders and, if one accepts the proposition that tender offers are beneficial for society as a whole, its impact on American society.[152]

In the context of multiple proration pools and the length of the proration period itself, the only specific indications of congressional intent conflict with any expansion of the ten day period.[153] Although the general purpose of investor protection may support the Commission's position, the specific legislative rejection of a proration period extending over the life of a tender offer[154] clearly

148. *See supra* notes 140-42 and accompanying text.

149. The *Krouse* court had characterized the rulemaking authority of the SEC as "plenary." *See supra* text accompanying note 101; *infra* text accompanying note 166.

150. *See supra* notes 31-46 & 135 and accompanying text.

151. *See supra* notes 135-39 and accompanying text.

152. *See supra* note 56.

153. *See supra* notes 113-34 and accompanying text.

154. *See supra* notes 123-34 and accompanying text.

should control over general declarations, particularly since the question tests the very limits of statutory language. The congressional hearings on the Williams Act do not set forth any specific reason for adopting the ten day proration period other than the practice of the New York Stock Exchange.[155] Nevertheless, the hearings do demonstrate that the appropriate committees did consider the length of the pro rata period.[156] Notwithstanding one's propensity to find fault with the process of congressional decisionmaking, the actual attention that legislators focused on the pro rata provision in committee confirms that Congress knowingly rejected a requirement similar in effect to revised rule 14d-8.[157] Furthermore, a number of commentators have maintained that actions which increase the expense and difficulty of tender offers harm investors by curbing the appetite of potential bidders.[158] If this theory on the effects of tender offer regulation accurately reflects the psychology of tender offers, the SEC has contravened the same general congressional purpose on which it has relied.

The legislative history of the Williams Act clearly articulates the congressional desire to protect investors, but the current debate over tender offer regulation reveals disagreement on which shareholder interests merit the most protection. Some commentators[159] — including Chairman Shad[160] and Commissioner Treadway[161] — have argued against regulations that may detrimentally affect tender offers while attempting to protect the right of investors to realize higher premiums from escalating bids in a takeover battle. Nevertheless, other commentators,[162] such as the other three members of the Commission,[163] have expressed dismay with the failure of tender offer regulation to safeguard the right of investors to make informed investment decisions. In this sense the merits of rule 14d-8 intertwine with the SEC's authority to adopt the rule.

The original ten day proration period of section 14(d)(6) apparently compromises between no proration period, which would expedite the tender offer at the expense of informed shareholder

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155. *See supra* text accompanying notes 128-32; *supra* note 120.
156. *See supra* notes 113-34 and accompanying text.
157. *Id.*
158. *See supra* note 56.
159. *Id.*
160. *See supra* notes 47-60 and accompanying text.
161. *See supra* notes 61-65 and accompanying text.
162. *See supra* note 56.
163. *See supra* notes 31-46 and accompanying text.

decisionmaking, and a proration period extending over the life of the offer, which perhaps would aid investor decisionmaking at the expense of the frequency of tender offers. Such an analysis of the ten day period, therefore, comports with the congressionally professed position of neutrality between a bidder and target management.[164] Although a majority of the SEC felt that current tender offer practice had become incompatible with informed investor decisionmaking,[165] the division among the commissioners highlights the difference of opinion that still predominates debate over tender offer regulation. In light of this conflict of views on the proper approach to investor protection, Congress, rather than the SEC, should have been the body to consider any proposed change in the pro rata acceptance requirements of the Williams Act. In short, the Commission's rulemaking authority under sections 14(e) and 23(a) simply does not support the SEC's alteration of a congressionally crafted resolution of competing policy concerns.

B. Recent Judicial Evaluations of the Williams Act

Perhaps the *Krouse* court would have upheld the challenge to the SEC rule in question if the rule had contravened an express statutory provision, but that court's characterization of the Commission's authority under section 14(e) as "plenary power"[166] certainly demonstrates a strong presumption in favor of the Commission's activities. The Commission itself apparently endorses such an interpretation. Nevertheless, the court in *Jacobs* simply rejected the contention—arising largely from the SEC release that proposed revised rule 14d-8—that the use of multiple proration pools violates the Williams Act.[167] The reasoning of the *Jacobs* court may indicate that even if the SEC could adopt a rule varying the provisions of section 14(d)(6), the use of multiple proration pools does not constitute a "fraudulent, manipulative, or deceptive" practice under section 14(e). Thus, section 14(e) could not be the basis for action against multiple proration pools. If the Commission could not promulgate the rule pursuant to section 14(e),

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164. *See supra* notes 135-39 and accompanying text.

165. *See supra* notes 31-46 and accompanying text.

166. *See supra* text accompanying note 101. The SEC's adoption of revised rule 14d-8 apparently would not qualify as "arbitrary and capricious" under the three-part test that the *Krouse* court articulated. *See supra* note 89. Both of the Commission's releases comprehensively identify the relevant factors and the manner in which the SEC related the adoption of revised rule 14d-8 to those concerns.

167. *See supra* notes 66-80 and accompanying text.

then it could rely only on the very general rulemaking mandate of section 23(a). Although the *Krouse* court's superficial analysis of the SEC's section 23(a) authority reflects that court's great deference for the Commission's rulemaking, the availability of other more direct sources of authority reduces the significance of section 23(a) in that context.[168] If the SEC could not promulgate rule 14d-8 under the more appropriate authority of section 14(e), the Commission should be unable to rely on the "catch-all" authority of section 23(a) to contravene an express provision of the Exchange Act. The differing conclusions of the *Jacobs* court and the SEC concerning the validity of multiple proration pools merely highlight an immediate need for congressional consideration of the problem.

VI. CONCLUSION

The SEC's adoption of revised rule 14d-8, which effectively alters the requirements of section 14(d)(6) of the Exchange Act, may signal a pressing need for wholesale revisions of the Williams Act. In the release adopting revised rule 14d-8, the Commission announced its intention to reexamine the entire regulatory structure applicable to tender offers.[169] The basic difficulty with any regulation of tender offers, however, is that new regulations merely evoke imaginative responses from lawyers and investment bankers.[170] The SEC, therefore, must retain sufficient rulemaking authority to provide the congressionally prescribed regulatory structure with the flexibility necessary to adapt to changes in practice and to handle new problems expeditiously.

The SEC, of course, often has exercised its rulemaking authority in connection with the other provisions of section 14 of the Exchange Act without contradicting statutory requirements.[171] This history suggests that congressional attempts to define broad substantive and procedural guidelines for tender offers—guidelines which the SEC has amplified and clarified by rule—generally have not fared badly in spite of the rapid changes that affect tender

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168. *See supra* notes 81-110 and accompanying text.

169. *See supra* note 143.

170. *See House Hearings on Williams Act*, *supra* note 42, at 18 (testimony of Mr. Manuel Cohen) ("We think the House bill provides additional protections for stockholders in this respect and that, in view of the almost infinite variety in the terms of most tender offers, which are limited only by the ingenuity of the offeror and his counsel, some flexibility through rulemaking is needed.").

171. *See, e.g.*, 17 C.F.R. §§ 240.14d-1-.14d-7 (1983); *id.* §§ 240.14e-1-.14e-3.

offer practice. In the case of revised rule 14d-8, however, the failure of the Williams Act properly to accommodate the multistep transaction has prompted the SEC to overreach and distort its rulemaking authority under section 14(e). Congress, not the Commission, should determine whether a problem exists in this area and if so, what action is appropriate.

The SEC clearly has demonstrated a suspicion that the existing regulatory structure is inadequate to deal with the increasingly popular multistep transaction which includes a partial tender offer. The difficulty and the time-consuming nature of congressional action confirm the advantages of SEC action in terms of the speed with which the Commission may respond to current trends in tender offer practice, but the constitutional system of this nation does not countenance the empowering of an agency to alter congressionally imposed requirements. One might argue that the Commission, despite its questionable authority, had to promulgate revised rule 14d-8 to force Congress to address the problem of multiple proration pools. Notwithstanding any such possible motivation, however, the Commission's excursion beyond the permissible parameters of its rulemaking authority has harmed the credibility of the current regulatory structure. Congress, the courts, or the Commission itself should invalidate revised rule 14d-8 and allow Congress to review its earlier resolution of the conflicting policies in section 14(d)(6).

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