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The Williams Amendments: An Evaluation of the Early Returns

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The Williams Amendments: An Evaluation of the Early Returns

The purpose of this note is to examine the judicial interpretation of the Williams Amendments to the Securities Exchange Act. The background of the legislation is outlined to direct attention to its general purpose and to isolate its intended beneficiaries.[1] A discussion of the actual amendments will provide the informational base necessary for consideration of the recent cases. The critical discussion of the first few cases interpreting the amendments provides the foundation for a suggested approach in applying the available remedies to violators of the Williams Amendments.

I. General Background

The Williams Bill,[2] enacted in 1968, amended the Securities Exchange Act of 1934 (1934 Act)[3] and provided explicit regulations in three areas that previously were subsumed under seetion 10(b) of the 1934 Act.[4] Cases involving two of the three areas have now been decided—(1) the cash tender offer and (2) a preliminary move to a tender offer when a person or group of persons acquires ten percent of the stock in an attempt to gain control through a creeping acquisition. The third area regulated is issuer repurchases of stock.

The Williams Bill was the result of tempering an earlier version[5] that characterized tender offerors as "white collar pirates who reduce proud old companies" to mere shells by trading off the best assets and splitting up the loot.[6] The concern over the willy-nilly liquidation of ready cash and quick assets is more apparent than real.[7] It is now more probable that the tremendous increase in tender offers is not due to the wasting of proud old companies by white collar pirates, but rather is a component of the larger trend toward corporate conglomeration. The attitudes increasing the number of acquisitions include: (1) the current

1. For a discussion of the bill prior to its enactment, see Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAW. 149 (1966); Manne, *Cash Tender Offers For Shares—A Reply to Chairman Cohen*, 1967 DUKE L.J. 231; Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George From the Dragon*, HARV. J. LEGIS. 431 (1968).

2. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454.

3. 15 U.S.C. §§ 78a-hh (1964) [hereinafter cited as 1934 Act].

4. 15 U.S.C. § 78j(b) (1964); *see* Note, *Regulation of Corporate Tender Offers Under the Federal Securities Laws: A New Challenge For 10b-5*, 33 U. CHI. L. REV. 359 (1966).

5. S. 2731, 89th Cong., 1st Sess. (1965).

6. *See* 111 CONG. REC. 28257-60 (1965) (remarks of Senator Williams, D-N.J.).

7. In one survey, 2/3's of the acquiring firms retained at least 75% of the purchased assets 5 years after the completion of the acquisition. Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 HARV. BUS. REV., March-April, 1967, at 135, 138.

inflationary spiral which encourages the purchase of existing assets rather than the expense of constructing new facilities; (2) the immediate acquisition of an assembled staff; (3) a new respectability for cash bids; and (4) diversification which eases the effects of a cyclical demand in a given product line because its performance can be set off against that of an unrelated product line.[8] Tight money has recently slowed the number of bids but the outlook is for a continuation of the trend.[9] Further, the activity of the *Fortune* 500 lions in the acquisition arena has absorbed many of the willing merger partners; proxy fights are expensive; so the cash tender offer becomes more attractive.[10]

With the increase in mergers and acquisitions, the identification of takeover candidates has become more difficult due to the diminishing supply. This has led some brokerage houses to make a market in the specialized information concerning potential target companies. The Senate has recently announced an investigation into possible conflicts of interests since the brokerage house normally collects a large finder's fee for the sale of the information, and in addition, up to four commissions on the transactions involved in the consummation of a takeover.[11]

The paradigm takeover candidate features a low price to earnings ratio as a reflection of a significantly lower return on shareholder's equity than that exhibited by industry competitors. Often a declining dividend payout is present because of the disappointing profits. In addition, the candidate should have surplus liquid assets. A large unused debt capacity—long term debt to shareholder's equity ratio—is

8. *See generally* Bjork, *The Merger and Tender Movements—An Economic Evaluation* in PRACTISING LAW INSTITUTE, TAKEOVER BIDS, PROXY CONTESTS AND TRANSACTIONS IN CONTROL—SEC AND OTHER ASPECTS 51 (J. Flom, Chairman 1968).

9. Metz, *Market Place: Tender Offers: Revival Is Seen*, N.Y. Times, Oct. 3, 1969, at 64, col. 7. In 1968 at least 250 corporations experienced some kind of tender offer, raid, or merger bid. Vance, *Is your company a take-over target?*, 47 HARV. BUS. REV., May-June, 1969, at 93.

10. Textron, Litton, and FMC have been followed by Teledyne, Whitaker, Gulf & Western, Walter Kidde, SCM Corp., and others without even considering American Electric Power Co., W.R. Grace, Xerox, Bristol Myers, RCA, and General Motors. Hayes & Taussig, *supra* note 7, at 138; *see* Bjork, *supra* note 8.

11. *See* Wall Street Journal, Jan. 26, 1970, at 1, col. 6 (southwest ed.) (Senate investigation into brokers and mutual fund activities with respect to the Leasco Data takeover of Reliance Insurance Co.). Typically the researcb department of a brokerage bouse will identify a potential takeover candidate. A partner armed with this knowledge may inform the target, but will surely inform his big clients, usually institutions, of the bargain price and potential takeover. Having obtained the usual brokerage commission on the sales to the institutions, the broker then approaches a big conglomerate with his find and his knowledge of where large blocks of stock are placed. He then collects a finder's fee if the deal is consummated and a double commission if he acts as a depository for the sbares. A fourth commission is generated after the broker reinvests the proceeds received by the institutional investor.

also indicative of a possible takeover candidate. Another attractive feature is a conservative valuation of assets.[12]

The cash tender offer has been the most effective takeover method.[13] Because of the shift in power from the owners of corporations to the technostructure and the proxy rules promulgated under section 14 of the 1934 Act,[14] the proxy contest is extremely difficult.[15] The stock tender offer is burdensome because it is subject to the registration requirements of the Securities Act of 1933.[16] Even before specific regulation of cash tender offers by the Williams Amendments, incumbent management had a variety of defensive weapons from which to choose. It could split the stock, raise the dividend,[17] repurchase shares,[18] launch a publicity campaign,[19] make a counteractive takeover, or undertake a defensive merger, for example with a competitor of the offeror to raise potential antitrust infractions.[20] Consequently, two-thirds of the takeover attempts via the most successful method have been defeated.[21]

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12. *See generally* Vance, *supra* note 9, at 94-97.

13. For a discussion of the various acquisitive methods available in the quest for corporate control, see Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317 (1967).

14. 1934 Act § 14, 15 U.S.C. § 78n (1964).

15. Even with the Teapot Dome oil scandal and the ample resources of John D. Rockefeller, the ouster of the delinquent management of Standard Oil of Indiana was barely accomplished. J. GALBRAITH, THE NEW INDUSTRIAL STATE 77-80 (1967). The proxy contest is also very expensive. In the New York Central proxy fight, it was reported that the victorious insurgents spent $1,308,000.00 and management spent $825,000.00. N.Y. Times, May 18, 1956, at 33, col. 5.

16. 1933 Act § 2(3), 15 U.S.C. § 77b(3) (1964); *see* L. LOSS, SECURITIES REGULATION 513 (2d ed. 1961) [hereinafter cited as LOSS].

17. Proposed SEC Rule 10b-12, 33 Fed. Reg. 4632 (1968), would limit target companies' dividend boost if there was not a sufficient cash surplus to warrant a dividend distribution. It may be that the increase of a dividend is a manipulative device within SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1969) [hereinafter cited as 10b-5]. *See* Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540 (2d Cir. 1967) (injunction issued to prevent price manipulation through depressed dividend policy); Cochran v. Channing Corp., 211 F. Supp. 239 (S.D.N.Y. 1962) (decrease of dividend to affect market price violates SEC Rule 10b-5).

19. The brutality of a heated campaign is demonstrated by a full page advertisement in the *Wall Street Journal* which screamed "World's First Comic Prospectus. Read about 'Funny Money,' How Emerson Turned the Profit Corner, and Other Factual but Hilarious Stuff." Wall Street Journal, July 1, 1969, at 11. Publicity of this type would now be subject to § 14(e) of the 1934 Act, 15 U.S.C. § 78n(e) (1969). Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc., [Current] CCH FED. SEC. L. REP. ¶ 92,557 (2d Cir. Jan. 8, 1970) (§ 14(e) applies to stock tender offer).

20. Hayes & Taussig, *supra* note 7, at 142-47. For a general discussion of these defensive tactics, see Schmults & Kelly, *Cash Take-over Bids—Defense Tactics*, 23 BUS. LAW. 115 (1967); Note, *Defensive Tactics Employed by Incumbent Management in Contesting Tender Offers*, 21 STAN. L. REV. 1104 (1969).

21. Hayes & Taussig, *supra* note 7, at 135, 137. One study found that from 1966 to the first quarter of 1968, 8 of every 10 tender offers failed. FORBES, April 1, 1967, at 60.

The Securities and Exchange Commission (Commission) submitted recommendations which were incorporated as amendments to the original bill.[22] Their intent was to eliminate the advantage that cash tender offers had over proxy fights and stock tender offers, and make symmetrical the regulation of the various acquisitive methods. Following hearings before the Subcommittee on Securities of the Senate Committee on Banking and Currency,[23] substantially all of the Williams Bill[24] was enacted as amendments to sections 13 and 14 of the 1934 Act.[25] The Commission has maintained that these provisions were "intended to provide full disclosure [for the benefit of investors] without tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid . . . ."[26]

Prior to the enactment of the Williams Amendments there was a paucity of case law on cash tender offers.[27] The "Birnbaum Doctrine," which declared that a civil action under section 10(b) of the 1934 Act[28] may be maintained *only* by a purchaser or seller of securities,[29] precluded either the target corporation[30] or the nontendering

22. Memorandum of the Securities and Exchange Commission to the Committee on Banking and Currency, U.S. Senate, on S. 2731, 112 CONG. REC. 19003 (1966).

23. *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 122 (1967) [hereinafter cited as *Hearings*].

24. A 5-day pre-offer disclosure period where the offeror would disclose all the information required on Schedule 13D to the target and Commission was deleted as was the requirement of a pro-rata take-up of all the shares tendered throughout the duration of the offer. As enacted shares tendered only during the initial 10 days are taken up pro-rata when the offer is for less than all of the class outstanding. The right to withdraw tendered shares was limited to the first 7 days of the offer and after the offer has been open for 60 days.

25. 15 U.S.C. §§ 78m, 78n (Supp IV, 1969). There is some concern that by adding § 2 of the Williams Bill to § 14 of the 1934 Act which regulates proxy solicitation that the amendments will be a trap for the unwary. While cash tender offers are frequently an alternative to a proxy contest, they are different in that they involve a purchase of shares. Thus § 2 might have been more appropriately placed under § 10 of the 1934 Act. *See Hearings, supra* note 23, at 142 (statement of Professor Painter).

26. Memorandum of the SEC as Amicus Curiae at 5, Pan American Sulphur Co. v. Susquehanna Corp., [Current] CCH FED. SEC. L. REP. ¶ 92,473 (W.D. Tex. May 28, 1969), *on appeal*, No. 27920 (5th Cir. 1970), *quoting* H. R. REP. No. 1711, 90th Cong., 2d Sess. 3 (1968); *Hearings, supra* note 23, at 183-84. A more direct method might have been to require the target company to furnish a shareholder list of the offeror company if the shareholder is really the intended beneficiary of these provisions. *Id.* at 165-75.

27. For both citation and discussion of relevant cases in this area, see Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 HARV. L. REV. 505 (1965); Hill, *The Sale of Controlling Shares*, 70 HARV. L. REV. 986 (1957); Jennings, *Trading in Corporate Control*, 44 CALIF. L. REV. 1 (1956).

28. 1934 Act § 10(b), 15 U.S.C. § 78j(b) (1964).

29. Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

30. *E.g.*, Allied Artists Pictures Corp. v. D. Kaltman & Co., 283 F. Supp. 763, 765

shareholder from asserting a private right of action under Rule 10b-5.[31] While some observers thought, and the Commission hoped, that *Birnbaum* had met its demise,[32] the vitality of the doctrine has been very recently reasserted.[33] Professor Loss defends *Birnbaum*,[34] and feels that the two cases that seriously challenge *Birnbaum*[35] demonstrate only that there need not be privity between plaintiff and defendant.[36] In addition, the tender offeror had never been under a duty to disclose to tendering shareholders since the information upon which he made his offer came from sources external to the target corporation.[37]

II. THE WILLIAMS AMENDMENTS

A. Parties and Securities Involved

Section 13(d)[38] requires reporting the information on Schedule 13D[39] once *any person* has acquired directly or indirectly[40] more than

(S.D.N.Y. 1967); Pacific Ins. Co. v. Blot, 267 F. Supp. 956, 957 n.2 (S.D.N.Y. 1967). *But see* Moore v. Greatamerica Corp., 274 F. Supp. 490 (N.D. Ohio 1967) (temporary restraining order issued and target held to have standing to sue for injunction). The court did not cite or discuss *Birnbaum* or related cases.

31. 17 C.F.R. § 240.10b-5 (1969). Significantly the language "in connection with a purchase or sale of any security" upon which the *Birnbaum* limitation of 10b-5 was based is omitted from § 14(e), 15 U.S.C. § 78n(e) (1964), which is the antifraud provision.

32. Lowenfels, *The Demise of the Birnbaum Doctrine: A New Era for 10b-5*, 54 VA. L. REV. 268 (1968).

33. The Commission as amicus curiae urged that *Birnbaum* be overruled in a recent case which applied the doctrine to deny standing to an offeror corporation which had been unable to purchase any shares due to the false and misleading statements of the target corporation. Iroquois Indus., Inc. v. Syracuse China Corp., 417 F.2d 963, 967 (2d Cir. 1969); *see* Greenstein v. Paul, 400 F.2d 580, 581 (2d Cir. 1968). *But see* Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969), *noted in* 23 VAND. L. REV. 885 (1970).

34. 3 Loss at 1469; 6 Loss at 3617.

35. A.T. Brod & Co. v. Perlow, 375 F.2d 393, 397 n.3 (2d Cir. 1967) (broker held to be a purchaser with standing to sue customer who placed orders for stock and refused to pay for it); Vine v. Beneficial Finance Co., 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967) (nontendering shareholder left only with appraisal rights in a subsequent short-form merger held to be a forced seller). The court in *Vine* specifically found it "unnecessary to deal with [the] interesting contention" advanced by the Commission as amicus curiae that the plaintiff need not be a purchaser or seller to sue under 10b-5. 374 F.2d at 636.

36. 3 Loss at 1767-71.

37. Mills v. Sarjem Corp., 133 F. Supp. 808, 828-29 (D. Del. 1951); *cf.* Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540 (2d Cir. 1967) (plaintiffs who purchased stock in target after tender offer in which the offeror obtained 94% of target's shares had no claim for damages under 10(b) but could enjoin manipulation of the present market price through a depressed dividend policy).

38. 1934 Act § 13(d), 15 U.S.C. § 78m(d) (Supp. IV, 1969).

39. 17 C.F.R. § 240.13d-101 (1969).

40. "Indirectly" may invoke the attribution policy of § 16(a) of the 1934 Act, 15 U.S.C. § 78p(a) (1964). *See* note 154 *infra* and accompanying text.

ten percent of any equity security of a class which is registered under section 12 of the 1934 Act.[41] The term "person" includes any association, group, syndicate, or just two or more persons who act as a partnership for the purpose of acquiring, holding, or disposing of securities of an issuer.[42] The concept of a group is unresolved presently but apparently an all-inclusive definition is contemplated.[43] Section 14(d),[44] which is applicable to the cash tender offer for equity securities registered under section 12, requires the filing by the offeror of a statement containing the information and exhibits required by Schedule 13D and the filing of Schedule 14D[45] by the management of the target if it wishes to make a recommendation to its shareholders.

It might be argued that sections 14(d)(5), which permits withdrawal of the tendered security during the first seven days and after 60 days of the tender offer;[46] 14(d)(6), which requires pro rata acceptance within the first ten days of an offer if it is for less than all the outstanding equity securities and a greater number is deposited;[47] and 14(d)(7), which gives to all who tender the benefit of any subsequent increase in the price offered for the securities during the offer,[48] apply to all tender offers irrespective of whether the target security is registered under section 12. Reading the section in its entirety, however, it would appear that the limitation to registered securities in section 14(d)(1) applies across the board to all subsections of 14(d). There is also the unresolved question of whether equity security includes convertible debt.

B. Disclosure Requirements

Anyone who acquires directly or indirectly ten percent of any class of registered equity security, or who is about to embark on a cash tender offer must file Schedule 13D which requires the disclosures discussed in the following paragraphs.[49]

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41. 1934 Act § 12, 15 U.S.C. § 78*l* (1964).
42. 1934 Act § 13(d)(3), 15 U.S.C. § 78m(d)(3) (Supp. IV, 1969).
43. *See* notes 145-47, 151-57 *infra* and accompanying text.
44. 1934 Act § 14(d)(1), 15 U.S.C. § 78n(d)(1) (Supp. IV, 1969).
45. 17 C.F.R. § 240.14d-101 (1969).
46. 1934 Act § 14(d)(5), 15 U.S.C. § 78n(d)(5) (Supp. IV, 1969).
47. 1934 Act § 14(d)(6), 15 U.S.C. § 78n(d)(6) (Supp. IV, 1969).
48. 1934 Act § 14(d)(7), 15 U.S.C. § 78n(d)(7) (Supp. IV, 1969).
49. Section 13(d)(5)(A) of the 1934 Act, 15 U.S.C. § 78m(d)(5)(A) (Supp. IV, 1969), exempts from the operation of the filing requirements "any acquisition or offer to acquire securities made or proposed to be made by means of registration statement under the Securities Act of 1933." Presumably adequate disclosure would result from procedure under the Securities Act of 1933, 15 U.S.C. § 77a-bbbb (1964) [hereinafter cited as 1933 Act]. Senator Williams, D-

1. *Background and Identity of Purchaser.*—This provision and rules adopted by the Commission require a corporation making the disclosure to file information about the corporation, its officers, directors, and controlling shareholders.[50] This provision is probably more for the benefit of the Commission than the shareholder. While the shareholder may be more apt to respond to the usually offered increment above market price than to the identity of the offeror, few would dispute his right to know the identity of the purchaser, especially where the offer is for control.[51] The shareholder should have the information with which to assess the corporation's future in the hands of the incumbent management or the acquiring party. The burden of disclosure of identity is minimal. The New York Stock Exchange previously required listed companies to disclose the identity of the principal making the offer.[52]

2. *Source of Funds.*—If funds have been borrowed from other than a United States banking institution in the ordinary course of business for the purpose of acquiring and holding the shares, a description of the transaction and the names of the parties must be furnished.[53] Those in opposition argue that this provision is unfortunate

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N.J., introduced S. 3431, 91st Cong., 2d Sess. (1970), to lower the 10% requirement to 5% because the practice has developed of purchasing 9% of the stock prior to the making of the tender offer and thereby avoiding the reporting requirements of §§ 13(d) and 16(a), 15 U.S.C. §§ 78m(d), 78p(a) (1964). Supp. IV, 1969). The new bill would also specifically include insurance companies since they are now "at the mercy of the secret takeover bid" by virtue of their exemption from the reporting requirements of the 1934 Act. 116 CONG. REC. § 1533-34 (daily ed. Feb. 10, 1970). He introduced his bill because "between 1946 and 1966 only five companies with assets exceeding $250 million were acquired [by cash tender offer, while] in 1967, six such acquisitions took place In 1968, [that] number doubled." *Id.* He feels that 10% owners are a controlling interest, apparently not recalling the tremendous battle that John D. Rockefeller, a 14% "controlling interest" had to wage to retire the chief executive officer of Standard Oil for his activities in the Teapot Dome scandal. *See* J. GALBRAITH, *supra* note 15, at 77-80.

50. 1934 Act § 13(d)(1)(A), 15 U.S.C. § 78m(d)(1)(A) (Supp. IV, 1969); Item 2, Schedule 13D, 17 C.F.R. § 240.13d-101 (1969). The regulations require disclosure of: names, business addresses and principal occupations for the past 10 years, and whether such person has been convicted in a "criminal proceeding" within the past 10 years. SEC Rule 14d-1, 17 C.F.R. § 240.14d-1(4) (1969). Apparently since the language of 13D, 17 C.F.R. § 240.13d-101 (1969), requires a criminal proceeding only to be disclosed, neither liability in an SEC disciplinary hearing nor an injunction issued for violation of the securities laws need be disclosed.

51. Professor Manne unabashedly disputes the shareholders' right to know. He feels that the disclosure of the identity of the offeror hampers the control market. Manne, *supra* note 1, at 243-46.

52. *Hearings, supra* note 23, at 87 (Donald Calvin, Vice-president of the New York Stock Exchange).

53. 1934 Act § 13(d)(1)(B), 15 U.S.C. § 78m(d)(1)(B) (Supp. IV, 1969); Item 3, Schedule 13D, 17 C.F.R. § 240.13d-101 (1969). The regulation does not exempt banks as the statute does. It is unlikely that the Commission would be able to restrict the words of the statute.

in that the shareholder really doesn't care from whom the money comes as long as he is paid. The New York Stock Exchange had previously required an assurance of financial ability to purchase the shares sought; this is about the limit of the shareholders' concern.[54] The Commission and other government agencies are interested in the sources of funds, however, since this sometimes reveals the real party in interest.[55] There is also the suspicion that cash tender offers may be serving as the laundry for the gains accumulated by the more notorious activities of organized crime.[56]

While loans from banks are exempted, Congress has been criticized for failing to consider that other financial institutions, such as pension funds and insurance companies, can be subjected to pressures similar to those of a banking institution, thus, the reason for exempting banks from the regulation is equally applicable to the other institutions.[57] Another criticism is that the phrase "in the ordinary course of business" is nowhere defined in the statute or regulations. There is also the problem of the proximate relationship of the loan to the acquisition. It may be that a person would consider a loan that was made prior in time or for another purpose unrelated to cash generated from internal sources to be used for the acquisition while the Commission would not.

3. *The Purpose of the Transaction.*—The fourth item, potentially the most hazardous to the continuing vitality of any takeover attempt, is the statement of the purpose of the transaction. If the purpose of the transaction is to control the target, the offeror must disclose his future plans with respect to the assets.[58] This requirement gives the incumbent management an advantage in that they are free to change policy since they need not disclose their plans as a condition precedent to making a recommendation to the shareholders on the tender offer. Thus, the incumbent management can usurp the benefit of the presumably more efficient plan of the offeror for the use of the business assets without incurring the cost of planning. Competitors of the target will also be greatly interested in any new deployment of the target corporation's assets.

The offeror is operating from outside the corporation at the time he is formulating his plans; thus, what would seem reasonable without the

54. *Hearings, supra* note 23, at 87 (Donald Calvin).

55. *Id.* at 182 (Manuel Cohen, then Chairman of the SEC).

56. *See* N.Y. Times, Oct. 25, 1965, at 57, col. 1.

57. *Hearings, supra* note 23, at 58 (Professor Samuel Hayes); *id.* at 127 (Arthur Fleisher).

58. 1934 Act § 13(d)(1)(C), 15 U.S.C. § 78m(d)(1)(C) (Supp. IV, 1969); Item 4, Schedule 13D, 17 C.F.R. § 240.13d-101 (1969).

insider's knowledge of the corporation may be a totally unacceptable mode of operation once control has actually changed hands.[59] It is probable, however, that definite plans have been made because the lending institution is looking to a combined balance sheet for security. It will therefore require apprisal of future plans prior to making the loan commitment.

The reason behind the requirement of disclosure of future plans is the fear that the offeror is seeking the assets primarily for their liquidation or sale value. As discussed earlier, this is probably not the case in practice. Even if it were, liquidating a failing company often serves a valuable purpose in minimizing the shareholders' losses and precluding the consumption of any accumulated earnings.[60] Thus, liquidation is not always undesirable from the shareholders' point of view.

It is probable that skillful lawyers will attempt to circumvent the law with nebulous statements of purpose such as those that are found in corporate charters. The Commission really should have little concern with the reason for the acquisition so long as an orderly market is maintained. Thus, it should be an allowable practice for the offeror to disclose his purpose to the extent of whether he is purchasing for investment or seeking control, but beyond that only a general, all-inclusive statement should be required.[61] Otherwise minority shareholders might try to hold management to the policies enunciated in the statement when later business circumstances dictate significant changes.[62] The offeror may also be denied the benefit of his acquisition[63] or be liable for false or misleading statements under section 10(b) or section 14(e) of the 1934 Act.

4. *Other Items.*—The offeror must disclose the number of shares of the target which he owns directly or indirectly either by himself or through his associates,[64] and any contracts, arrangements, or understandings such as options, proxy arrangements or loans, with any

59. Leasco Data Processing Corporation's experience with Pergamon Press, Ltd., is illustrative of how misinformed an offeror can be. *See* Wall Street Journal, Feb. 20, 1970, at 3, col. 4 (southwest ed.).

60. Professor Manne is a staunch defender of the corporate liquidator, although he would prefer to use the term corporate redeemer. Manne, *supra* note 1, at 236-37 n.14.

61. *See* Hayes & Taussig, *supra* note 7, at 144.

62. *Cf.* United Funds, Inc. v. Carter Prods., Inc., [1961-1964 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,288 (Baltimore City Cir. Ct. 1963).

63. Pan American Sulphur Co. v. Susquehanna Corp., [Current] CCH FED. SEC. L. REP. ¶ 92,473 (W.D. Tex. May 28, 1969), *on appeal*, No. 27920 (5th Cir. 1970).

64. 1934 Act § 13(d)(1)(D), 15 U.S.C. § 78m(d)(1)(D) (Supp. IV, 1969); Item 5, Schedule 13D, 17 C.F.R. § 240.13d-101 (1969).

person with respect to any securities of the target corporation.[65] These disclosure provisions certainly relate to valid shareholder interests. However, to be balanced against these interests is the fact that they may provide another basis for superficial actions seeking injunction or damages that may ruin the tender offer before the action is subsequently dismissed. The terms "direct or indirect ownership" may present a potential trap in view of the all-inclusive definition of "group" in section 13(d)(2).[66]

C. *Target Company Disclosure*

Ostensibly the Williams Amendments were not to tip the scales in the favor of America's proud old companies. Yet unless the target company makes a recommendation to its shareholders, it can completely avoid the operation of the amendments. The regulation of the target company was passed on to the Commission under section 14(d)(4), which gives the Commission the authority to promulgate such rules and regulations with respect to solicitation or recommendation to the holders of a security to accept or reject a tender offer. The Commission has responded with Rule 14d-4.[67] In effect, the target management, as a condition to commenting on the offer, must disclose the reasons for opposition. Its statements are circumscribed by the antifraud limitation of section 14(e).[68] Management must also disclose any arrangement the person filing the statement has with either the issuer or tender offeror.[69] The Commission feels that the rulemaking power will regulate the defending management and bring order to an area where formerly misleading statements were made with impunity.

D. *The Antifraud Provision*

Section 14(e) applies to all parties and all statements made in both cash and stock tender offers.[70] The conspicuous absence of the language

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65. 1934 Act § 13(d)(1)(E), 15 U.S.C. § 78m(d)(1)(E) (Supp. IV, 1969); Item 6, Schedule 13D, 17 C.F.R. § 240.13d-101 (1969).

66. *See* notes 145-47, 151-57 *infra* and accompanying text.

67. SEC Rule No. 14d-4, 17 C.F.R. § 240.14d-4 (1969). However, a communication from an issuer to its shareholders which does no more than state that management is studying the offer and requests shareholders to defer making a determination until they have received the recommendation of management which must be given by at least 10 days prior to the close of the offer is exempted by SEC Rule No. 14d-2(f), 17 C.F.R. § 240.14d-2(f) (1969).

68. 1934 Act § 14(e), 15 U.S.C. § 78n(e) (Supp. IV, 1969).

69. For a discussion of the target management's duty to make a recommendation with the concomitant disclosure requirement, see Krasik, *Tender Offers: The Target Company's Duty of Disclosure*, 25 BUS. LAW. 455 (1970).

70. Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc., [Current] CCH FED. SEC. L. REP. § 92,557 (2d Cir. Jan. 8, 1970) (§ 14(e) applies to a stock tender offer).

"in connection with a purchase or sale" will give standing to nontendering shareholders, target corporations, and the offeror, in the rare case where he has been denied the tender of shares because of the manipulative devices of the target.[71] Professor Loss believes that a more significant omission was the failure to insert the jurisdictional language. He feels that without a reference to interstate facilities, the section is open to constitutional attack.[72] For the present, however, it is apparent that the *Birnbaum* doctrine has been circumvented for the cash and stock tender offer situation.[73]

E. Other Regulatory Measures

1. *Issuer Repurchases.*—The issuer of a class of securities registered under section 12 of the 1934 Act may not repurchase any security issued by it in contravention of rules and regulations promulgated by the Commission under the grant of authority in section 13(e) to define areas of fraudulent, deceptive, or manipulative practice and develop the means to prevent such practices.[74] Previously this technique was used by the management of the target corporation to drive up the price of its stock,[75] or to purchase the interest of the offeror who threatened to take control. Surprisingly, under state law, if there was any connection at all with a contemplated change in policy, the shares held by a threatening outside interest could be purchased, even at a premium price, with funds of the target corporation. The action of entrenched management was protected by the "business judgment" rule.[76]

Presently, the Commission merely requires disclosure of the purpose of the transaction, the source of the funds or other consideration, including a description of the transaction and identification of all the parties.[77] There is no exclusion for banks. In addition, the antifraud provision of section 14(e) applies to the

71. Iroquois Indus., Inc. v. Syracuse China Corp., 417 F.2d 963 (2d Cir. 1969); *see* note 33 *supra*.

72. 6 Loss at 3661.

73. *See* notes 29-35 *supra* and accompanying text.

74. 1934 Act § 13(e), 15 U.S.C. § 78m(e) (Supp. IV, 1969). The scope of the term "issuer" is presently unclear.

75. *Hearings, supra* note 23, at 138 (Professor Robert Mundheim). This technique was limited in that as the target increased its holdings, the offeror's shares represented a larger proportion of the voting stock.

76. Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (1964); Kors v. Carey, 39 Del. Ch. 47, 158 A.2d 136 (1960); Israels, *Corporate Purchase of Its Own Shares—Are There New Overtones?*, 50 CORNELL L.Q. 620 (1965).

77. SEC Rule 13e-1, 17 C.F.R. § 240.13e-1 (1969).

statement of purpose of the transaction; thus, it would appear that purchases merely for the maintenance of control would no longer be protected under the "business judgment doctrine."[78]

2. *New Shareholder Rights.*—The shareholder in whose behalf the bill was passed is explicitly benefited in that he may withdraw his shares any time within the first seven days of the offer or after the offer has remained open for 60 days.[79] The Commission originally sought an unlimited withdrawal privilege to allow the shareholder to take advantage of any competing, higher tender offer. This would have brought uncertainty to the offeror because he would not be able to gauge the success of his offer and plan accordingly. The offeror would then become an insurer of the value of the stock against future decline, but could not have the benefit of any advance in the market price that was probably prompted by his offer.[80] The compromise withdrawal period, although it will make tender offers somewhat more expensive since an element of uncertainty is introduced, is reasonable because it gives the unsophisticated investor who was immediately attracted by the opportunity to sell at twenty percent above the market price time to review his decision and change his mind after management has responded to the attack with further information or after a competing tender offer with even more favorable terms has been made.

Another new right given to the shareholder is the benefit of any increase in price during the term of the offer without regard to whether the securities were taken up by the offeror prior to the variation in terms of the tender offer.[81] The committee report felt that discrimination in favor of late-tendering shareholders should be abolished.[82] It would appear that the effect is more apparent than real, however, because the section only applies to changes in terms made during the tender offer. Thus, a second tender offer, increasing the consideration, could be made after the conclusion of the first and still be within the letter of the law.[83]

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78. The authority given to the Commission in § 13(e)(1), 15 U.S.C. § 78m(c)(1) (Supp. IV, 1969), is broad enough to allow the Commission to prohibit absolutely issuer repurchases during the pendency of a tender offer. The House Report recognized that while an issuer repurchase during an offer period usually would be a manipulative device, there are legitimate purposes for repurchase. Some examples are: to reduce outstanding shares following a cash sale of an operating division, or to have shares for use in pension programs, executive options, or acquisitions. H.R. REP. No. 1711, 90th Cong., 2d Sess. 6-7 (1968).

79. 1934 Act § 14(d)(5), 15 U.S.C. § 78n(d)(5) (Supp. IV, 1969).

80. *Hearings, supra* note 23, at 92-93 (letter of the New York Stock Exchange).

81. 1934 Act § 14(d)(7), 15 U.S.C. § 78n(d)(7) (Supp. IV, 1969).

82. H.R. REP. No. 1711, 90th Cong., 2d Sess. 11 (1968).

83. The Commission might under its rule-making power in § 14(d)(4), 15

The third innovative provision was borrowed from the practice of the New York Stock Exchange (NYSE). This provision requires companies making a tender offer to take up the shares tendered within the first ten days on a pro-rata basis when the offer is for less than all the outstanding shares of a class of stock.[84] The ten day pro-rata period followed by acceptance of shares on a first-come-first-served basis helps the small shareholder because his shares will be on deposit a shorter time, and it permits all shareholders to participate in the offer to the same extent.

The final provision requires the issuer to provide the same information as required by sections 14(a) and (c) of the 1934 Act if there is an understanding between the target and the offeror with respect to the election of a majority of the directors otherwise than by a meeting of security holders.[85]

3. *Exemptions.*—Sections 13(d) and 14(d) of the 1934 Act are not applicable to acquisitions or offers made or proposed to be made by means of a registration statement filed under the 1933 Act;[86] acquisitions of less than two percent of the outstanding securities of the same class during the preceding twelve month period;[87] acquisitions made by the issuer of the security;[88] or any acquisition or proposed acquisition that the Commission may by grace exempt providing the transaction is "not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer . . . ."[89]

There is not a private offering type exemption as is found in the 1933 Act registration requirements or exemption for initial contacts prior to the formation of a "group" within section 13(d)(3) as there is in the rules governing initial stages of a proxy solicitation.[90] It is

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U.S.C. § 78n(d)(4) (Supp. IV, 1969), integrate the tender offers where it appeared that the second offer was merely an extension of the first.

84. NYSE COMPANY MANUAL A-180 (1963); *Hearings, supra* note 23, at 87, 89-90.

85. 1934 Act § 14(f), 15 U.S.C. § 78n(f) (Supp. IV, 1969).

86. 1934 Act §§ 13(d)(5)(A), 14(d)(8)(A), 15 U.S.C. §§ 78m(d)(5)(A), 78n(d)(8)(A) (Supp. IV, 1969).

87. 1934 Act §§ 13(d)(5)(B), 14(d)(8)(B), 15 U.S.C. §§ 78m(d)(5)(B), 78n(d)(8)(B) (Supp. IV, 1969).

88. 1934 Act §§ 13(d)(5)(C), 14(d)(8)(C), 15 U.S.C. §§ 78m(d)(5)(C), 78n(d)(8)(C) (Supp. IV, 1969). The distinction between equity security as used in § 13(d)(5)(C) and the term security used in 14(d)(8)(C) seems to be more of a function of the imprecise drafting generally found in the amendments rather than an attempt to exclude such items as convertible debt in the former provision but include it in the latter. Issuer repurchases are governed by § 13(e), 15 U.S.C. § 78m(e) (Supp. IV, 1969).

89. 1934 Act §§ 13 (d)(5)(D), 14(d)(8)(D), 15 U.S.C. §§ 78m(d)(5)(D), 78n(d)(8)(D) (Supp. IV, 1969).

90. 1933 Act § 4(2), 15 U.S.C. § 77d(2) (1964); SEC Rule 14a-2(a), 17 C.F.R. § 240.14a-2(a) (1969).

interesting to note that the Commission Release covering Rule 14d-2 stated that the "exclusions relate to matters such as offers to no more than ten security holders during any period of twelve months . . . ."[91] This exclusion, however, is not found in Rule 14d-2.[92]

III. THE JUDICIAL INTERPRETATION

A. *Tender Offer—Standing and Materiality*

The first case to be decided under the Williams Amendments, an action by the target company to enjoin the offeror from voting the stock acquired in a tender offer and to require divestiture of the stock, held that there is a private right of action for violation of the Amendments and that the target corporation is an appropriate party to bring the action. The court, however, refused to grant the relief requested.[93] The defendant International Controls Corporation (ICC) generated about 40 million dollars through a private placement of stock and a sale of Eurobonds to use for acquisitions. ICC authorized a purchase of 100,000 shares of Electronic Specialty (ELS) through a bank in the Bahamas.[94] After it had acquired approximately one-half of that number or about two and one-half percent of the outstanding shares of ELS, ICC's president proposed a merger. The plaintiff (ELS) was much larger than ICC and rebuffed its initial overture of merger on a share-for-share basis.[95] After these talks an article appeared in the *Wall Street Journal* which overestimated the size of ICC's position in ELS stock. On the strength of this statement and a discussion of the merger, ELS stock reached an all time high. ICC's investment bankers then advised against a tender offer as being too expensive at the present time. ELS then announced merger plans with a third company. ICC

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91. SEC Exchange Act Release No. 8392 (Aug. 30, 1968), [Current] CCH FED. SEC. L. REP. ¶ 77,715, at 83,638.

92. SEC Rule 14d-2, 17 C.F.R. § 240.14d-2 (1969).

93. Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969). A better perspective of the factual setting can be gained by reading the 2 lower court opinions. Electronic Specialty Co. v. International Controls Corp., 295 F. Supp. 1063 (S.D.N.Y. 1968); Electronic Specialty Co. v. International Controls Corp., 296 F. Supp. 462 (S.D.N.Y. 1968) (denial of a motion for a preliminary injunction).

94. As long as ICC owned less than 10% of ELS, it would not have to file Schedule 13D, 17 C.F.R. § 240.13d-101 (1969), pursuant to § 13(d)(1), 15 U.S.C. § 78m(d)(1) (Supp. IV, 1969), or insider trading reports under § 16(a) of the 1934 Act, 15 U.S.C. § 78p(a) (1964). ICC then avoids any liability on short-swing profits it might make on a sale of ELS shares within 6 months if the deal falls through. *See* Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969), *cert. denied*, 396 U.S. 1036 (1970), *noted in* 22 VAND. L. REV. 1003 (1969).

95. 296 F. Supp. at 464. ELS's net earnings in 1967 were $2,630,000.00, or $1.42 per share, as compared with ICC's earnings of $678,000.00, or $.31 per share.

reported that merger talks had broken off and that it did not plan to use its cash for an ELS tender offer. ELS stock began to decline in price and ICC sold 5,400 shares on the market. On August 13, the ICC president was interviewed by the *Wall Street Journal* and stated that his "preference was to sell our stock in Electronic Specialty." The *Wall Street Journal* once again estimated ICC's holdings at twice their actual size or about five percent of the outstanding shares of ELS.[96] That evening the ICC president advised the board of ICC that a tender offer should be reconsidered. The interview of August 13 was published on August 15 after the intervening change of preference. On August 16, ICC filed Schedule 13D with the Commission which allegedly failed to disclose specific plans eventually to merge with ELS. On August 19, the tender offer for 500,000 shares of ELS was published in New York, Los Angeles, and San Francisco newspapers. The offer failed to state that ICC had previously sold a substantial number of shares or that it had a plan to merge with ELS. The plaintiff instituted an action for injunction to prevent consummation of the tender offer and moved for temporary relief. ICC extended the offer and announced that it would accept all shares tendered. ELS officers stated that if their motion was denied they would withdraw their former recommendations to the shareholders, tender their shares, and resign. Judge McLean denied the injunctive relief. He found the tender offer not misleading, even though the plaintiff might prevail on the possible manipulative effect of the August 15 *Wall Street Journal* interview and the equivocal statement in Schedule 13D with respect to future plans, inasmuch as ICC had previously planned a share-for-share merger. The judge had balanced the hardships to the stockholders of both companies with other available relief such as a later injunction against voting the stock.[97] The officers then tendered their shares. Following the denial of the preliminary injunction, ICC forwarded payment for all the shares tendered. The checks were accompanied by a copy of the complaint in the pending action, Judge McLean's opinion, and an offer permitting any shareholder to withdraw. Few accepted. ICC then moved for a summary judgment on the ground that ELS lacked standing and that the tendering and nontendering shareholders had not acted in reliance upon any statement alleged to be misleading.

At the request of the district court judge, the Commission

96. Dorfman, *Heard on the Street*, Wall Street Journal, Aug. 15, 1968, at 23, col. 2 (southwest ed.).

97. 296 F. Supp. at 469; *see* Symington Wayne Corp. v. Dresser Indus., Inc., 383 F.2d 840, 843 (2d Cir. 1967).

submitted a memorandum as amicus curiae vigorously urging that the target corporation has standing.[98] The position of the Commission and that adopted by the court was that a cash tender offer is congruent with a proxy solicitation. The court cited the congressional history of the proxy rules, which

> anticipated protection from 'irresponsible outsiders seeking to wrest control of a corporation away from honest and conscientious corporation officials.' . . . [T]he Proxy Rules are shot through with provisions recognizing that in contests for control the management has a role to play as such and not merely insofar as the managers are stockholders.[99]

The court concluded that nothing could be "a more appropriate description of the state of facts that exists in this case."[100]

The lower court seems wrong on two counts. First, the cash tender offer and the proxy solicitation are not identical. In the cash tender offer situation an individual is pondering whether the amount offered is enough to make him part with his stock. The argument that he is "voting" for present or replacement management by tendering or not tendering is unacceptable because an individual might refuse the tender yet hope the offer is successful so that he will retain an interest in the growth of the company under new management. In the proxy situation, the primary consideration is not the amount of cash flowing measured against past prices of the commodity, but rather the qualifications of the individuals seeking to replace incumbent management. The frame of reference is not the adequacy of price for termination of interest, but the presumption of continued equity participation.

Secondly, the amendments ostensibly were to benefit stockholders, not management—incumbent or insurgent. The Second Circuit partially recognized the error and attempted to ameliorate the consequences of an inadequate and erroneous characterization made by the lower court interested only in reaching what it thought to be a desirable result.[101]

A more palatable basis upon which to give the private right of action for injunction to incumbent management is that in asserting its self-interest, management is in the best position to protect the interests of the shareholders if the offeror has violated the securities laws.

98. The Commission was in somewhat of a bind because the defendant cited an earlier amicus memorandum of the Commission which urged that a target corporation did not have standing to sue for an injunction assuming that there had been a violation of 10b-5. Memorandum of the SEC as Amicus Curiae at 10, Pacific Ins. Co. v. Blot, 267 F. Supp. 956 (S.D.N.Y. 1967).

99. 295 F. Supp. at 1069-70.

100. *Id.*

101. 409 F.2d at 945-46.

Management can move quickly and efficiently to gather the facts and disseminate them to the shareholder. By stating the action in that fashion the private right of action is put in the proper perspective as a "necessary supplement to Commission action."[102] The relief then becomes available when there is actual wrongdoing, but is not a tool of defense to be used anytime inefficient management is threatened by outside entrepreneuers.

Judge Friendly, writing for the majority of the Second Circuit, advised future district judges to ponder well whether a violation of the amendments has been sufficiently proved at the outset. He felt that the opportunity for doing equity is "considerably better then than it will be later on."[103] He pointed out that the flexible powers of equity can be used to fashion the appropriate relief when it will usually be a temporary injunction designed to hold the situation in abeyance until full compliance with the amendments is achieved. However, the district judges must be "vigilant against resort to the courts on trumped-up or trivial grounds as a means for delaying and thereby defeating legitimate tender offers."[104]

The Second Circuit examined the actions upon which the two trial judges had found violations, but denied relief and determined that in fact ICC had not violated section 14(e). However, as an alternative holding the court found that even if there had been a violation of 14(e), the restricted injunction against further violations was well within the discretion of the district judge. The majority felt that the cash tender offer is like a contest and occurs not in a vacuum but "under the stresses of the market place." The problem is to distinguish the flagrant situation from the case where a violation has occurred yet drastic relief is unwarranted. The key to this distinction is "materiality." This nebulous concept has been used as the limiting doctrine in 10b-5 cases and can be successfully applied to cases interpreting the Williams Amendments.[105] Thus, the test of materiality for this purpose is "whether any of the stockholders who tendered their shares would probably not have tendered their shares if the alleged violations had not occurred."[106]

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102. J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

103. 409 F.2d at 947.

104. *Id.*

105. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied sub nom.* Kline v. SEC, 394 U.S. 976 (1969).

106. 409 F.2d at 948, *citing* Symington Wayne Corp. v. Dresser Indus., Inc., 383 F.2d 840, 843 (2d Cir. 1967); *see* General Time Corp. v. Talley Indus., Inc., 403 F.2d 159, 161-62 (2d Cir. 1968), *cert. denied,* 393 U.S. 1026 (1969).

Judge Friendly pointed out that the statement of purpose required by Schedule 13D under SEC Rule 14d-1(c) can be as seriously infringed by an overstatement as to the definiteness of merger plans as well as an understatement as alleged here. Thus, where plans are not proved to be definite, an equivocal statement for this item will satisfy the requirements if it appears to be offered in good faith. He also held that while a company may choose to correct a misstatement in the press not attributable to it, it is not required to do so. Thus, the court excused the incorreet assessment of ICC's position in ELS which appeared in the *Wall Street Journal.* The court also found that the sale of ELS stock took place while ICC was not contemplating a tender offer and that the interview, which was given before an offer was decided upon but appeared after the decision to make an offer was reached and prior to the publication of the offer, was inaccurate but resulted from "difficulties commonly experienced in answering skilled and energetic reporters who seek more definiteness than there is, and the frailties inevitable in human communication . . . ."[107]

On balance, this decision seems to be motivated in all respects by very pragmatie considerations. While the court could have avoided the issue of standing in view of its holding on the merits, it felt constrained to discuss the issue. In so doing, it provided the proposition for which this case will most likely be cited.[108] The granting of standing to the target corporation is intuitively just. When it is tempered by the admonition against recognizing frivolous claims that allow dilatory litigation to block a tender offer beneficial to the shareholders, it will encourage dissemination of the maximum amount of information to the shareholders. In addition, Judge Friendly felt that it was unrealistic for a tender offeror to be responsible for rumors not attributable to it. This makes good sense to a point, but in view of the similarity between the misleading interview answers and the press release of *Texas Gulf Sulphur*, it would appear that this is not an entirely accurate statement of the law.[109] The point for which this decision is criticized is its lack of a strong penalty.[110] The Commission submitted a memorandum as amicus curiae in a subsequent case because of their disappointment with the instant decision.[111]

107. 409 F.2d at 951.

108. *E.g.*, MGM v. Transamerica Corp., 303 F. Supp. 1344, (S.D.N.Y. 1969); Pan American Sulphur Co. v. Susquehanna Corp., [Current] CCH SEC. L. REP. ¶ 92,473, at 98,233 (W.D. Tex. May 28, 1969), *on appeal*, No. 27920 (5th Cir. 1970).

109. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied sub nom.* Kline v. SEC, 394 U.S. 976 (1969).

110. Note, *Cash Tender Offers*, 83 HARV. L. REV. 377, 390-403 (1969).

111. "[Electronic Specialty] failed to give sufficient recognition to principles . . .

B. Tender Offer—Remedies

1. *Power.*—The federal courts have "the power to grant all necessary remedial relief"[112] in "all suits in equity and actions at law brought to enforce any liability or duty created" by the 1934 Act or rules.[113] The Commission in its memorandum as amicus curiae argued for the broadest application of that power. Even Judge Friendly in his circumspect opinion in *Electronic Specialty* recognized the "variety of tools" available to the district court.[114]

The availability of an appropriate remedy does not turn on its specification in a particular statute. In antitrust, for example, the Supreme Court has ordered the drastic remedy of divestiture although it is not specified in the Sherman Act.[115] Similarly, restitution has been invoked as a remedy for a violation of the Fair Labor Standards Act of 1938 without statutory mandate. The Court in ordering reimbursement for lost wages stated: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."[116]

In the securities field the Supreme Court in *J.I. Case Co. v. Borak*,[117] made it clear that the language, "the protection of investors" certainly "implies the availability of judicial relief where necessary to achieve that result."[118] The Court cited *Deckert v. Independence Shares Corp.*[119] which held that similar language in the 1933 Act was "sufficient to fashion a remedy to rescind a fraudulent sale, secure restitution and even to enforce the right to restitution against a third party holding assets of the vendor."[120] Other relief available in addition to restitution and divestiture has included the appointment of a receiver

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establishing the importance of effective remedies as an enforcement weapon to deter future violations." Memorandum of the SEC as Amieus Curiae at 13, Pan American Sulphur Co. v. Susquehanna Corp., [Current] CCH FED. SEC. L. REP. ¶ 92,473 (W.D. Tex. May 28, 1969), *on appeal*, No. 27920 (5th Cir. 1970).

112. J.I. Case Co. v. Borak, 377 U.S. 426, 435 (1964).

113. 1934 Act § 27, 15 U.S.C. § 78aa (1964); Mills v. Electric Auto-Lite Co., [Current] CCH FED. SEC. L. REP. ¶ 92,556 (U.S. Jan. 20, 1970).

114. 409 F.2d at 947.

115. United States v. duPont & Co., 366 U.S. 316 (1961); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128 (1948).

116. Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288, 291-92 (1960).

117. 377 U.S. 426 (1964).

118. *Id.* at 432.

119. 311 U.S. 282 (1940).

120. 377 U.S. at 433.

in an action involving claims under both the 1933 Act and the 1934 Act.[121] Where a violation of the proxy rules had been shown, the Commission was granted an injunction requiring the resolicitation of proxies.[122] Thus, the district court has the power to fashion whatever relief is appropriate.

The Court in *Mills v. Electric Auto-Lite Co.*,[123] in discussing the relief to which shareholders, who proved a corporate merger was accomplished through a false and misleading proxy statement, were entitled, stated that setting aside the merger might be an appropriate remedy, but it is not necessarily required. All factors including fairness of the terms must be considered. The Court stated:

> In selecting a remedy the lower courts should exercise 'the sound discretion which guides the determinations of courts of equity,' keeping in mind the role of equity as 'the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'[124]

2. *Temporary injunction.*—In *Pan American Sulphur Co. v. Susquehanna Corp.*,[125] the plaintiff-target corporation (PASCO) and two of its stockholders sued to temporarily enjoin Susquehanna from voting 1.8 million shares obtained as a result of a cash tender offer which was alleged to be false and misleading. In its statement of future plans, Susquehanna stated that it did not plan to liquidate PASCO, sell its assets, merge it, or make any other major change in its business or corporate structure. Susquehanna reserved the right, however, to adopt or propose such course "if, at some subsequent time, it should appear that the interest of the PASCO stockholders would be better served by any of the foregoing courses of action . . . ."[126] Secondly, Susquehanna stated although ownership of approximately 38 percent of PASCO would not insure any representation on PASCO's board of directors, Susquehanna expected to request that two existing vacancies be filled with Susquehanna designees and that "in the opinion of Susquehanna's Management, 1,800,000 shares should give Susquehanna working control of PASCO."[127]

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121. Los Angeles Trust Deed & Mortgage Exch. v. SEC, 285 F.2d 162, 181 (9th Cir. 1960), *cert. denied*, 366 U.S. 919 (1961); *cf.* Aldred Investment Trust v. SEC, 151 F.2d 254 (1st Cir. 1945), *cert. denied*, 326 U.S. 795 (1946) (Investment Company Act of 1940).

122. SEC v. Transamerica Corp., 163 F.2d 511, 518 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948).

123. 396 U.S. 375 (1970).

124. *Id.* at 98,536-37 (citations omitted).

125. [Current] CCH FED. SEC. L. REP. ¶ 92,473 (W.D. Tex. May 28, 1969), *on appeal*, No. 27920 (5th Cir. 1970).

126. Memorandum of the SEC as Amicus Curiae at 2 & n.2, Pan American Sulphur Co. v. Susquehanna Corp., [Current] CCH FED. SEC. L. REP. ¶ 92,473 (W.D. Tex. May 28, 1969), *on appeal*, No. 27920 (5th Cir. 1970).

127. *Id.* at n.3.

The plaintiffs asserted that Susquehanna intended to obtain a majority on PASCO's board and to use PASCO as a vehicle for acquisitions. The court granted a temporary injunction restraining Susquehanna from voting the stock acquired in connection with the offer, requiring the composition of the board to remain as presently constituted, and delaying the annual meeting of PASCO pending the final trial of the case on the merits.[128] The order was appealed to the Fifth Circuit.[129] The relief sought by PASCO was an order directing divestiture of the shares or, in the alternative, removal from the PASCO board of the three Susquehanna designees, and a permanent injunction to keep Susquehanna from voting the PASCO shares it had acquired. The court balanced the hardship of defendant's temporary loss of voting power pending a trial on the merits against the detriment that the plaintiff would suffer. The court decided that since plaintiff had demonstrated a reasonable chance of success at trial the temporary injunction would issue.

The situation presented by Susquehanna demonstrates one of the problems facing a court in fashioning adequate relief with respect to the public and private interests which may be in conflict. The public generally is interested in the enforcement of the securities laws while the private interests of the nontendering shareholders, for example, may militate toward allowing the wrongdoer the benefit of his deception. It may be that relief will not be sought until after the tender offer because the falsity of the statements in Schedule 13D and the offer have not been discovered until that time. On the other hand, the incumbent management might still have a minority position in the target and wish to use a superficial violation of the amendments to regain control through disenfranchisement of the successful tender offeror—now a majority stockholder. An example would be where the offeror has stated that his plans were not to liquidate or make any major change in its business. After becoming privy to inside information, however, he finds liquidation of an unprofitable portion of the business necessary. By this time the price of the stock has probably declined, and the shareholders will not want to rescind what has been a profitable transaction.[130] The temporary injunction can be used to preclude the

128. [Current] CCH FED. SEC. L. REP. ¶ 92,473, at 98,234, *on appeal*, No. 27920 (5th Cir. 1970).

129. The Commission did not file a memorandum on appeal, but did file a statement to the effect that it adhered to the position taken in the district court. Letter from Phillip A. Loomis, Jr., General Counsel, Securities and Exchange Commission, to Lawrence Ashby, Case & Note Editor, *Vanderbilt Law Review*, Dec. 22, 1969.

130. *See The Continental Corporation Offer To Purchase Common Stock Of The Diners' Club, Inc. At $15 Per Share*, Wall Street Journal, Feb. 13, 1970, at 15 (southwest ed.). Hayes and

tender offeror from exercising control until the court can determine if the asserted illegality was material.

The temporary injunction can be used even more effectively during the tender offer. If it is clear that there has been a material misrepresentation and the plaintiff will prevail at trial, the temporary injunction can be used to best advantage early in the tender offer, before the intervening equities of tendering shareholders have attached. The flexibility of the temporary injunction was demonstrated in *MGM v. Transamerica Corp.*,[131] where the preliminary injunction restraining the tender offer was conditioned in part upon disclosure of the future financing plans if and when they were made definite.[132] After satisfaction of the conditions upon which the first temporary injunction had issued, the court refused a new injunction because the plaintiff did not demonstrate the ability to succeed at trial and because the irreparable damage which might well fall upon the tendering shareholders and the offeror outweighed the need fcr enjoining statements which might be misleading.[133]

3. *Damages.*—Judge Friendly rejected damages as an appropriate remedy with the statement that "no one has had the temerity to suggest that ICC now be required to raise the price to a figure it was never willing to pay."[134] The reply to his argument is that, assuming a material violation of the 1934 Act, the defendant should not be allowed to profit by his wrongful conduct. Secondly, the price was artificially depressed by his manipulative conduct. Most tender offers, however, will include the three- to five-year trading history of the stock in question so that the shareholder can compare the offering price.[135] Surprisingly enough, if the market price of the stock is depressed, stockholders cannot easily be induced to tender shares even with a high premium.[136] It would also be extremely difficult to show what the proper price of the stock should be. In addition, the price is usually higher because of the buying pressure of the offeror's market

Taussig showed that subsequent price performance for both successful and unsuccessful takeovers failed to keep pace with the market behavior of other stocks in the target's industry during the following 12 months. Hayes & Taussig, *supra* note 7, at 147.

131. 303 F. Supp. 1344 (S.D.N.Y. 1969).

132. *Id.* at 1354.

133. MGM v. Transamerica Corp., [Current] CCH FED. SEC. L. REP. ¶ 92,471, at 98,229 (S.D.N.Y. Aug. 8, 1969).

134. Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 948 (2d Cir. 1969).

135. *See* Wall Street Journal, Feb. 13, 1970, at 15 (southwest ed.).

136. Hayes & Taussig, *supra* note 7, at 140.

acquisitions prior to making his offer.[137] If damages were awarded, the ultimate source of the recovery to tendering shareholders may be the nontendering shareholders—if a reorganization follows to make them owners of the corporation that would be liable. The difficulties involved appear to preclude the award of damages as an appropriate remedy.

4. *Rescission.*—The offeror in *Electronic Specialty* voluntarily offered the tendering shareholders an opportunity to withdraw after full disclosure. Only one one-hundredth of one percent of the shares were withdrawn.[138] Since the price of the stock will always decline after a tender offer, it is unlikely that rescission will ever be freely elected by stockholders. To force such a choice on them would be a drastic remedy indeed, and to require repurchase at the inflated tender offer price would inflict a huge loss upon the very people whom the amendments were designed to protect.

5. *Divestiture.*—The Commission argued forcefully for appropriateness of this remedy in its memorandum as amicus curiae in the *Susquehanna* decision. The Commission was troubled by the rejection of divestiture or at least disenfranchisement of voting rights by the Second Circuit in *Electronic Specialty.* The Commission stated:

> [The *Electronic Specialty* opinion] failed to give sufficient recognition to the principles, enunciated in the Supreme Court decisions discussed earlier, establishing the importance of effective remedies as an enforcement weapon to deter future violations. In this connection, the court attached undue significance to the possible monetary loss to the defendant from an order of divestiture or disenfranchisement.[139]

The Commission then cited *United States v. E.I. du Pont de Nemours & Co.*[140] for the proposition that those who violate the Act must forfeit the benefit no matter how adverse the consequences to private interests.

Divestiture would appear to be the remedy appropriate to only the most extreme cases. The Supreme Court recognized that in the securities field—unlike the antitrust area—the legislation is designed to protect the private interests of the shareholders. Thus, in the recent opinion of *Mills v. Electric Auto-Lite Co.,*[141] the Court, on a similar

137. Since Schedule 13D, 17 C.F.R. § 240.13d-101 (1969), requires a statement of all transactions by the tender offeror, its officers, directors and affiliated persons in the stock of the target sought by way of the tender offer, within 60 days preceding the offer, the practical solution has been for the offerors to take a position in the target of less than 10% then effect no transactions for 60 days prior to the intended tender offer date. *See* Wall Street Journal, Feb. 13, 1970, at 15 (southwest ed.).

138. The equivalent of 1,200,000 shares had been tendered while 1100 were withdrawn. 409 F.2d at 944.

139. Memorandum of the SEC as Amicus Curiae at 13, Pan American Sulphur Co. v. Susquehanna Corp., [Current] CCH FED. SEC. L. REP. ¶ 92,473 (W.D. Tex. May 28, 1969), *on appeal,* No. 27920 (5th Cir. 1970).

140. 366 U.S. 316, 326-27 (1961).

141. 396 U.S. 375 (1970).

proposition referred to the passage cited by Judge Friendly when he affirmed the lower court's denial of divestiture or disenfranchisement even if there had been a violation of section 14(e). Although the district courts have broad equitable powers to fashion appropriate relief, they must temper that power with the qualities of mercy and practicality. It is then appropriate for the court to consider the consequences on both the corporation and nontendering shareholders. The former would be a rudderless ship since incumbent management usually departs after a successful takeover bid. The latter would see the value of their investment evaporate. Presumably they chose to remain with the corporation because they thought the new management more capable or the price offered for the stock below its intrinsic value and that the price would soon seek its correct level. In either event, the nontendering shareholder will be disappointed. First, the more capable management is being denied its opportunity, and secondly, with the market flooded by the release of what is presumably a control block of securities, the value of his stock can do nothing but decline. In addition, the tendering shareholder who was misled is no better off. He has accrued no direct benefit. Reinvestment in the target in its present position is probably not very attractive. Divestiture would also produce a huge loss for the offeror, thereby injuring even more innocent shareholders, since the sale of the stock could hardly command anything near the purchase price.[142] The inequity of this remedy is further demonstrated by the fact that no similar remedy may be used against incumbent management for equally egregious violations of the amendments in opposing the tender offer.

6. *Deprivation of Voting Rights.*—Judge Friendly dismissed this method of relief as a "disguised method of forcing divestiture."[143] If his analogy is correct the same criticisms offered with respect to divestiture are relevant here. It is correct to say that there is no comparable remedy with which to deter incumbent management from similar conduct in the future. Neither divestiture nor disenfranchisement provides a benefit to the tendering shareholders other than the cold comfort of knowing that future corporate wrongdoers will be deterred from a questionable course of conduct.

Judge Friendly observed that as a general proposition it is unhealthy to leave a minority in control of a corporation. However,

142. If ICC had been forced to sell its ELS holdings even at the then prevailing market price, it would have sustained a $15,000,000 loss or approximately 1/3 of the purchase price. 409 F.2d at 947.

143. 409 F.2d at 948.

this has happened only as a result of disenfranchisement under state law.[144] While he was correct in his contention that relief can best be given by preliminary injunction at the time of the tender offer, there will be situations where the falsity of the statements cannot be known until after the offer is completed. For this situation, disenfranchisement may be the only appropriate remedy. It is not necessarily coextensive with divestiture in that an offeror could hold nonvoting stock as an investment. Disenfranchisement would allow the offeror the opportunity of waiting for a better price at which to sell. While this remedy is drastic, it appears to be the least onerous to all parties at this stage of the tender offer. It should, however, be reserved for extreme circumstances or flagrant violations.

C. Creeping Acquisitions and Ten Percent Shareholders

Many of the problems of the tender offer, such as standing and remedies, are common to the situation presented by individuals who find themselves described as a "group" in section 13(d)(3) of the 1934 Act.[145] If the group owns more than ten percent of any outstanding class of securities, it must file Schedule 13D within ten days of the acquisition of ten percent of the equity security.[146]

In *Bath Industries, Inc. v. Blot*,[147] some rather sophisticated investors found themselves so described and clearly in violation of section 13(d) inasmuch as they had not filed the statement within ten days. In April of 1969, four of the defendants met with the president of Bath Industries, a holding company, and offered to purchase his stock in Bath, which is headquartered in Wisconsin although its principal operating subsidiaries include a shipbuilding concern in Maine and a recently acquired floor covering manufacturer in New Jersey. The defendants asserted that the president had made a poor impression on investment analysts and balked at moving the corporate headquarters to New York City. The plaintiff had alleged that the defendants wished to spin off the shipbuilding subsidiary. This would be difficult to do if it were awarded a two billion dollar destroyer construction contract. Apparently the defendants questioned the

144. Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (1947) (shareholder voting pool agreement not specifically enforceable, rather votes of party in violation of the agreement not counted).

145. 15 U.S.C. § 78m(d)(3) (Supp. IV, 1969).

146. 1934 Act § 13(d)(1), 15 U.S.C. § 78m(d)(1) (Supp. IV, 1969); Schedule 13D, 17 C.F.R. § 240.13d-101 (1969); *see* note 49 *supra*.

147. 305 F. Supp. 526 (E.D. Wis. 1969).

profitability of the contract, which would require a financing of 65 million dollars.[148] It was suggested by the opinion that the prospect of a proxy fight at the time the award of the contract was to be announced would insure that the contract would go to the remaining competitor. During the summer, the defendants began purchasing Bath common, convertible preferred, and warrants.[149] By September 10, 1969, a list of shareholders that constituted the group seeking to control Bath had been reduced to writing and presented to the plaintiff. Defendants had also engaged a proxy solicitation firm and a public relations firm that specializes in proxy contests. On September 12, the defendants requested a shareholder list and demanded a special shareholders' meeting to elect an expanded new board which gave them the majority and requested a special shareholders' meeting to be held November 17, the day prior to the award of the destroyer contraet. On September 16, the defendants met with the board and demanded the election of their man as chief executive officer and the addition of three nomineces to the board. The board adjourned until September 29 without reaching agreement. Plaintiff filed this action and requested a temporary restraining order on September 29. The court, being satisfied that plaintiffs would suffer irreparable injury if defendants were not restrained, issued the temporary restraining order on the following day. After an evidentiary hearing, the court stated that it would grant a preliminary injunction because the plaintiff had made a "showing of probable cause for ultimate relief on the merits."[150]

Betwcen October 17 and October 21, several of the defendants had filcd with the Commission statements purporting to satisfy Schedule 13D requirements. The plaintiff claimed they were false and misleading. On November 3, 1969, the court enjoined the defendants from calling a special stockholders' meeting and selecting a new chief executive officer until all defendants had filed Schedule 13D and the statements filed were determined to be legally sufficient.

After determining that venue was proper, the court found that the shareholders constituted a group within section 13(d)(3) and SEC Rule 13d-3.[151] The court concluded that they were required to file a statement

148. The company was planning a private placement of $25,000,000 and the sale of $40,000,000 of debentures.

149. From the early summer, the defendants owned substantially in excess of 10% of the outstanding common and preferred.

150. 305 F. Supp. at 528; *see* Russell v. Farley, 105 U.S. 433, 438 (1881); Chicago S.S. & S.B.R.R. v. Monon R.R., 235 F. Supp. 984, 985 (N.D. Ill. 1964).

151. 1934 Act § 13(d)(3), 15 U.S.C. § 78m(d)(3) (Supp. IV, 1969); SEC Rule 13d-3, 17 C.F.R. § 240.13d-3 (1969).

within ten days after they agreed to pool their voting interests since, at that time, they held over ten percent of Bath common and preferred stock. The fact that certain members of the group acquired additional shares of Bath was only to "further . . insure the success of their plan."[152]

The court gave a broad definition to "directly or indirectly the beneficial owner."[153] The court referred to a Commission Release under section 16(a) of the 1934 Act to conclude that beneficial owner applies to anyone who has "[b]enefits substantially equivalent to ownership . . . [such as] the ability to exercise a controlling influence over the purchase, sale, or voting of such securities."[154] The House Report noted:

> [Section 13(d)(3)] would prevent a group of persons who seek to pool their voting or other interests in the securities of an issuer from evading the provisions of the statute because no one individual owns more than 10 percent of the securities.[155]

Having concluded that the defendants violated the Williams Amendments, the court in balancing the hardships determined that if the defendants were not enjoined, a strongly contested proxy fight might ensue causing the shipbuilding subsidiary to lose the large contract which was to be awarded in the near future. The hardship to defendants caused by the possible delay in replacing the chief executive officer and moving the corporate headquarters was considered insignificant in comparison.[156]

It is interesting to note the conflict between section 13(d) as interpreted by this court and section 14(a) and SEC Rule 14 a-2(a). The proxy rules exempt "[a]ny solicitation made otherwise than on behalf of the management of the issuer where the total number of persons solicited is not more than ten."[157] This exemption is provided to allow the organization of an insurgent shareholder committee. Yet this same committee would be in violation of section 13(d) if their pooled holdings are equal to ten percent, as they must be in order to consider mounting a proxy fight. In this regard the Williams

152. 305 F. Supp. at 537.

153. 1934 Act § 13(d)(1), 15 U.S.C. § 78m(d)(1) (Supp. IV, 1969).

154. Exchange Act Release No. 7739 (Jan. 19, 1966), 2 CCH FED. SEC. L. REP. ¶ 26,032, at 19057-4.

155. H.R. REP. No. 1711, 90th Cong., 2d Sess. 8-9 (1968).

156. The court said that: "Plaintiff has failed to satisfy the court that it is likely to recover on its second claim for relief: alleged violations by the defendants of section 14(a) of the 1934 Act. . . ." 305 F. Supp. at 539.

157. SEC Rule 14a-2(a), 17 C.F.R. § 240.14a-2(a) (1969); *see* notes 98-99 *supra* and accompanying text.

Amendments were supposed to add symmetry to the 1934 Act by regulating cash tender offers in a manner similar to the regulation of proxy solicitation; however, it would appear that with respect to organization of the attack, a heavier burden is placed on the cash purchaser. Thus, the large shareholder who disagrees with management is at a greater disadvantage in the context of forming an insurgent committee than the small shareholder.

The court, here faced with a clear cut violation, tailored the relief to the situation as well as it could. This decision demonstrates how this section can be a trap. But by enjoining the shareholders' meeting until all defendants had filed sufficient statements, it has delayed the majority owners from making a business decision in their enterprise and might force them to be a party to a contract the majority disfavors. Since the defendants have all entered into settlements with the plaintiff, they may have felt that the purpose of a proxy fight the day prior to the award of the contract has been accomplished by the litigation—a demonstration of the lack of solidarity of management.[158] Clearly, the drastic relief of divestiture was inappropriate here since Bath had to go to the money market in the event that the contract was awarded to them. Likewise, damages, rescission, and a permanent disenfranchisement were not in order. The flexible position adopted by the court serves all interests. It encourages full disclosure, otherwise a shareholders' meeting will never be held; yet it is not oppressive to either the group or other shareholders.

IV. CONCLUSION

Proper considerations for the court faced with either a cash tender offer or the creeping acquisition are the policies which are the origin of the legislation. The first draft provided strong measures for dealing with those described as white collar pirates. Later versions and much of the testimony at the Senate Hearings indicated that the new regulatory measure was not designed to favor either incumbent management or the offeror. The result is legislation that is designed to provide full disclosure to the shareholders. While practice would indicate that white collar pirates are not in abundance, if a case is presented where the offeror is accurately described by that term, the machinery is present in the Williams Amendments to deal drastically with him.

The 1933 Act and the provisions of the 1934 Act should be read as a unit whenever possible.[159] Items that are regulated by the disclosure

158. 305 F. Supp. at 529 n.2.

159. Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963); 6 Loss at 3915.

provisions of the proxy solicitation and 1933 Act registration requirements should not be material under the projected outlook section of Schedule 13D. Additionally, a meeting of stockholders that would be exempt from disclosure requirements under the proxy rules should not be in violation of the group and disclosure requirements of section 13(d).

The courts should be aware of the great trust that has been bestowed upon them after *Borak* and *Mills v. Electric Auto-Lite* acknowledged the power to grant virtually any relief that is appropriate. The rational application of this vast power requires a constant consideration of the policies discussed earlier. The court must be satisfied that the plaintiff can ultimately succeed on the merits before it grants provisional relief. It must bear in mind that the real benefactor is to be the shareholder, not incumbent management. The latter can share the benefit only to the extent that it helps discharge its duty to the shareholder.

When a mere superficial violation occurs, the court can look to its power of temporary injunction to secure full compliance with the disclosure requirements. It will be drastic enough in most situations. The full force of the powers available should be used only when circumstances call for drastic relief. The remedy should be determined in the light of all the circumstances, which necessarily involves a careful analysis of the overall effect of such relief on all the shareholders.

The distinction between the situation which calls for drastic relief and that which requires little or no relief turns on the materiality of the information not disclosed or disclosed in a misleading manner. If no reasonably prudent investor would have acted differently at the time of the transaction if a full disclosure had been made, then little or no relief is needed—perhaps an injunction against future violations. If there is some question as to what a reasonable investor would do, then the temporary injunction should issue either upon the condition of full compliance or a determination of the issues on the merits. If the situation demonstrates clearly a material omission or misleading information, so that a reasonably prudent investor would have acted otherwise if there had been full disclosure, then it is appropriate to consider drastic relief keeping in mind its overall effect on all the intended beneficiaries of the Williams Amendments.*

M. DOUGLAS DUNN

* While this Note was at the galley stage, the Fifth Circuit Court of Appeals reversed the case of *Pan American Sulphur Co. v. Susquehanna Corp.* The appellate court decided in favor of the tender offeror. The Wall Street Journal, Mar. 17, 1970, at 18, col. 5. (The case is discussed in notes 26, 63, 108, 111, 125, 126, 128, and 139 *supra*).