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## COMMENTS

# ANTITAKEOVER MANEUVERS: DEVELOPMENTS IN DEFENSE TACTICS AND TARGET ACTIONS FOR INJUNCTIVE RELIEF

by Patrick C. Sargent

THE USE of a tender offer<sup>1</sup> to effect the takeover of one corporation by another has been a popular practice for nearly twenty years.<sup>2</sup> The popularity of this maneuver is readily determinable from the vast number of tender offers attempted and completed<sup>3</sup> and the voluminous literature on the subject.<sup>4</sup> A "raider" corporation might seek to take

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1. Federal securities laws do not define the term "tender offer," but the Securities and Exchange Commission (SEC) recently proposed the following two-tier definition in Exchange Release No. 16385, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,374 (1979):

Under the first tier, proposed Rule 14d-1(b)(1)(i), the term "tender offer" consists of four elements: (1) one or more offers to purchase or solicitations of offers to sell securities of a single class; (2) during any 45-day period; (3) directed to more than 10 persons; and (4) seeking the acquisition of more than 5% of the class of securities.

*Id.* at 82,603 (footnotes omitted). The second tier defines a tender offer by means of three conditions: (1) the solicitation must involve a widespread dissemination of the offer, (2) the price offered must include a premium of 5% or two dollars above the security's current market price, and (3) the offer must not provide a meaningful opportunity to negotiate price and terms. *Id.* at 82,604-05. The second tier operates independently of the first such that a tender offer may be determined according to one although it does not meet the requirement of the other. For further discussion of aspects of a tender offer, see Einhorn & Blackburn, *The Developing Concept of "Tender Offer": An Analysis of the Judicial and Administrative Interpretations of the Term*, 23 N.Y.L. SCH. L. REV. 379 (1978); Note, *Cash Tender Offers: A Proposed Definition*, 31 U. FLA. L. REV. 694 (1979).

2. See P. DAVEY, DEFENSES AGAINST UNNEGOTIATED CASH TENDER OFFERS I (Conference Board Report No. 726, 1977).

3. See P. DAVEY, *supra* note 2, at 3. See also Vance, *Is Your Company a Take-Over Target?*, 47 HARV. BUS. REV., May-June 1969, at 93 (250 tender offers, mergers, raids in 1968); Taylor & Schorr, *Government May Abandon Fight to Stem Conglomerate Takeovers*, Wall St. J., Nov. 24, 1980, at 27, col. 4 (conglomerate acquisitions worth \$500 million or more rose from 6 in 1978, to 16 in 1979).

4. For an extensive discussion of books and articles dealing with the topic of tender offers and takeovers, see Comment, *A Review of the Literature on Defensive Tactics to Surprise Cash Tender Offers*, 13 CREIGHTON L. REV. 909 (1980).

over a "target" corporation<sup>5</sup> for a variety of reasons, including the desire to strengthen the raider's overall earnings picture, the security of obtaining a ready supplier of raw materials or goods essential to the raider's productivity, the development of a full vertical or horizontal product distribution network, and the financial aspects of securing the excess cash of a highly liquid target.<sup>6</sup>

Because a tender offer may take a target corporation by surprise and the resulting takeover may effect substantial changes in the target corporation's management, policy, or operations, corporate management must be concerned with the law regarding takeovers and with the options available for dealing with hostile takeover attempts. This Comment examines defense tactics and maneuvers frequently employed by corporate management both in avoiding potential takeovers and in deflecting takeovers already in progress. Additionally, recent rules and regulations governing takeovers promulgated by Congress and the Securities and Exchange Commission (SEC) are reviewed. In discussing the deflection of a takeover attempt in the context of federal regulation, the tactic of initiating litigation against the raider inevitably surfaces as an important consideration. Accordingly, this Comment addresses recent developments concerning a target's action against a raider for injunctive relief from continuation of the tender offer or purchase of target stock under the Williams Act.<sup>7</sup> Section 13(d) of the Act receives particular emphasis because recent federal court decisions conflict over the issue of target standing to sue under this section. Beyond the scope of this Comment is corporate management's pervasive fiduciary duty to the corporation and its shareholders. This issue underlies all decisions made by the management and the board of directors, however, and should not be ignored when considering antitakeover strategies.<sup>8</sup>

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5. A "raider" corporation is one that makes an unnegotiated tender offer to wrest control from an attractive company, the "target."

6. See generally P. DAVEY, *supra* note 2, at 1-3.

7. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. III 1979) (originally enacted as Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454). The Williams Act amended the Securities Exchange Act of 1934 by providing for full disclosure of corporate equity ownership. For example, § 13(d) requires that any person who acquires more than 5% of the securities of a public corporation must file an information report within 10 days of such acquisition with the issuer of the securities, with the exchange where the stock is traded, and with the SEC. 15 U.S.C. § 78m(d) (1976 & Supp. III 1979). Similarly, § 14(d) requires that for a person to make a tender offer, after which such person will become owner of more than 5% of the corporate securities, such person must have filed an information report similar to the one required in § 13(d) by the date of the tender offer. 15 U.S.C. § 78n(d) (1976). The reports required by each section are Schedules 13D and 14D respectively, and are discussed generally at notes 116-20 *infra* and accompanying text. For a discussion of the Williams Act, see Wander, *Selecting Targets and Shaping Strategy in Corporate Take-Over: Securities Law Considerations*, 24 Sw. L.J. 593, 594-600 (1970).

8. State law regulates the obligations owed by corporate directors to the corporation and its shareholders except where federal law expressly preempts it. *Cort v. Ash*, 422 U.S. 66, 84 (1975). Typically, state law holds that "corporate officers and directors . . . owe their corporation and its minority shareholders a fiduciary obligation of honesty, loyalty, good faith and fairness." *Singer v. Magnavox Co.*, 380 A.2d 969, 977 (Del. 1977) (citations omitted). Federal courts may entertain an action under §§ 10b and 14(e) of the Securities Ex-

## I. DEFENSE TACTICS

A. *Target Characteristics*

Many corporate directors fail to recognize the possibility that a surprise tender offer to effect a takeover could be made on their corporation.<sup>9</sup> Although no foolproof method exists to determine whether a business is a likely takeover candidate, certain factors indicate substantially greater susceptibility to a takeover attempt. These factors can be segregated into financial and nonfinancial categories. The financial factors that appeal to a raider include a low price/earnings ratio, a low debt/capital ratio, high liquidity or excessive cash reserves, a strong record of earning stability, and a book value of the stock greater than its market price.<sup>10</sup> In analyzing a potential target's attractiveness, the raider may prefer a corporation with tangible assets such as real estate, machinery, and inventory, although a corporation with an established name or product and an efficient distribution channel also is appealing.<sup>11</sup>

While financial factors are of substantial importance in locating a desirable target, nonfinancial factors are critical in determining the feasibility of effecting the takeover. Nonfinancial factors favorable to a takeover include a broad base of shareholders without strong ties to the corporation, a weak or unaggressive management, the absence of strong state antitakeover statutes in the potential target's state of incorporation,<sup>12</sup> and limited

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change Act of 1934, 15 U.S.C. §§ 78j(b), 78n(e) (1976), if the claim involves manipulation and deception. General fiduciary cases, however, should be decided by state corporate law. *Altman v. Knight*, 431 F. Supp. 309, 313-14 (S.D.N.Y. 1977); see *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 478 (1977); *Berman v. Gerber Prods. Co.*, 454 F. Supp. 1310, 1318 (W.D. Mich. 1978). For a discussion of corporate director responsibility and liability, see Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101 (1979); Weiss, *Tender Offers and Management Responsibility*, 23 N.Y.L. SCH. L. REV. 445 (1978); Note, *Corporate Directors' Liability for Resisting a Tender Offer: Proposed Substantive and Procedural Modifications of Existing State Fiduciary Standards*, 32 VAND. L. REV. 575, 585-86 (1979).

9. See Vance, *supra* note 3, at 93.

10. A profitable company with low debt clearly presents an attractive investment opportunity. Some raiders acquire targets with successful profit records to enhance their own overall profit picture by using equity accounting principles, that is, consolidating the acquired corporation's financial statements into the acquirer's statements once 50% ownership has been secured. A target with excessive cash reserves or high liquidity, however, may be sought by a raider that merely wants to soak up these assets to pay off debts, part of which may have arisen through financing the tender offer, or to finance capital expansion. Frequently this strategy results in the dissolution of the target corporation. See generally Vance, *supra* note 3, at 94-95; Comment, *supra* note 4, at 912-13.

11. Trough, *Characteristics of Target Companies*, 32 BUS. LAW. 1301, 1302 (1977). The author suggests that a corporation that has recently made large capital expenditures, preferably cash rather than by debt, is attractive because it will begin to realize profits from those expenditures over time. Similarly, small energy companies with significant holdings in oil, gas, and coal reserves are likely targets. Furthermore, he suggests that in the future raiders will probably seek close-end trusts because these large pools of capital can be liquidated quickly. *Id.* at 1302-03. A takeover candidate can be characterized simply as a "reasonably successful, relatively debt-free company where the management holds little stock and does not appear to be terribly aggressive." *Id.* at 1304.

12. State antitakeover statutes, because they tend to favor target management, have been scrutinized by judges and legislators, particularly within the last several years. Briefly, the statutes regulate tender offers and stock trading. A typical statute provides for pre-offer

insider control.<sup>13</sup> A loyal shareholder base is less apt to tender its stock without careful consideration of the offer and its effect on the corporation; conversely, a weak management is not likely to foster strong shareholder ties or consider other types of takeover defense preparations.<sup>14</sup> Although these factors are not determinative of target candidates, the existence of one or more should put management on notice of the possibility.

### B. Tactics

*Advance Preparation Tactics.* Advanced preparation is the preferred means of confronting a surprise tender offer.<sup>15</sup> Numerous methods of preparation are available to concerned corporate management, but each has a different degree of success depending on the needs of the target and the circumstances surrounding the takeover bid. Although defensive preparation may provide a greater chance of success in fending off an unwelcome raider, management should not be lulled into a false sense of security.<sup>16</sup>

*Defense Team.* The first step in a sound defense strategy is to develop a small tactical defense team with the capacity to act at a moment's notice in response to a takeover bid.<sup>17</sup> The composition of the team is vital to its effectiveness and, consequently, it should include, at minimum, the corporation's chief executive and financial officers, legal counsel well versed in takeovers, investment bankers, and public relations experts.<sup>18</sup> The extent of the team's effectiveness in addressing the issue of whether to challenge

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waiting periods, duration of the offer, and limited disclosure requirements. For a discussion of recent developments in the state statutes, see notes 52-61 *infra* and accompanying text.

13. For a general listing of factors indicating takeover susceptibility, see 1 M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS 9-10 (1978).

14. See Troubh, *supra* note 11, at 1301-02.

15. Comment, *Corporate Defenses to Takeover Bids*, 44 TUL. L. REV. 517, 521 (1970).

16. See A. FLEISCHER, TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING 2-3 (1979); M. KATZ & R. LOEB, ACQUISITIONS AND MERGERS: STRATEGY AND TACTICS 221 (1979).

17. See Reuben & Elden, *How to be a Target Company*, 23 N.Y.L. SCH. L. REV. 423, 427-28 (1978). The authors suggest that some members of the defense team should be assembled during the "digging in" stage in anticipation of a takeover attempt. Other tactical members may be selected later when the identity of the aggressor is determined. In recognition of the realities of the marketplace, the authors preface their discussion with the "Cardinal Rule" that "a tender offer should and will prevail at some price if the aggressor is willing to pay it." *Id.* at 427 (emphasis in original).

Defense teams are recognized also as essential elements in defending takeover attempts that already have materialized. See note 64 *infra* and accompanying text. The time saved and the efficiency of having specific persons organized before the actual attempt are obvious advantages of establishing a team in advance.

A tactic that has recently emerged involves the target putting a merger and acquisition counseling firm on retainer. See Carrington, *Kidder Teaches Clients How to Fend Off Takeover Bids*, Wall St. J., Nov. 25, 1980, at 25, col. 4. This enables the target to receive advice on how to avoid a takeover attempt and what course of action the target should follow once the bid becomes a reality. Furthermore, the fact of having the advisory service itself could be an effective defense by indicating to potential raiders that the target is prepared for a hard-fought battle. *Id.* at 35, col. 1.

18. See Barnhill, *The Corporate Raider: Contesting Proxy Solicitations and Take Over Offers*, 20 BUS. LAW. 763, 769-71 (1965); Comment, *supra* note 4, at 915-16.

the tender offer is also dependent upon providing the members with updated materials on industry and stock market activity and takeover law developments through an efficient communications system.<sup>19</sup> Once the decision to challenge a tender offer has been reached by the target's board of directors, the team must then implement an effective system of defense.<sup>20</sup>

*Black Books.* Either in conjunction with or in lieu of the defense team, corporations could develop a "black book" listing various modes of action and procedures to be implemented if a takeover threat arises.<sup>21</sup> The black book may contain, for example, a checklist of steps to take immediately upon learning of the takeover bid, a list of key corporate personnel phone numbers and addresses, letters with arguments against tender offers to be sent to shareholders, reference materials, schedules for any SEC filing requirements that may apply,<sup>22</sup> and logistic directions for carrying out the above.<sup>23</sup> Some commentators, however, express concern over the utility of a black book because the takeover situation rarely can be predicted with any degree of certainty.<sup>24</sup> Thus, while the black book is a recognized tool in preparing for a potential takeover attempt, it should not be viewed as a sufficient safeguard against a determined raider.

*Shareholder Relations.* Critical components in planning defensive strategy include establishing a shareholder relations program and monitoring stock trading activity.<sup>25</sup> Because a target without strong shareholder relations may be an attractive subject of a takeover attempt,<sup>26</sup> fostering close shareholder ties could be crucial. Periodic newsletters to shareholders, personal contact with large individual shareholders, and dividend reinvestment programs in which the corporation assumes administrative and brokerage costs are effective methods of establishing such ties.<sup>27</sup> Initially, however, a detailed analysis of the shareholder composition should be made, noting such factors as its geographic concentration, the type and size of holders, their cost basis in the stock, and their possible reactions to a hostile tender offer.<sup>28</sup> Monitoring the appropriate stock exchange for unusual stock activity and noting changes in stock ownership of the corporation's major shareholders are important because these often give target

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19. I M. LIPTON & E. STEINBERGER, *supra* note 13, at 264; Reuben & Elden, *supra* note 17, at 431.

20. For a discussion of the defense team's considerations and operations after the offer has been made, see notes 62-115 *infra* and accompanying text.

21. M. KATZ & R. LOEB, *supra* note 16, at 221.

22. The Williams Act regulates tender offers and other stock acquisitions. Recently adopted regulations under the Act are discussed at notes 68-77 *infra* and accompanying text.

23. P. DAVEY, *supra* note 2, at 11-12.

24. See note 16 *supra*.

25. M. KATZ & R. LOEB, *supra* note 16, at 222; Comment, *supra* note 15, at 521. Once the offer has been made, a more aggressive shareholder campaign should be waged. See notes 78-81 *infra* and accompanying text.

26. See notes 13-14 *supra* and accompanying text.

27. See Robinson, *Strategy to Prevent a Takeover*, 32 BUS. LAW. 1361, 1362 (1977).

28. *Id.* at 1361.

management the first indication that a raider corporation is positioning itself for a hostile tender offer.<sup>29</sup>

*Corporate Acquisitions.* On a larger scale, the target could decide to acquire another corporation as part of its defensive preparation. Federally regulated businesses, certain foreign corporations, and businesses involved in activities similar to those of the raider are the primary considerations as objects of this tactic. Many offerors view the attempted takeover of a regulated company or a company with a regulated subsidiary as problematic<sup>30</sup> because governmental approval generally is required before a federally regulated business undergoes any significant change in corporate control.<sup>31</sup> Accordingly, due to the delay involved in securing approval and the overall bureaucratic red tape, acquisition by a potential target of a federally regulated business may discourage or delay a planned takeover.<sup>32</sup>

Similarly, some prospective targets have acquired Canadian businesses as a preventive measure.<sup>33</sup> This tactic can be effective because Canada will approve a takeover of one of its incorporated businesses only after a demonstration that the takeover is of significant benefit to the country.<sup>34</sup> Initially, of course, the target will face the same difficulties in acquiring the federally regulated or Canadian corporation that it seeks to impose subsequently on a raider corporation.

Following the same rationale, a target candidate could acquire an outside company in order to raise antitrust problems in the event of an

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29. Barnhill, *supra* note 18, at 765. Although the author recommends a good shareholder relations program, he cautions against overreliance on it as insurance against a takeover contest. *Id.* at 764-65.

30. See Brown, *Changes in Offeror Strategy in Response to New Laws and Regulations*, 28 CASE W. RES. L. REV. 843, 873 (1978).

31. Regulated industries that require government approval include radio and television, insurance, domestic air carriers, defense facilities, and public utilities. See, e.g., 47 U.S.C. § 310(d) (1976). The statute requires that an application be submitted to the Federal Communications Commission before any change in control of a corporation holding a radio station license occurs.

32. See P. DAVEY, *supra* note 2, at 18; A. FLEISCHER, RESPONSES TO TAKEOVER BIDS: CORPORATE, SEC, TACTICAL, AND FIDUCIARY CONSIDERATIONS, A-6 to -7 (BNA Corporate Practice Series No. 6, 1978); Hochman & Folger, *Deflecting Takeovers: Charter and By-law Techniques*, 34 BUS. LAW. 537, 558 (1979). See also Nathan, *Developments in Strategies and Tactics for Offerors in Merger, Tender Offer and Similar Acquisition Transactions* in TENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 369, 398 (1978). The author cautions, however, that federally regulated targets may not be wholly immune from takeover, even though activity thus far indicates an extremely favorable position against takeover for those targets that are federally regulated. *Id.* For a case rejecting a target's claim that the acquisition by a bidder would violate transfer of control restrictions under § 184 of the Atomic Energy Act of 1954, 42 U.S.C. § 2234 (1976), see Babcock & Wilcox Co. v. United Technologies Corp., 435 F. Supp. 1249 (N.D. Ohio 1977).

33. See A. FLEISCHER, *supra* note 32, at A-6; 2 M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS G-2 (1978) (example of target letter alerting shareholders to the conflict with Canadian law posed by a takeover); Hochman & Folger, *supra* note 32, at 558.

34. See Foreign Investment Review Act, 1973 Can. Stat. ch. 46, § 8(1), at 636. The approval requirement may be temporarily avoided, however, if the offeror applies for approval upon commencing the tender bid, recognizing that it may be forced to divest itself of the Canadian subsidiary pending a determination by the Governor in Council. *Id.* §§ 8(3)(a)-13, at 637-43.

attempted takeover by a corporate raider that deals in a related or competing industry.<sup>35</sup> The acquisition of a company for this purpose, however, is generally a post-offer tactic because a potential target rarely knows in advance the identity of its unwelcome suitor.<sup>36</sup> Even without such an acquisition by the target, some proposed takeovers present antitrust complications between the raider and the target itself. The target could raise these arguments in court, or the Justice Department or the Federal Trade Commission could undertake an independent investigation of the alleged violations.<sup>37</sup>

*Contract Clauses.* A maneuver that receives less support than the various acquisition alternatives is the insertion in loan agreements and long-term contracts of clauses that call for termination of the contract or other severe consequences upon a change in corporate control.<sup>38</sup> The lack of enthusiasm stems from certain risks that may accompany the use of such clauses. For example, a long-term employment contract for target management providing for large severance payments upon a change in control requires proper disclosure in the corporation's proxy statements and must satisfy a strong corporate purpose because it tends to favor management.<sup>39</sup> Furthermore, debt acceleration clauses in loan agreements may have questionable enforceability.<sup>40</sup> In spite of the skepticism concerning the effectiveness of such clauses, offeror strategists are likely to give them careful consideration when analyzing potential takeover candidates.<sup>41</sup>

*Charter and Bylaw Provisions.* Charter and bylaw provisions are effective devices for either preventing an outright acquisition of the target company or providing target management with a breathing period to formulate and effectuate defensive strategy while retaining control.<sup>42</sup> One

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35. See A. FLEISCHER, *supra* note 32, at A-7 to -10; I M. LIPTON & E. STEINBERGER, *supra* note 13, at 271-72; Comment, *supra* note 4, at 921.

36. See Comment, *supra* note 4, at 911. See also notes 92-105 *infra* and accompanying text.

37. Kennedy, *Tender Moment*, 23 BUS. LAW. 1091, 1101 (1968).

38. I M. LIPTON & E. STEINBERGER, *supra* note 13, at 272-73; Yoran, *Advance Defensive Tactics Against Takeover Bids*, 21 AM. J. COMP. L. 531, 534 (1973).

39. Mishkin & Donovan, *Long Range Protective Planning*, in TENDER OFFERS, MAKING AND MEETING THEM 313, 339-40 (1979).

40. *Id.* at 340; I M. LIPTON & E. STEINBERGER, *supra* note 13, at 273.

41. See Brown, *supra* note 30, at 872.

42. See Hochman & Folger, *supra* note 32. The authors analyze available procedures and amendments from the target management's perspective for retaining control and preventing the squeezeout of minority shareholders unwilling to tender their shares. The existence of tough charter and bylaw provisions initially informs a would-be raider that he is in for a difficult battle. For a further discussion of charter and bylaw provisions, see E. ARANOW, H. EINHORN & G. BERLESTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 193-99 (1977); M. KATZ & R. LOEB, *supra* note 16, at 222-25; Reuben & Elden, *supra* note 17, at 424-25. In Mishkin & Donovan, *supra* note 39, at 316-34, the authors discuss in detail the classification of directors, limitations on removal of directors, supermajority vote requirements, fair price for corporate stock provisions, and the authorization of additional stock.



such control-retaining "shark repellent"<sup>43</sup> is the staggering of director terms, a tactic that prolongs the time a raider must wait before securing control of the target's board of directors.<sup>44</sup> The charter or bylaws could also limit the ability of shareholders to remove directors by requiring a showing of cause for removal.<sup>45</sup> Additionally, a provision increasing the amount of authorized stock could enable directors to dilute a raider's growing control through a planned sale of the unissued stock.<sup>46</sup> Finally, directors could achieve dilution through an employee stock purchase plan.<sup>47</sup> Such a plan would serve not only the dilution goal, but also the goal of keeping stock in friendly hands. The foregoing provisions, as well as others, should be secured in the charter or bylaws by requiring a supermajority vote to pass amendments.<sup>48</sup> Drafters of these provisions, however, must scrutinize the terms carefully to avoid conflict with state laws and to avoid provisions that prevent the corporation from later instituting favorable changes.<sup>49</sup>

Charter and bylaw provisions can go a step further by providing protection to minority shareholders after a raider has gained control. First, requiring a supermajority vote for the approval of mergers will prevent control by a majority shareholder to the exclusion of the minority.<sup>50</sup> Secondly, fair price clauses can be designed to assure equitable compensation for a minority shareholder faced with a depressed market or a subvalue

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43. "Shark repellent" clauses are aimed at discouraging unwanted suitors, the "sharks," from initiating takeover attempts and preventing them from wresting complete control from the management. *But see* A. FLEISCHER, *supra* note 32, at A-3, in which the author notes that reliance on these clauses may be ill-placed, especially when encountering a determined bidder.

44. For example, the articles may provide for the election of a classified directorship in which three of nine directors serve staggered three-year terms, and the election of each class is held annually. Therefore, assuming a majority shareholder could elect two of the three directors each year, as many as three annual elections could be required to gain full control of the board. *See* Hochman & Folger, *supra* note 32, at 538.

45. A. FLEISCHER, *supra* note 32, at A-4; Hochman & Folger, *supra* note 32, at 541. The Delaware Code requires a showing of cause for removal only with a classified board of directors. DEL. CODE ANN. tit. 8, § 141(k) (1978).

46. Caution should be exercised, however, because stock issuances by corporate management that appear to be for the purpose of frustrating a tender offer and that circumvent shareholder approval have been held invalid. *See, e.g.,* Applied Digital Data Syss., Inc. v. Milgo Elec. Corp., 425 F. Supp. 1145 (S.D.N.Y. 1977).

47. Hochman & Folger, *supra* note 32, at 547. The establishment by a corporation of an employee stock trust has been upheld although the corporation's own stock was purchased for the trust in order to avoid purchase of the stock by an outsider seeking to gain control. *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972). For general considerations under stock repurchases by the issuer, see notes 82-85 *infra* and accompanying text.

48. Supermajority votes require greater than a simple majority; for example, provisions may call for a shareholder vote of 66-2/3% or 80% or more. *See* Mullaney, *Guarding Against Takeovers—Defensive Charter Provisions*, 25 BUS. LAW. 1441 (1970).

49. P. DAVEY, *supra* note 2, at 14 (this procedure may prevent desired mergers); A. FLEISCHER, *supra* note 32, at A-5 (must consider state blue sky laws, deterrence of favorable mergers, and fiduciary duties); M. KATZ & R. LOEB, *supra* note 16, at 223-24 (California and Wisconsin disfavor these provisions); I M. LIPTON & E. STEINBERGER, *supra* note 13, at 265-71 (efficacy is questionable; may call attention to company as a target).

50. *See* note 48 *supra* and accompanying text.

freezeout following a takeover.<sup>51</sup> Because such provisions may minimize the possibility of intimidation of minority shareholders by tender offerors, target management could realize a benefit in its efforts to retain control.

*State Takeover Statutes.* Reincorporating the potential target in a state with a strong antitakeover statute has been a commonly used defense tactic.<sup>52</sup> Questions, however, have been raised as to the validity of such statutes in light of federal legislation and the commerce clause. In *Great Western United Corp. v. Kidwell*<sup>53</sup> the Fifth Circuit addressed the constitutionality of the Idaho takeover statute<sup>54</sup> in light of the Williams Act, which regulates tender offers on the federal level. The issue arose when Great Western initiated a tender offer for Sunshine Mining and Metal Company, located principally in Idaho, and state officials sought to impose Idaho corporation law. Although Great Western had complied with the filing and disclosure requirements under the Williams Act, compliance with the Idaho statute would have delayed the tender offer. Consequently, Great Western brought suit against the Idaho state officials. After a lengthy discussion of jurisdiction and venue issues,<sup>55</sup> the court of appeals affirmed the district court's decision that the Idaho statute was unconstitutional on two grounds. First, the court held that the Idaho statute was preempted by the Williams Act because the state's fiduciary approach to investor protection was incompatible with the market approach adopted by Congress.<sup>56</sup> Secondly, the court held that because the statute put restraints on tender offerors, it unconstitutionally burdened the interstate commerce of security transactions and, therefore, was invalid under the commerce clause of the

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51. Compensation provisions apply a formula for determining a minimum price at which minority shareholders can be bought out. See E. ARANOW, H. EINHORN & G. BERLSTEIN, *supra* note 42, at 196; Mishkin & Donovan, *supra* note 39, at 324-26. "Freezeouts" and "squeezeouts" can occur when the majority shareholder, by virtue of such ownership, forces a minority shareholder to tender shares at an unfavorable price in order to eliminate the minority and secure total ownership.

52. See E. ARANOW, H. EINHORN & G. BERLSTEIN, *supra* note 42, at 196-97; I J. FLOM, M. LIPTON & E. STEINBERGER, TAKEOVERS AND TAKEOUTS—TENDER OFFERS AND GOING PRIVATE 81-93 (1976); Reuben & Elden, *supra* note 17, at 434-36. State antitakeover statutes regulate takeovers under state corporation law and typically favor target companies desiring to resist hostile takeover attempts. See, e.g., IDAHO CODE §§ 30-1501 to -1513 (1980) discussed at note 54 *infra*; *State Takeover Statutes and New Takeover Strategies—A Panel*, 32 BUS. LAW. 1459 (1977); Wilmer & Landy, *The Tender Trap: State Takeover Statutes and their Constitutionality*, 45 FORDHAM L. REV. 1 (1976); Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510 (1979).

53. 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

54. IDAHO CODE §§ 30-1501 to -1513 (1980). Tender offerors are required to pay state registration fees. *Id.* § 30-1508. They also must participate in a hearing on the offer if the target directors so request. *Id.* § 30-1503(4). The offer, in addition, can be delayed pending final determination of an administrative or injunctive proceeding brought by a target director. *Id.* § 30-1506(5). See *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1278 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

55. 577 F.2d at 1265-74.

56. *Id.* at 1279-80. The market approach is more neutral because it allows the investor to make a decision based on persuasive arguments by the offeror and the target. The fiduciary approach, in contrast, allows the target to make the decision for the shareholder. *Id.*

United States Constitution.<sup>57</sup> The Supreme Court, however, reversed the decision on venue grounds<sup>58</sup> without resolving the constitutional question, although three Justices in dissent said they would have affirmed the decision of the court of appeals.<sup>59</sup> Consequently, the question of whether federal securities law preempts state takeover statutes remains open. While commentators tend to deride the state antitakeover statutes, preferring instead a single, pervasive federal law,<sup>60</sup> case decisions have gone both ways depending on the degree of interference with federal law.<sup>61</sup>

*Post-Tender Tactics.* Once the bidder has made public his tender offer proposal, the target still has an opportunity to formulate an adequate response. Many of the preventive tactics discussed above are applicable after the offer materializes.<sup>62</sup> A surprise tender offer generally catches target management off guard, and any delayed action by the target could prove futile if, for example, arbitrageurs, having made a market assessment indicating a profitable resale to the raider, purchase large quantities of target stock.<sup>63</sup> Accordingly, the target must react immediately.

*Initial Considerations.* In order to deal effectively with the takeover bid, the defense team should immediately analyze the tender offer and recommend a suitable response to the board of directors.<sup>64</sup> The directors, in deciding whether to recommend or oppose the offer, or to hold out for a higher price,<sup>65</sup> should consider the price per share offered, the business policies and future potential of the target corporation, and the resultant

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57. *Id.* at 1286; U.S. CONST. art. I, § 8.

58. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 186-87 (1979).

59. *Id.* at 187 (White, J., dissenting). Justice White was joined by Justices Brennan and Marshall.

60. See Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 257 (1977); Wilner & Landy, *supra* note 52, at 32; Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U.L. REV. 872, 940 n.509 (1978).

61. Courts recently have upheld Virginia and Ohio takeover laws as not preempted by federal law. See *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029 (4th Cir. 1980); *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929 (S.D. Ohio 1979). The Delaware takeover statute was declared unconstitutional in *Dart Indus. Inc. v. Conrad*, 462 F. Supp. 1 (S.D. Ind. 1978).

62. The time factor will limit the effectiveness of several tactics mentioned, but management nonetheless can implement acquisitions to interpose antitrust complications, shareholder communication programs, or plans to issue additional stock to dilute the raider's shareholdings.

63. Arbitrageurs are not involved with either the target or raider. They independently assess risk, reward, and probability in determining whether or not to purchase target stock in the early stages of a tender offer in hopes of realizing a profit on a subsequent sale to the raider. See Rubin, *Arbitrage*, 32 BUS. LAW. 1315, 1315 (1977); Comment, *Should Tender Offer Arbitrage Be Regulated?*, 1978 DUKE L.J. 1000, 1005.

64. See notes 17-20 *supra* and accompanying text. See also M. KATZ & R. LOEB, *supra* note 16, at 233. The recommendation stage may be bypassed, however, if the board has already determined that the best interests of the corporation and its shareholders are served by retaining the corporation's independence. Again, any such determination must be made in light of the board's fiduciary obligations to the shareholders and corporation. See note 8 *supra*.

65. Federal regulations promulgated by the SEC require a response by the target to the tender offer. See notes 72-73 *infra* and accompanying text.

impact on target employees, customers, minority shareholders, and public and community interests.<sup>66</sup>

In addition to the policy and economic factors inherent in the offer itself, the directors must consider federal regulations. The Williams Act, which regulates tender offers and certain stock purchases, grants broad authority to the SEC to promulgate rules and regulations thereunder.<sup>67</sup> The SEC recently promulgated regulations that affect target defensive maneuvers substantially.<sup>68</sup> Prior to these new regulations, a tender offeror was forced to bring suit against a reluctant target in order to obtain shareholder lists to facilitate distribution of offer materials because the Williams Act did not expressly require the target to produce these lists.<sup>69</sup> Under the new regulations, however, a corporation that is the subject of a tender offer must, within three business days of notification of such offer by the bidder, either mail the tender offer materials directly to the subject corporation's shareholders<sup>70</sup> or send an updated shareholder list directly to the tender offeror.<sup>71</sup> Furthermore, the regulations now require a target corporation to publish within ten days of notification of the offer whether the target recommends acceptance or rejection, is neutral toward the offer, or is unable to take a position with respect to the offer, and state the reasons for whichever position it elects.<sup>72</sup> The target corporation also must comply with new disclosure requirements on Schedule 14D-9, which include information concerning the existence of any material contracts, agreements, or conflicts of interest between offeror and target, and any current or proposed negotiations in response to the tender offer.<sup>73</sup>

Although the foregoing provisions impose a greater burden on the target, some of the new regulations are advantageous. One regulation, for example, extends the minimum offering period to twenty business days,<sup>74</sup> which provides target management with more time to develop a response to the offer. Additionally, in order to promote greater deliberation on the

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66. See, e.g., Lipton, *supra* note 8, at 130; Steinbrink, *Management's Response to the Takeover Attempt*, 28 CASE W. RES. L. REV. 882, 898-903 (1978). For cases in which the court found that the corporation had an obligation to the public, see *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972) (corporation engaged in publication of large metropolitan newspaper); *Coalition to Advocate Pub. Util. Responsibility, Inc. v. Engels*, 364 F. Supp. 1202 (D. Minn. 1973) (utility corporation providing services to several states).

67. 15 U.S.C. § 78n(d)(4) (1976) provides that any solicitation or recommendation to shareholders concerning a tender offer "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."

68. 17 C.F.R. §§ 230, 240 (1980); see H. BLOOMENTHAL, SECURITIES LAW SERIES 1980 SECURITIES LAW HANDBOOK 180-87 (1980); Note, *The Effect of the New SEC Rules on the Constitutionality of State Takeover Statutes*, 8 FORDHAM URB. L.J. 913, 920-25 (1979-1980).

69. See *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910 (N.D. Tex. 1976). The suits were not always successful; courts on occasion have refused to require the targets to turn over the lists. See *A & K R.R. Materials, Inc. v. Green Bay & W.R.R.*, 437 F. Supp. 636 (E.D. Wis. 1977).

70. 17 C.F.R. § 240.14d-5(b) (1980).

71. *Id.* § 240.14d-5(c).

72. *Id.* § 240.14e-2(a).

73. *Id.* § 240.14d-101.

74. *Id.* § 240.14e-1(a).

part of shareholders, the new regulations permit a tendering shareholder to withdraw tendered shares during the first fifteen days or following the sixtieth day after the offer opened.<sup>75</sup> Should another bidder commence a tender offer, the shareholder may withdraw shares tendered to the first bidder for up to ten days following the second bidder's announcement if the shares have not yet been accepted for payment according to the terms of the first offer.<sup>76</sup> Rather than favoring the offeror or target, the claimed purpose of the new regulations is to protect the interests of shareholders by striking a balance between the target and the offeror.<sup>77</sup>

*Shareholder Communications.* In the event a decision is made to oppose the offer, target management, or the defense team, should implement a plan of defense. Because shareholders are the subject of a tender offer, such a plan should include an offer rejection campaign to apprise the shareholders of the disadvantages of tendering their shares of stock.<sup>78</sup> Common criticisms of tender offers are that the offering price is inadequate, that the future prospects of the business are more promising as an independent corporation, that brokers receive a substantial commission on the sale, and that the offeror has engaged in illegal or improper activities.<sup>79</sup> Furthermore, the target could inform shareholders that tendering shares would be a taxable transaction and may result in undesirable tax consequences.<sup>80</sup> The target should avoid being overzealous in condemning the offer, however, because the management and directors could be liable for false or misleading statements.<sup>81</sup>

*Repurchase of Stock by Issuer.* In order to prevent the raider from acquiring control, the target could repurchase its own shares on the open market. The repurchase not only removes available shares from the market, but also causes the target stock price to increase, resulting in a greater acquisition cost for the raider. If the shares are held merely as treasury stock, however, the target's outstanding stock is decreased and the raider

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75. *Id.* § 240.14d-7(a)(1).

76. *Id.* § 240.14d-7(a)(2).

77. *See* 44 Fed. Reg. 70,326 (1979).

78. *See* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 268-74 (1973); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEXAS L. REV. 1, 33 (1978).

79. *See, e.g.,* Berman v. Gerber Prods. Co., 454 F. Supp. 1310 (W.D. Mich. 1978) (alleged improper foreign payments on behalf of offeror); A. FLEISCHER, *supra* note 32, at A-26 to -27, B-1901 to -2201. Recently, in Seagram Company's hostile takeover bid for St. Joe Minerals Corporation, St. Joe announced a 32% increased estimate of its gold reserves. The timing of the announcement appeared to be related to the takeover attempt in an effort to encourage shareholders not to tender their shares. *See St. Joe to End or Suspend Suits Against Seagram*, Wall St. J., Mar. 23, 1981, at 3, col. 1.

80. Note, *Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers*, 21 STAN. L. REV. 1104, 1113-14 (1969). A stock for stock exchange under a "B" reorganization, however, is not a taxable event. *See* I.R.C. §§ 354(a), 368(a)(1)(B).

81. *See* Royal Indus., Inc. v. Monogram Indus., Inc., [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,863 at 91,131 (C.D. Cal. 1976); note 91 *infra* and accompanying text.

must acquire a proportionately less amount to obtain control.<sup>82</sup> Moreover, federal regulations require that an issuer file an information statement with the SEC before purchasing any of its own stock after a tender offer has been announced.<sup>83</sup> The required information includes the amount of securities to be purchased and from whom, the purpose for the purchase, the expected disposition of the repurchased shares, and the source of funds to be used in the purchase.<sup>84</sup> Because stock repurchases could be regarded as improper manipulation of the market, the issuer should avoid any such allegations by channeling the repurchased shares for use in valid corporate programs such as pension or employee stock plans.<sup>85</sup>

*Defensive Mergers.* The defensive merger with a friendly third party or a "white knight" is another popular tactic.<sup>86</sup> Typically, the purpose in soliciting such a merger is either to enable the target to continue its operations in an independent atmosphere or to secure a better offering price through competing bids.<sup>87</sup> The merger could complement the target's line of business, present favorable tax advantages to shareholders, or simply result in a more amicable working relationship between the managements of the target and the merging corporation.<sup>88</sup>

The defensive merger, even when it is designed to thwart a takeover by an unfriendly bidder, may be one of the target's safest avenues to avoid takeover while at the same time providing a frustrated bidder or the target's own shareholders minimal cause for an action against target management for improper rejection of the original offer. Two factors support this theory. First, the white knight generally will offer more favorable terms in order to secure shareholder approval. Secondly, the shareholder, rather than target management, will make the ultimate decision regarding both

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82. See Note, *supra* note 80, at 1120. A corporate purchase of its own stock for the purpose of an employee trust, however, does not produce the antidilutive effect. See note 47 *supra* and accompanying text.

83. 17 C.F.R. § 240.13e-1 (1980). The rules also state that the issuer must have sent the information required under the rules to its shareholders within the past six months. *Id.* Should the target announce a tender offer for its own stock, rather than engage in an open market repurchase, it would then be subject to regulations specifically addressing tender offers by issuers. See *id.* § 240.13e-4.

84. *Id.* §§ 240.13e-1(a)(1)-(3).

85. Comment, *supra* note 15, at 526-27; see notes 47-48 *supra* and accompanying text; cf. *Cheff v. Mathes*, 199 A.2d 548 (Del. 1964) (use of corporate funds to purchase issuer's stock from shareholder threatening takeover was justified). See generally *Israels, Limitations on the Corporate Purchase of Its Own Shares*, 22 Sw. L.J. 755 (1968).

86. A "white knight" is a company that moves in to thwart takeover efforts by an unwanted raider, usually by acquiring the target. P. DAVEY, *supra* note 2, at 2.

A merger is one of three principal methods of combining corporations and "results in the surviving corporation acquiring all the assets and assuming all the liabilities of the acquired corporation by operation of law." H. BLOOMENTHAL, *supra* note 68, at 162. Mergers generally require stockholder approval and should be distinguished from tender offers, which involve the "purchase of substantially all the outstanding stock of the corporation." *Id.* at 162-65, 179-98.

87. P. DAVEY, *supra* note 2, at 22-24; A. FLEISCHER, *supra* note 32, at A-35 to -36; see Uttal, *Knighthood is Still in Flower at General Signal*, *FORTUNE*, Oct. 6, 1980, at 58.

88. Steinbrink, *supra* note 66, at 893-95.

the raider's tender offer and the proposed white knight merger.<sup>89</sup> Consequently, the shareholder is not excluded from the decision-making process and likely will reap an economic benefit from the transaction.<sup>90</sup> Target management, however, must ensure that it makes no improper or misleading disclosures to shareholders regarding the proposed merger and the tender offer in violation of the Williams Act.<sup>91</sup>

*Acquisitions for Antitrust Purposes.* Defensive maneuvers by the target frequently involve the acquisition of a company that would pose antitrust implications for the raider in the event of takeover.<sup>92</sup> For example, should the target acquire a company that operates in the same industry as that of the raider, a proposed takeover by the raider might be labeled anticompetitive or monopolistic in violation of section 7 of the Clayton Act.<sup>93</sup> Acquisitions by the target have been defended successfully against shareholder allegations of breach of fiduciary duty by directors;<sup>94</sup> however, courts tend to be skeptical of antitrust claims raised by the target,<sup>95</sup> particularly when it has consummated a hasty acquisition for the sole purpose of fending off a takeover attempt.<sup>96</sup> Moreover, a raider in some cases may obviate the antitrust obstacle by agreeing to dispose of the competing line of business after the takeover.<sup>97</sup> Nonetheless, antitrust acquisitions by the target are likely to continue as a defense technique because the resulting litigation allows discovery of information about the offeror that may indicate anticompetitive effects and often causes failure of the offer or at least a valuable delay for the target.<sup>98</sup>

In contemplation of acquisitions presenting antitrust violations, Congress in 1976 enacted the Hart-Scott-Rodino Antitrust Improvement Act.<sup>99</sup>

89. Lynch & Steinberg, *The Legitimacy of Defense Tactics in Tender Offers*, 64 CORNELL L. REV. 901, 932 (1979).

90. The merger, for example, could constitute a tax-free exchange for securities and normally results in an increase in the value of target stock. *Id.*

91. The Act provides: "It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact . . . in connection with any tender offer." 15 U.S.C. § 78n(e) (1976); see, e.g., *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973).

92. See Lynch & Steinberg, *supra* note 89, at 936-38.

93. Section 7 of the Clayton Act prohibits the acquisition by one company of another that would tend to cause a monopoly or lessen competition. 15 U.S.C. § 18 (1976).

94. See, e.g., *Altman v. Knight*, 431 F. Supp. 309 (S.D.N.Y. 1977).

95. See *Babcock & Wilcox Co. v. United Technologies Corp.*, 435 F. Supp. 1249 (N.D. Ohio 1977); *Anaconda Co. v. Crane Co.*, 411 F. Supp. 1210 (S.D.N.Y. 1975).

96. See *Royal Indus., Inc. v. Monogram Indus., Inc.*, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,863, at 91,136-37 (C.D. Cal. 1976), in which the court held that Royal's acquisition for the sole purpose of defeating Monogram's tender offer violated § 14(e) of the Securities Exchange Act of 1934.

97. See *FTC v. Atlantic Richfield Co.*, 549 F.2d 289 (4th Cir. 1977); A. FLEISCHER, *supra* note 32, at A-8.

98. See Brown, *supra* note 30, at 854. Antitrust actions by the target have defeated offers in the past as a result of preliminary injunctions granted by the court. See *Pargas, Inc. v. Empire Gas Corp.*, 423 F. Supp. 199 (D. Md.), *aff'd*, 546 F.2d 25 (4th Cir. 1976); *Boyer-town Burial Casket Co. v. Amedco, Inc.*, 407 F. Supp. 811 (E.D. Pa. 1976).

99. 15 U.S.C. § 18a (1976). See *Antitrust Aspects of Takeovers and Mergers: The Hart Scott Rodino Antitrust Improvement Act of 1976—A Panel*, 32 BUS. LAW. 1517 (1977); Axinn,

The Act prohibits the acquisition of the securities or assets of a corporation if, as a result of such acquisition, the acquirer would hold fifteen percent or more of the issuer's securities unless the acquirer properly files a notification of the acquisition with the Federal Trade Commission (FTC) and the United States Assistant Attorney General.<sup>100</sup> The Act further provides for a thirty-day waiting period (fifteen days for cash tender offers) after notifying the FTC of the acquisition before any securities may be acquired;<sup>101</sup> the FTC and the Assistant Attorney General, however, have discretion to waive the waiting period,<sup>102</sup> or to extend it in order to obtain more information concerning the merger.<sup>103</sup> The Act does not delay the commencement of a tender offer, but prolongs its completion because the waiting period requirement applies to stock acquisitions rather than to the announcement of the offer.<sup>104</sup> The waiting period, although ostensibly unfavorable to a raider, may give it a time advantage because any subsequent offeror, particularly a white knight, is subject to the same restrictions if such offeror and the target fall within the Act's parameters.<sup>105</sup> As a corollary, then, the Act could apply likewise to a defensive acquisition made by the target for the purpose of interposing antitrust complications.

*Other Tactics.* Commentators recognize a host of other emergency techniques to provide the target candidate with some means of defense.<sup>106</sup> For example, if the target is attractive for its liquidity, the directors could reduce excess cash holdings by declaring an increased dividend. The declaration will produce an increase in the stock price and thereby increase the takeover cost to a bidder.<sup>107</sup> Additionally, a higher dividend encourages shareholders to retain the stock as a profitable long-term investment rather than tender for an immediate gain. Another alternative is to have key personnel in the target corporation state their intention to resign upon acquisi-

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Fogg & Stoll, *Contests for Corporate Control Under the New Law of Preacquisition Notification*, 24 N.Y.L. SCH. L. REV. 857 (1979); Brown, *supra* note 30, at 852-54.

100. 15 U.S.C. § 18a(a)(3)(A) (1976). Alternatively, the Act applies if the aggregate amount of securities held by the acquirer as a result of the acquisition is in excess of \$15,000,000. *Id.* § 18a(a)(3)(B). The Act applies only when one of the parties has assets or net sales of at least \$10,000,000 and the other party has assets or net sales of at least \$100,000,000. *Id.* §§ 18a(a)(2)(A)-(C); see Brown, *supra* note 30, at 853.

101. 15 U.S.C. § 18a(b)(1) (1976). In tender offers, the waiting period begins when the acquiring person properly submits the required information. *Id.* § 18a(e)(2).

102. *Id.* § 18a(b)(2).

103. *Id.* § 18a(e). The extension period is limited to 20 days (10 days in cash offers) and may be further extended only by a United States district court. *Id.*

104. See Brown, *supra* note 30, at 853.

105. See Axinn, Fogg & Stoll, *supra* note 99, at 880; note 100 *supra* and accompanying text.

106. See, e.g., P. DAVEY, *supra* note 2, at 24-25; Comment, *supra* note 15, at 522-27. *But cf.* Vance, *supra* note 3, at 98 (injunction suits, stock repurchases, and reductions of liquidity are delaying techniques at most; the best strategy is to avoid becoming vulnerable).

107. A. FLEISCHER, *supra* note 32, at A-37. Caution should be exercised lest the market see the anticipated takeover as the cause of the increase in stock and therefore lead investors and shareholders to deem the takeover beneficial. *Id.* at A-37 n.248; see Note, *supra* note 80, at 1119-20 (price-raising maneuvers include stock splits, dividend increases, and target repurchase of its own stock).



tion of the target by the raider.<sup>108</sup> This obviously will have an effect only when the target relies on those persons for its operations. The target also may enlist its suppliers, distributors, or customers to intercede on its behalf in dissuading an undesirable suitor from a takeover attempt.<sup>109</sup>

*Litigation.* One of the major defense tactics employed by target management is litigation.<sup>110</sup> The target often will seek an injunction against the offeror from the further purchase of its stock.<sup>111</sup> Such lawsuits frequently are based on alleged disclosure improprieties under the Williams Act,<sup>112</sup> or violations of antitrust laws.<sup>113</sup> The ultimate goal in pursuing these legal avenues is to have the tender offer declared invalid or withdrawn by the offeror. A secondary goal is to gain valuable time for developing other defense tactics.<sup>114</sup> The realization of either goal will depend on whether the court, in deciding favorably for the target, grants permanent or merely temporary injunctive relief. Recent federal court decisions, however, have raised a major problem threatening the effect and availability of the target's action for such relief: lack of standing to sue.<sup>115</sup>

## II. TARGET STANDING TO SUE FOR INJUNCTIVE RELIEF

### A. *The Williams Act*

Congress enacted the Williams Act (the Act) in 1968, amending the Securities Exchange Act of 1934 (the 1934 Act), primarily to assure adequate disclosure during the course of tender offers and other major stock transactions. The legislative history of the Act makes this goal clear.

The bill avoids tipping the balance of regulation either 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

108. See A. FLEISCHER, *supra* note 32, at A-37.

109. Schmults & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 BUS. LAW. 115, 127 (1967).

110. See *Corenco Corp. v. Schiavone & Sons*, 488 F.2d 207 (2d Cir. 1973). See generally E. ARANOW, H. EINHORN & G. BERLSTEIN, *supra* note 42, at 199; Wachtell, *Special Tender Offer Litigation Tactics, Tender Offer Litigation—A Panel*, 32 BUS. LAW. 1433 (1977).

111. A party bringing an action for injunctive relief must show "irreparable harm" by defendant's actions for the court to sustain it. See *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 50-51 (1975).

112. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. III 1979). Section 78m(d)(1)(A)-(E) of the Act lists information to be filed by a person acquiring more than 5% of the stock of a corporation and is set out in part at note 117 *infra*. Omission of material information violates the antifraud provisions of § 78n(e). Cases involving alleged Williams Act violations are discussed in Part II of this Comment, text accompanying notes 154-84 *infra*.

113. See notes 92-105 *supra* and accompanying text. Litigation could be based on other grounds as well, for example, the poor quality of the raider's securities. *Humana, Inc. v. American Medicorp, Inc.*, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,286, at 92,823-24 (S.D.N.Y. 1978).

114. P. DAVEY, *supra* note 2, at 22. Recognition of the secondary goal is not a condonation of spurious or vexatious litigation. The target is presumed to have determined a valid reason for bringing the injunctive action. Otherwise, questions regarding target management's fiduciary duties and corporate counsel's professional ethics could be raised, both of which are beyond the scope of this Comment.

115. See notes 137-50, 172-82 *infra* and accompanying text.

while at the same time providing the offeror and management equal opportunity to fairly present their case.

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The bill would correct the current gap in our securities laws by amending the Securities Exchange Act of 1934 to provide for full disclosure in connection with cash tender offers and other techniques for accumulating large blocks of equity securities of publicly held companies. Under this bill, the material facts concerning the identity, background, and plans of the person or group making a tender offer or acquiring a substantial amount of securities would be disclosed.<sup>116</sup>

The provisions of the Act also require disclosure of the source of funds used in making the purchase of the securities, the number of shares of stock beneficially owned by the acquirer, and any arrangements the acquirer has made regarding the stock of the issuing corporation.<sup>117</sup> Under the pertinent parts of the Act, sections 13(d) and 14(d), an acquirer must disclose the foregoing information in Schedules 13D and 14D respectively, to the SEC, to the exchange where the securities are traded, and to the issuer of the securities (the target).<sup>118</sup> Although similar, the two sections differ in important respects. Section 13(d), for example, applies when an acquirer becomes the beneficial owner of five percent or more of the issuer's securities, and requires the filing of the information statement within ten days after such acquisition.<sup>119</sup> Section 14(d), on the other hand, expressly applies to tender offers and requires that disclosure statements, which are similar to section 13(d) statements, must be on file at the time the tender offer is made.<sup>120</sup>

Despite extensive disclosure requirements, the Act fails to provide a pri-

116. H.R. REP. NO. 1711, 90th Cong., 2d Sess., reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2811, 2813-14.

117. See 15 U.S.C. § 78m(d)(1) (Supp. III 1979). This section provides, in part, for the filing of the following information:

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases . . .

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned . . . by (i) such person . . . and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer . . .

*Id.*

118. *Id.* §§ 78m(d)(1), 78n(d)(1) (1976). Regulations providing for the filing of Schedules 13D and 14D are located at 17 C.F.R. §§ 240.13d-1, 240.14d-3.

119. 15 U.S.C. § 78m(d)(1) (Supp. III 1979). See generally Comment, *Section 13(d) and Disclosure of Corporate Equity Ownership*, 119 U. PA. L. REV. 853 (1971).

120. 15 U.S.C. § 78n(d)(1) (1976). The consequence of this difference might be that a raider could acquire substantial amounts of the target's stock on the open market for 10 days after reaching the 5% ownership limit, and then announce a tender offer on the tenth day while simultaneously filing the required statements. If the target has not been monitoring

vate remedy for violation of its terms. One possible avenue of relief is section 18(a) of the 1934 Act, which expressly provides a cause of action for damages against a person who makes a false or misleading statement in any report filed pursuant to that chapter.<sup>121</sup> That section is inadequate to remedy disclosure violations, however. One reason is that courts do not uniformly recognize the applicability of section 18 to section 13. The District Court for the Central District of California has stated that "[i]t is not clear to this court whether or not § 13 reports are within the scope of § 18. § 18 refers to requirements of 'this chapter.' § 13 may not be of 'this chapter' as defined by 15 U.S.C. § 78a, *et seq.*"<sup>122</sup> Also, even if section 18(a) is held to apply to section 13, section 18(a) requires a showing of reliance by a purchaser or seller of securities on the false or misleading statements and does not encompass a complete failure to file the statement.<sup>123</sup> Moreover, section 18(a) involves an action only for damages. Injunctive relief from the continued purchase of the target's stock is not available. The distinction between an action for damages and one for injunctive relief is critical for the purposes of this discussion.<sup>124</sup> While the former seeks recovery of damages sustained, the latter generally is designed to secure full compliance with the disclosure provisions and does not involve money judgments.<sup>125</sup>

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the trade of its stock for unusual activity, this maneuver could provide the raider with a head start in addition to its surprise advantage.

121. 15 U.S.C. § 78r (1976).

122. *In re Equity Funding Corp. of Am. Sec. Litigation*, 416 F. Supp. 161, 190 n.18 (C.D. Cal. 1976). *But see* 15 U.S.C. § 78a (1976), which states: "This *chapter* may be cited as the 'Securities Exchange Act of 1934.'" (emphasis added).

123. *See Stromfeld v. Great Atl. & Pac. Tea Co.*, 484 F. Supp. 1264, 1268-69 (S.D.N.Y. 1980) (plaintiffs must allege actual reliance on false or misleading statements; § 18(a) provides no liability for failure to file); *Dewitt v. American Stock Transfer Co.*, 433 F. Supp. 994, 1004-05 (S.D.N.Y.) (plaintiff had no standing under § 18(a) to sue for defendant's failure to file), *modified*, 440 F. Supp. 1084 (S.D.N.Y. 1977). In *Ross v. A.H. Robins Co.*, 607 F.2d 545 (2d Cir. 1979), *cert. denied*, 446 U.S. 946 (1980), the court discussed the similarities between an action under § 10(b) of the 1934 Act, 15 U.S.C. § 78j(b) (1976), and one under § 18(a). The court held that although plaintiff's derivative action alleging the filing of false and misleading statements was subject to § 18(a), he was not precluded from asserting a cause under § 10(b). 607 F.2d at 556.

124. Several courts have granted injunctive relief to the target when a judgment for damages would have been improper. *See, e.g., GAF Corp. v. Milstein*, 453 F.2d 709, 720 & n.22 (2d Cir. 1971) (issuer has standing to sue for injunctive relief under § 13(d)), *cert. denied*, 406 U.S. 910 (1972). In *W.A. Krueger Co. v. Kirkpatrick, Pettis, Smith, Polian, Inc.*, 466 F. Supp. 800 (D. Neb. 1979), the court held that an issuer had standing to obtain injunctive relief pending proper filing under § 13(d) by stock purchasers. "Restrictions upon the ability of an issuing corporation to obtain damages flowing from the failure to file a Section 13(d) document do not extend to prayers for injunctive relief." *Id.* at 803.

125. One commentator has stated:

The implication of a private right of action to seek injunctive relief by target companies stands on entirely different footing . . . from target company damage suits. . . . [T]he recognition of an implied action for a target company would serve the important purposes of the Williams Act, by affording an important mechanism by which the target shareholders are given a fair opportunity to determine whether, and to whom, to tender their shares.

Pitt, *Standing to Sue Under the Williams Act After Chris-Craft: A Leaky Ship on Troubled Waters*, 34 BUS. LAW. 117, 187 (1978).

*B. Judicial Interpretations—Implied Remedies*

Because Congress did not expressly grant a private remedy under sections 13 and 14, any right of action must be judicially implied. In *J.I. Case Co. v. Borak*<sup>126</sup> the United States Supreme Court held that private parties had a right of action for damages under section 27<sup>127</sup> for violation of section 14(a) proxy solicitation requirements.<sup>128</sup> The Court stated that although the legislative history "makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."<sup>129</sup> The Court focused its holding on the goal of effectuating the congressional purpose, but it did not mention other guidelines for implying a cause of action.

In *Cort v. Ash*<sup>130</sup> the Court clarified what guidelines it would consider in determining whether to imply a cause of action when none was expressly granted. The Court set forth four factors: (1) whether the plaintiff is a member of the class for whose special benefit the statute was enacted; (2) whether evidence exists of legislative intent to create or deny a private remedy; (3) whether implication of a private remedy is consistent with the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law.<sup>131</sup> The Court subsequently considered these factors in *Piper v. Chris-Craft Industries, Inc.*<sup>132</sup> in deciding the question of whether an offeror has a right of action for damages against the target for violation of the Williams Act. Holding that no such right could be implied,<sup>133</sup> the Court emphasized that the factors merely were relevant<sup>134</sup> in implying a right of action. The language suggested that the Court would not rigidly adhere to the *Cort* test and that in some cases it could deny a right of action although the test was met.<sup>135</sup> Significantly, however, the holding was restricted to denying an offeror a cause of action for damages under section 14(e), and the Court expressly refused to address the issue of a target's standing to sue.<sup>136</sup>

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126. 377 U.S. 426 (1964).

127. 15 U.S.C. § 78aa (1976). The section grants exclusive jurisdiction to federal courts of "violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." *Id.*

128. 377 U.S. at 430-31. Section 14(a) is codified at 15 U.S.C. § 78n(a) (1976).

129. 377 U.S. at 432.

130. 422 U.S. 66 (1975). The case dealt with a stockholder action against the corporation for making allegedly illegal expenditures for advertisements in connection with the 1972 presidential election, in violation of a criminal statute. Act of June 25, 1948, ch. 645, § 610, 62 Stat. 723 (repealed 1976). The Court concluded that no federal cause of action could be implied because the statute was concerned with controlling the corporation rather than protecting shareholder interests, there was no legislative intent to imply a cause of action, and the action was one traditionally relegated to state law. 422 U.S. at 77-78.

131. *Id.* at 78.

132. 430 U.S. 1 (1977).

133. *Id.* at 42.

134. *Id.* at 37.

135. Pitt, *supra* note 125, at 145 n.197.

136. 430 U.S. at 42 & n.28.

Two recent Supreme Court cases further modify the *Cort* test, indicating a trend away from freely implying a right of action when none is provided. In *Touche Ross & Co. v. Redington*<sup>137</sup> the Court held that customers of a brokerage firm had no private right of action for damages against an accounting firm that audited reports filed by the brokerage firm pursuant to section 17(a) of the 1934 Act.<sup>138</sup> Section 17(a) requires brokers and other regulated businesses to file periodic reports to government agencies, thereby enabling the agencies to monitor the financial health of the businesses and take appropriate action for the protection of investors and broker customers should the threat of insolvency arise.<sup>139</sup> Nonetheless, the Court refused to imply a private damages action on behalf of the broker's customers and instead further modified the *Cort* test:

It is true that in *Cort v. Ash*, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.<sup>140</sup>

The Court, in addition, stated it would adhere to a stricter standard for implying a private cause of action than it had in *Borak*.<sup>141</sup> The Court admitted acquiescence, however, in lower federal courts' twenty-five-year acceptance of an implied private action under section 10(b),<sup>142</sup> a history absent from section 17(a).<sup>143</sup> One possible interpretation of the Court's statement is that an implied right of action historically recognized by federal courts will be afforded Supreme Court approval.<sup>144</sup>

Six months after *Touche Ross* the Court again refused to imply a private action for damages, this time under the Investment Advisers Act.<sup>145</sup> In

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137. 442 U.S. 560 (1979). See generally Comment, *An Analytical Framework for Implied Causes of Action: Section 17 of the Securities Exchange Act and Redington v. Touche Ross & Co.*, 59 B.U.L. REV. 157 (1979).

138. 442 U.S. at 571. The Court stated in conclusion: "If there is to be a federal damages remedy under these circumstances, Congress must provide it." *Id.* at 579. Section 17(a) is codified at 15 U.S.C. § 78q(a) (1976).

139. The Court, however, cites no direct interest of investors or customers of the brokers other than through action taken by government agencies. The Williams Act, on the other hand, was designed specifically for the purpose of full disclosure to shareholders and the investing public. See notes 116-17 *supra* and accompanying text. The district court in *Kirsch Co. v. Bliss & Laughlin Indus., Inc.*, 495 F. Supp. 488, 491 (W.D. Mich. 1980), also noted this distinction. The *Kirsch* decision is discussed at notes 158-64 *infra* and accompanying text.

140. 442 U.S. at 575.

141. *Id.* at 578; see notes 126-29 *supra* and accompanying text.

142. 15 U.S.C. § 78j(b) (1976).

143. 442 U.S. at 577 n.19. The comparison is significant particularly because the Court cited only one case that recognized an action for damages under § 17(a). *Id.*

144. The disparity between judicial recognition of an implied right under § 10(b) and § 17(a) is substantial. The Court clearly does not want to open new avenues for litigation by implying new private actions. The recognition of a private action under § 13 and § 14 and the target's standing to bring such an action, however, enjoy a markedly more successful history than does § 17(a) in the *Touche Ross* comparison, although not as substantial as that of § 10(b). See Part II(C) *infra*.

145. 15 U.S.C. §§ 80a-1 to -21 (1976).

*Transamerica Mortgage Advisors, Inc. v. Lewis*<sup>146</sup> a shareholder of the petitioner-trust brought a derivative action alleging that the trustees were guilty of fraud and breach of fiduciary duty under the Act and sought injunctive relief, rescission of the investment adviser's contract, and an award of damages. In response to the claim for injunctive relief and rescission, the Court concluded that "the statutory language itself fairly implies a right to specific and limited relief in a federal court. By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere."<sup>147</sup> The Court viewed the damages claim "quite differently,"<sup>148</sup> however, and cited its analysis in *Touche Ross* to support the denial of an implied action.<sup>149</sup> Again, the Court emphasized as the dispositive issue the question of congressional intent to create a remedy.<sup>150</sup>

Although the *Touche Ross* and *Transamerica* decisions can be read as a retreat from the implication of private actions when not expressly provided, such a reading without qualification is overly broad. In *Touche Ross* the Supreme Court admitted its acquiescence to certain implied rights.<sup>151</sup> Furthermore, three Justices who sided with the majority in *Touche Ross* dissented in *Transamerica* with a revival of the *Cort* test.<sup>152</sup> Consequently, a general restriction on implied actions has not been applied consistently by the Court. Because of the differing opinions and factual distinctions in both cases, the close decision in *Transamerica* could give hope to the implying of a private remedy under a proper fact situation, and to deferential treatment of injunctive relief actions over damages actions.<sup>153</sup>

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146. 444 U.S. 11 (1979).

147. *Id.* at 18. Section 215, codified at 15 U.S.C. § 80b-15(b) (1976), provides: "Every contract made in violation of any provision of this subchapter . . . shall be void . . .". Section 206, codified at 15 U.S.C. § 80b-6 (1976), proscribes fraudulent activity by investment advisers. Compare §§ 13(d) and 14(d), which do not declare any contract void, but require disclosure for the protection of shareholders and the investing public.

148. 444 U.S. at 19. The damages claim was brought under § 206, which proscribes fraudulent activity; the dissent considered the section analogous to § 10(b) of the 1934 Act. *Id.* at 25 n.1 (White, J., dissenting).

149. *Id.* at 23-24. The Court, noting that lower federal courts had implied equitable causes of action in similar circumstances, cited *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). 444 U.S. at 19. In *Kardon*, however, the district court not only implied an action where the statute stated that contracts violating its provisions would be void, but stated that "such suits would include not only actions for rescission but also for money damages." 69 F. Supp. at 514. *Cf.* *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977) (private right of action for damages may be implied under Investment Adviser's Act), *cert. denied*, 436 U.S. 913 (1978).

150. 444 U.S. at 24.

151. See notes 142-43 *supra* and accompanying text.

152. Justices White, Brennan, and Stevens dissented in *Transamerica*, but sided with Justice Rehnquist's majority opinion in *Touche Ross*. Justice Marshall also dissented in *Transamerica* to make it a 5-4 decision, but was the lone dissenter in *Touche Ross*.

153. The Court could be willing to grant an implied equitable action, for example, when the interests of the general public are at issue directly and the possibility of irreparable injury is present. Such was not the case in *Touche Ross*. See note 139 *supra* and accompanying text. A distinction between the treatment of an action for equitable relief and one for damages can be gleaned from the two cases. The denial of an implied action for damages

*C. Injunctive Relief Under Section 13(d)*

Despite the Supreme Court's extensive treatment of implied actions ranging from *Borak* through *Transamerica*, it has never addressed the issue of whether a target has standing to sue for injunctive relief through an implied right under section 13(d).<sup>154</sup> The Court, however, has considered the requirements for a suit seeking injunctive relief under the section. In *Rondeau v. Mosinee Paper Corp.*<sup>155</sup> the Court denied injunctive relief to a target because it failed to make a showing of irreparable harm due to the offeror's late filing of the Schedule 13D.<sup>156</sup> The Court did not rule on whether the target had an implied action, but stated that neither the statute nor the legislative history of section 13(d) expressed creation of an action. Nonetheless, the Court declared that it "ha[s] not hesitated to recognize the power of federal courts to fashion private remedies for securities laws violations when to do so is consistent with the legislative scheme and necessary for the protection of investors as a supplement to enforcement by the Securities and Exchange Commission."<sup>157</sup> The Court's failure to decide specifically the question of an implied action under section 13(d) and its recent refusals to imply a private action in *Touche Ross* and *Transamerica* have left the lower federal courts in a quandry. Several recent decisions illustrate this confusion.

In *Kirsch Co. v. Bliss & Laughlin Industries, Inc.*<sup>158</sup> the District Court of the Western District of Michigan dealt with both the question of a target's standing to bring an action under section 13(d) and the requirements for

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was rejected in both cases, but the injunctive relief claim was sustained in *Transamerica*. Lower federal courts also have recognized this distinction. See note 124 *supra*.

154. Many of the cases discussing injunctive actions under § 13(d) are analogous to actions under §§ 14(d)-(e), which specifically address tender offers. Because the latter sections apply only to tender offers, a target seeking relief must first show that the purchaser has engaged in a tender offer. *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1207 (2d Cir. 1978) (no showing that a tender offer was made). Nevertheless, target actions under §§ 14(d)-(e) have been successful. See, e.g., *Prudent Real Estate Trust v. Johncamp Realty, Inc.*, 599 F.2d 1140 (2d Cir. 1979); *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969). For purposes of this Comment, actions under § 13(d) will be emphasized because the most recent federal court conflicts evolve around that section. Moreover, the cases and discussion under § 13(d) provide a useful comparison for §§ 14(d)-(e) actions.

155. 422 U.S. 49 (1975).

156. *Id.* at 59. For a discussion of the case and various elements of injunction under the Williams Act, see Porter & Hyland, *Rondeau v. Mosinee Paper Company and the Williams Act Injunction*, 59 MARQ. L. REV. 743 (1976). The authors note a special distinction in the granting of injunctive relief in cases where the violation is willful and fraudulent rather than merely an unintentional oversight, with the former generally meriting permanent relief while the latter would require only temporary relief. *Id.* at 746, 761, 768-69. Consequently, targets must realize that the injunction often will afford them only a delay in the takeover attempt during which they should implement other defenses.

157. 422 U.S. at 62. The SEC's subsequent admissions that it was incapable of adequately enforcing securities laws and that private litigation is a "necessary supplement to SEC enforcement activity" are consonant with the *Rondeau* Court's statement and support a broader delegation of power to lower federal courts to fashion such remedies. See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 35 (1979) (White, J., dissenting); Pitt, *supra* note 125, at 163-64.

158. 495 F. Supp. 488 (W.D. Mich. 1980).

injunctive relief. Plaintiff Kirsch contended that the defendant had violated section 13(d) by failing to disclose its true purpose in acquiring Kirsch stock, thereby misleading the investing public. The court first focused on Kirsch's standing, stating that the purpose of section 13(d) is to assure disclosure of information by acquirers so that investors can assess any changes in corporate control and evaluate the company's worth.<sup>159</sup> The court concluded that because section 13(d) implicitly requires the filing of truthful statements, "there is no doubt, that Kirsch has standing to contest violations of § 13(d)" and "[a]ny other result would certainly defeat the [statute's] purpose."<sup>160</sup> Moreover, the court rejected the defendant's contention that the Supreme Court's decisions in *Touche Ross* and *Transamerica* mandated a denial of standing to Kirsch because those cases involved actions for damages and the statutes in question did not entail a public interest for full and truthful disclosure.<sup>161</sup>

Having determined that Kirsch had a right to sue, the court next stipulated the standards under which a target would be granted injunctive relief as:

- (1) whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
- (2) whether the plaintiffs have shown irreparable injury;
- (3) whether the issuance of a preliminary injunction would cause substantial harm to others; [and]
- (4) whether the public interest would be served by issuing a preliminary injunction.<sup>162</sup>

The court, concluding that injunctive relief was proper, specifically found that the plaintiffs had demonstrated a strong likelihood of success on the merits, and that irreparable harm would occur unless Bliss & Laughlin was enjoined from further purchase of Kirsch stock pending the filing of a corrected Schedule 13D and notification to Kirsch shareholders of its intentions toward the Kirsch Company.<sup>163</sup> A key element in satisfying the irreparable harm requirement was that substantial harm threatened not

159. *Id.* at 491. For the proposition that the main purpose of the Williams Act is protection of investors' best interests, see H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2811.

160. 495 F. Supp. at 491-92. The court also noted that the Sixth Circuit had not addressed the issue. *Id.* at 492.

161. *Id.* at 491.

162. *Id.* at 501 (quoting *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977)); cf. Mulligan, *The Second Circuit Review—1975-76 Term—Foreword: Preliminary Injunction in the Second Circuit*, 43 BROOKLYN L. REV. 831, 836, 839 (1977) (criticizing cases relying on the first factor and emphasizing that a showing of irreparable harm is the more critical element). For a discussion of various injunctive remedies and their application under § 13(d), see Porter & Hyland, *supra* note 156.

163. 495 F. Supp. at 502. An important factor in determining whether the Schedule 13D was inaccurate or misleading rested on a test of materiality. The omission or misstatement is material, according to the court, if a reasonable shareholder would consider the information significant in making his investment decision. *Id.* at 503. *Accord*, *Seaboard World Airlines, Inc. v. Tiger Int'l, Inc.*, 600 F.2d 355, 360 (2d Cir. 1979). Section 13(d) may be violated also if the Schedule 13D is not filed within the proper time. See *Twin Fair, Inc. v. Reger*, 394 F. Supp. 156 (W.D.N.Y. 1975).



only Kirsch, but also more importantly, the intended benefactors of the Williams Act, the shareholders and the investing public.<sup>164</sup>

The *Kirsch* court is not alone in recognizing the standing of a target to sue for injunctive relief. The Fourth Circuit, in *Dan River, Inc. v. Unitex Ltd.*,<sup>165</sup> granted a target company equitable relief requiring a purchaser to file an accurate and truthful Schedule 13D. The court proclaimed that "the sole basis of standing in favor of the corporation itself is to enforce the statutory mandate to file a Schedule 13D, which is complete, accurate, truthful, and not misleading."<sup>166</sup> Dan River had filed for a preliminary injunction against Unitex, alleging various omissions and misstatements in the filing of a Schedule 13D by a Unitex subsidiary, and was granted relief by the district court. The amended filing, however, still contained omissions and contradictions, according to Dan River, but the district court denied further injunctive relief because the disclosure purpose of the Williams Act, in the court's view, had been achieved.<sup>167</sup> The circuit court reversed, indicating an obligation on the part of the court to ascertain not merely whether the disclosure was facially adequate, but also whether it was accurate and truthful.<sup>168</sup> The decision, although without any discussion of *Touche Ross* or *Transamerica*, implicitly supports the *Kirsch* analysis and emphasizes that the basis for standing lies in the primary purpose of the Williams Act, to provide full and truthful disclosure to the shareholders and the investing public.

In addition to the decisions expressly addressing the standing issue, courts have entertained actions by a target seeking injunctive relief under the Williams Act in which the target's standing to sue apparently was not an issue. Both the Second Circuit<sup>169</sup> and the Eighth Circuit<sup>170</sup> recently

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164. 495 F. Supp. at 502.

165. 624 F.2d 1216 (4th Cir. 1980) *cert. denied*, 101 S. Ct. 896, 66 L. Ed. 2d 827 (1981).

166. 624 F.2d at 1225. The court repeated that it was dealing with the right of the corporation itself to sue and emphasized that "[the] right is limited to equitable relief, compelling the filing of a full and accurate Schedule 13D." *Id.*

167. *Id.* at 1222.

168. *Id.* at 1227.

169. *Treadway Cos. v. Care Corp.*, [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,603, at 98,191 (2d Cir. Aug. 12, 1980). Treadway sued the raider corporation for injunctive relief because of an inaccurate Schedule 13D. The court denied the injunction because a corrected schedule had been on file for four months, giving Treadway shareholders ample time to digest the correct information. "Since the informative purpose of § 13(d) had thereby been fulfilled, there was no risk of irreparable injury and no basis for injunctive relief." *Id.* at 98,209 (footnote omitted). In *Seaboard World Airlines, Inc. v. Tiger Int'l, Inc.*, 600 F.2d 355 (2d Cir. 1979), the Second Circuit heard a complaint by a target company alleging misstatements of material facts in a tender offer by defendant in violation of §§ 14(d)-(e). Standing was not an issue addressed by the court, but the injunction was denied because the misstatement failed to meet the materiality test. *Id.* at 361. See note 163 *supra*. In an earlier decision, the Second Circuit upheld a temporary injunction against a tender offeror pending correction of certain financial information and other disclosures in the offeror's Schedule 14D. *Prudent Real Estate Trust v. Johncamp Realty, Inc.*, 599 F.2d 1140 (2d Cir. 1979).

170. *Chromalloy Am. Corp. v. Sun Chem. Corp.*, 611 F.2d 240 (8th Cir. 1979). Omitting discussion of the target's standing, the court recognized an action for injunctive relief by a

have rendered decisions without discussing the target's standing, focusing instead on whether the remedy of injunction was merited by the facts. These decisions augment a growing base of case law either implicitly or explicitly supporting target standing for injunctive relief.<sup>171</sup>

Although substantial authority indicates that standing will be granted a target corporation under the Williams Act, case authority exists to the contrary. Most notably, the United States District Court for the Northern District of Illinois, in *Gateway Industries, Inc. v. Agency Rent A Car, Inc.*,<sup>172</sup> held that a target company did not have standing to sue for injunctive relief under section 13(d) either on its own behalf or for the benefit of its shareholders.<sup>173</sup> Gateway filed suit for injunction alleging that Agency's Schedule 13D was defective for omitting the company's background information and the source of funds used to finance the stock purchase, and for misrepresenting its purpose in acquiring Gateway shares. Gateway claimed that these omissions and misrepresentations resulted in irreparable harm to Gateway and its shareholders by creating confusion and uncertainty as to the future control and operation of the corporation, by precipitating the possible delisting of the corporation from the New York Stock Exchange, and by forcing shareholders and investors to make decisions based on inaccurate investment information.<sup>174</sup>

The district court, addressing the question of Gateway's standing to sue, conceded at the outset that "decisional authority unanimously has upheld the existence of a private right of action for injunctive relief under section 13(d)."<sup>175</sup> Nonetheless, the court declined to follow that authority, citing instead three Supreme Court decisions that restricted the implication of a private right of action and that employed an analysis of whether Congress

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target pending filing of a correctly amended Schedule 13D, but denied further injunction beyond curing of the schedule's defects. Because the schedule had been corrected, defendant complied with § 13(d) and no relief was necessary.

171. See, e.g., *General Aircraft Corp. v. Lampert*, 556 F.2d 90 (1st Cir. 1977); *GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972); *Bath Indus., Inc. v. Blot*, 427 F.2d 97 (7th Cir. 1970); *Saunders Leasing Sys., Inc. v. Société Holding Gray D'Albion S.A.*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,881, at 90,447 (N.D. Ala. Jan. 30, 1981); *Wellman v. Dickinson*, 475 F. Supp. 783 (S.D.N.Y. 1979); *W.A. Krueger Co. v. Kirkpatrick, Pettis, Smith, Polian, Inc.*, 466 F. Supp. 800 (D. Neb. 1979). See also *Robinson & Mahoney, Schedule 13D: Wild Card in the Takeover Deck*, 27 BUS. LAW. 1107 (1972); Young, *Section 13(D)—A New Element in the Battles for Control of Corporate Managements: The Implications of GAF Corporation v. Milstein*, 27 BUS. LAW. 1137 (1972).

172. 495 F. Supp. 92 (N.D. Ill. 1980), appeal dismissed, No. 80-1871 (7th Cir. Aug. 11, 1980). See *Huffman, Gateway May Signal Stricter Construction of Securities Laws*, *Legal Times Wash.*, Aug. 25, 1980, at 3, col. 1.

173. 495 F. Supp. at 99-100.

174. *Id.* at 94-95. The argument that continued purchase of Gateway shares by Agency would result in delisting was disposed of by the court on the ground that Agency's supplemental 13D filing recognized that threat, and also because the alleged harm would continue to exist even if the Schedule 13D were corrected, so long as Agency continued to acquire shares. *Id.* at 94 n.2, 99 n.12. This reasoning, however, fails to account for shareholders who might not tender their shares to Agency upon learning of the potential harm to Gateway. Such a factor is clearly within the disclosure and shareholder protection purposes of the Williams Act.

175. *Id.* at 95 (footnote omitted). The court noted, however, that neither the Supreme Court nor the Seventh Circuit had dealt with the issue. *Id.*

intended to create such a remedy.<sup>176</sup> Based upon the lack of express terms providing for a cause of action within section 13(d), the absence of legislative history or congressional intent indicating an implied right, and the provision for investigation of violations by the SEC, the court concluded that no right of action for injunctive relief could be implied under this section.<sup>177</sup> Two defects in the district court's rationale and reliance on the Supreme Court decisions surface upon closer analysis. First, the three Supreme Court cases cited dealt with statutory schemes unrelated to the Williams Act that did not have as their purpose the assurance of full and truthful disclosure to the investing public. Secondly, Gateway was seeking injunctive relief to compel disclosure compliance with section 13(d) while the cited cases were actions for damages, a distinction the court refused to accept.<sup>178</sup>

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176. *Id.* at 96-97. The court cited *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Cannon v. University of Chicago*, 441 U.S. 677 (1979), as representing the Court's development of restrictive principles governing implication of private rights of action. *Transamerica* and *Touche Ross* are discussed at notes 137-53 *supra* and accompanying text. *Cannon*, though granting a private remedy in a sex discrimination action, marked a reluctance by the Court to imply private actions broadly. See Phillips & Miller, *The Demise of Implied Rights*, 13 REV. SEC. REG. 887 (1980).

177. 495 F. Supp. at 99-100. Although the court found no legislative history indicating a right of action, the original Williams Act was introduced with the express concern for protection of target corporations. See A. BROMBERG & L. LOWENFELS, *SECURITIES FRAUD & COMMODITIES FRAUD* ¶ 6.3(122) (1979).

The court went on to reject Gateway's contention that it could sue on behalf of its shareholders, and stated that permitting target corporations to maintain injunctive actions could give them a competitive edge over takeover corporations, thereby destroying the neutrality of the Williams Act. *Id.* at 101. This analysis fails to consider whether a raider corporation could sue for injunctive relief in the event a target dispensed misleading or inaccurate information to its shareholders during a takeover, and by thus implying a right of action for targets and raiders alike, retain the balance of neutrality. See Note, *Standing Under Section 14(e) of the Securities Exchange Act of 1934: May a Tender Offeror Sue for Injunctive Relief?*, 8 FORDHAM URB. L.J. 405, 423-24 (1979-1980). See also *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 32 n.21 (1977) (stockholders constitute the "especial class" for which § 14(a) proxy provisions were enacted).

178. 495 F. Supp. at 96 n.8. The district court's holding effectively denies a target the opportunity to compel timely compliance by a stock purchaser with the § 13(d) disclosure requirements, a decision anomalous to the express purposes of the Williams Act. The district court in *Kirsch*, discussed at notes 158-64 *supra* and accompanying text, refuted the *Gateway* analysis on a point-by-point basis and specifically distinguished the Supreme Court cases on the disclosure and damages considerations. On the difference between damages actions and injunctive relief actions, see notes 124-25 *supra* and accompanying text.

The position taken by the *Gateway* court also was challenged by the District Court for the Southern District of New York in *Kaufman & Broad, Inc. v. Belzberg*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,893, at 90,500 (S.D.N.Y. Mar. 12, 1981). The court reviewed the *Touche Ross* and *Transamerica* decisions and stated that "[t]he Supreme Court apparently has not understood its decisions as overruling *GAF*, as the Court has recently denied a petition for certiorari in *Unitex Limited v. Dan River, Inc.*, 49 U.S.L.W. 3488 (Jan. 13, 1981), letting stand a decision in the Fourth Circuit following *GAF* . . ." *Id.* at 90,504. *GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972), expressly granted standing to a target for § 13(d) actions. *Dan River* is discussed at notes 165-68 *supra* and accompanying text.

In *Berman v. Metzger*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,857, at 90,292 (D.D.C. Feb. 9, 1981), the court held that no private right of action for damages existed under § 13(d), citing *Gateway*. *Id.* at 90,294. The court noted that some courts had

In *Sta-Rite Industries, Inc. v. Nortek, Inc.*<sup>179</sup> the District Court of the Eastern District of Wisconsin followed the *Gateway* analysis, stating that the threshold question was whether Congress intended to create a private right of action.<sup>180</sup> As in *Gateway*, the court concluded that only the SEC had standing to sue for equitable relief under section 13(d).<sup>181</sup> Although the court recognized that action initiated by the SEC was not the most expedient avenue for relief, it declined to accept the notion that Congress would authorize direct access to the courts for corporations or shareholders concerned with a purchaser's filing of a Schedule 13D.<sup>182</sup>

The *Gateway* and *Sta-Rite* decisions, by refusing to imply a cause of action for targets seeking injunctive relief, are at odds with other recent federal cases and a recognized history of 13(d) injunctive actions.<sup>183</sup> Although the opinions posit their holdings on a perceived trend by the Supreme Court away from implying actions in the absence of express congressional intent, they fail to discern the distinctions in the cases they cite for support that detract from the strength of a broad restriction on all implied rights. The nature and purposes of the Williams Act weigh more heavily toward providing the target and shareholders with a direct and expedient avenue of relief to secure compliance with the Act's disclosure provisions. Commentators, as well as the SEC, favor such a remedy.<sup>184</sup>

### III. CONCLUSION

The proliferation of tender offers as a means of corporate acquisition has spawned various modes of defense utilized by target management to fend off hostile takeover attempts. A target corporation often can identify factors indicating its susceptibility to a takeover attempt and, accordingly, prepare advance defensive strategies. Although such preparation is preferable, other defensive maneuvers are available to a corporation that is caught off guard by a surprise tender offer. Target management must analyze these strategies and maneuvers, as differing degrees of success are attributable to them. Moreover, tender offers and certain stock purchases

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implied injunctive relief actions, but stated firmly that no action would be implied for damages, particularly in light of *Touche Ross* and *Transamerica*. *Id.* at 90,295-96. The *Berman* case arose from an earlier case in which the District of Columbia court granted injunctive relief upon a demonstration of irreparable harm to target shareholders for defendant's failure to file a Schedule 13D. *Financial Gen. Bankshares, Inc. v. Lance*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,403, at 93,418 (D.D.C. 1978).

179. 494 F. Supp. 358 (E.D. Wis. 1980).

180. *Id.* at 361.

181. *Id.* at 362-65. Under the court's holding, a target would have to approach the SEC first with its complaint, and then the SEC could file suit in district court if it deemed the complaint a valid violation. The delay occasioned by this process could be enough to deprive the target of a timely remedy.

182. *Id.* at 363.

183. See note 144 *supra*.

184. See, e.g., Aranow, Einhorn & Berstein, *Standing to Sue to Challenge Violations of the Williams Act*, 32 BUS. LAW. 1755, 1763 (1977); Pitt, *supra* note 125, at 187; Porter & Hyland, note 156 *supra*; note 157 *supra*; cf. Note, *Private Rights of Action for Damages Under Section 13(d)*, 32 STAN. L. REV. 581 (1980) (private right of action for damages under 13(d) should be provided shareholders).

are federally regulated. Both Congress and the SEC have promulgated a multitude of rules and regulations that substantially affects the course of action chosen by the target, as well as by the acquirer of target stock.

The Williams Act, which regulates tender offers and certain stock acquisitions, mandates substantial disclosure by both the target and the stock acquirer. The Act, however, fails to provide a private judicial remedy by which a target can secure a stock purchaser's compliance with its terms, and the Supreme Court has not stated that such a remedy may be implied. Due to a recent Supreme Court trend toward restraining broad implication of a private action under various statutes when the statutes do not so provide, lower federal courts recently have been inconsistent in implying a private remedy to grant target corporations standing to sue for purchaser compliance. The purpose of the Williams Act, to assure complete and truthful disclosure for the protection of shareholders and the investing public, can best be served by granting target corporations an action for relief from inadequate or misleading disclosures and from the complete failure to file required disclosure statements. The SEC's inability to handle the ever-increasing number of violations substantiates the need for a private remedy. Consequently, either the Supreme Court or Congress should act to remedy this deficiency and end the confusing and inconsistent federal court interpretations of judicial trends and congressional intent.