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Tender Offers for Corporate Control

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RECENT BOOKS

Book Reviews

Tender Offers for Corporate Control. By *Edward Ross Aranow* and *Herbert A. Einhorn*. New York: Columbia University Press. 1973. Pp. xiii, 352. $40.

Tender Offers for Corporate Control is a most topical addition to the growing list of specialized securities regulation treatises. Prior to 1960, the American method of changing corporate control was the proxy fight. In the sixties, however, the bull market, easy money, and the conglomerate craze combined to popularize the cash takeover bid or—as it is frequently called—the tender offer. By 1966, corporations were making more than 100 takeover bids a year,[1] and an annual aggregate of more than 1,000,000,000 dollars was involved.[2] The cash takeover had arrived. Management was threatened.

Senator Harrison Williams of New Jersey rose to the occasion. In October 1965, the Williams bill[3] was introduced. Its stated purpose was to protect management from industrial sabotage resulting from reckless corporate raids on proud old companies.[4] By the time of its enactment in July 1968, however, the Williams bill was intended to do more than defend entrenched management. The House Report stated that 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 while at the same time providing the offeror and management equal opportunity to fairly present their case."[5]

The Williams Act[6] added five new provisions to the Securities Exchange Act of 1934: sections 13(d), 13(e), 14(d), 14(e), and 14(f).[7] In general, the new provisions regulate the terms on which tender offers can be made, require specific disclosures by potential offerors and similar disclosures by purchasers within ten days after acquisition of five per cent[8] of any class of registered equity securities, proscribe fraud in connection with tender offers, authorize SEC rule-

1. H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2 (1968).
2. *See* 113 Cong. Rec. 24664-65 (1967) (remarks of Sen. Williams).
3. S. 2731, 89th Cong., 1st Sess. (1965).
4. 111 Cong. Rec. 28257-60 (1965) (remarks of Sen. Williams).
5. H.R. Rep. No. 1711, *supra* note 1, at 4.
6. Act of July 29, 1968, Pub. L. No. 90–439, 82 Stat. 454.
7. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1970).
8. A 1970 amendment reduced this figure from 10 per cent, as originally enacted. Act of Dec. 22, 1970, Pub. L. No. 91–567, 84 Stat. 1497, *amending* Securities Exchange Act of 1934, § 13(d), 15 U.S.C. § 78m(d) (1970).

making with respect to the repurchase by corporations of their own securities, and require proxy-statement-type disclosure in connection with a change of a majority of the directors following a takeover.[9]

Aranow and Einhorn, practitioners with broad experience in tender offers and proxy fights and authors of *Proxy Contests for Corporate Control*,[10] have written a treatise that covers substantially all of the questions involved in a tender offer. The practical is interspersed with the legal in a well-coordinated pattern. The financial and market considerations necessary to identify an appropriate target and determine whether and at what price it is vulnerable to a takeover bid are discussed in summary form. The tender-offer team of lawyer, investment banker, dealer-manager, professional proxy-soliciting firm, public relations man, and depository bank are identified and their roles explained. The essential position of arbitrageurs in tender offers is treated in a chapter prepared with the assistance of a partner of one of the leading arbitrage firms. There is also a comprehensive discussion of tactics to use in defense against a takeover bid.

The core of the book is a detailed discussion of the provisions

9. Section 14(d), 15 U.S.C. § 78n(d) (1970), requires a "person" (defined to include a "group" acting in concert) making a tender offer that would result in the offeror's ownership of more than five per cent of the shares of the target company to disclose concurrently the offeror's identity and background; the source and amount of the funds to be used to pay for the tendered shares; if the purpose of the tender is control of the target; any plans for liquidation, merger, or other major change in the business or corporate structure of the target; the number of shares the offeror presently owns; and any contracts or understandings with other persons with respect to any securities of the target. In addition to requiring disclosure, section 14(d) substantively regulates tender offers by requiring that (1) tendering shareholders be permitted to withdraw tendered shares during the first seven days of the offer or after sixty days if the offeror has not purchased or returned the shares by then, thereby providing an opportunity for tendering shareholders to change their minds after reflection and preventing indefinite lockups; (2) if more shares are tendered than are to be purchased, the offeror purchase on a pro rata basis from among all shares tendered during the first ten days of the offer, thereby preventing a first-come-first-served stampede by shareholders anxious to have their shares accepted; and (3) any increase in the tender price be paid to all tendering shareholders, including those accepted at the lower price, thereby assuring equal treatment of all shareholders.

Section 13(d), 15 U.S.C. § 78m(d) (1970), requires the same disclosure of identity, financing, purpose, holdings, and understandings by any person (again including a "group") who acquires more than five per cent of the shares of a corporation. The disclosure must be made within ten days after the five per cent threshold is reached. The purpose of this requirement is to alert the corporation, its shareholders, and the market in general to the fact of the acquisition and the purchaser's plans.

Section 14(e), 15 U.S.C. § 78n(e) (1970), is a general antifraud provision. It proscribes material misstatements, misleading omissions, and fraudulent or manipulative acts in connection with a tender offer.

The SEC rulemaking authority with respect to repurchase of stocks by a corporation is contained in section 13(e), 15 U.S.C. § 78m(e) (1970).

Section 14(f), 15 U.S.C. § 78n(f) (1970), deals with planned changes in boards of directors following takeovers.

10. E. Aranow & H. Einhorn, Proxy Contests for Corporate Control (1957) (2d ed. 1968).

of the Williams Act and the SEC regulations with respect to tender offers. The principal issues are raised; the legislative history, court decisions, and SEC interpretations are noted.

Unfortunately for the reader, the book's August 31, 1972, cutoff date results in the omission of the bumper crop of 1973 tender offer cases. A series of 1973 decisions have made the Williams Act an almost impossible barrier to contested takeovers. The courts have now done what Congress refused to do; they have made the Williams Act a shield for entrenched management against "reckless corporate raids on proud old companies." The Act, as recently construed, will bar contested takeovers whether or not management has performed well and whether or not a majority of the shareholders wish to accept the offer. The 1973 decisions have been recognized by Wall Street. Arbitrageurs now sit back until they see the target's defensive team, particularly the lawyer. If the target is determined and represented by counsel experienced in takeover defense, the arbitrageurs will not buy to tender and a major battle of the takeover war is thus lost at the outset. Indeed, one member of the New York Bar has become so renowned for his successful defense against takeovers that the first question on Wall Street is which side has him.

As Aranow and Einhorn recognize, the key to takeover defense under the Williams Act is the requirement that the offeror disclose the purpose of the offer and that there be no material misstatement or misleading omission in such disclosure. However, as the book necessarily fails to convey, this year's decisions, particularly in the Second Circuit, have given such a broad sweep to this requirement that one must doubt the practicality of the takeover bid as a means of changing control. Injunctions have been issued for failure to disclose that an offeror, ostensibly seeking only twenty per cent of the target and disclaiming all but investment intent, had a history of expanding minority interests into complete acquisition;[11] for failure to disclose that the acquisition of shares of the target might be an antitrust violation;[12] for failure to disclose that the purchase of the target's stock pursuant to the tender offer might reduce the stock's float to the point where stock exchange delisting would be considered;[13] for failure to disclose a possible intention to use the liquid assets of the target, inferred from the offeror's action in an unrelated acquisition three years earlier;[14] for failure to disclose that a foreign-controlled offeror might be required under the laws of its parent's

11. Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973).

12. Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973).

13. Sonesta Intl. Hotels Corp. v. Wellington Associates, CCH FED. SEC. L. REP. ¶ 94,041 (2d Cir. 1973).

14. General Host Corp. v. Triumph Am., Inc., 359 F. Supp. 749 (S.D.N.Y. 1973).

domicile to follow certain dividend and investment policies;[15] for failure to disclose an offeror's financial position where that information was not publicly available and the offeror sought control through acquisition of less than all shares and contemplated a merger with the target;[16] and for failure to disclose the amount of a judgment won by the target against the offeror, despite disclosure of the dispute.[17] Injunctions have also been granted because of an offeror's late filing under section 13(d).[18] This spate of 1973 decisions must be read and understood to complete the tender offer picture sketched as of August 1972 by Aranow and Einhorn.[19]

The need for an early supplement to *Tender Offers for Corporate Control* is highlighted by the necessary omission of the 1973 landmark decision of the Second Circuit in *Chris-Craft Industries v. Piper Aircraft Corporation.*[20] The contest between Chris-Craft and Bangor

15. General Host Corp. v. Triumph Am., Inc., 359 F. Supp. 749 (S.D.N.Y. 1973). *See also* Ronson Corp. v. Liquifin Aktiengesellschaft, CCH FED. SEC. L. REP. ¶ 94,088 (3d Cir. 1973).

16. Corenco Corp. v. Schiavone & Sons, Inc., 362 F. Supp. 939 (S.D.N.Y.), *affd.*, CCH FED. SEC. L. REP. ¶ 94,196 (2d Cir. 1973). In this case the offeror was permitted to revise its disclosures to comply with the injunction, republish, and continue the offer, giving previous tenderors the option to withdraw. The Second Circuit, recognizing the effects of the earlier decisions, rejected the argument that nondeliberate section 14(e) disclosure violations should be punished by disqualification of the offeror. For the offeror who is not precluded by market or financing considerations from continuing its offer, this represents a tipping of the scale back toward evenhanded treatment of offeror and target.

17. Sonesta Intl. Hotels Corp. v. Wellington Associates, CCH FED. SEC. L. REP. ¶ 94,041 (2d Cir. 1973).

18. Water & Wall Associates, Inc. v. American Consumer Indus., CCH FED. SEC. L. REP. ¶ 94,943 (D.N.J. 1973). *Cf.* Mosinee Paper Corp. v. Rondeau, CCH FED. SEC. L. REP. ¶ 93,971 (W.D. Wis. 1973).

19. A very recent decision creates even more uncertainty. In Texasgulf, Inc. v. Canada Dev. Corp., CCH FED. SEC. L. REP. ¶ 94,160 (S.D. Tex. 1973), the court rejected, after a hearing on the facts, Texasgulf's (target) claims that Canada Development Corporation violated sections 14(d) and 14(e) by failing to disclose (1) that the acquisition of shares of the target might be an antitrust violation; (2) that the acquisition of shares of the target might be in violation of the state corporation statutes; (3) that the acquisition of shares of the target might be in violation of the Federal Communications Act, and thereby result in loss of valuable communciation assets; (4) the conflict of interest existing between target and tender offeror; (5) the plans for management changes and possible disposition of target's assets; (6) that the acquisition of shares of the target might result in adverse effects to target's overseas operations; (7) that the acquisition of shares of the target would cause target to become ineligible for certain insurance, finance, and other programs offered in connection with investments in less developed countries; and (8) the identity of persons allegedly acting in concert with it. The case is of particular interest for the court's approval of amended offering document disclosure to "cure" prior "defects."

For an interesting opinion on determining the status of a tender offer as a contract, see Lowenschuss v. Berry, 73 Civ. 2021 (S.D.N.Y., July 1973), in which the court held that a tender offer "is . . . a solicitation of offers from the tendering parties or in other words an 'offer for an offer' "; and that, assuming that a tender offer constitutes a contract, if the tender offer is enjoined for violation of section 14(e) of the Securities Exchange Act of 1934, performance of the contract would be impossible, and, therefore, there would be no breach of contract.

20. [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,816 (2d Cir. 1973).

Punta to take over Piper Aircraft Corporation is a classic in terms of the strategems employed by the contestants and the multitude of legal issues raised in the three-way takeover war. While the book discusses the earlier cases in the Piper War, its 1972 cutoff date omits this latest opinion, which encompasses the earlier skirmishes and reverses a number of the lower court holdings discussed in the book. In addition to holding that the defeated offeror may bring a damage action against the management of the target, the competing offeror, and the underwriter for the competing offeror for their Williams Act violations, the Second Circuit opinion establishes the standards of materiality, disclosure, and due diligence that are to be applied under the Act. The opinion also sustains the right of the SEC to obtain the ancillary relief of a rescission order, on behalf of tendering shareholders, against offerors who have violated the antifraud provisions of the federal securities laws.

Although the book is comprehensive with regard to pre-1973 law, one topic treated summarily, and to this reader unsatisfactorily, by Aranow and Einhorn is the so-called "creeping tender offer" theory —the integration of the purchases of the target's stock made before the announcement of the formal tender offer with the formal tender offer so as to make the early purchases violations of the Williams Act. The authors reject the theory categorically. They also deny that the federal securities laws require an offeror to disclose its intent to make a future tender offer before making open-market purchases: "The laws could hardly be otherwise unless one were willing to accept the ludicrous result of requiring every investor that intended to make substantial purchases of a security to disclose such intention prior to its initial purchase" (p. 73).

While existing precedent supports the Aranow and Einhorn position on creeping tender offers, the argument to the contrary cannot be so lightly dismissed. Indeed, in a case where the prior determination to make a tender offer is clearly established, it would not be surprising to see a court reach the opposite result and, for Williams Act purposes, integrate preannouncement open-market purchases with the formal offer.[21] Once a tender offer has been made both the

21. *Compare* Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 356 F. Supp. 1066 (S.D.N.Y.), *affd.*, 476 F.2d 687 (2d Cir. 1973); General Host Corp. v. Triumph Am., Inc., 359 F. Supp. 749 (S.D.N.Y. 1973) (rejecting the argument that pre-formal announcement purchases of less than five per cent of the shares of the target require Williams Act disclosure) *and* Texasgulf, Inc. v. Canada Dev. Corp., CCH FED. SEC. L. REP. ¶ 94,160 (S.D. Tex. 1973) ("Thus, it is evident that CDC's [Canada Development Corporation] undisclosed purchase and conscious avoidance of the 5% triggering requirement, whether alone or together with Noranda, are not a violation of the law." ¶ 94,160, at 94,684.) *with* Griffith & Tucker, *The Williams Act, Public Law 90-439 —Growing Pains? Some Interpretations with Respect to the Williams Act*, 16 How. L.J. 654, 700-01 (1971); the integration theory underlying the SEC staff position in its interpretative letter with respect to Cattlemen's Inv. Co. [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,775 (Jan. 4, 1972) *and* Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248 (W.D. Okla. 1972) (holding that the legislative history of the Williams

Williams Act and rule 10b–13[22] require equality of treatment of shareholders. Arguably, the policy considerations underlying these provisions are equally applicable to the shareholders who sell the first five per cent of the target's stock to the offeror. Acceptance of these policy considerations would require integration of the pre-announcement purchases with the tender offer.

The creeping tender offer also raises the question whether rule 10b–5[23] requires disclosure of the prospective offeror's intentions before it makes purchases in the open market.[24] This issue is not adequately considered in the book.[25] Unfortunately, there is no direct precedent on this question. Nor is there any direct precedent on the related question whether, apart from the intention to make a formal tender offer in the future, the immediate intention to engage in a substantial buying program, at prices contemplated to be in excess of the current market price or in a market situation where the buying program may reasonably be expected to result in higher prices, in and of itself requires disclosure.

The answer to these questions is rooted in the answer to the more fundamental question of whether rule 10b–5 requires—or should require—that the parties to a securities transaction, under all circumstances, inform each other of all nonpublic material facts of which they know. In short, does rule 10b–5 require parity of information for all market participants?[26] It seems clear that the objective of a

Act establishes the congressional intent that the Williams Act cover other techniques for accumulating large blocks as well as conventional tender offers). *See also* Water & Wall Associates, Inc. v. American Consumer Indus., CCH FED. SEC. L. REP. ¶ 93,943 (D.N.J. 1973) (rejecting, without consideration of the arguments, open-market purchases for the purpose of control as constituting a tender offer); Mosinee Paper Corp. v. Rondeau, CCH FED. SEC. L. REP. ¶ 93,971, at 93,888 (W.D. Wis. 1973) (questioning whether a series of open-market purchases exceeding in the aggregate five per cent should be construed as a tender offer).

22. 17 C.F.R. § 240.10(b)–13 (1973).

23. 17 C.F.R. § 240.10(b)–5 (1973).

24. The SEC releases on rule 10b–13 show that the SEC contemplated that nondisclosure of intent to make a tender offer after open-market purchases could be a violation of rule 10b–5 and other antifraud and antimanipulation provisions. In SEC Securities Exchange Act Release No. 8595, at 2 (May 5, 1969), [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,706, at 83,617, proposing rule 10b–13, the SEC said: "Such pre-tender purchases, of course, would be subject to the provisions of Rule 10b–5 under the Act." In SEC Securities Exchange Act Release No. 8712, at 2 (Oct. 8, 1969), [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,745, at 83,709, adopting rule 10b–13, the SEC said: "Of course, the general anti-fraud and anti-manipulation provisions could apply to such pre-tender purchases."

25. If disclosure of preannouncement open-market purchases is required by rule 10b–5 or the other antifraud provisions, such disclosure would presumably tip the balance on the tender offer definition question. The SEC staff has taken the position that announcement of a tender offer to be made in the future starts the tender offer period and triggers the applicability of rule 10b–13. United Brands Co., [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,268 (Dec. 19, 1972); Allied Prods. Corp., CCH FED. SEC. L. REP. ¶ 79,375 (March 21, 1973).

26. The basic question as recently posed by the SEC is, "whether and to what extent

normally functioning market should override the parity-of-information principle when normal accumulations of investment position

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selected, nonpublic knowledge about the existing or future market in particular securities should be treated as material information which must be disclosed by securities professionals or other persons prior to any transactions in those securities." SEC Securities Exchange Act Release No. 10316 (Aug. 1, 1973), CCH FED. SEC. L. REP. ¶ 79,446, at 83,263. In Fleischer, Mundheim & Murphy, *An Initial Inquiry into the Responsibility to Disclose Market Information*, 121 U. PA. L. REV. 798, 818 (1973), the authors reach the conclusion that the parity-of-information approach is too restrictive; it would depart significantly "from an underlying assumption of a competitive economy that it is desirable, on the whole, to reward the diligent who have acquired a superior market position." As an alternative the authors suggest a fairness test, which "would permit the user of material, nonpublic information to show that his exploitation of that information represented a legitimate reward for the economic effort by him or the person who provided him the information," but they conclude that even this would be too restrictive and adhere instead to a test based on a special relationship between the parties and an independent duty to disclose. Dicta in recent cases, the theory underlying recent SEC complaints, the broad sweep given to rule 10b-5 by the Supreme Court in Superintendent of Ins. v. Banker's Life & Cas. Co., 404 U.S. 6 (1971), and Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), and the public concern with achieving fairness in the securities markets indicate that the parity-of-information rule may ultimately emerge as the standard. In Birdman v. Electro-Catheter Corp., CCH FED. SEC. L. REP. ¶ 93,934 (E.D. Pa. 1973), while discussing the failure to disclose the potential market impact of the contemplated sale of shares by insiders, the court came very close to a parity-of-information test in saying: "The omission of such information, if material, would thwart the basic policy of Rule 10b-5 . . . which is that all investors have relatively equal access to material information." ¶ 93,934, at 93,725-26. Other cases that, although distinguishable on their facts, may be said to accept the parity-of-information principle are SEC v. Great Am. Indus., 407 F.2d 453 (2d Cir. 1968) (concurring opinion); Landy v. FDIC, CCH FED. SEC. L. REP. ¶ 94,094 (3d Cir. 1973); Courtland v. Walston & Co., 340 F. Supp. 1076 (S.D.N.Y. 1972). The parity-of-information test accords with present day expectations. When rule 10b-5 was adopted, the public had not yet been invited in. The market consisted of professionals, semipros, and those who liked to think of themselves as semipros. The vast majority of people "in the market" did not expect parity of market information. At most, they expected not to be defrauded by insiders with knowledge of material changes in things like earnings or dividends. After the public was invited in, expectations changed. The public expects evenhanded fairness and does not distinguish losses arising out of nondisclosure of market information from those arising out of nondisclosure of corporate information. It is evident today that the Congress and the SEC are responding to this public expectation, and the courts may do likewise. In this connection, Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969), should be kept in mind. In finding a rule 10b-5 violation in failure to disclose the offeror's market activities in the target company's stock, the court felt constrained to find an "insider" relationship. The court "reasoned" that the tender offeror was an "insider" with respect to the trading in the target's stock even though such information peculiarly concerned the tender offeror and not the target. As in many judicial developments, the courts may reach parity-of-information results before the principle itself is fully recognized and adopted.

A recent White Paper, COMPANY LAW REFORM, COMND. No. 5391, at 8 (1973), contains an excellent statement of the philosophy of the parity-of-information principle:

> Unfair profits can on occasion be made in share dealings by the improper use of confidential, price-sensitive information that is not generally available to the investing public. This is prima facie most likely to happen in a bid, or expected bid, situation, but in principle it can happen at any time. The efficient operation of the market as a source of capital, as a measure of industrial success and hence as a means of achieving a desirable and efficient disposition of resources, requires that relevant information should be fairly available, and that all investors should be able to back their knowledge and judgment rather than that favoured individuals should be able to take private advantage of confidential information. These

are involved. Proposed rule 13e–2,[27] regarding corporate repurchase programs, is a good analogy. If a buying program is not likely and the buyer does not intend to affect the market price, disclosure should not be required. However, if market conditions or the buyer's intentions are such that it knows, or reasonably should know, that its transactions will have a material effect on the market price, there is a substantial question as to whether disclosure should be required.

Having rejected both integration and rule 10b–5 disclosure in connection with preannouncement open-market purchases, Aranow and Einhorn do not face the difficult issues of when it is appropriate to apply the integration concept and what is material information in this context. In most situations, the buyer's intention is not formulated at the time of the initial purchases. Rather, the buyer generally tests the market, determines the dimensions of the buying program, and then decides whether or not to make a tender offer on the basis of "how the market acts." This creates a question of fact as to the buyer's real intention at the time of the initial purchases or, assuming that the buyer's intention was fluid, a question as to the materiality of the information that a buyer who might make a tender offer is testing the market. Where open market purchases are made without any intention to make a tender offer and the investor subsequently changes its mind and decides to make a tender offer, the open-market purchases should not be integrated with the later offer.

Aranow and Einhorn also do not treat specifically another of the most intriguing questions under the Williams Act—open-market purchases by a third party to defeat a tender offer. A possible scenario is: Target, listed on the New York Stock Exchange (NYSE), has 2,000,000 shares outstanding. Target stock has recently been trading at twenty dollars per share. Offeror makes the requisite filing under the Williams Act and announces a tender offer for all Target shares at twenty-six dollars per share, conditioned on obtaining not less than 1,000,000 shares. The price of Target on the NYSE goes to twenty-five and one quarter. The next day, Competitor, without any prior disclosure or announcement of its intentions, commences to purchase Target shares on the NYSE; it intends to buy 1,000,000

requirements have so far been fulfilled by the application of the rules of the Stock Exchange and, in bid situations, by the Take-Over Panel. Without implying that malpractice has been widespread, the Government have concluded that it is necessary for the voluntary system to be reinforced by statute so as to ensure, as far as practically possible, that the market operates freely on the basis of equality between buyer and seller. Care must of course be taken to avoid unduly inhibiting the flexibility of the market. But the general desirability of ensuring equality of information to all potential or actual investors, and hence a proper disposition of the resources available to those investors, must have a high priority. The successful operation of the system demands a high degree of confidence in fair dealing on the Stock Exchange, and indeed in securities generally, whether or not publicly quoted.

27. SEC Securities Exchange Act Release No. 8930 (July 13, 1970), 2 CCH Fed. Sec. L. Rep. ¶ 26,854 (1970).

shares and thereby defeat Offeror's bid and gain control of Target for itself. After buying 500,000 shares at prices between twenty-five and one half and twenty-six and one eighth, Competitor issues a press release that states its intention to continue to buy Target shares until it has 1,000,000 shares. During the next few days, Competitor buys the other 500,000 shares at prices between twenty-five and one half and twenty-six and one half. All of Competitor's purchases are in transactions on the floor of the NYSE by a broker continuously bidding on behalf of Competitor and continuously accepting all offers at its current bid. Competitor does not in any way (other than through its press release) communicate directly with Target shareholders. Competitor does not file under the Williams Act until after it has completed all of its purchases. It then files, within the specified ten-day period, a schedule 13D.[28] Following Competitor's press release, a number of brokers voluntarily contact Target shareholders to advise them to sell immediately because Offeror's bid appears to be defeated and the brokers expect the price of Target to return to twenty when Competitor completes its buying program. A number of market professionals reach the same conclusion and decide that making short sales of Target stock to Competitor is a "sure thing" in that, when Competitor stops buying after accumulating 1,000,000 shares as announced, they will be able to cover at lower prices.[29] The number of shares tendered to Offeror falls far short of 1,000,000, and it terminates its offer and returns all shares tendered. The market price of Target drops to the pre-tender offer level.

Without making prior announcement, and without complying with the Williams Act, Competitor, using the umbrella of Offeror's bid (Offeror, having announced a tender offer, was precluded by rule 10b–13 from buying on the floor of the NYSE in competition with Competitor), was able to acquire 1,000,000 shares of Target and defeat Offeror. In so doing, Competitor did not accord potential sellers pro rata treatment and did not disclose its future plans for Target—but did afford market professionals the opportunity for a speedy short-sale profit. The real victims of Competitor's unregulated buying program were the unsophisticated public shareholders of Target who were unable to act fast enough to sell to Competitor at twenty-six plus. These shareholders, unable to obtain the twenty-six dollar tender offer price from Offeror and not appreciating the temporary nature of the increase in market price above Offeror's offer, were left with shares at a market value substantially less than

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28. 17 C.F.R. § 240.13d–101 (1973).

29. Announcement of a third offer for all Target shares at a price higher than 26 or an increase in Offeror's bid is the only danger faced by the short sellers, and this is unlikely after Competitor has already acquired more than 25 per cent of the outstanding shares.

the trading prices that prevailed during Competitor's buying program.

Clearly Competitor's action resulted in unfairness and injury to the public shareholders of Target. The only question is whether such action is remediable under the federal securities laws—whether the conduct of Competitor violated the Williams Act, as well as rules 10b-5 and 10b-13. Notwithstanding the Aranow and Einhorn position on creeping tender offers and the 1973 cases that refuse to outlaw open-market purchases as tender offers, if the purposes of the Williams Act are to be achieved, large-scale open-market purchases to obtain control should be held to be tender offers. Where such purchases are made for the purpose of defeating another's tender offer, the argument for finding them to be a tender offer is compelling. To hold that these purchases are not tender offers is to handicap severely the person making the formal tender offer in compliance with the Williams Act and to subject the public shareholders to the disadvantages that the Williams Act was intended to remedy.[30] In addition, independent of the question of the definition of a tender offer, such purchases should also be held to violate rule 14d-4,[31] which requires compliance with the Williams Act disclosure provisions by those attempting to defeat tender offers.

Despite its unfortunate cutoff date and its summary treatment of a few points, *Tender Offers for Corporate Control* is a significant contribution to the literature on securities regulation. It is a handy starting place and a good research resource in the tender offer field. No well-rounded library should be without it.

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30. *See* Note, *The Developing Meaning of "Tender Offer" under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1275 (1973), in which it is suggested that the appropriate basis on which to determine what is a tender offer is the impact on the shareholders of the target; if the effect is substantially the same as a conventional tender offer, it is a "tender offer." The American Law Institute's proposed Federal Securities Code would define a "tender request" in terms of an offer to more than 35 persons, without regard to the manner of the offer. ALI FED. SEC. CODE § 299.9 (Tent. Draft No. 1, 1972).

31. 17 C.F.R. § 240.14d-4 (1973).