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Tender Offers and Bidder Access to Target Company Shareholder Lists

Among the long-recognized rights of stock ownership is the investor's right to obtain information about the corporation and the value of its stock. Because a tender offer for the shares of a particular corporation can materially affect the value of that corporation's stock, some degree of disclosure is necessary before shareholders can decide whether to participate in, actively oppose, or simply ignore the offer. Congress has made it clear that the purposes of existing tender offer legislation can best be achieved by full disclosure and a free flow of information to shareholders.¹ The parameters of a shareholder's right to receive a free flow of information about a tender offer, however, have yet to be defined precisely.

The purpose of this Comment is to set out the specific circumstances in which a bidder enjoys the right to have its tender offer materials mailed directly to target company shareholders. The trend toward more liberally granting bidders this direct access will be charted and an attempt will be made to determine whether this trend will eventually make direct bidder access available in all tender offer bids.

Granting direct access, as used in this Comment, refers to compelling the target company management either to mail the bidder's tender offer materials itself,² or to produce a copy of its shareholder list so that the bidder³ or some third party⁴ can mail

1. *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910, 914 (N.D. Tex. 1976); Appleton, *The Proposed SEC Tender Offer Rules*, 32 BUS. LAW. 1381, 1387 (1977). See *Texasgulf Inc. v. Canada Dev. Corp.*, 366 F. Supp. 374, 420 (S.D. Tex. 1973); S. REP. NO. 550, 90th Cong., 1st Sess. 1 (1967). Cf. *McLean v. Alexander*, 420 F. Supp. 1057, 1075 (D. Del. 1976) (discussing the purpose of § 10(b) and rule 10b-5 of the Securities Exchange Act).

2. Federal regulations employ this method for proxy solicitation. 17 C.F.R. § 240.14a-7 (1977). It has been suggested that this proxy rule be the pattern for a tender offer rule. Letter from the Subcommittee On Tender Offers, Proxy Materials, and Going Private Transactions of the Securities Law Committee of the Chicago Bar Association to the Securities and Exchange Commission (Oct. 11, 1976) (comment letter in SEC File No. S7-649).

3. The Securities and Exchange Commission (SEC) and American Bar Association (ABA) apparently prefer this method over the first. SEC Release Nos. 33-5731, 34-12676, 40-9386 (Aug. 2, 1976), 364 SEC. REG. & L. REP. (BNA) I-12; Atkins, *Shareholder Lists*, 9 REV. SEC. REG. 901, 906 (1976) (quoting a letter from the Subcommittee On Proxy Solicitations and Tender Offers of the Committee on Federal Regulation of Securities, Section of Corporation, Banking and Business Law of the American Bar Association (Dec. 9, 1974)).

4. This function could be filled by the target company's transfer agent (who already has the shareholder list), the bidder's tender offer depository, or some independent third party. For a discussion regarding who should do the mailing, see note 89 *infra*.

the materials to the shareholders. Leading authorities consider the issue of when bidders should be allowed such direct access to be "the most controversial question in the tender offer area."⁵ Present recommendations range from not allowing direct access in any case, based on the contention that advertising is sufficient, to allowing a free flow of information from the bidder to target company shareholders in every tender offer.

I. BACKGROUND

A. Defining "Tender Offer"

Both Congress and the Securities and Exchange Commission (SEC) have avoided defining "tender offer" as that term is used in applicable statutes and regulations in order to have a functional definition develop in a case-by-case manner.⁶ The working definition that has evolved focuses on the pressure the offer creates in light of the often competing interests of the bidder, target company management, and target company shareholders.⁷ Generally, any method of securities acquisition that exerts the type of pressure on shareholders that Congress perceived would exist in conventional tender offer takeover bids will be subject to tender offer regulations.⁸ Thus, many securities acquisition

5. Black & Sparks, *Triggering the Williams Act*, 8 REV. SEC. REG. 971 (1975) (coauthored by Lewis S. Black, Jr., chairman, Subcommittee On Proxy Solicitations and Tender Offers of the Committee on Federal Regulation of Securities, Section of Corporation, Banking and Business Law of the American Bar Association). See Appleton, *supra* note 1, at 1386 (statement of Ruth D. Appleton, Chief, Office of Tender Offers, Acquisitions and Small Issues, SEC).

6. *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 598 (5th Cir. 1974). See SEC Release Nos. 33-5731, 34-12676, 40-9386 (Aug. 2, 1976), 364 SEC. REG. & L. REP. (BNA) I-2 (Aug. 4, 1976). The lack of a concrete definition has led to situations where individual investors buying up stock of a particular company have been found guilty of tender offer violations when they were possibly not even aware they were making tender offers. See, e.g., *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); *Cattlemen's Inv. Co. v. Fears*, 343 F. Supp. 1248 (W.D. Okla. 1972).

7. See text accompanying notes 11-30 *infra*.

8. This expanded definition is proposed in Note, *The Developing Meaning of "Tender Offer" under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973), and expressly accepted in *Nachman Corp. v. Halfred Inc.*, [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455 (N.D. Ill. 1973).

A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price.

[The] approach to defining the term tender offer . . . advocated by this Note, would look at the shareholder impact of particular methods of securities acquisition, classifying as tender offers those found capable of exerting the same sort of pressure on shareholders to make uninformed, ill-considered decisions to

schemes not readily recognized as tender offers may be regulated. Making a premium bid directly to the shareholders of a target corporation, however, continues to be one of the most popular devices for effectuating corporate takeovers.⁹ Such tender offers normally involve either a cash payment for tendered shares or a stock-for-stock exchange for shares of the bidder corporation. A recent shift in emphasis between the two methods was reported in 1976 when it was found that "[d]uring the last 5 years, the cash tender offer was the almost exclusive method used. This is in contrast to the preceding 1968-72 5-year period when exchange-of-shares tender offers outnumbered cash tender offers."¹⁰

B. *Competing Interests in a Tender Offer*

1. *Interests of the bidder*

A primary interest of the bidder is to profit from acquiring control of the particular target company. The bidder's motives "may include the desire to expand or diversify its business, the desire to pursue an attractive investment opportunity, or the desire to profit by resuscitating a sluggish company."¹¹

After the bidder decides to make a tender offer, it is essential that secrecy be maintained until the premium bid is officially announced.¹² Any public revelation of an imminent takeover bid¹³

sell which Congress found the conventional tender offer was capable of exerting.

Note, *The Developing Meaning of "Tender Offer" under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251, 1275 (1973).

9. In addition to cash offers and exchange arrangements, many mergers and consolidations must be considered subject to federal tender offer regulation under the broad and developing definition of "tender offer," all of which can either come by surprise or as a result of prior negotiation with the target management. The number of unnegotiated cash tender offers alone arose from only 7 in 1960 to 113 in 1975 and 107 in 1976. It is estimated that the final tally for 1977 will exceed the previous high. Wall St. J., Oct. 25, 1977, at 22, col. 3.

10. *Corporate Takeovers: Hearings on Regulation under Federal Banking and Securities Laws of Persons Involved in Corporate Takeovers Before the Comm. on Banking, Housing and Urban Affairs, United States Senate, 94th Cong., 2d Sess. 1* (1976) (statement of the committee chairman, Senator William Proxmire).

11. Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U.L. REV. 991, 993 (1973). "Of course, the offeror is subject to certain limitations in making acquisitions, principally the antitrust laws." *Id.* at 993-94.

12. Herman, *Mum's the Word: Firms Act to Prevent Leaks as Take-Overs and Mergers Multiply*, Wall St. J., June 2, 1976, at 1, col. 6.

13. The recent amendment to the Clayton Act requiring that the Federal Trade Commission and Assistant Attorney General be notified 15 days in advance of certain tender offers contains safeguards against public disclosure of the planned bid. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390 (codified at 15 U.S.C. § 18a (1976)). The notification of a tender offer and 15-day waiting period is generally required if (1) the bidder or target company is engaged in commerce;

would likely thwart the prospective tender offer since the market and/or target company would predictably react to make the acquisition more costly, if not impossible. Advance public knowledge of a tender offer drives up the market price of the target company's stock via arbitrage toward the expected premium bid. This, in turn, may make it necessary to increase the originally intended bid in order to accomplish the takeover. The ante may also increase if competing bidders are attracted before official announcement of the bid is made. In addition, when the management of the target company learns of a tender offer in advance, it has more time to begin defensive moves aimed at thwarting the takeover bid or pressuring the bidder to raise its offer price.

Another primary objective of the bidder is to communicate the offer to the shareholders of the target company. Because the decisions of individual shareholders will ultimately determine the success or failure of the takeover bid, it is vital to the bidder that the shareholders know of the existence and terms of the tender offer.¹⁴ In some cases this can be adequately accomplished through advertising.¹⁵ A direct mailing, however, is clearly the more effective vehicle.¹⁶

2. *Interests of target company management*

A target company may consider a tender offer as either "friendly" and in its best interests or "hostile." Target management can halt a "hostile" tender offer with judicial assistance when the bidder has failed to comply with all applicable tender offer regulations.¹⁷ When the bidder has properly initiated a "hostile" tender offer, however, defensive moves available to target management are more limited and include: (1) arranging for

(2) either the bidder or target company has over \$100 million in annual net sales or total assets and the other party has over \$10 million in annual net sales or total assets (subject to special provisions for sales and manufacturing firms); and (3) the tender offer would result in a holding of more than 15% or \$15 million of the target company's securities. *Id.*

14. Those who should be contacted include: individual shareholders, brokers as conduits to beneficial owners, funds, and bank nominees (custodial accounts, pension funds, fiduciary accounts, investment management accounts, and other institutional accounts) as conduits to beneficial owners. Robinson, *The Role in Tender Offers of Specialists: Professional Solicitation Firm, Public Relations, and Dealer-Manager*, in *THE TENDER OFFER* 81, 84 (Corporate Law & Practice Course Handbook Series No. 82, Practising Law Institute 1972).

15. Advertising and publicity media include: advertisements (*New York Times*, *Wall Street Journal*, local papers, specialty magazines, and financial trade journals); press releases (Dow Jones, Reuters, and the press generally); and press meetings. *Id.* at 86.

16. Appleton, *supra* note 1, at 1386.

17. *E.g.*, *Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc.*, 425 F.2d 842 (2d Cir. 1970).

a "friendly" merger with another corporation,¹⁸ (2) soliciting a "friendly" competing tender offer from another bidder,¹⁹ (3) bringing spurious court actions,²⁰ (4) leaking the information to the public,²¹ and (5) denying or delaying bidder access to the target company's shareholder list.²²

The management of a target company has no general duty under common law to see that shareholders are informed of a tender offer for their stock. In addition, the SEC has stated that it has no authority under federal law to require that *each* shareholder know of a tender offer as long as "some sort of national publication" of the offer is made.²³ Moreover, management does not have a fiduciary duty under state law to relay tender offer information to its shareholders.²⁴ However, federal courts *have* required a target company's management to relay tender offer materials to shareholders as a bidder's remedy in a tender offer antifraud action when management's actions in opposing the bid were found to be an abuse of shareholder information rights.²⁵

Other duties on a target company's management involve the necessity and propriety of recommendations to shareholders about tender offers. While no securities regulation specifically requires the management of a target company to make any recommendation,²⁶ at least one federal court has held that "management has the responsibility to oppose offers which, in its

18. See, e.g., *American Standard Inc. v. Crane Co.*, 510 F.2d 1043 (2d Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975).

19. See, e.g., *Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1 (1977).

20. But see *Electronic Speciality Co. v. International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969): "[J]udges must be vigilant against resort to the courts on trumped-up or trivial grounds as a means for delaying and thereby defeating legitimate tender offers."

21. See text accompanying notes 12-13 *supra*. In addition, "leaks can give the target company more time to plan a defense. 'Loose lips sink ships,' warns John J. Gavin, senior vice president of D. F. King & Co., a New York firm that provides advisory services in tender-offer situations." Herman, *supra* note 12, at 1, col. 6.

22. See E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* 226 (1973).

23. *Advance Sys., Inc.*, SEC Staff Reply (Aug. 29, 1973), [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,534.

24. California law, for example, lays a strict fiduciary duty on management toward shareholders, *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93, 108-12, 460 P.2d 464, 471-74, 81 Cal. Rptr. 592, 599-602 (1969), but it does not protect "the shareholder's right to accept or reject tender offers intelligently." *Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 234 (9th Cir. 1975).

25. See *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910 (N.D. Tex. 1976) (discussed in text accompanying notes 67-75 *infra*).

26. See Note, *A Proposal for Affirmative Disclosure by Target Management During Tender Offers*, 75 COLUM. L. REV. 190, 190 (1975).

best judgment, are detrimental to the company or its stockholders."²⁷ When management indicates that it will make a recommendation, however, a duty arises to communicate that recommendation and to do so free of material misrepresentations or omissions.²⁸

3. *Interests of target company shareholders*

A free flow of information about a tender offer from both the bidder and target management is necessary in order for the target company's shareholders to knowledgeably decide whether their investments would be optimized by disinvestment. If so, they must decide whether to tender their shares or pursue another strategy. Not infrequently target shareholders choose to avoid the risk of some shares being returned when more have been tendered than the bidder wishes to buy by selling their shares on the open market at a premium²⁹ or by attempting to tender short.³⁰

27. *Northwest Indus., Inc., v. B.F. Goodrich Co.*, 301 F. Supp. 706, 712 (N.D. Ill. 1969). *But see Broffe v. Horton*, 172 F.2d 489, 494 (2d Cir. 1949). It is also possible that target management would be liable for damages for opposing a tender offer which would have been in the best interests of target shareholders. *See, e.g., Wall St. J.*, Aug. 11, 1977, at 10, col. 3.

28. 15 U.S.C. § 78n(d)(4), (e) (1976). Target management must file a schedule 14D, 17 C.F.R. § 240.14d-101 (1977), with the SEC in connection with any recommendation to accept or reject a tender offer. *Id.* § 240.14d-4. *But see id.* § 240.14d-2(f) (setting forth a narrow exception to the requirement that target companies must file a schedule 14D before communicating with shareholders about a tender offer).

29. Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U.L. REV. 991, 996 (1973).

[The target shareholder] must remember that even if he tenders his shares, some shares may be returned if the offeror receives more stock than it desires to purchase. Thus, even though he has decided to disinvest, a tendering shareholder may still find himself an involuntary investor in the target, now a subsidiary company. In fact, after a particularly attractive offer, so many shares may be returned, and the market price may fall so low, that the value of the shareholder's returned shares plus the payment received from the offeror is less than the value of his pre-offer holdings. Therefore, rather than tendering, a shareholder may choose to avoid this risk by selling his shares on the market. Arbitrage will often stimulate a rise in the market price so that the selling shareholder will still earn a premium; although this premium is not so large as that of the offer, the shareholder runs no risk of continuing to own stock in the target.

Id. (footnotes omitted).

30. SEC Release No. 34-14157 (Nov. 9, 1977), 428 SEC. REG. & L. REP. (BNA) E-1:

In order to reduce or eliminate the risks of partial acceptance during tender offers, a person who desired to have his securities accepted in full at the tender offer price (and who, for example, estimated 50 percent acceptance by the offeror) would indicate a desire to tender twice as many shares as he actually owned. Assuming his calculations (and estimates) were correct, the result would be that the offeror accepted all the shares the tendering person actually owned. This practice became known as short tendering.

The right to a free flow of information about a tender offer affords the primary protection for these shareholders' interests and is the right around which most securities regulation, both state and federal, revolves. It is not surprising, then, to find bidders asserting that the shareholders' right to a free flow of information about a tender offer imposes a duty on management to facilitate direct access to shareholders by making a shareholder list available or by relaying the tender offer materials to the shareholders.

II. INCREASING AVAILABILITY OF BIDDERS' DIRECT ACCESS TO TARGET COMPANY SHAREHOLDERS

A. *State Law*

Common law and state statutory law, as well as some state takeover acts, grant bidders who are simultaneously target company shareholders the right, under certain circumstances, to inspect shareholders lists upon request. Direct mail access for a tender offer is then obtained by a bidder exercising its right to copy the list.³¹ Although this might suggest that a potential bidder need only purchase a few shares of the target company's stock before announcing its offer, a shareholder must establish a proper corporate purpose in order to exercise his inspection right. Such disclosure could be more detrimental to a tender offer than having the shareholder list would be helpful.

1. *Proper corporate purpose for inspection*

The common law inspection right of a shareholder is recognized only when the shareholder asserts a proper corporate purpose for inspecting the corporation's records.³² Most recent court decisions have held that a tender offer is such a proper corporate

The SEC's attempts to prohibit short tendering will be bolstered if the SEC adopts the proposed amendment to rule 10b-4 under the Securities Exchange Act published for comment in November 1977. *See id.*

31. The right to copy records being inspected is specifically provided for in many state corporate-record-inspection statutes. Even in the absence of such a specific provision, however, courts have held that the right to make copies is coextensive with the right to inspect. *E.g.*, *State ex rel. Healy v. Superior Oil Corp.*, 40 Del. 460, 463, 13 A.2d 453, 454 (1940); *Shea v. Parker*, 234 Mass. 592, 594-95, 126 N.E. 47, 48 (1920); *State ex rel. Watkins v. Cassell*, 294 S.W.2d 647, 653 (Mo. Ct. App. 1956); *People ex rel. Lorge v. Consolidated Nat'l Bank*, 105 A.D. 409, 412, 94 N.Y.S. 173, 175 (1905).

32. *Fox & Fox, Corporate Acquisitions and Mergers*, in 13A BUSINESS ORGANIZATIONS § 27.04(3)(a) (1977); *Newman, Inspection of Stock Ledgers and Voting Lists*, 16 Sw. L.J. 439, 450-55 (1962). *See also* Annot., 15 A.L.R.2d 11 (1951); Annot., 13-15 A.L.R.2d Later Case Service 321 (1973).

purpose, particularly where there is evidence that a takeover could make the corporation more profitable.³³ In so holding, the courts have had to distinguish tender offer cases from cases denying shareholder lists requested by shareholders for purposes inimical to the corporation³⁴ or for the solicitation of stock transactions on a commission basis.³⁵ Courts have found it to be an improper corporate purpose, however, for a shareholder to obtain a shareholder list to give to a nonshareholder for use in a tender offer.³⁶ Nevertheless, a few courts have honored a shareholder's inspection right where there has been a possibly improper purpose so long as a proper purpose also existed.³⁷

By legislative action, every state has codified the qualified right of a shareholder to inspect the corporation's books and records.³⁸ These statutory versions of the common law inspection

33. *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855 (Del. Ch. 1969); *Crane Co. v. Anacanda Co.*, 39 N.Y.2d 14, 346 N.E.2d 507, 382 N.Y.S.2d 707 (1976). See *Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp.*, 394 F. Supp. 267, 294 (S.D.N.Y. 1975); *Lunkenheimer Co. v. Condec Corp.*, 268 F. Supp. 667, 672 n.2 (S.D.N.Y. 1967). These decisions allowing shareholders access to shareholder lists for takeover purposes may have been influenced by the spirit of the federal proxy rules, e.g., 17 C.F.R. § 240.14a-7 (1977), and other court decisions which actively protect minority shareholders from oppression by those in control of the corporation, e.g., *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969).

34. See Annot., 15 A.L.R.2d 11, 57-94 (1951); Annot., 13-15 A.L.R.2d Later Case Service 321, 328-31 (1973).

35. See, e.g., *White v. Jacobsen Mfg. Co.*, 293 F. Supp. 1358 (E.D. Wis. 1968); *Laidlaw & Co. v. Pacific Ins. Co.*, 52 Misc. 2d 122, 275 N.Y.S.2d 125 (Sup. Ct. 1966). But see *Alex, Brown & Sons v. Latrobe Steel Co.*, 376 F. Supp. 1373 (W.D. Pa. 1974); *Weeks, Business Associations*, 19 SYRACUSE L. REV. 353, 354-55 (1967) (criticizing *Laidlaw*).

36. E.g., *A & K R.R. Materials, Inc. v. Green Bay & W.R.R.*, 437 F. Supp. 636, 645 (E.D. Wis. 1977). But see *Alex, Brown & Sons v. Latrobe Steel Co.*, 376 F. Supp. 1373 (W.D. Pa. 1974).

37. E.g., *Crane Co. v. Westinghouse Air Brake Co.*, 56 Misc. 2d 538, 540, 288 N.Y.S.2d 984, 986 (Sup. Ct. 1968). See also *National Consumers Union v. National Tea Co.*, 14 Ill. App. 3d 186, 189, 302 N.E.2d 118, 121 (1973); *Murchison v. Alleghany Corp.*, 27 Misc. 2d 290, 210 N.Y.S.2d 153 (Sup. Ct. 1960), *aff'd mem.*, 12 A.D.2d 753, 210 N.Y.S.2d 975 (1961); E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* 17 (1973). But see Annot., 15 A.L.R.2d 11, 29 (1951) (discussing "ulterior purpose" as grounds for denying a shareholder list).

38. ALA. CODE tit. 10, § 10-2-6 (1975); ALASKA STAT. § 10.05.240 (1962); ARIZ. REV. STAT. ANN. § 10-052 (1977); ARK. STAT. ANN. § 64-312 (1966); CAL. CORP. CODE § 1600 (West 1977); COLO. REV. STAT. § 7-5-117 (1973); CONN. GEN. STAT. § 33-333 (1977); DEL. CODE ANN. tit. 8, § 220 (1974); D.C. CODE ANN. § 29-920 (1973); FLA. STAT. ANN. § 607.157 (West 1977); GA. CODE ANN. § 22-613 (1977); HAW. REV. STAT. § 416-51 (1976); IDAHO CODE § 30-144 (1967); ILL. REV. STAT. ch. 32, § 157.45 (1973); IND. CODE ANN. § 23-1-2-14 (Burns 1972); IOWA CODE ANN. § 496A.47 (West Supp. 1977); KAN. STAT. § 17-6510 (1974); KY. REV. STAT. § 271A.260 (Supp. 1976); LA. REV. STAT. ANN. § 12:103 (West 1969); ME. REV. STAT. tit. 13A, § 626 (1974); MD. CORP. & ASS'NS. CODE ANN. §§ 2-512 to -513 (1975); MASS. GEN. LAWS ANN. ch. 155, § 22 (West 1970); MICH. COMP. LAWS ANN. § 450.1487 (1973); MINN. STAT. § 301.34 (1969); MISS. CODE ANN. § 79-3-99 (1972); MO. ANN. STAT. § 351.215

right also typically require a proper corporate purpose and, in addition, impose certain procedural restrictions. The New York statute, for example, requires five days' written demand and record ownership for at least six months or representation of at least five percent of any class of outstanding stock.³⁹ A six-month delay in a tender offer is rarely practical and the disclosure required by federal tender offer legislation for holders of five percent or more of a company's shares⁴⁰ would give target managements advance notice of a planned tender offer, as would the five days' written demand. Thus, even if the bidder is or becomes a shareholder of the target company and the courts recognize the tender offer (or a supplemental reason) as a proper corporate purpose for obtaining a shareholder list, the procedural requirements of many state corporate-records-inspection statutes may, in practical effect, thwart the tender offer by giving target company managements advance notice.⁴¹

2. *State takeover acts*

In recent years a growing number of states have enacted state takeover acts to supplement the federal regulation of tender offers.⁴² A few of these states have dealt with the question of a bidder's access to target shareholders by allowing bidders who are already shareholders of the target company to obtain a shareholder list upon demand.⁴³ The net result, therefore, is little more

(Vernon 1966); MONT. REV. CODES ANN. § 15.2246 (1947); NEB. REV. STAT. § 21-2050 (1977); NEV. REV. STAT. § 78.105 (1973); N.H. REV. STAT. ANN. § 294:92 (1966); N.J. STAT. ANN. § 14A:5-28 (West Supp. 1977); N.M. STAT. ANN. § 51-24-48 (Supp. 1975); N.Y. BUS. CORP. LAW § 624 (McKinney Supp. 1977); N.C. GEN. STAT. § 55-38 (1975); N.D. CENT. CODE § 10-19-51 (1976); OHIO REV. CODE ANN. § 1701.37 (Page 1964); OKLA. STAT. ANN. tit. 18, § 1.71 (West 1953); OR. REV. STAT. § 57.246 (1977); PA. STAT. ANN. tit. 15, § 1308 (Purdon Supp. 1977); R.I. GEN. LAWS § 7-1.1-46 (1969); S.C. CODE § 33-11-260 (1976); S.D. COMPILED LAWS ANN. § 47-4-25 (1967); TENN. CODE ANN. § 48-717 (Supp. 1977); TEX. BUS. CORP. ACT. ANN. art. 2.44 (Supp. 1978); UTAH CODE ANN. § 16-10-47 (1953); VT. STAT. ANN. tit. 11, § 1896 (1973); VA. CODE § 13.1-47 (Supp. 1977); WASH. REV. CODE ANN. § 23A.08.500 (1969); W. VA. CODE § 31-1-105 (1975); WIS. STAT. ANN. § 180.43 (West Supp. 1977); WYO. STAT. § 17-36.44 (1965).

39. N.Y. BUS. CORP. LAW § 624(b) (McKinney 1963).

40. 15 U.S.C. § 78m(d)(1) (1976).

41. See notes 12, 18-22 and accompanying text *supra*.

42. In February 1976, 11 states had statutes designed to help protect target companies from takeover bids. Vaughan, *State Tender Offer Regulation*, 9 REV. SEC. REG. 969 (1976). By December 1976, 23 states had takeover acts, another was on a governor's desk to be signed, and more appeared inevitable. Steinberger, *New York's Takeover Act*, 9 REV. SEC. REG. 807 (1976).

43. E.g., IDAHO CODE § 30-1505(3) (Supp. 1977); MINN. STAT. ANN. § 80B.05(3) (West Supp. 1978); S.D. COMPILED LAWS ANN. § 47-32-12(3) (Supp. 1977); WIS. STAT. ANN. § 552.09(4) (West Supp. 1977).

than a reaffirmation that a tender offer by a shareholder is a proper corporate purpose sufficient to invoke the common law and statutory inspection right of a shareholder.

Although most state takeover acts have heretofore been extremely protective of target companies,⁴⁴ a change in the approach of such acts may be required in light of the fact that Idaho's statute was recently declared unconstitutional on federal preemption and commerce clause grounds.⁴⁵ In *Great Western United Corp. v. Kidwell* a federal district court held that the tipping of the balance in favor of target management by the Idaho takeover act impermissibly frustrated the express goal of federal tender offer regulation.⁴⁶ Further, Idaho's statute was found to burden interstate commerce without fulfilling a "legitimate local interest."⁴⁷ The striking down of the Idaho takeover act because it was not as favorable to bidders as federal tender offer regulation requires indicates that although access to shareholder lists has traditionally been a matter of state law,⁴⁸ bidders may find sup-

44. State takeover acts typically place restrictions on tender offerors, but not on target managements. Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1147 n.113 (1974). See also Vaughan, *supra* note 42.

45. *Great W. United Corp. v. Kidwell*, 439 F. Supp. 420 (N.D. Tex. 1977). See also Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1 (1976). Both the Supreme Court and Congress have indicated, however, that federal securities regulation was not intended to completely preempt state securities regulation. In a trio of cases the Court held that the three blue sky laws considered did not violate the fourteenth amendment or unduly burden interstate commerce. *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917). The federal securities chapter of the United States Code specifically provides that "[n]othing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." 15 U.S.C. § 78bb(a) (1976).

46. *Great W. United Corp. v. Kidwell*, 439 F. Supp. 420, 437 (N.D. Tex. 1977):

The Idaho statute thus places the tools of delay—anathema to an offeror—within and only within the reach of management. And the statute blithely removes all impediments of an offer if management approves. There is a conflict of purpose between the Williams Act and the Idaho statute: the Williams Act regulates the making of tender offers for the benefit of shareholders, while the Idaho statute regulates the making of tender offers primarily for the benefit of the management of the target company. By weighing the scales so heavily in favor of management of target companies, the Idaho statute has destroyed the delicate balance reached by the Williams Act. Because of the conflict that exists, this court is of the opinion that the Idaho takeover statute is preempted by the Williams Act.

47. *Id.* at 438-39. See Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133 (1974).

48. *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Comm. on Banking and*

port under federal law for their attempts to obtain direct mail access to target shareholders. Indeed, to the extent that federal regulation "would eliminate the time-consuming and conflicting state statutory requirements and doctrines and thereby promote a uniform requirement governing the furnishing of stockholder lists [to tender offerors], the imposition of that requirement would be in the best interests of investors."⁴⁹

B. Federal Law: The Williams Act

The Williams Act of 1968,⁵⁰ as amended by the Investor Protection Act of 1970,⁵¹ adds tender offer disclosure and antifraud provisions to the Securities Exchange Act of 1934.⁵² Under the Williams Act, "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 [must] be disclosed."⁵³ By including guidelines for target management disclosure⁵⁴ and providing an antifraud section (14(e)) applicable to all parties "in connection with" any tender offer,⁵⁵ the legislation 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.⁵⁶

Currency, United States Senate, 90th Cong., 1st Sess. 175 (1967) (statement of Manuel F. Cohen, Chairman, SEC).

49. Letter from the Subcommittee On Proxy Solicitations and Tender Offers of the Committee on Federal Regulation of Securities, Section of Corporation, Banking and Business Law of the American Bar Association to the SEC (Oct. 14, 1976) (comment letter in SEC File No. S7-649).

50. Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. §§ 78l, 78m, 78n (1976)).

In order to immediately implement this statutory framework the [Securities and Exchange] Commission adopted emergency rules and regulations under the Williams Act Amendments. Subsequent to the passage of the 1970 Williams Act Amendments, P.L. 91-567, which provided additional investor protection in the context of tender offers, the Commission made further amendments to its rules.

SEC Release Nos. 33-5731, 34-12676, 40-9386 (Aug. 2, 1976), 364 SEC. REG. & L. REP. (BNA) I-2 (footnotes omitted).

51. Pub. L. No. 91-567, 84 Stat. 1497 (1970) (codified at 15 U.S.C. §§ 77c, 77ddd, 78c, 78m, 78n (1976)).

52. Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified 15 U.S.C. §§ 77b-77e, 77j-77k, 77m, 77o, 77s, 78a-78z, 78aa-78hh (1976)).

53. S. REP. No. 550, 90th Cong., 1st Sess. 4 (1967).

54. See note 28 *supra*.

55. 15 U.S.C. § 78n(e) (1976) (for complete text, see note 57 *infra*).

56. S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967).

This express intent of the Williams Act has encouraged bidders to demand equal opportunity to use the mails to fairly present their case to target company shareholders.

1. *Injunctive relief under section 14(e)*⁵⁷

a. *Nature of suit for shareholder lists.* In a statement to a federal district court judge, the SEC has acknowledged that

"[d]espite the absence, at this time, of an express requirement that shareholders' lists be provided upon request to tender offerors, the Commission believes that, under certain circumstances, a court may direct, as an appropriate form of relief in an action brought under the Williams Act provisions, that a shareholders' list be provided. See, *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910 (N.D. Tex. 1976)."⁵⁸

A bidder apparently has standing to sue for such injunctive relief under the Williams Act⁵⁹ notwithstanding the Supreme Court's holding in *Piper v. Chris-Craft Industries, Inc.*⁶⁰ "that a

57. Section 14(e) provides:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of the subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

15 U.S.C. § 78n(e) (1976).

58. *Applied Digital Data Sys. Inc. v. Milgo Elec. Corp.*, 425 F. Supp. 1163, 1166 app. (S.D.N.Y. 1977).

59. *Humana, Inc. v. American Mediacorp., Inc.*, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,298 (S.D.N.Y. Jan. 27, 1978); *Great W. United Corp. v. Kidwell*, 439 F. Supp. 420, 426 (N.D. Tex. 1977). In the past, however, some courts have had difficulty properly supporting their decision to allow standing. In *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910, 912 n.2 (N.D. Tex. 1976), for example, the target company's challenge of the bidder's standing was summarily dismissed—the court citing as authority the Fifth Circuit's recognition of tender offeror standing in *Sargent v. Genesco, Inc.*, 492 F.2d 750, 769 (5th Cir. 1974). The Fifth Circuit's recognition of tender offeror standing relied on, however, was only dictum based on *Chris-Craft Indus. Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 358 (2d Cir. 1973) (since reversed by the United States Supreme Court, 430 U.S. 1 (1977)), and on *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421, 423 (1st Cir. 1973) (erroneously relies on *Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc.*, 425 F.2d 842 (2d Cir. 1970), and *Electronic Speciality Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969), to support a tender offeror's standing to sue for injunctive relief under 14(e); neither *Butler Aviation* nor *Electronic Speciality* dealt with the question of an offeror's standing).

60. 430 U.S. 1 (1977), *rev'g Chris-Craft Indus. Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973).

tender offeror, suing in its capacity as a takeover bidder, does not have standing to sue for damages under § 14(e)."⁶¹ In a footnote to the last paragraph of the decision, the Court indicated that an action by a bidder for an injunction could be distinguished from Chris-Craft's suit for damages against a competing bidder.⁶²

The standards which must be met by a bidder seeking a preliminary injunction under the Williams Act to facilitate access to target company shareholders are rooted in the two basic requirements for injunctive relief: there must be a showing of probable success on the merits and the threatened harm must be irreparable and not adequately redressable at law.⁶³ Probable success on the merits, of course, is dependent upon the facts of each case. Irreparable harm can be found by a court's recognition of the difficulty of ever resurrecting a tender offer or "unscrambling the eggs" once a competing tender offer has been completed.⁶⁴ In addition, the inadequacy of a remedy at law in tender offer cases is particularly clear in the wake of the *Piper* decision that completely denies bidders standing to sue for damages.⁶⁵ Preliminary injunctive relief is, therefore, frequently employed in tender offer cases because it "is often the best manner in which to effectuate the goals of the Williams Act."⁶⁶

b. *Significant cases.* *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*⁶⁷ was the first case to set forth in any detail the Williams Act remedy of access to a shareholder list.⁶⁸ In that case a week

61. *Id.* at 42 n.28.

62. *Id.* at 47 n.33. Similarly, less stringent standing requirements are imposed on rule 10b-5 plaintiffs seeking injunctive relief than are imposed on those seeking damages under rule 10b-5 of the Securities Exchange Act. *See, e.g.,* *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 546-47 (2d Cir. 1967).

63. *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910, 912-13 (N.D. Tex. 1976); Note, *Tender Offer Regulations - Injunction Standards under the Williams Act*, 45 *FORDHAM L. REV.* 51, 56-66 (1976).

64. *See* *Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp.*, 394 F. Supp. 267, 281-82 (S.D.N.Y. 1975); *Cattlemen's Inv. Co. v. Fears*, 343 F. Supp. 1248, 1252-53 (W.D. Okla. 1972); *M.G.M. v. Transamerica Corp.*, 303 F. Supp. 1344, 1348 (S.D.N.Y. 1969).

65. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977).

66. *Broder v. Dane*, 384 F. Supp. 1312, 1323 (S.D.N.Y. 1974). In the cases that have granted bidders access to target company shareholder lists, preliminary injunctions were the specific form of relief used by the courts. *See* *Applied Digital Data Sys. Inc. v. Milgo Elec. Corp.*, 425 F. Supp. 1163 (S.D.N.Y. 1977) (discussed in text accompanying notes 76-79 *infra*); *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910 (N.D. Tex. 1976) (discussed in text accompanying notes 67-75 *infra*). *See also* Note, *Tender Offer Regulation - Injunction Standards under the Williams Act*, 45 *FORDHAM L. REV.* 51, 54-66 (1976).

67. 406 F. Supp. 910 (N.D. Tex. 1976).

68. In seeking direct access, the plaintiff bidder had but two unreported proceedings to rely upon. The Williams Act was viewed in each of these cases as an alternative and not the sole basis for the remedy of granting access to shareholder lists. *Mesa* cited both

of swift corporate and legal maneuvering began on Friday, January 2, 1976, when Mesa Petroleum Company (Mesa) announced its desire to purchase all outstanding common shares of Aztec Oil and Gas Company (Aztec).⁶⁹ Mesa advertised the ten-day cash tender offer⁷⁰ and requested an Aztec shareholder list from Aztec's management. The Board of Directors of Aztec, however, voted to oppose the tender offer, refused Mesa's request for the list, arranged for newspaper advertisements against the offer, and sent a misleading letter to each shareholder.⁷¹ Mesa's complaint in federal district court urged under section 14(e) of the Williams Act⁷² that Aztec be required to either relay the tender offer materials to its shareholders or provide Mesa with a shareholder list. After consideration of additional claims⁷³ and counterclaims⁷⁴ and before the tender offer was much more than a week old, the federal judge ruled that because the letter from Aztec's management had clouded the true state of affairs vis-à-vis the tender offer, "the opportunity to inform the shareholders of Aztec of the positions both of Aztec and Mesa can best be served hereafter by granting Mesa access to the Aztec shareholder list" conditioned

of the unreported decisions, *American Chain & Cable Co. v. Babcock & Wilcox, Ltd.*, Civil Action No. B 75-370 (D. Conn. 1975) (Zampano, J.), and *Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp.*, 75 Civ. 1949 JMC (S.D.N.Y. 1975), in its Brief in Support of Plaintiff's Request for a Stockholders List, Brief for Plaintiff at 6-7, *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910 (N.D. Tex. 1976).

69. Mesa offered to purchase all 5,560,634 shares of Aztec's common stock held by over 8,000 shareholders for \$22 per share. On Dec. 30, 1975 Aztec stock had closed at \$15½ per share on the New York Stock Exchange. In conjunction with the tender offer Mesa filed a schedule 13D to comply with §§ 13(d) and 14(d) of the Securities Exchange Act. 406 F. Supp. at 911. Effective Aug. 31, 1977, a schedule 14D-1 is now required of bidders in similar circumstances. SEC Release Nos. 33-5844, 34-13787, IC-9862 (July 21, 1977), 413 SEC. REG. & L.REP. (BNA) H-1.

70. The tender offer was publicized extensively in the *New York Times*, the *Dallas Morning News*, and the *Wall Street Journal*. 406 F. Supp. at 911.

71. The letter from Aztec's management urged Aztec shareholders "not to tender your shares to Mesa until more information about these matters is made available to you." *Id.* That statement was misleading in light of management's refusal to grant Mesa access to shareholder list, management's failure to mention in the letter that the offer would soon expire, and management's failure to disclose to shareholders that Mesa had been denied access to the shareholder list.

72. For complete text of § 14(e), see note 57 *supra*.

73. Mesa filed an amended complaint alleging that Aztec's letter to its shareholders contained false and misleading statements and failed to disclose material facts in violation of § 14(d)-(e) of the Williams Act. 406 F. Supp. at 912.

74. Aztec's answer to the original complaint challenged Mesa's standing to sue under § 14(e) and counterclaimed that Mesa's tender offer materials violated § 14(d)-(e) of the Williams Act and that a takeover would violate § 7 of the Clayton Act. 406 F. Supp. at 912.

"upon an extension of the tender period, with all its correlative rights."⁷⁵

The court in *Applied Digital Data Systems Inc. v. Milgo Electronic Corp.*⁷⁶ came to the same conclusion more than a year later without even citing *Mesa Petroleum*. After obtaining a preliminary injunction to halt a defensive move by the target company,⁷⁷ the bidder, Applied Digital Data Systems (ADDS), requested a Milgo Electronic (Milgo) shareholder list in a supplementary proceeding. ADDS had neither a common law nor a statutory right to the list because it was not a shareholder of the target company. A federal district judge for the Southern District of New York held that the decision of the target company, Milgo, to provide a concurrently competing bidder with a shareholder list while refusing to provide ADDS with the same "would offend express congressional concern in adopting the Williams Act that both the offeror and management (and here a friendly offeror) have an 'equal opportunity to fairly present their case.'"⁷⁸ To remedy this affront to the Williams Act, the court exercised its equity powers by ordering Milgo to provide ADDS access to its shareholder list as a matter of "fairness."⁷⁹

Not all federal courts, however, have been eager to entertain an expansive reading of the policies behind the Williams Act. In *A & K Railroad Materials, Inc. v. Green Bay & Western Railroad*,⁸⁰ another federal district court distinguished both *Mesa Petroleum* and *Applied Digital* and set certain limits on the trend of increasing the availability of target company shareholder lists as a bidder's remedy under section 14(e) of the Act. Almost three years after Burlington Northern (BN) made a tender offer for the outstanding shares of Green Bay and Western Railroad (GB&W), A & K Railroad Materials (A&K) announced a competing tender

75. 406 F. Supp. at 915. The judge ordered:

If the tender offer of Mesa with all its terms and conditions conformed to the new time period is promptly extended for a period of not less than ten (10) days from its present expiration date, Aztec will promptly either mail to its stockholders Mesa's offering materials, or deliver to Mesa a list of such stockholders so that Mesa can issue such mailing, all at Mesa's expense

Id. at 917.

76. 425 F. Supp. 1163 (S.D.N.Y. 1977).

77. *Applied Digital Data Sys. Inc. v. Milgo Elec. Corp.*, 425 F. Supp. 1145 (S.D.N.Y. 1977).

78. 425 F. Supp. 1163, 1165. Milgo freely offered its shareholder list to Racal Electronics Ltd., but offered the list to ADDS only upon certain conditions [which] would in effect impose self-decapitation upon ADDS' offer." *Id.* at 1164.

79. *Id.*

80. 437 F. Supp. 636 (E.D. Wis. 1977).

offer. GB&W directors had supported the first tender offer (which was still pending final ICC authorization) and, in addition, had provided BN with a shareholder list. After being denied its request for a similar list, A&K sued in federal district court under both the antifraud section of the Williams Act and state law, alleging that GB&W directors had breached certain fiduciary duties due GB&W's shareholders.⁸¹ The court denied injunctive relief and held that the target company had not violated section 14(e) and that there was insufficient evidence to support the allegation that GB&W's directors had breached any fiduciary duty to shareholders. In so holding, the court declared that the mere refusal to honor a bidder's request for a shareholder list is neither a deceptive nor a manipulative practice under section 14(e). The court somewhat superficially distinguished *Applied Digital* by stating that a target company management may provide a shareholder list to only one of two competing bidders when the two tender offers are not initiated simultaneously. The court also declared that mere negligent conduct in making a statement to the press is insufficient to establish a target management's culpability for a material misstatement or omission under section 14(e).

Finally, [the judge added,] even if the Court had found a violation of federal law, the Court is not convinced that giving the plaintiff the defendant's shareholder list is the appropriate remedy. The shareholder list was not used by GB&W to make the challenged statements. Rather, these comments were made to the local newspaper. Plaintiffs could have challenged these statements in the media. The shareholder list was not necessary to communicate their rebuttal.⁸²

The rule that emerges from these cases is that a bidder will be granted direct access to target company shareholders as a remedy under the Williams Act when the target company itself has misused its shareholder list so as to violate the antifraud provisions of the Act, section 14(e). *Mesa Petroleum* can be read as holding that the target company violated section 14(e) by using

81. Federal courts have exclusive jurisdiction over § 14(e) actions by virtue of 15 U.S.C. § 78aa (1976) and can adjudicate related state law rights by exerting "pendent jurisdiction over the state claims." *Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 231 (9th Cir. 1975).

82. 437 F. Supp. at 646. Apparently ignoring or very strictly construing the Supreme Court's holding in *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977), the federal district judge went on to suggest that "[u]nder the particular circumstances of this case, if liability had been found an award of damages would probably have been more appropriate." 437 F. Supp. at 646.

its shareholder list to mail materially misleading letters.⁸³ Similarly, in *Applied Digital*, the target company violated section 14(e) by providing its shareholder list to only one of two concurrently competing tender offerors. Under the more than mere negligence standard in *A & K Railroad*, however, it is not a violation of section 14(e) to refuse to honor a bidder's request for a shareholder list, and the direct access remedy is not available unless a violation involving shareholder list misuse is found.

2. SEC's proposed rule⁸⁴

It is likely that the SEC will further the trend toward greater tender offeror access to target shareholders by adopting a shareholder list rule similar to proposed rule 14e-1. Originally proposed in August 1976 under the Williams Act,⁸⁵ the rule would allow

83. See 437 F. Supp. at 643-44.

84. SEC Release Nos. 33-5731, 34-12676, 40-9386 (Aug. 2, 1976), 364 SEC. REG. & L. REP. (BNA) I-12. The full text of the proposed rule reads:

§ 240.14e-1 Furnishing of stockholder and other lists.

It shall constitute a fraudulent, deceptive, or manipulative act or practice within the meaning of Section 14(e) of the Act, for any subject company with a class of equity securities referred to in Section 14(d)(1) of the Act to fail to furnish, upon the written request of any bidder planning to make a tender offer for such securities, the most recent lists in the possession, or under the control, of the subject company of the names and addresses of the holders of record of such securities; and the security position listings, if any, from Depository Trust Company and similar clearing agencies, within two business days after receipt of such written request, provided that:

(a) the bidder has filed a Schedule 14D-1 [§ 240.14d-100] pertaining to the tender offer with the Commission;

(b) the bidder undertakes in writing to the subject company that such lists will be used exclusively in connection with the tender offer and extensions thereof;

(c) the bidder represents in writing to the subject company that the reasonable costs incurred by the subject company in furnishing the lists will be promptly paid by the bidder; and

(d) the bidder undertakes in writing to mail, at its own expense, a copy of the tender offer material to each person whose name appears on the list of stockholders and to furnish, at its own expense, the number of sets of the tender offer materials requested by participants whose names appear on the clearing agency's security position listings.

Id.

85. Emergency rules were promulgated immediately upon enactment of the Williams Act as a stopgap measure until permanent rules could be adopted. See note 50 *supra*. In a release announcing the adoption of the first permanent rule (effective Aug. 31, 1977), the SEC stated:

While Schedule 14D-1 has been adopted separately from the other tender offer proposals [including proposed rule 14e-1], it should be particularly noted that the other proposals have not been withdrawn by the Commission. Subsequent to the completion of the revision of certain of these proposals in response to the

bidders direct mail access to target company shareholders upon request after notice of the tender offer has been registered with the SEC. The rule would thus only reach tender offers which must be registered with the SEC. According to section 14(d)(1) of the Williams Act, a tender offer must be registered if the bidder

directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise [makes] a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78l of this title [15 U.S.C.], or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78l(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class⁸⁶

This proposal for a shareholder list rule comes over a decade after the Senate hearings on the Williams Act, during which Senator Harrison A. Williams indicated to the SEC Chairman that the Senator expected the SEC to promulgate an antifraud tender offer rule allowing direct bidder access to a target company's shareholders.⁸⁷ The Senator was surprised to learn that a shareholder list would not be available to the bidder as a matter of course, but seemed satisfied by the Chairman's assurance that an SEC rule under the tender offer antifraud section similar to an existing rule under the proxy sections could be promulgated to require the desired direct access.⁸⁸

comment letters received from the public, the Commission presently anticipates further rulemaking action.

SEC Release Nos. 33-5844, 34-13787, IC-9862 (July 21, 1977), 413 SEC. REG. & L. REP. (BNA) H-1.

86. 15 U.S.C. § 78n(d)(1) (1970).

87. *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Comm. on Banking and Currency, United States Senate*, 90th Cong., 1st Sess. 176 (1967).

88. *Id.* The fact that Senator Williams apparently intended to have the SEC promulgate a rule granting bidders access to a target company's shareholder list under § 14(e) similar to rule 14a-7, 17 C.F.R. § 240.14a-7 (1977) does not clearly indicate whether or not the shareholder list rule should be applicable to all tender offers. Rule 14a-7 does not apply to all proxy fights because § 14(a) is specifically limited to proxies for shares registered pursuant to § 12 of the Securities Exchange Act. See 15 U.S.C. § 78n(a) (1976). In contrast, § 14(e) is applicable to all tender offers and there is no language restricting the rulemaking authority thereunder to less than the full scope of the section. See 15 U.S.C. § 78n(e) (1976). It is interesting to note that a proposed SEC rule prohibiting short

Since evaluation of all the comments received on this controversial proposed rule has become such a large assignment, the exact date of adoption and the final wording of the rule are not yet known.⁸⁹ It is believed that the rule will soon be adopted, and that it will provide a mechanism for tender offer materials to be mailed to shareholders upon bidder request;⁹⁰ however, the rule

tendering under § 14(e) and other sections of the Securities Exchange Act applies to all tender offers. See SEC Release No. 34-14157 (Nov. 9, 1977), 428 SEC. REG. & L. REP. (BNA) E-1.

89. In August and September 1976 the SEC received 111 letters in response to its request for comments on the proposed tender offer rules. SEC Release Nos. 33-5844, 34-13787, IC-9862 (July 21, 1977), 413 SEC. REG. & L. REP. (BNA) H-2. The SEC's Chief of the Office of Tender Offers, Acquisitions and Small Issues reported that "[p]roposed rule 14e-1 is causing considerable controversy, particularly the requirement that the target must furnish the shareholders list to the bidder upon written request." Appleton, *supra* note 1, at 1386. Most of the controversy centers on the question of who, if anyone, should do the mailing. Some "support an alternative method such as giving the target company the opportunity to mail soliciting material of the bidder." Letter from O'Melveny & Myers of Los Angeles to the SEC (Sept. 29, 1976) (comment letter in SEC File No. S7-649), perhaps patterned after proxy rule 14a-7. 17 C.F.R. § 240.14a-7 (1977). Those in favor of the method put forth in the proposed rule argue that the bidder should be provided with the shareholder list upon request in order to avoid abuses by target management "such as delaying the mailing of tender offer materials," SEC Release Nos. 33-5731, 34-12676, 40-9386 (Aug. 2, 1976), 364 SEC. REG. & L. REP. (BNA) I-6, and to enable the bidder to make "direct telephonic or personal contact with shareholders." Atkins, *supra* note 3, at 906 (quoting a letter from the Subcommittee on Proxy Solicitations and Tender Offers of the Committee on Federal Regulation of Securities, Section of Corporation, Banking and Business Law of the American Bar Association (Dec. 9, 1974)). It is clear that no matter which side is chosen to do the mailing, the other side will demand that provisions be made to prevent abuses in connection with the mailing. If such provisions prove inadequate, an alternative would be to have the target company's transfer agent, the bidder's tender offer depository, or some independent third party do the mailing.

90. By incorporating several of the most promising suggestions received by the SEC, proposed rule 14e-1 could be improved and adopted as follows (suggested changes italicized):

Furnishing of Stockholder Lists

For the purposes of preventing fraudulent, deceptive, or manipulative acts or practices within the meaning of Section 14(e) of the Act, any subject company with a class of equity securities referred to in Section 14(d)(1) of the Act shall furnish, upon the written request of any bidder which has filed a Schedule 14D-1 (§ 240.14d-100) pertaining to the tender offer with the Commission, the most recent lists in the possession, or under the control, of the subject company of the names and addresses of the holders of record of such securities; and the security position listings, if any, from Depository Trust Company and similar clearing agencies, within four days after receipt of such written request, provided that:

- (a) [14e-1(b), as is]
- (b) [14e-1(c), as is]
- (c) [14e-1(d), as is].

This should calm the fears that the proposed rule would run afoul of the Supreme Court's holding in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), that fraud, at least in a rule 10b-5 setting under the Securities Exchange Act, must involve scienter. Letter from the Committee on Securities Regulation of The Association of the Bar of the City of New York to the SEC (Oct. 22, 1976) (comment letter in SEC File No. S7-649). Such

will essentially be restricted to bidders seeking securities registered under section 12(g) of the Securities Exchange Act.⁹¹

III. LIKELIHOOD OF EVEN GREATER BIDDER ACCESS TO TARGET COMPANY SHAREHOLDERS

A. *Arguments for Further Extension of the Trend*

The primary focus of the Williams Act is on the target company shareholders' right to a free flow of information about a tender offer.⁹² Allowing direct bidder access to these shareholders protects that right and avoids tipping the balance in favor of either management or the bidder.⁹³ Although the proposed SEC shareholder list rule would greatly increase the instances in which direct bidder access would be possible, it would not apply to all tender offers.⁹⁴ Nor will basing the claim on other federal or state law grounds completely fill the gap. To stop short of allowing all tender offerors direct mail access would be to pretend that the right of target company shareholders to a free flow of information about the tender offer is being protected while the shareholders themselves are kept in ignorance of the very existence of the bid.

1. *Giving shareholders adequate notice of a tender offer*

A strong argument for requiring that direct access be available to *all* bidders is found when one analogizes a shareholder's right to a free flow of information under the Williams Act to a party's right to notice under the due process clause of the fourteenth amendment. The comparison also sheds light on the proposed shareholder list rule requirement that offering materials

would also be more clearly within the SEC's rulemaking authority granted under § 14(e) by the Investors Protection Act of 1970 because it would certainly have prevented the violation of the Williams Act in *Applied Digital*, and arguably would have prevented the § 14(e) violation in *Mesa Petroleum*.

Part (a) of the proposed rule 14e-1 which makes the rule applicable after a schedule 14D-1 has been filed should be incorporated into the introductory paragraph to avoid confusion or conflict with the "planning to make a tender offer" language in the rule as originally proposed, and the length of time allowed for compliance should be extended to four days (instead of two) to make compliance more feasible. Letter from the Subcommittee On Proxy Solicitations and Tender Offers of the Committee on Federal Regulation of Securities, Section of Corporation, Banking and Business Law of the American Bar Association to the SEC (Oct. 14, 1976) (comment letter in SEC File No. S7-649).

91. Telephone interview with J. Rowland Cook, Chief, Office of Disclosure Policy and Processing, Division of Corporation Finance, SEC, Washington, D.C. (Sept. 29, 1977).

92. See note 1 and accompanying text *supra*.

93. See note 56 and accompanying text *supra*.

94. See notes 108-12 and accompanying text *infra*.

must be sent to *every* shareholder on a procured list.⁹⁵

In *Mullane v. Central Hanover Bank & Trust Co.*,⁹⁶ the Supreme Court held that although the statutory minimum notice by publication was complied with, parties affected by the judicial settlement of a common trust fund were entitled to notice by mail if their addresses were reasonably available. The right to participate in a matter which could deprive one of his property was described as "the fundamental requisite of due process" which "has little reality or worth unless one is informed that the matter is pending."⁹⁷ Similarly, a shareholder's right to a free flow of information as guaranteed by the Williams Act has little value if the shareholder is not even aware of the tender offer. Participation in a tender offer, as in a common trust fund settlement, may be necessary to avoid the deprivation of an economic benefit. Just as in *Mullane* the mail was found to be a better method of notice than publication, and thus necessary to protect due process rights, mailing is a better method of disseminating tender offer materials to protect investors' Williams Act rights.⁹⁸

Of the conditions attached to a tender offeror's access to a target company's shareholder list under the proposed shareholder list rule, the most surprising to many has been the duty of the bidder "to mail, at its own expense, a copy of the tender offer material to each person whose name appears on the list."⁹⁹ This requirement is, however, in full accord with the general principle enunciated in *Mullane* that, if the addresses are at hand, those who will be affected by the action have a right to have notice mailed to them.

2. *Allowing a bidder equal opportunity to present a case*

Another argument for greater direct bidder access to target company shareholders is that the degree of access contemplated

95. Compare *Advance Sys., Inc.*, SEC Staff Reply (Aug. 29, 1973), [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,534 (stating that there is no federal regulation requiring that all shareholders know of a tender offer) with *Missouri Portland Cement Co. v. H.K. Porter & Co.*, 406 F. Supp. 984, 986 (E.D. Mo. 1975) (finding initial tombstone publications and the bidder's knowing use of a 1974 shareholder mailing list for a 1975 tender offer to be inadequate and therefore a violation of the Williams Act).

96. 339 U.S. 306 (1950).

97. *Id.* at 314.

98. See Appleton, *supra* note 1, at 1386.

99. SEC Release Nos. 33-5731, 34-12676, 40-9386 (Aug. 2, 1976), 364 SEC. REG. & L. REP. (BNA) I-12 (full text at note 84 *supra*). See Appleton, *supra* note 1, at 1383-84. In most cases, the tender offeror would want to mail the material to all on the shareholder list provided by the target management anyway because the list need not, and probably would not, indicate the number of shares held by each.

by the Williams Act has not yet been attained. While imposing a heavy duty of disclosure on tender offerors, the Act was also designed to provide bidders with as much opportunity to promote a particular tender offer as target management has to oppose it. Citing to the Senate report accompanying the Williams Act, the SEC spells out this dual intent of federal tender offer regulation.

While the primary objective of the Williams Act was to provide investor protection, Congress also recognized that "takeover bids should not be discouraged" and that the act should be administered in an even-handed way "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." Thus, the act was 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.¹⁰⁰

It follows, therefore, that because target management always has the opportunity to mail materials opposing the tender offer to each shareholder, bidders should have the same opportunity to mail materials favoring it.

B. Restrictions on a Continuation of the Trend

In order to ensure bidder access to target shareholders in all tender offers, some basis for a universal affirmative duty on target management to produce a shareholder list would need to be recognized since American courts have rejected the view now adopted in England that shareholder lists are public information.¹⁰¹ State law, federal case law under section 14(e), and the SEC's proposed shareholder list rule have all taken different approaches, none of which have established a relationship broad enough to support an affirmative duty on target management to produce a shareholder list in every tender offer.

1. State law restrictions

State law focuses on target management's duties to its shareholders, including the duty to facilitate the shareholders' right to

100. SEC Release Nos. 33-5844, 34-13787, IC-9862 (July 21, 1977), 413 SEC. REG. & L. REP. (BNA) H-1.

101. *Stowe v. Harvey*, 241 U.S. 199, 200-01 (1916); *A & K R.R. Materials, Inc. v. Green Bay & W.R.R.*, 437 F. Supp. 636, 644 (E.D. Wis. 1977). England's Companies Act guarantees *all* persons the right to inspect and obtain copies of shareholder registers of any company for a nominal fee. The Companies Act, 1948, 11 & 12 Geo. 6, c. 38, § 113.

inspect the shareholder list and other corporate records. What little clarification has been available from the few state takeover acts which have addressed the issue of direct access is dubious now that the constitutionality of state takeover acts has been called into serious question.¹⁰² Apparently, the "proper corporate purpose" test will remain the primary test for determining state corporate record inspection rights, thus ruling out the possibility of a shareholder obtaining a shareholder list to give to a third-party tender offeror.¹⁰³ The difficulties associated with a potential bidder becoming a target shareholder eligible to claim a statutory right of access to a shareholder list¹⁰⁴ effectively limit such access to longstanding target shareholders who themselves promote a tender offer.

2. Federal case law restrictions

Federal case law under the antifraud section of the Williams Act, section 14(e), focuses on a type of privity relationship established when target management wrongs the bidder directly or indirectly by misusing its own shareholder list. "Mere negligent conduct is not sufficient."¹⁰⁵ As illustrated in *Mesa Petroleum* and *Applied Digital*, when it is "necessary to set the record straight"¹⁰⁶ a federal court will impose a duty on the target company's management to produce a shareholder list as a remedy for the bidder. While it is conceivable that a management's refusal to provide a bidder with a shareholder list upon request could constitute a deceptive or manipulative practice under section 14(e), the court in *A & K Railroad* refused to so hold.¹⁰⁷ Access to target shareholders through the federal courts and section 14(e), therefore, appears to be limited to instances where target management is more than merely negligent in abusing its shareholder list so as to trigger a violation of tender offer antifraud restrictions.

102. See notes 44-49 and accompanying text *supra*.

103. See *A & K R.R. Materials, Inc. v. Green Bay & W.R.R.*, 437 F. Supp. 636, 645 (E.D. Wis. 1977). But see *Alex, Brown & Sons v. Latrobe Steel Co.*, 376 F. Supp. 1373 (W.D. Pa. 1974).

104. See text accompanying notes 38-41 *supra*.

105. *A & K R.R. Materials, Inc. v. Green Bay & W.R.R.*, 437 F. Supp. 636, 642 (E.D. Wis. 1977).

106. *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910, 914 (N.D. Tex. 1976).

107. 437 F. Supp. at 642. See also *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. at 914.

3. *Limits of the proposed SEC shareholder list rule*

A target company management's duty to produce a shareholder list under the proposed federal rule will apparently only exist for tender offers required to be registered under section 14(d)(1) of the Williams Act.¹⁰⁸ This, in effect, means that a target company can escape the requirements of the proposed rule if its securities are not listed on a national exchange and if it has less than \$1,000,000 total assets or fewer than 500 shareholders.¹⁰⁹ Probably the most significant group of potential target companies not subject to the rule would be that comprised of the relatively large corporations with less than 500 shareholders. Moreover, in light of the many corporations now "going private," the proportion of potential target companies not subject to the proposed rule is likely to increase rather than decrease.¹¹⁰ Ironically, it is often the shareholder list of the more closely held target corporations not subject to the proposed rule that the bidder needs most. While publication of a tender offer may be reasonable for a widely held company,¹¹¹ direct access to shareholders is essential if a bid for a more closely held corporation is to succeed.¹¹²

Apparently feeling it lacks the authority to impose an affirmative duty on companies not required to register their securities

108. Notes 84-89 and accompanying text *supra*.

109. See 15 U.S.C. 78l(g) (1976). Securities not listed on a national exchange can also fall outside the scope of the proposed rule if neither the target company's business nor the trading of its securities involve interstate commerce. *Id.* This, however, is almost impossible to establish.

110. Typically, a publicly held corporation "goes private" by reducing the number of shareholders and delisting its securities. First, the shares of a corporation will be consolidated into the hands of fewer than 300 shareholders by any one or a combination of methods, including tender offers. Next, delisting involves severing any ties with a national securities exchange or the interdealer quotation system of a registered national securities association and complying with § 12(g)(4) or with § 15(d) and rule 15d-6 of the Securities Exchange Act. "Going private" transactions became very popular during the depressed stock market of 1974 and have continued to occur in such significant numbers (despite subsequent improvement in the market) that the SEC has proposed "going private" rules. For a good discussion of and a list of secondary sources on "going private," see the background section of the SEC release announcing the proposed "going private" rules. SEC Release Nos. 33-5884, 34-14185, IC-10015 (Nov. 17, 1977), 429 SEC. REG. & L. REP. (BNA) E-2 to E-4.

111. See generally Fox & Fox, *Corporate Acquisitions and Mergers*, in 13A BUSINESS ORGANIZATIONS § 27.04[3][a] (1977).

112. Gibson & Freeman, *Business Associations*, 54 VA. L. REV. 1224, 1237-38 (1968):

As a practical matter, in the close corporation context a potential purchaser must approach stockholder individually rather than through public solicitation. . . . While it is sometimes possible to gain control of the publicly held corporation through ownership of considerably less than fifty percent of the voting stock, this is rarely the case in the close corporation.

pursuant to section 12(g) of the Securities Exchange Act, the SEC has limited the proposed shareholder list rule to "apply only to tender offers for securities of a class referred to in Section 14(d)(1)," despite its promulgation under section 14(e) which admittedly "applied to all tender offers."¹¹³ This reluctance seems overcautious in light of the 1970 amendment to the Williams Act which specifically gives the SEC rulemaking authority under section 14(e).¹¹⁴ If, however, the SEC is resolute in so restricting the proposed shareholder list rule, it would be more consistent to adopt the proposed rule under another, more restricted, section of the Williams Act, such as section 14(d)(4) covering communications to shareholders in registered tender offer situations, instead of the more universal antifraud section.¹¹⁵ In any event, the proposed shareholder list rule would leave bidders who are not required to register their offers under section 14(d)(1) of the Williams Act without a tender offer rule to assist them in obtaining an equal opportunity to fairly present their case to target company shareholders.

IV. CONCLUSION

Accompanying the rise of the tender offer as a major means of corporate acquisition has been a trend toward granting bidders direct access to target company shareholders in more and more cases. This trend seeks to guarantee a target company shareholder his right to a free flow of information about a tender offer since such an offer necessarily affects the value of the stock he owns.

Under state law, status as a target company shareholder and a proper corporate purpose are prerequisites for the bidder to

113. SEC Release Nos. 33-5731, 34-12676, 40-9386 (Aug. 2, 1976), 364 SEC. REG. & L. REP. (BNA) I-6.

114. See 15 U.S.C. § 78n(e) (1976).

115. "The powers of the [SEC] under section 14(d)(4) fall directly in the area of communications with stockholders—an area clearly encompassing the question of availability of stockholder lists." Letter from the Subcommittee on Proxy Solicitations and Tender Offers of the Committee on Federal Regulation of Securities, Section of Corporation, Banking and Business Law of the American Bar Association to the SEC (Oct. 14, 1976) (comment letter in SEC File No. S7-649). The holding in *A & K R.R. Materials, Inc. v. Green Bay & W.R.R.*, 437 F. Supp. 636 (E.D. Wis. 1977), that mere failure to produce a shareholder list does not violate § 14(e) would imply that shareholder list access should be divorced from § 14(e) completely. But *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910 (N.D. Tex. 1976) clearly indicates that § 14(e) is applicable to access to shareholders: "While 14(e) and the proxy rules include both analogous and non analogous [*sic*] provisions, by its nature 14(e) enjoys a common purpose with the proxy—regulation of the information flowing to shareholders." *Id.* at 913.

obtain a shareholder list. Although many courts now consider the making of a tender offer to be such a proper corporate purpose, procedural requirements associated with the bidder's status as a shareholder which are imposed by state corporate-record-inspection statutes often complicate and substantially delay bidder access to such lists. In a few states, specific takeover acts have eliminated the corporate purpose test and require only that the bidder be a target company stockholder in order to obtain a shareholder list. The validity of state takeover acts, however, has been called into question due to their burdensome effect on interstate commerce and their tendency to upset the balance of regulation established by the Williams Act between bidders and the managements of target companies.

Federal case law has also lent impetus to this trend of increased access to shareholder lists. In *Mesa Petroleum* and *Applied Digital*, the courts granted the bidders access to target company shareholder lists where the target companies had violated the antifraud provisions of section 14(e) of the Williams Act through certain misuse of their own lists. A mere refusal to produce a shareholder list upon a bidder's request, however, was held in *A & K Railroad* not to violate section 14(e).

The next movement in the trend involves the probable adoption by the SEC of a shareholder list rule requiring target companies to produce a shareholder list when requested by a bidder who has been required to register its tender offer with the SEC under section 14(d)(1) of the Williams Act. Apparently the trend will stop short of granting bidders direct access to target company shareholders in every tender offer. The dual purpose of the Williams Act, however, to promote disclosure by a free flow of information and to prevent fraud by affording both sides equal opportunity to fairly present their cases, hardly justifies not granting bidders direct access to target company shareholders in all tender offers.

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