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### Effectuating Disclosure Under the Williams Act

Ronald J. Colombo

*Maurice A. Deane School of Law at Hofstra University*

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# EFFECTUATING DISCLOSURE UNDER THE WILLIAMS ACT

*Ronald J. Colombo*<sup>+</sup>

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Though crafted to close a gap in U.S. securities regulation, the Williams Act suffers a serious loophole of its own.<sup>1</sup> Courts construing the Act have established a remedial approach to violations that renders the Act essentially toothless in major respects.<sup>2</sup> Worse, the courts'

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<sup>+</sup> Associate Professor of Law, Hofstra University School of Law. Special thanks to the Hofstra University Junior Faculty forum for its extremely helpful commentary and feedback on an earlier draft and to Jennifer Riley for her incredibly diligent research assistance.

1. See, e.g., *Hubco, Inc. v. Rappaport*, 628 F. Supp. 345, 352 (D.N.J. 1985) (recognizing that the Williams Act does not provide a private right of action to remedy violations of the Act); see *infra* text accompanying notes 21–45, 67–69 (noting that, although the Williams Act purports to require more complete disclosure, the absence of a statutory enforcement scheme provides no incentive for individuals to meet the timely filing requirements).

2. See *Rondeau v. Mosinee Paper Co.*, 422 U.S. 49, 50–51, 56–60, 65 (1975) (interpreting § 13(d) of the Williams Act and recognizing that injunctive relief is not an appropriate remedy for a violation of the Act under the particular circumstances of the case). Since *Rondeau*, many lower courts deferring to the decision have been reluctant to hold that

approach invites gamesmanship that undermines the Act's very purpose.<sup>3</sup>

The Williams Act purports to foster market efficiency and investor protection by mandating certain disclosures when someone either purchases a significant stake in a public company or undertakes a tender offer for the stock of a public company.<sup>4</sup> Each of these instances implicates the question of company control. But, with respect to the former situation—the purchase of a significant stake in a public company—there is little incentive to honor the general disclosure requirement because of judicial interpretation of the Act.

Because the deficiency in question is a judicial creation, courts can rectify the situation by reconsidering precedent. Alternatively, Congress could amend the Act, or the Securities and Exchange Commission (SEC) could engage in corrective rulemaking—a move that would be particularly appropriate in light of the current re-examination of U.S. securities regulation.<sup>5</sup> Further, the SEC, through administrative proceedings or through the exercise of applicable civil-litigation powers can rectify the

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a failure to meet disclosure requirements under § 13(d) constitutes irreparable harm, therefore curbing the grant of injunctions for violations of § 13(d). *See* Gen. Aircraft Corp. v. Lampert, 556 F.2d 90, 96 (1st Cir. 1977) (interpreting *Rondeau* to mean that an injunction cannot be issued solely for a Williams Act violation); *Hubco, Inc. v. Rappaport*, 628 F. Supp. 345, 354 (D.N.J. 1985) (citing *Rondeau* for the proposition that a failure to meet § 13(d)'s filing requirements in a timely manner does not create an irreparable injury that warrants injunctive relief); *Condec Corp. v. Farley*, 573 F. Supp. 1382, 1386 n.3 (S.D.N.Y. 1983) (explaining that under *Rondeau*, failure to meet § 13(d)'s disclosure requirements does not constitute irreparable harm unless the nondisclosure was particularly egregious). Through restricting the issuance of injunctions, courts have failed to discourage acts of noncompliance, thereby rendering the Williams Act's disclosure requirements largely ineffective. *See* Bath Indus., Inc. v. Blot, 427 F.2d 97, 113 (7th Cir. 1970) (explaining that, if late filing is permitted by the courts rather than discouraged by an injunction, insurgents will have no incentive to file on time, and the purpose of the Williams Act—to ensure prompt disclosure—will be defeated). For a more in-depth discussion of the approach taken by courts in response to violations of the Williams Act, see *infra* Part III.

3. *See infra* text accompanying notes 276–99 (explaining how, under current judicial construction, managers can actively evade compliance with the Act without fearing the imposition of harsh penal remedies).

4. *See* Mark L. Berman, *SEC Takeover Regulation Under the Williams Act*, 62 N.Y.U. L. REV. 580, 583–84 (1987) (discussing the objectives of the Williams Act).

5. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of 12 U.S.C. and 15 U.S.C.) (containing over two hundred rulemaking mandates, including dozens directed toward the Securities and Exchange Commission); *see also* DAVIS POLK & WARDWELL LLP, SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, ENACTED INTO LAW ON JULY 21, 2010, i–ii (2010), available at [http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910\\_Financial\\_Reform\\_Summary.pdf](http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf) (noting that the Act authorizes 243 rulemakings, 95 of which are directed toward the Securities and Exchange Commission).

situation unilaterally, an action which is particularly appropriate in the wake of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.<sup>6</sup>

The timeliness of such undertakings could not be greater, as the financial crisis of 2008–2009 underscored the importance of adequate, accurate disclosure.<sup>7</sup> Furthermore, the SEC has a renewed interest in the Williams Act of late, as evidenced by its high-profile investigation into Berkshire Hathaway<sup>8</sup> and its equally notable enforcement action against billionaire brothers Sam and Charles Wyly;<sup>9</sup> both incidents involved alleged Williams Act violations.

Part I of this Article sets forth the background, purpose, and intended operation of the Williams Act. It also discusses the Act's enforcement. Because this Article focuses on violations that are subject only to equitable relief, Part II lays out the general principles of equitable relief and surveys the application of those principles within the context of the Williams Act. Part III addresses the Supreme Court's only decision on the subject, *Rondeau v. Mosinee Paper Corp.*<sup>10</sup> and proffers a means of reinterpreting that decision to remedy the problems it has engendered. Part IV briefly outlines additional corrective measures for remedying the under-enforcement of the Williams Act.

Ultimately, this Article concludes that a shift toward more predictable and stringent remedies in response to violations of the Williams Act, coupled with a cause of action against any corporate management that is dilatory in reporting violations of the Act, would better serve the ends of the statute by strengthening the incentives for insurgents to comply with the Act and for incumbent management to report instances of noncompliance.

## I. THE WILLIAMS ACT

### A. Background, Legislative History, and Purposes

Unlike the approaches taken by other nations, and by many U.S. states, federal-securities law in the United States is primarily a disclosure-based

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6. See *infra* text accompanying notes 106–10; see also Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of 12 U.S.C. and 15 U.S.C.).

7. See Wulf A. Kaal, *Hedge Fund Valuation: Retailization, Regulation, and Investor Suitability*, 28 REV. BANKING & FIN. L. 581, 581–82, 626 (2009) (explaining that the repercussions of the financial crisis make reform necessary and likely).

8. See Dennis K. Berman, *SEC Examines Berkshire Disclosures*, WALL ST. J., May 6, 2010, at C1.

9. See Kara Scannell, *Two Wyly Brothers Hit with Fraud Case from SEC*, WALL ST. J., July 30, 2010, at C1.

10. 422 U.S. 49 (1975).

regime.<sup>11</sup> Instead of regulating the *merit* of potential securities transactions, U.S. securities law has traditionally regulated the *disclosure* that must—and, in some cases, must not—be provided to and by the parties involved.<sup>12</sup>

Providing quality, accurate information is considered essential for at least two interrelated reasons: investor protection and the health of capital markets.<sup>13</sup> In keeping with Congress's philosophical preference toward disclosure and against merit regulation, securities laws protect investors by requiring that they be furnished information deemed most critical to their ability to protect themselves.<sup>14</sup> Regarding the capital markets (and, indeed, markets in general), few things are more important than price, and quality, accurate information is essential to the market's pricing of securities.<sup>15</sup> The importance of accurate information and pricing was vividly underscored by the global economic recession that paralyzed world financial markets from 2008—2009. Among the many causes associated with this recession, commentators have repeatedly identified the lack of quality information concerning critical economic transactions and the inability to price assets accurately as primary causes.<sup>16</sup>

One category of information, which is particularly significant to investors and the market alike, concerns corporate control because “[t]he competence and integrity of a company's management, and of the persons who seek management positions, are of vital importance to stockholders.”<sup>17</sup> Indeed, the market price of a security generally “reflects an evaluation of the company based on the assumption that the present management and its policies will continue.”<sup>18</sup> Thus, “[s]ecrecy in this area is inconsistent with the expectations of the people who invest in the securities of publicly held corporations and impairs public confidence in securities as a medium of investment.”<sup>19</sup>

Not surprisingly, therefore, securities laws have long required the disclosure of efforts undertaken to seize control of a corporation:

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11. See Ronald J. Colombo, *Buy, Sell, or Hold? Analyst Fraud from Economic and Natural Law Perspectives*, 73 BROOK. L. REV. 91, 122 (2007) (providing a brief background on U.S. securities regulation).

12. See *id.*

13. *Id.* at 121.

14. Eric D. Roiter, *Illegal Practices and the Disclosure Requirements of the Federal Securities Laws*, 50 FORDHAM L. REV. 781, 783–84 (1982).

15. See Jill E. Fisch & Hillary A. Sale, *The Securities Analyst as Agent: Rethinking the Regulation of Analysts*, 88 IOWA L. REV. 1035, 1081 (2003) (explaining that analysts' roles in ensuring accurate disclosure information promotes accurate market pricing).

16. Kaal, *supra* note 7, at 581.

17. H.R. REP. NO. 90-1711, at 3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2811, 2812.

18. *Id.* at 4, 2813, *reprinted in* 1968 U.S.C.C.A.N. at 2813.

19. *Id.* at 2812, *reprinted in* 1968 U.S.C.C.A.N. at 2812.

Where one company seeks control of another by means of a stock-for-stock exchange, the offer must be registered under the Securities Act of 1933. The shareholder gets a prospectus setting forth all material facts about the offer. He knows who the purchaser is, and what plans have been made for the company. He is thus placed in a position to make an informed decision whether to hold his stock or to exchange it for the stock of the other company.

Where corporate control is sought through a proxy contest, the Securities Exchange Act requires that shareholders be informed of the identity of the participants and their associates, their shareholders and when they acquired them. When shares are purchased with borrowed funds, the identity of the lender must be disclosed if the funds were obtained otherwise than through a bank loan or margin account. In both the exchange offer and the proxy fight the information is filed with the Securities and Exchange Commission and is subject to statutory requirements and sanctions.<sup>20</sup>

However, as of 1968, not all efforts at seizing corporate control were covered by the securities acts' disclosure requirements.<sup>21</sup> Importantly, a simple cash tender offer<sup>22</sup> was not subject to reporting obligations under either the Securities Act of 1933 or the Securities Exchange Act of 1934.<sup>23</sup> Similarly, disclosure was not required of those who would simply purchase large quantities of a company's stock via privately negotiated cash

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20. *Id.* at 2812-12, *reprinted in* 1968 U.S.C.C.A.N. at 2812-13.

21. Thomas L. Hazen, *Transfers of Corporate Control and Duties of Controlling Shareholders—Common Law, Tender Offers, Investment Companies—and a Proposal*, 125 U. PA. L. REV. 1023, 1047 (1977) (detailing how, through the use of tender offers, individuals could evade disclosure requirements and attempt corporate takeovers prior to the enactment of the Williams Act in 1963).

22. Interestingly, the Williams Act does not define the term "tender offer." See 14A GUY P. LANDER, *U.S. SECURITIES LAW FOR INTERNATIONAL FINANCIAL TRANSACTIONS AND CAPITAL MARKETS*, § 11:14, at 11-42 (2d ed. 2009). The SEC and courts have adopted an eight-factor test for determining whether a stock purchase constitutes a tender offer:

(a) active and widespread solicitation of public shareholders for the shares of an issuer; (b) solicitation made for a substantial percentage of the issuer's stock; (c) offer to purchase made at a premium over the prevailing market price; (d) firm rather than negotiable offer terms; (e) offer contingent on the tender of a fixed minimum number of shares, often subject to a fixed maximum number of shares to be purchased; (f) offer open only a limited period of time; (g) pressure on offerees to sell their stock; and (h) public announcements of a purchasing program concerning the target that precede or accompany the rapid accumulation of large amounts of the target's securities.

*Id.*

23. Chang-Do Gong, *The Williams Act Amendments—Controlling Shareholders and Tender Offers*, in 2 FEDERAL SECURITIES EXCHANGE ACT OF 1934 § 7A.01, at 7A-4 to 7A-5 (A. A. Sommer, Jr. ed., 2002).

transactions or open-market cash sales of stock.<sup>24</sup> Compounding the problem, these undertakings could be, and often were, pursued quite effectively together.<sup>25</sup>

These loopholes were significant because they enabled "large accumulations of an issuer's shares and cash tender offers to be accomplished in complete secrecy."<sup>26</sup> Such accumulations undermined the objective of ensuring adequate disclosure to both investors and the market regarding "a potential shift in corporate control"<sup>27</sup> and, correspondingly, impeded the ability of investors and the market to "adequately evaluate the company's worth."<sup>28</sup> The loopholes gained practical significance in the 1960s, when the cash tender offer had "become an increasingly favored method of acquiring control of publicly held corporations."<sup>29</sup> In 1960, there were only eight cash tender offers for publicly held corporations, but in 1966, there were over one hundred cash tender offers for such corporations.<sup>30</sup>

In 1965, Senator Harrison Williams of New Jersey began his fight to close these loopholes.<sup>31</sup> That year he drafted legislation providing that "any substantial accumulation of shares of a company registered under the [1934 Securities Exchange] Act must be preceded by the filing of public information."<sup>32</sup> That was, he argued, "the only way that corporations, their stockholders, and employees [could] adequately prepare[] in advance to meet the threat of the takeover specialist."<sup>33</sup> Although initially

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24. *See id.*

25. *See* Dale A. Oesterle, *The Rise and Fall of Street Sweep Takeovers*, 1989 DUKE L.J. 202, 205-07 (1989) (detailing the effective strategy known as "street sweeps" that combines the purchase of a large quantity of a company's stock with tender offers).

26. *Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050, 1057 n.10 (D. Del. 1982).

27. *GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971).

28. *Id.*

29. H.R. REP. NO. 90-1711, at 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2811, 2811.

A cash tender offer

normally consists of a bid by an individual or group to buy shares of a company—usually at a price above the current market price. Those accepting the offer are said to tender their stock for purchase. The person making the offer obligates himself to purchase all or a specified portion of the tendered shares if certain specified conditions are met.

*Id.*

30. *See id.*

31. Comment, *Section 13(d) and Disclosure of Corporate Equity Ownership*, 119 U. PA. L. REV. 853, 859 (1971) [hereinafter *Section 13(d) and Disclosure*].

32. *Id.* (quoting 111 CONG. REC. 28,259 (1965) (statement of Sen. Harrison A. Williams, Jr.)) (internal quotation marks omitted).

33. *Id.* (quoting 111 CONG. REC. 28,259 (1965) (statement of Sen. Harrison A. Williams, Jr.)) (internal quotation marks omitted).

unsuccessful,<sup>34</sup> Senator Williams persisted, and in 1968, Congress passed the legislation that would come to bear his name: the Williams Act.<sup>35</sup>

An important stumbling block to the legislation's passage was Senator William's proposal to have any substantial accumulation of stock preceded by a public-information filing.<sup>36</sup> Although per se workable for tender offers, the SEC objected to this because it proved unworkable for open-market and privately negotiated purchases of stock.<sup>37</sup> The SEC considered it impractical to require individuals and entities to disclose their intention to purchase stock in a company beforehand, especially considering the speed in which trading decisions are often made.<sup>38</sup> Senator Williams relented on this point, and the legislation was altered so that the stock-accumulation provision would be triggered, not by plans to acquire stock in the future, but rather by the present or past acquisition of a certain threshold amount of stock.<sup>39</sup>

In total, the Williams Act added sections 13(d), 13(e), 14(d), 14(e), and 14(f) to the Securities Exchange Act of 1934.<sup>40</sup> Consistent with his original vision, the Act's ultimate purpose is "to require the disclosure of pertinent information . . . when a person or group of persons seek to acquire a substantial block of equity securities of a corporation by a cash tender offer or through the open market or privately negotiated purchases."<sup>41</sup> Senator Williams also explained that such disclosure is necessary in order that "shareholders and potential investors can adequately evaluate a tender offer or the possible effect of a change in substantial shareholders."<sup>42</sup>

Similarly, the Senate Report of the Williams Act states Congress's purpose as follows: "[to] correct the current gap in our securities laws by amending the Securities Exchange Act of 1934 to provide full disclosure in

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34. See *Section 13(d) and Disclosure*, *supra* note 31, at 859.

35. See Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended in scattered sections of 15 U.S.C.).

36. *Section 13(d) and Disclosure*, *supra* note 31, at 859.

37. Jonathan R. Macey & Jeffrey M. Netter, *Regulation 13d and the Regulatory Process*, 65 WASH. U. L.Q. 131, 134-35 (1987).

38. *Id.*

39. *Id.* at 134.

40. CHARLES J. JOHNSON, JR. & JOSEPH McLAUGHLIN, *CORPORATE FINANCE AND THE SECURITIES LAWS* § 13.01[G][2], at 13-22 (4th ed. Supp. 2009).

41. *Bath Indus., Inc. v. Blot*, 427 F.2d 97, 102 (7th Cir. 1970) (quoting 113 CONG. REC. 24,664 (1967) (statement of Sen. Harrison A. Williams, Jr.)); see also *Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050, 1057 (D. Del. 1982) ("The purpose of Section 13(d) is to provide shareholders and potential investors with information about a change in ownership and control of the issuer to enable them to make informed investment decisions.").

42. See *Section 13(d) and Disclosure*, *supra* note 31, at 862 (quoting *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. on Sec. of the Comm. on Banking and Currency*, 90th Cong. 2-3 (1967) (statement of Sen. Harrison A. Williams, Jr.)) [hereinafter *S. 510 Hearing*].

connection with cash tender offers and other techniques for accumulating large blocks of equity securities of publicly held companies.”<sup>43</sup>

As previously noted, the Williams Act addresses both outright purchases of stock, whether on national exchanges or via private negotiation, and tender offers.<sup>44</sup> Section 13(d) of the Act contains the deficiency upon which this Article focuses—the accumulation of securities via their outright purchase.<sup>45</sup>

Before reviewing the text of the Act itself, one final thread from its legislative history warrants attention. Congress was quick to stress that the Williams Act was not to be interpreted or applied for the protection of incumbent management, or to protect anyone else interested in gaining or maintaining corporate control for that matter.<sup>46</sup> Instead, “the sole purpose of the Williams Act was the protection of investors,”<sup>47</sup> and “Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts.”<sup>48</sup> As the Second Circuit recalled: “the Act’s draftsmen commented upon the ‘extreme care’ which was taken ‘to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.’”<sup>49</sup>

### B. Text and Applicability

Since its passage in 1968, the Williams Act has undergone a few minor amendments.<sup>50</sup> As it exists today, the disclosure requirements of the Act

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43. H.R. REP. NO. 90-1711, at 4 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2811, 2814; S. REP. NO. 90-550, at 4 (1967), *reprinted in* 1968 U.S.C.C.A.N. 2811, 2814.

44. *See supra* text accompanying notes 39–43.

45. *See* Securities Exchange Act of 1934 § 13(d), 15 U.S.C. § 78m(d) (2006). This Article is not concerned with tender offers per se, and, indeed, § 13(d) “has no application to tender offers” directly. *See* JOHNSON & MCLAUGHLIN, *supra* note 40, §13.01[G], at 13-22.

46. *Hubco, Inc. v. Rappaport*, 628 F. Supp. 345, 352 (D.N.J. 1985).

47. *Id.* (quoting *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 35 (1977)).

48. *ICN Pharm., Inc. v. Khan*, 2 F.3d 484, 491 (2d Cir. 1993) (quoting *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975)). Interestingly, this was a shift in Senator William’s initial approach, as his earlier version of the Act was explicitly predicated upon protecting incumbent management. James C. Wine, *Private Litigation Under the Williams Act: Standing to Sue, Elements of a Claim and Remedies*, 7 J. CORP. L. 545, 547–48 (1982).

49. *ICN Pharm., Inc.*, 2 F.3d at 491 (quoting *Rondeau*, 422 U.S. at 58). The Williams Act also added § 13(e) to the 1934 Securities Exchange Act, which regulates the purchase of securities by their issuer. *See* Williams Act, Pub. L. No. 90-439, § 2, 82 Stat. 454, 455 (1968) (codified as amended at 15 U.S.C. § 78m(e) (2006)).

50. *See* ARNOLD S. JACOBS, THE WILLIAMS ACT – TENDER OFFERS AND STOCK ACCUMULATIONS §2:5, at 19–23 (2009) (setting forth the legislative history of the Williams Act) [hereinafter JACOBS, THE WILLIAMS ACT]. The most significant of these subsequent amendments occurred in 1970, when the threshold amount of stock required to trigger the Act’s disclosure requirements was reduced from ten percent of any class outstanding to five percent. *Id.* § 2:5, at 20.

are triggered when any investor or group of investors acting together “acquir[es] more than 10 percent [now 5 percent] of any class of equity security registered under the Securities Exchange Act.”<sup>51</sup> The purpose of this structure is to prevent individuals from circumventing the Act’s disclosure provisions by dividing up a stock acquisition among several different persons acting in concert.<sup>52</sup>

Once the five-percent threshold is reached, the acquiring party or parties must, “within ten days after such acquisition,” provide notice via “registered or certified mail” to (1) “the issuer of the security”; (2) the exchange or exchanges on which the security is traded; and (3) the SEC.<sup>53</sup> This notice is provided on a Schedule 13D form and must contain the following information: (A) the identity and background of the acquiring party or parties; (B) the source of funds used to purchase the securities; (C) the purpose of the purchase of the securities; (D) the number of shares beneficially owned by the acquiring party or parties; and (E) agreements between the acquiring party or parties and others regarding any securities of the issuer.<sup>54</sup>

Perhaps the most critical provision is item C, which requires that the purpose motivating the purchase be revealed. The relevant text of item C requires that information be provided

if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure . . . .<sup>55</sup>

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51. *Id.* at 19 (quoting H.R. REP. NO. 90-1711, at 4 (1968), reprinted in 1968 U.S.C.C.A.N. 2811, 2814) (alteration in original). For the current text of this portion of the Act, see 15 U.S.C. § 78m(d) (2006).

52. H.R. REP. NO. 90-1711, at 8–9 (1968), reprinted in 1968 U.S.C.C.A.N. 2811, 2818.

53. Securities Exchange Act of 1934 § 13(d)(1), 15 U.S.C. § 78m(d)(1) (2006). A commonly recognized deficiency with this structure is that, though the disclosure requirement is triggered upon acquisition of five percent of a company’s stock, by the time the requisite disclosure reaches the market ten days later, a higher percentage of stock may have accumulated. See Allen E. Kelinsky, *Promoting Shareholder Equality in Stock Accumulation Programs for Corporate Control*, 36 AM. U. L. REV. 93, 111 (1986). This particular deficiency has been heavily discussed, and, though important, is beyond the scope of this Article. See *id.* at 111, 123–25.

54. 17 C.F.R. § 240.13d-101 (2010); see also Kelinsky, *supra* note 53, at 99 n.4 (discussing the requirements of § 13(d)).

55. Securities Exchange Act of 1934 § 13(d)(1)(c), 15 U.S.C. § 78m(d)(1)(C). The reference to “prospective purchases” is apparently an unfortunate carryover from the original bill introduced by Senator Williams, which would have triggered the disclosure requirements when an individual planned to purchase securities. See S. 2731, 89th Cong. (1965) (showing the “prospective purchases” language in the original Senate bill). As the Act’s provisions are currently triggered only by actual purchases, this verbiage appears inapplicable.

Significantly, the instructions to Schedule 13D are slightly broader on this point than the authorizing text.<sup>56</sup> Whereas the authorizing statutory text requires qualifying acquirers of stock to report their plans with regard to such acquisition if their ultimate goal is to gain control of a certain business or securities issuer,<sup>57</sup> the instructions to Schedule 13D include no such qualifier.<sup>58</sup> Instead, Item 4 of Schedule 13D instructs the acquirer to “[s]tate the purpose or purposes of the acquisition of securities of the issuer.”<sup>59</sup> As Jonathan Macey and Jeffry Netter have noted:

Item 4 of the Schedule 13D (the form filed to comply with section 13(d) and Rule 13d) goes a bit beyond the requirements of the statute, adding that the purchaser “state the purpose or purposes of the acquisition of securities” and “describe any plans or proposals which the reporting persons may have which relate to or would result in certain” enumerated types of changes in the management, composition, operation and policies of the issuer.<sup>60</sup>

The notice provisions of the Williams Act set forth the information that, in Congress’s estimation, best enables investors to assess the likelihood of a change in corporate control and to undertake its valuation.<sup>61</sup> Notably, Congress’s concerns over the importance of this information were not merely hypothetical.<sup>62</sup> Detailed analysis of stock returns following the filing of a Schedule 13D suggest that such filings result in statistically significant stock-price movement.<sup>63</sup>

Exceptions to the § 13(d) disclosure requirements are provided for acquisitions deemed unproblematic because either sufficient information

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56. This potential violation of administrative-law principles apparently has not been challenged. See Michael Douglas Jacobs, *Illuminating a Bureaucratic Shadow World: Precedent Decisions Under California’s Revised Administrative Procedure Act*, 21 J. NAT’L ASS’N ADMIN. L. JUDGES 247, 277–78 (2001) (discussing the limits on and parameters of rulemaking and noting that “[a]dministrative agencies have only the powers expressly or implicitly granted by their enabling statutes or the Constitution”).

57. Securities Exchange Act of 1934 § 13(d)(1)(c), 15 U.S.C. § 78m(d)(1)(C) (2006).

58. 17 C.F.R. § 240.13d-101 (2010).

59. *Id.*

60. See Macey & Netter, *supra* note 37, at 136 (quoting 17 C.F.R. § 240.13d-101). Additionally, “13D investors must file amendments to the original Item 4 in the event that there is ‘any material change in the facts set forth in prior filings.’” *Id.* (quoting 17 C.F.R. § 240.13d-101).

61. Cf. Macey & Netter, *supra* note 37, at 138–45 (setting forth the benefits of Item 4 disclosures and questioning the favorability of Williams Act disclosure requirements in certain circumstances because of the significant costs associated with such disclosure).

62. Macey & Netter, *supra* note 37, at 133–35.

63. See Gerald P. Madden, *Potential Corporate Takeovers and Market Efficiency: A Note*, 36 J. FIN. 1191, 1191–95 (1981); Wayne H. Mikkelsen & Richard S. Ruback, *An Empirical Analysis of the Interfirm Equity Investment Process*, 14 J. FIN. ECON. 523, 523 (1985).

has been or will be provided to investors, or because the acquisition does not reasonably implicate a potential change in corporate control.<sup>64</sup> An exception is also recognized for those individuals who, or entities which, acquired the securities “in the ordinary course of . . . business” and without the purpose or effect of “changing or influencing the control of the issuer.”<sup>65</sup> For such individuals, the required informational disclosure is reduced.<sup>66</sup>

### C. Enforcement

Although the requirements of the Williams Act are fairly clear, the repercussions flowing from a violation of the Act are not.

A Williams Act violation can be addressed by any of the following: (a) an SEC administrative action; (b) an SEC civil action; (c) a criminal action brought by the U.S. Department of Justice; or (d) private litigation.<sup>67</sup> Although this may seem sufficient to deter violators, a review of the case law demonstrates the relative toothlessness of this enforcement regime.<sup>68</sup> As a result, the incentive to comply with the Act’s disclosure requirements or for incumbent management to report violations promptly is relatively weak.<sup>69</sup>

The status quo is unsatisfactory because the harms occasioned by a Williams Act violation are serious. The simple fact that Congress has required such disclosure gives rise to a presumption of materiality.<sup>70</sup> As Manning Warren explained:

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64. The relevant exceptions apply to

- (A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933 . . . ;
- (B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;
- (C) any acquisition of an equity security by the issuer of such security;
- (D) any acquisition . . . not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer . . . .

Securities Exchange Act of 1934 §§ 13(d)(6)(A)–(D), 15 U.S.C. § 78m(d)(6)(A)–(D) (2006).

65. Securities Exchange Act of 1934 § 13(d)(5), 15 U.S.C. § 78m (d)(5); 17 C.F.R. § 240.13d-1(b)(1) (2010).

66. Securities Exchange Act of 1934 § 13(d)(5), 15 U.S.C. § 78m(d)(5); 17 C.F.R. § 240.13d-1(b)(1) (2010).

67. Security Exchange Act of 1934 §§ 15(b)(6), 21–21C, 15 U.S.C. §§ 78a(b)(6), 78u to 78u-3; *see also* Linda Chatman Thomsen et al., *Hedge Funds: An Enforcement Perspective*, 39 RUTGERS L.J. 541, 559 n.114 (2008) (listing succinctly the applicable means with which to address a violation).

68. *See infra* notes 240–43 and accompanying text.

69. *See infra* notes 242–43 and accompanying text.

70. *See* Manning Gilbert Warren III, *Revenue Recognition And Corporate Counsel*, 56 SMU L. REV. 885, 904 (2003). And “material,” for securities-law purposes, means “there is a substantial likelihood that a reasonable shareholder would consider it important . . . . Put

The *regulatory presumption* of materiality arises from the disclosure requirements imposed upon publicly-held corporations by the 1933 Act, the 1934 Act, and by the SEC's rules and forms under both statutes. Because Congress and the SEC have made policy decisions resulting in specific mandatory disclosure of certain types of information, a strong presumption exists that information specifically required to be disclosed is material. Accordingly, "lawyers can safely assume that required disclosure items may be presumed to be material."<sup>71</sup>

This presumption of materiality has been applied to the Williams Act, by both commentators<sup>72</sup> and courts.<sup>73</sup> Additionally, the presumption is particularly justifiable in this context because

irreparable harm is present if the investing public and the present shareholders of [a target company] are trading in a market place which is deprived of important and legally required information as to the acquiring group's intentions which may affect their judgment as to whether the stock should be sold, bought, or held.<sup>74</sup>

As previously indicated, the statistically significant movement of stock prices, ordinarily after the filing of a Schedule 13D, strongly supports this presumption of materiality.<sup>75</sup>

To underscore the seriousness of a 13(d) violation, Judge Milton Pollack of the Southern District of New York remarked:

Section 13(d) is not a mere "technical" reporting provision; it is, rather, the "pivot" of a regulatory scheme that may represent "the only way that corporations, their shareholders and others can adequately evaluate . . . the possible effects of a change in substantial shareholdings."<sup>76</sup>

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another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

71. Warren, *supra* note 70, at 904 (internal citations omitted) (quoting RICHARD W. JENNINGS ET AL., *SECURITIES REGULATION* 1010 (8th ed. 1998)).

72. See Albert F. Li, *The Meaning of Item Four of Schedule 13d of the Securities Exchange Act of 1934: A New Framework and Analysis*, 52 BUS. LAW. 851, 851-52 (1997).

73. See *Mates v. N. Am. Vaccine, Inc.*, 53 F. Supp. 2d 814, 823-24 (D. Md. 1999); *Trans World Airlines, Inc. v. Icahn*, 609 F. Supp. 825, 830-31 (S.D.N.Y. 1985).

74. *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413, 416 (S.D.N.Y. 1982).

75. See *supra* note 60 and accompanying text.

76. *SEC v. Drexel Burnham Lambert Inc.*, 837 F. Supp. 587, 607 (S.D.N.Y. 1993) (alteration in original) (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 & n.21 (D.C. Cir. 1989)). An additional authority explains that,

[a]lthough Section 13(d) is essentially a disclosure statute, an issuing corporation's remedies for a Section 13(d) violation are not limited to curative

### 1. Administrative Proceedings

The SEC is the federal administrative agency charged with enforcing U.S. securities law.<sup>77</sup> Although not historically the case, today the SEC has broad and potent authority to remedy a securities-law violation.<sup>78</sup> Among other capabilities, the SEC “has authority to [impose] . . . administrative cease-and-desist orders, disgorgement with prejudgment interest, civil monetary penalties, [and] remedial undertakings.”<sup>79</sup> These penalties generally serve both compensatory and deterrent functions.<sup>80</sup>

Under federal-securities law, “[t]he Commission is vested with [the] authority to conduct any investigation it deems necessary to determine whether a person has violated federal securities laws and the rules and regulations promulgated thereunder.”<sup>81</sup> These powers are broad, ranging from informal inquiries to the issuance of subpoenas,<sup>82</sup> and have been delegated to the Director of the SEC’s Division of Enforcement.<sup>83</sup>

Upon its discovery of a federal-securities law violation, the SEC must decide how to proceed. Although the SEC’s initial enforcement program was chiefly remedial, it has recently adopted a more deterrent-based and

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disclosure. The purpose of the reporting requirement in Section 13(d) is to insure that public shareholders facing a tender offer or the acquisition by a third party of a controlling block of shares may obtain adequate information about the qualifications and intentions of the acquiring person. Thus, the ultimate purpose of Section 13(d) is to protect shareholders. Filing a completely truthful Schedule 13D does not necessarily remedy the injuries suffered by shareholders who relied on the misstatements or omissions in the original Schedule 13D.

USG Corp. v. Wagner & Brown, 690 F. Supp. 625, 627 (N.D. Ill. 1987) (citations omitted).

77. See Jerry J. Campos, *Avoiding the Discretionary Function Rule in the Madoff Case*, 55 LOY. L. REV. 587, 603–04 (2009).

78. See Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317, 320–22 (2008) (“For much of the SEC’s existence its statutory remedies were very limited . . .”); Harvey L. Pitt et al., *SEC Enforcement Actions: An Overview of SEC Enforcement Proceedings and Priorities*, C700 A.L.I.-A.B.A. COURSE OF STUDY 167, 201 (1991) (“The SEC has broad statutory authority to conduct such investigations as it deems necessary to determine whether any person or entity has violated, is currently violating, or is about to violate, the provisions of the federal securities laws or rules . . .”).

79. Thomsen et al., *supra* note 67, at 559 n.114 (citing Security Exchange Act of 1934 §§ 15(b)(6), 21–21C, 15 U.S.C. §§ 78a(b)(6), 78u to 78u-3 (2006)).

80. Black, *supra* note 78, at 323–24.

81. Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 FORDHAM J. CORP. & FIN. L. 367, 371–72 (2008).

82. See Ralph C. Ferrara & Philip S. Khinda, *Overview of an SEC Enforcement Proceeding*, in 2 30TH ANNUAL INSTITUTE ON SECURITIES REGULATION 597, 606–36 (1998).

83. Atkins & Bondi, *supra* note 81, at 372.

punitive focus.<sup>84</sup> Accordingly, after an investigation, the SEC can opt not to impose a remedy,<sup>85</sup> or it may effectuate an administrative remedy,<sup>86</sup> a civil remedy,<sup>87</sup> or, via referral to the U.S. Department of Justice, a criminal remedy.<sup>88</sup> The path selected depends on the severity of the wrongdoing and the strength of the evidence.<sup>89</sup>

In the context of Williams Act violations, the most relevant among the SEC's administrative remedies are the powers afforded it under §§ 15(c)(4) and 21C of the 1934 Securities Exchange Act.<sup>90</sup> Section 15(c)(4) of the Securities Exchange Act empowers the Securities and Exchange Commission, "after notice and opportunity for hearing," to "publish its findings" regarding a violation of § 13(d) and issue an order to the violating individual demanding that he comply or take "steps to effect compliance, with such provision or such rule or regulation thereunder upon such terms and conditions and within such time as the Commission may specify in such order."<sup>91</sup> Importantly, unlike some of the SEC's other administrative powers,<sup>92</sup> § 15(c)(4) extends to "any person," thereby authorizing the SEC to invoke its corresponding powers against individuals not ordinarily subject to SEC regulations.<sup>93</sup>

The effectiveness of § 15(c)(4) has long been undermined, however, by the fact that a violation of that section "does not result in any penalty other than a court order directing compliance."<sup>94</sup> Recognizing this, Congress, in its 1990 Securities Enforcement Remedies and Penny Stock Reform Act,

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84. *Id.* at 383.

85. Pitt et al., *supra* note 78, at 7 (noting that the Commission is authorized to decide whether or not to bring an action).

86. *Id.* at 185.

87. *Id.* at 147.

88. *See id.* at 53; *infra* text accompanying note 128.

89. *See* Pitt et al., *supra* note 78, at 7; *see also* DIV. OF ENFORCEMENT, SEC, ENFORCEMENT MANUAL § 2:1:1, at 11 (2010), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>; Terrance O'Malley et al., *An Overview of the SEC Enforcement Process*, MANAGED FUND ASS'N REP., Aug./Sept. 2007; Tammy Whitehouse, *Past, Present, and Future of SEC Enforcement Policy*, COMPLIANCE WEEK, Mar. 9, 2010, <http://www.complianceweek.com/article/5834/past-present-and-future-of-sec-enforcement-policy>.

90. *See* 5E ARNOLD S. JACOBS, DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS §§ 20:131–132, at 20-404 (2010) [hereinafter JACOBS, DISCLOSURE AND REMEDIES]; *see also* Security Exchange Act of 1934 §§ 15(c)(4), 21C, 15 U.S.C. §§ 780(c)(4), 78u-3(a) (2006).

91. Security Exchange Act of 1934 §§ 15(c)(4), 15 U.S.C. § 780(c)(4).

92. For example, Rule 2(e), § 12(j), and § 12(k) are restricted to regulated entities. *See* JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, §§ 20:126, 20:129–20:130, at 20-402 to 20-403.

93. *Id.*, *supra* note 90, § 20:131, at 20-404.

94. S. REP. NO. 101-337, at 18 (1990).

amended the 1934 Securities Exchange Act by adding § 21C.<sup>95</sup> Section 21C empowers the SEC to issue cease-and-desist orders<sup>96</sup> and authorizes the judiciary to “impose a civil monetary penalty, a mandatory injunction, or both for a violation” of such an order.<sup>97</sup> Armed with § 21C, the SEC has little incentive to resort to its more limited powers under Section 15(c)(4), which, in the words of one commentator, has been rendered an “unimportant tool.”<sup>98</sup> Thus, in the face of a Williams Act violation, the SEC may issue a cease-and-desist order under its own administrative authority.<sup>99</sup> Such an order could, for example, mandate that the violator cease violating the Williams Act and file the requisite Form 13D.<sup>100</sup>

The Securities Enforcement Remedies Act of 1990 also included a provision enabling the SEC to levy monetary penalties in administrative proceedings, but under limited circumstances.<sup>101</sup> More specifically, these amendments permitted the SEC to levy monetary penalties against broker-dealers, municipal-securities dealers, government-securities brokers, government-securities dealers, clearing agencies, and transfer agents.<sup>102</sup> Accordingly, even following the Securities Enforcement Remedies Act of 1990, the SEC did not have the authority to assess a monetary penalty for a Williams Act violation per se, but could do so if such violation were coincidentally committed by a regulated person.<sup>103</sup> Similarly, the 1990 amendments included a provision granting the SEC authority to require disgorgement in an administrative proceeding in which the SEC possesses authority to levy monetary penalties.<sup>104</sup> Thus, the

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95. See JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:132, at 20-404 to 20-405 (citing S. REP. NO. 101-337, at 18 (1990)). See generally Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931.

96. See JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:132, at 20-404 to 20-405.

97. *Id.*

98. See *id.* § 20:131, at 20-404. Under § 21(a)(1), the SEC may “investigate violations of the 1934 Act or the rules thereunder, and [to] publish a report of its findings.” See *id.* § 20:127, at 20-402 to 20-403. Some have described this power as “ineffective.” *Id.*

99. GARY M. BROWN, SODERQUIST ON THE SECURITIES LAWS § 11:4.1, at 11-12 (5th ed. 2007).

100. JACOBS, THE WILLIAMS ACT, *supra* note 50, § 2:107, at 316-18.

101. JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:133, at 20-411; see also Securities Exchange Act of 1934 § 21(B), 15 U.S.C. § 78u-2 (2006).

102. JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:133, at 20-411; see also Securities Exchange Act of 1934 § 21(B), 15 U.S.C. § 78u-2.

103. JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:133, at 20-411; see also Securities Exchange Act of 1934 § 21(B), 15 U.S.C. § 78u-2.

104. 15 U.S.C. §§ 78u-2e, 80a-4(e), 80b-3(j); see also Ferrara & Khinda, *supra* note 82, at 641-42 (citing 15 U.S.C. §§ 78u-2e, 80a-4(e), 80b-3(j)) (discussing the SEC’s power to order disgorgement and noting that it never before enjoyed that authority); Richard A. Spehr & Michelle J. Annunziata, *The Remedies Act Turns Fifteen: What Is Its Relevance Today?* 1 N.Y.U. J. L. & BUS. 587, 593 (2005) (“The Remedies Act also authorizes the SEC to order

availability of the SEC's power to administratively disgorge a Williams Act violator has long been dependent upon the nature of the violator.<sup>105</sup>

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010<sup>106</sup> has significantly changed this status quo.<sup>107</sup> Section 929P of the Act, aptly entitled "Strengthening Enforcement by the Commission," empowers the SEC to impose a civil penalty against any person found to have violated any provision of the 1934 Securities Exchange Act, which includes the Williams Act, within the context of a section 21C proceeding.<sup>108</sup> Therefore, as of July 21, 2010,<sup>109</sup> the SEC can punish anyone found to have violated the Williams Act in a section 21C administrative proceeding by means of a civil penalty or a cease-and-desist order.<sup>110</sup>

## 2. SEC Civil Action

In addition to administrative remedies, the SEC is authorized to pursue civil remedies in federal court against securities-law violators.<sup>111</sup> As with the SEC's administrative powers, this authority was significantly expanded by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990.<sup>112</sup>

As things currently stand, § 21(d) of the Securities Exchange Act authorizes the SEC to seek injunctive relief "upon a proper showing" with regard to "any person engaged" or "about to engage" in "acts or practices constituting a violation of any provision of" the Securities Exchange Act.<sup>113</sup> Section 21(d) also authorizes the SEC to seek a judgment for monetary damages "upon a proper showing" that "any person has violated

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the disgorgement of ill-gotten gains in administrative proceedings in which the SEC has authority to impose monetary penalties.").

105. See *supra* text accompanying notes 102–03.

106. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of 12 U.S.C. and 15 U.S.C.).

107. See DAVIS POLK & WARDWELL LLP, *supra* note 5, at i (discussing the impact of the Act and calling it "the greatest legislative change to financial supervision since the 1930s").

108. Dodd-Frank Wall Street Reform and Consumer Protection Act § 929P, 124 Stat. at 1862 (to be codified at 15 U.S.C. 77h–1).

109. See Jesse Lee, *President Obama Sings Wall Street Reform: "No Easy Task,"* THE WHITE HOUSE BLOG (July 21, 2010), <http://www.whitehouse.gov/blog/2010/07/21/president-obama-signs-wall-street-reform-no-easy-task>.

110. Dodd-Frank Wall Street Reform and Consumer Protection Act § 929P(a)(1), 124 Stat. at 1862 (to be codified at 15 U.S.C. 77h–1).

111. Securities Exchange Act of 1934 §§ 21(d)(1), 21(d)(3), 21(d)(5), 15 U.S.C. §§ 78u(d)(1), 78u(d)(3), 78u(d)(5) (2006).

112. See Spehr & Annunziata, *supra* note 104, at 588–89 (discussing the expansion of the sanctions available to the SEC).

113. Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d)(1).

any provision of” the Act or the rules or regulations promulgated thereunder.<sup>114</sup> This is in addition to the SEC’s longstanding authority to seek disgorgement under certain circumstances.<sup>115</sup>

Although the SEC may administratively impose a cease-and-desist order enjoining further violation of the Williams Act,<sup>116</sup> more creative remedies may be crafted if the SEC pursues injunctive relief in federal court.<sup>117</sup> For example, in addition to an order of disgorgement,<sup>118</sup> the SEC has obtained an order sterilizing the voting rights of shares acquired in connection with a violation of the Williams Act<sup>119</sup> and an order for rescission of sales of shares also made in connection with a violation of the Williams Act.<sup>120</sup> Indeed, courts have recognized the authority to grant “all necessary relief” within such contexts.<sup>121</sup>

In granting the SEC’s requests for injunctive relief, courts have enunciated the following guiding principles:

- Courts need not award an injunction under all circumstances
- Trial courts have discretion to grant or to deny injunctions
- Equitable considerations should be a part of a trial judge’s determination
- Injunctions are designed to deter rather than to punish
- A judge can mould each decree

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114. Securities Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d)(3)(A).

115. See Spehr & Annunziata, *supra* note 104, at 587.

116. 15 U.S.C. §§ 80a-9(f)(1), 80b-3(k)(1).

117. See JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:107, at 20-319 to 20-322, 20-342 to 20-346.

118. See Black, *supra* note 78, at 320–21.

119. SEC v. Gen. Refractories Co., 400 F. Supp. 1248, 1259–60 (D.D.C. 1975).

120. Clearfield Bank & Trust Co. v. Omega Fin. Corp., 65 F. Supp. 2d 325, 347 (W.D. Pa. 1999); see also SEC v. Tex. Int’l Co., 498 F. Supp. 1231, 1255 (N.D. Ill. 1980) (recognizing, although not exercising, the SEC’s authority to order rescission as a remedy to a Williams Act violation). Unfortunately, “there is little written as to what factors a court should consider to determine whether to order rescission, or to require the defendant to offer rescission.” JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:110, at 20–366. Arnold Jacobs suggests that the “controlling factors should be those a court uses to decide whether to grant or to deny disgorgement.” *Id.* In particular, Jacobs notes:

Two points should guide courts here: (1) courts justify disgorgement on the grounds that the purposes of the 1934 Act would be defeated if defendants kept their profit and that disgorgement makes violations unprofitable. These two grounds (plus the Rule’s underlying policies) join to form one point courts should use. (2) Since disgorgement could be considered a form of mandatory injunction, at least some factors courts weigh to determine whether or not to award the SEC an injunction also are germane.

*Id.* § 20:109, at 20-354 to 20-355.

121. JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:108, at 20-349 to 20-350.

- Flexibility rather than rigidity is its characteristic
- Mercy and practicality are its qualities
- Injunctions should be used to ensure a nice adjustment between the public interest and private needs.<sup>122</sup>

Additionally, most courts have recognized that private litigants have standing to sue for injunctive relief.<sup>123</sup> Unlike private litigants, however, the SEC has certain advantages in civil litigation. Although the SEC “is subject to the general requirements of Rule 65 of the Federal Rules of Civil Procedure” in its pursuit of injunctive relief,<sup>124</sup> the SEC need not allege or prove irreparable injury or an inadequate remedy at law<sup>125</sup>—a critically important advantage for reasons that will become clear.<sup>126</sup>

### 3. Criminal Prosecution

“The SEC frequently refers cases to and subsequently assists the U.S. Department of Justice and the U.S. Attorneys” with criminal violations of U.S. securities laws.<sup>127</sup> This practice is explicitly authorized by § 21(d)(1) of the 1934 Securities Act, which states that the SEC “may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of [the 1934 Act] or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings.”<sup>128</sup>

Section 21(d)(1) should be read in conjunction with § 32(a), which criminalizes any willful violations of the 1934 Securities Exchange Act.<sup>129</sup> Section 32(a) also criminalizes any knowingly false or misleading material statement in a document filed pursuant to the 1934 Securities Exchange Act.<sup>130</sup>

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122. *Id.* § 20:107, at 20-320 to 20-322 (citations omitted).

123. *See infra* Part I.C.4.

124. Pitt et al., *supra* note 78, at 150.

125. *See id.* at 151 (“It is not necessary . . . for the Commission to demonstrate an irreparable injury or an inadequate legal remedy.”); *see also* JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:107, at 20-325 (“[M]ost courts hold that the Commission need not allege or prove irreparable injury or lack of a legal remedy to get a preliminary or permanent injunction.” (citations omitted)).

126. *See infra* Part II.A.

127. Ferrara & Khinda, *supra* note 82, at 662.

128. Securities Exchange Act of 1934 § 21(d)(1), 15 U.S.C. § 78u(d)(1) (2006).

129. Security Exchange Act of 1934 § 32(a), 15 U.S.C. § 78ff(a); *see* JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:161, at 20-479 to 20-482 (discussing criminal penalties for violations in general). Whether a violation of the 1934 Act is “willful” varies by court, with some jurisdictions requiring specific intent and other jurisdictions predicating criminal liability upon recklessness. *Id.*

130. *See* JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:161, at 20-479 to 20-482.

Therefore, the Department of Justice may criminally prosecute violations of the Williams Act.<sup>131</sup> A party's willful failure to file a Schedule 13D form would be a criminal violation, as well as a party's decision to file a materially and knowingly false or misleading Schedule 13D.<sup>132</sup> Criminal prosecutions for failing to make required disclosures under the securities laws are, however, exceedingly rare.<sup>133</sup>

#### 4. Private Rights of Action

Although the Williams Act "does not, by its terms, create a right of action in favor of any private party to redress a violation" of the Act,<sup>134</sup> within two years of the Act's promulgation a court recognized such a right,<sup>135</sup> and within three years courts also recognized issuers as holders of this right.<sup>136</sup>

This right to redress violations of the Williams Act does not extend to all actors under all circumstances, however. The critical question for the purposes of this Article is: who has standing to sue on account of a party's failure to timely file a Schedule 13D?

The Supreme Court ruled on Williams Act standing by applying the following rule: "where congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of

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131. Edward F. Greene et al., *Toward a Cohesive International Approach to Cross-Border Takeover Regulation*, 51 U. MIAMI L. REV. 823, 835 (1997); see also Carolyn C. Lavecchia & R. Stephen Nelson, Jr., Note, *Dan River Inc. v. Icahn: Disclosure Violations—Relief for Subject Management?*, 18 U. RICH. L. REV. 375, 399 (1984) (explaining that the SEC cannot "initiate criminal proceedings sua sponte," but must refer cases to the Department of Justice for prosecution); JACOBS, THE WILLIAMS ACT, *supra* note 50, § 2:88, at 289 ("[T]he failure to file a Schedule 13D when due or filing an inaccurate Schedule 13D can give rise to criminal charges under Section 32(a) of the Exchange Act . . .").

132. See *United States v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991) (recognizing the "duty to file" and noting that "criminal penalties are available against one who knowingly makes a false and misleading statement of material fact on a document required to be filed by the securities laws").

133. Lavecchia & Nelson, *supra* note 131, at 399.

134. *Hubco, Inc. v. Rappaport*, 628 F. Supp. 345, 352 (D.N.J. 1985). Notably, § 18(a) of the 1934 Securities Exchange creates an express right of action for anyone who relies upon a false or misleading statement in a document filed under the 1934 Act. JACOBS, THE WILLIAMS ACT, *supra* note 50, § 2:88, at 289. Thus, an express right of action exists under § 18(a) for false or misleading schedule-13D filings in violation of the Williams Act. See Securities Exchange Act of 1934 § 18(a), 15 U.S.C. § 78r(a) (2006).

135. See *Grow Chem. Corp. v. Uran*, 316 F. Supp. 891, 892 (S.D.N.Y. 1970) (holding that a private plaintiff, as securities purchaser, stated a cause of action against the defendant for failing to disclose interests owned in violation of the Securities Exchange Act of 1934).

136. *GAF Corp. v. Milstein*, 453 F.2d 709, 719–20 (2d Cir. 1971); see also *Bath Indus., Inc. v. Blot*, 427 F.2d 97, 111 (7th Cir. 1970) (failing to address or question an issuer's standing).

the particular class intended to be protected by the statute.”<sup>137</sup> And, within the context of the federal-securities laws, private enforcement has long been seen as a necessary supplementation to SEC enforcement.<sup>138</sup> In applying this rule to the Williams Act, courts have determined that the Act exists to “protect shareholders and prospective investors.”<sup>139</sup> As such, current and prospective shareholders have standing to sue for Williams Act violations.<sup>140</sup>

Courts have also held that a target issuer, that is, the company whose stock is being acquired, has standing to sue under § 13(d) of the Securities Exchange Act of 1934.<sup>141</sup> Although issuers have not been deemed part of the class intended for protection under the Williams Act, they have been granted standing to sue on the theory that such standing serves the protection of shareholders<sup>142</sup> and because issuers are often in the best position to detect and litigate Williams Act violations.<sup>143</sup> For similar reasons, at least one court has held that a tender offeror also has standing to sue under § 13(d).<sup>144</sup>

Interestingly, successful plaintiffs in § 13(d) suits are not ordinarily entitled to monetary damages awards, regardless of their injuries.<sup>145</sup>

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137. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 24–25 (1977). For a review of how the Court’s approach to implied rights of action have changed over time, see Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 864–69 (1996).

138. *Piper*, 430 U.S. at 25.

139. JACOBS, THE WILLIAMS ACT, *supra* note 50, § 2:7, at 23 & n.2 (including a list of cases supporting the idea that the purpose of the section is to protect shareholders).

140. *Id.* §2:88, at 295–96.

141. See Richard C. Morrissey, Sullivan and Cromwell LLP, E.ON AG et al. v. Acciona, S.A. et al.: *U.S. Federal District Court Takes Jurisdiction of Dispute Among European Parties Concerning Contest for Control of Endesa, S.A.*, in PLI’S SIXTH ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE: A CONTRAST IN EU AND US PROVISIONS 393, 396 (2007) (citing *Rondeau v. Mosinee Paper Co.*, 422 U.S. 49, 65 (1975); *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 621 n.9 (2d Cir. 2002)).

142. JACOBS, THE WILLIAMS ACT, *supra* note 50, § 2:88, at 289–90.

143. See Joy Flowers Conti et al., *Claims Trafficking in Chapter 11—Has the Pendulum Swung Too Far?*, 9 BANKR. DEV. J. 281, 335 (1992) (noting that courts have held that targets and bidders can seek equitable remedies because they “[have] the expertise and the incentive to seek such relief at a time when equitable relief could be effective”).

144. JACOBS, THE WILLIAMS ACT, *supra* note 50, § 2:88, at 295–96 (citing *Torchmark Corp. v. Bixby*, 708 F. Supp. 1070, 1078–79 (W.D. Mo. 1988) (finding that the plaintiff had standing to sue defendant shareholders accused of violating §13(d) of the Williams Act by failing to file a Schedule 13D after defendants allegedly decided to act in concert, thereby crossing the five-percent ownership threshold as a group)).

145. See JACOBS, THE WILLIAMS ACT, *supra* note 50, § 2:88, at 292–93 (“[J]udges have been virtually uniform in denying a Section 13(d) private right of action for damages regardless of the plaintiff’s status.”); see also *Motient Corp. v. Dondero*, 529 F.3d 532, 536

Whether monetary damages can be awarded depends on whether the defendant filed a false or misleading Schedule 13D, in which case damages are available, as opposed to cases in which no Schedule 13D was filed and damages are not available.<sup>146</sup> This curiosity results from the courts' reading of the Williams Act in light of § 18(a) of the 1934 Securities Exchange Act.<sup>147</sup> Section 18(a) provides a damages remedy for violations of the 1934 Securities Exchange Act that involve materially false or misleading statements.<sup>148</sup> Although filing a fraudulent Schedule 13D falls within the scope of §18(a), the failure to file a Schedule 13D does not.<sup>149</sup> Thus, when confronted with a private right of action predicated upon the failure to file a Schedule 13D, courts have uniformly eschewed awarding damages, and have opted instead for injunctive or other equitable relief.<sup>150</sup>

## II. EQUITABLE RELIEF UNDER THE WILLIAMS ACT

As discussed, courts have declined to apply a damages remedy for failure to file a Schedule 13D on the grounds that such a remedy would be inconsistent with the primary purpose of the Williams Act.<sup>151</sup> Instead, the relief granted has invariably been injunctive or equitable in nature.<sup>152</sup> This Part will explore equitable relief in more detail, starting with the principles of equitable relief in general, then turning to the application of those principles within the context of a violation of § 13(d) of the Williams Act.

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(5th Cir. 2008) ("No other Circuit has found a private right of action for money damages under Section 13(d).").

146. See JACOBS, THE WILLIAMS ACT, *supra* note 50, § 2:88, at 294 (noting the Act's silence regarding a right of action for damages and discussing how courts have interpreted such).

147. *Id.*

148. Securities Exchange Act of 1934 § 18(a), 15 U.S.C. § 78r(a) (2006).

149. See Conti et al., *supra* note 143, at 355 (noting that § 18(a) of the Securities Exchange Act of 1934 provides a cause of action for fraudulent Schedule 13D filings, but not for failure to file a schedule 13D).

150. JACOBS, THE WILLIAMS ACT, *supra* note 50, § 2:88, at 291–93. For example, the Fifth Circuit has commented:

[s]ince any material misstatement or omission to an investor who purchases or sells the security and actually relies on that information gives rise to a private cause of action under Section 18(a) of the Exchange Act, . . . Section 18(a) provides the sole basis for a private right of action for damages resulting from a violation of Section 13(d).

Motient Corp. v. Dondero, 529 F.3d 532, 536 (5th Cir. 2008) (citation omitted).

151. See Conti et al., *supra* note 143, at 334–35 (1992) (discussing courts' refusal to issue damages remedies for violations of the Williams Act, noting, in particular, that "permitting such a remedy would be inconsistent with the prime purpose of the Williams Act"); see also JACOBS, THE WILLIAMS ACT, *supra* note 50, § 2:3, at 13–18 (noting the purpose of the Act and discussing the filing of a Schedule 13D); *supra* text accompanying notes 139–43.

152. See *supra* text accompanying note 150.

### A. Equitable Relief Principles

Federal courts possess the authority to grant equitable, injunctive relief to resolve disputes before them.<sup>153</sup> This discretion is bound, however, by certain traditional principles.<sup>154</sup> Among these is the notion that injunctions are “designed to deter, not to punish.”<sup>155</sup> The Supreme Court has explained: “Flexibility rather than rigidity has distinguished [the injunction]. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.”<sup>156</sup>

In applying these principles to securities cases, one commentator has identified the following salient holdings:

- An injunction need not be granted in every instance
- The trial court has discretion to issue an injunction
- Equity should guide courts in granting or withholding injunctions
- Injunctions are designed to deter rather than to punish
- A trial judge has the power to mould each decree to the necessities of the situation
- Injunctions are a flexible remedy [and]
- Mercy and practicality have made injunctions the instrument for nice adjustment of the litigants’ rights.<sup>157</sup>

Additionally, it should be noted that courts have expressed a greater willingness to order prohibitory relief—in which a defendant is ordered to refrain from certain actions—over affirmative relief—in which a defendant is directed to undertake certain actions.<sup>158</sup> And because injunctive relief is considered “extraordinary” by nature, all such remedies are granted “sparingly” by the courts.<sup>159</sup>

In assessing the appropriateness of injunctive relief, the circuit courts have employed different tests.<sup>160</sup> Further, the test that is applied differs

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153. See *Meredith v. Winter Haven*, 320 U.S. 228, 235 (1943) (“An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.” (citation omitted)).

154. See *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944) (emphasizing the importance of a court’s discretion to issue an injunction and noting that Congress may expressly limit this discretion).

155. *Id.*

156. *Id.*

157. JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:90, at 20-270 to 20-271 (internal citations omitted).

158. *Id.* § 20:90, at 20-271 to 20-272.

159. *Id.* § 20:91, at 20-297.

160. See *id.* § 20:91, at 20-275 to 20-280 (outlining the test each circuit court applies).

depending on whether the injunction sought is preliminary versus permanent.<sup>161</sup>

Within the context of a Williams Act violation, both forms of injunctive relief are applicable. Because such violations are often time sensitive, parties frequently rush to court seeking preliminary injunctions to enjoin the violators from acquiring additional shares or to enjoin the occurrence of a shareholder meeting or vote until such time as the Williams Act violation has been cured.<sup>162</sup> Other times, the feared, potential effects of a Williams Act violation may be sufficiently remote or may have already been realized, thus making permanent injunctive relief a sensible remedy.<sup>163</sup> Accordingly, standards relevant to each form of injunctive relief must be considered.

“[A] court will grant an injunction based on the strength of the plaintiff’s case and a showing of irreparable injury plus, in the case of some circuits, the public interest and weighing the defendant’s and plaintiff’s harm if an injunction were issued.”<sup>164</sup> Where the injunction sought is permanent, evaluating the strength of the plaintiff’s case is not necessary because a permanent injunction is granted *after* a proceeding on the merits has already transpired.<sup>165</sup>

The strength of the plaintiff’s case is largely a factual matter. Although there are certainly legal issues that could arise when assessing whether an individual or group violated the Williams Act by failing to file a Schedule 13D,<sup>166</sup> for the most part the question of whether someone was required to and subsequently failed to file a Schedule 13D would be rather easy to resolve.

Of critical concern are the inquiries regarding irreparable injury, public interest, and the harm to both the defendant and the plaintiff. Though these are imbued with strong factual components, there are certain important

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161. *Id.* § 20:90, at 274–75. A preliminary injunction is a temporary measure designed to preserve the status quo, or prevent continuing or threatened harm, prior to a proceeding on the merits. 42 AM. JUR. 2d *Injunction* § 8, at 564–65 (2000). A permanent injunction is a remedy granted after there has been a final hearing and a plaintiff succeeds on the merits, and when the relief measures are deemed appropriate. *Id.* § 10, at 568.

162. See *Lavecchia & Nelson*, *supra* note 131, at 396 (“Because participants in a tender offer need relief quickly, most cases under the Williams Act involve requests for preliminary rather than permanent injunctive relief.”).

163. See, e.g., *Grow Chem. Corp. v. Uran*, 316 F. Supp. 891, 891 (S.D.N.Y. 1970) (denying a defendant’s motion for summary judgment against a plaintiff’s claim for an injunction when the plaintiff overpaid for stock he purchased as a result of the defendant’s failure to file a Schedule 13D disclosing his ownership stake in excess of ten percent).

164. JACOBS, THE WILLIAMS ACT, *supra* note 50, § 2:107, at 317.

165. See *supra* note 161.

166. See JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, §§ 20:85–86, at 20-262 to 20-263 (discussing legal issues that could arise, such as third-party liability).

legal presumptions that can be applied to tilt the scale in one direction or the other.

Some of these presumptions involve the definition of important terms. "Irreparable injury" is defined as "substantial injury to a material degree, coupled with inadequacy of monetary damages."<sup>167</sup> Additionally, the "inadequacy" of monetary damages is not construed strictly, and a "preliminary injunction may be appropriate when fixing damages is unusually difficult or where the uncertainty as to the correct measurement will result in a potentially great injustice to either party."<sup>168</sup>

The public-interest component is usually interpreted by courts in the Williams Act context as relating to the furnishing of full and accurate information to the public without unduly burdening a potential acquirer.<sup>169</sup> The Second Circuit set forth the common approach to the public-interest component by stating:

If [the offeror] is in fact proceeding in violation of the . . . securities laws, a preliminary injunction would serve the public interest as much as [the target company's] private interest. In this regard, by asserting these claims, [the target company] is assuming a dual role, including that of a private attorney general. Since it is impossible as a practical matter for the government to seek out and prosecute every important violation of laws designed to protect the public in the aggregate, private actions brought by members of the public in their capacities as investors or competitors, which incidentally benefit the general public interest, perform a vital public service.<sup>170</sup>

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167. *Id.* § 20:91, at 281.

168. *Id.* § 20:91, at 283.

169. *See, e.g.,* *Polaroid Corp. v. Disney*, 862 F.2d 987, 1006 (3d Cir. 1988) (noting that Congress, in passing the Williams Act, effectuated an intent that takeovers "were not in the public interest if effected through tender offers containing material misrepresentations"); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568-69 (6th Cir. 1982) (noting that the unconstitutional application of the Williams Act is against the public interest and that shareholders' interests are protected by the Act's general policies).

170. *Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., Inc.*, 476 F.2d 687, 698-99 (2d Cir. 1973). The Court continued by saying:

As the Supreme Court said in *J.I. Case Co. v. Borak*, private actions provide "a necessary supplement" to actions by the government and "the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement" of laws designed to protect the public interest. Therefore, as in actions brought by the government, doubts as to whether an injunction sought is necessary to safeguard the public interest . . . should be resolved in favor of granting the injunction.

*Id.* at 699 (internal citation omitted).

Issues unrelated to these concerns have been held irrelevant to the public-interest determination.<sup>171</sup>

With regard to weighing the harm to each defendant and plaintiff, Arnold Jacobs compiled a helpful and comprehensive list of harms credited by the courts within the tender-offer context—a field distinct from, but often overlapping, that of nonpublic accumulations of stock on open markets.<sup>172</sup> As would be expected, the harms usually asserted by potential acquirers revolve around the acquirer's inability to consummate the acquisition.<sup>173</sup> Target issuers usually complain about the disruption to management the potential takeover poses,<sup>174</sup> and shareholders usually complain about the effect of the potential takeover on stock price—complaints that may weigh in favor of or against granting an injunction.<sup>175</sup>

### *B. Application of Equitable Relief to Williams Act Violations*

Plaintiffs—including the SEC in civil litigation<sup>176</sup>—have sought many forms of relief in Williams Act cases, including injunctions

[t]o correct an inaccurate Schedule 13D; to file a Schedule 13D when no Schedule 13D has been filed yet; to enjoin future violations of Section 13(d); to enjoin purchases until disclosure is made; to prohibit a tender offer; to impose a “cooling-off” period on purchases once full disclosure is made; to require divestiture of shares acquired; to offer rescission to persons who sold to the defendant; to enjoin sales of the purchased shares; to sterilize the vote of purchased shares; to enjoin solicitation of proxies; to enjoin the holding of a stockholders meeting; to enjoin attempts to influence the issuer; and to bar the defendants from becoming officers or directors of a public company.<sup>177</sup>

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171. See, e.g., *Koppers Co., Inc. v. Am. Exp. Co.*, 689 F. Supp. 1371, 1406–07 (W.D. Pa. 1988) (finding that “environmental concerns” and concerns regarding “jobs, communities and families” were irrelevant in deciding whether to grant injunctive relief in a Williams Act case).

172. See JACOBS, DISCLOSURE AND REMEDIES, *supra* note 90, § 20:91, at 20-285 to 20-294.

173. See *id.* § 20:91, at 20-285 to 20-286 (listing the “[f]actors conserving the tender offeror”).

174. See *id.* § 20:91, at 20-286 to 20-291 (listing the “[f]actors concerning the target company”).

175. See *id.* § 20:91, at 20-290 to 20-291 (listing the “[f]actors concerning stockholders of the target company”).

176. See JACOBS, THE WILLIAMS ACT, *supra* note 50, § 2:108, at 324 (“The SEC can bring an injunctive action for breaches of the Exchange Act.”).

177. *Id.* § 2:107, at 316.

Courts, however, have been reluctant to grant many of the items on this list.<sup>178</sup> Indeed, except in cases where the SEC is the plaintiff, courts often deny relief altogether.<sup>179</sup> A survey of the case law demonstrates that the following responses largely encompass the courts' reactions to requests for injunctive relief as a result of a § 13(d) violation:

Deny the relief requested as moot or otherwise unnecessary (a) if compliance with § 13(d) has eventually been achieved and (b) if the violation in question did not affect control of the corporation whose stock purchase went unreported;<sup>180</sup>

Enjoin the annual shareholder meeting until such time as accurate § 13(d) disclosures are made;<sup>181</sup>

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178. See *id.* § 2:107, at 316–24 (discussing the various remedies and how courts have treated them).

179. The SEC has often succeeded in procuring injunctive relief in the many cases it has brought against violators of § 13(d) of the Williams Act. See, e.g., *SEC v. Fischbach Corp.*, 133 F.3d 170, 177 (2d Cir. 1997) (affirming disgorgement remedy); *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1217 (D.C. Cir. 1989) (affirming disgorgement remedy); *SEC v. Sierra Brokerage Servs., Inc.*, 608 F. Supp. 2d 923, 974 (S.D. Ohio 2009) (granting disgorgement and enjoining defendants from committing further § 13(d) violations); *SEC v. Bilzerian*, 814 F. Supp. 116, 124 (D.D.C. 1993), *aff'd*, 29 F.3d 689 (D.C. Cir. 1994) (granting disgorgement); *SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587, 612 (S.D.N.Y. 1993) (granting disgorgement); *SEC v. Zimmerman*, 407 F. Supp. 623, 631 (D.D.C. 1976), *aff'd in part, vacated in part sub nom. SEC v. Savoy Indus. Inc.*, 587 F.2d 1149 (D.C. Cir. 1978) (ordering the filing of a Schedule 13(d)); *SEC v. General Refractories Co.*, 400 F. Supp. 1248, 1261 (D.D.C. 1975) (enjoining defendants from committing further § 13(d) violations). This could be a result of the strength of these cases, all of which include alleged violations of other provisions of the securities laws in addition to § 13(d), or the SEC's ability to proceed without a showing of irreparable harm. See *supra* text accompanying notes 125–26.

180. See, e.g., *Gearhart Indus. v. Smith Int'l, Inc.*, 741 F.2d 707, 715 (5th Cir. 1984) (holding that injunctive relief was precluded because the Schedule 13D had already been amended); *Treadway Cos., Inc. v. Care Corp.*, 638 F.2d 357, 380 (2d Cir. 1980) (holding that, because the "purpose of § 13(d) had . . . been fulfilled," there was "no basis for injunctive relief"); *Gen. Aircraft Corp. v. Lampert*, 556 F.2d 90, 97–98 (1st Cir. 1977) (concluding that injunctive relief was precluded because the defendant eventually filed the Schedule 13D and because there was no evidence of an "imminent contest for control" of the corporation); *Int'l Banknote Co. v. Muller*, 713 F. Supp. 612, 620 (S.D.N.Y. 1989) (finding that injunctive relief was not justified because the Schedule 13D was eventually filed); *Drobbin v. Nicolet Instrument Corp.*, 631 F. Supp. 860, 913 (S.D.N.Y. 1986) ("It is well-settled that once the informative purpose of § 13(d) has been fulfilled by curative disclosure, there is no risk of irreparable injury to shareholders and no basis for injunctive relief."); *Hubco, Inc. v. Rappaport*, 628 F. Supp. 345, 355 (D.N.J. 1985) ("[T]he court finds that defendants' amendments to their original Schedule 13D moots plaintiffs' charges in almost all respects."); *Condec Corp. v. Farley*, 573 F. Supp. 1382, 1386 (S.D.N.Y. 1983) (noting the subsequent filing of the Schedule 13D after the law suit was filed); see also JACOBS, *THE WILLIAMS ACT*, *supra* note 50, § 2:102, at 311 (explaining that "curing . . . the breach will moot the case").

181. See, e.g., *Camelot Indus. Corp. v. Vista Res., Inc.*, 535 F. Supp. 1174, 1184–85 (S.D.N.Y. 1982) (enjoining a tender offer until the § 13(d) disclosures are made).

Enjoin the § 13(d) violator from acquiring shares, soliciting proxies, or making tender offers until the violation has been cured and adequate time has passed to allow the information disclosed to be digested;<sup>182</sup>

Enjoin the § 13(d) violator from violating § 13(d) again in the future.<sup>183</sup>

Of these responses, the most common is the denial of relief on the ground of mootness, as most § 13(d) violators cure their violations shortly after being called to task.<sup>184</sup> Though this is the case, some of these same courts that denied relief have noted in dicta that their decisions might have been different if they were faced with “an imminent contest for control” or “shares rapidly acquired just before a contest for control following a Section 13(d) violation,”<sup>185</sup> thus holding out the promise of more stringent relief.

Additionally, courts have explicitly acknowledged—if not outright endorsed—some of the more severe forms of relief sought as potentially appropriate remedies to a § 13(d) violation.<sup>186</sup> Consider, for example,

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182. See, e.g., *ICN Pharm., Inc. v. Kahn*, 2 F.3d 484, 489 (2d Cir. 1993) (“When . . . a corrective filing is made and adequate opportunity is provided for the information that it contains to be digested by shareholders, the corrective injunction should be terminated.”); *K-N Energy, Inc. v. Gulf Interstate Co.*, 607 F. Supp. 756, 771 (D. Col. 1983) (holding that members of the filing group shall be permanently enjoined from acquiring shares, soliciting a proxy, or making a tender offer until thirty days after a corrected Schedule 13D is filed); *Cone Mills Corp. v. West. Pac. Indus.*, No. C-83-1181-G, 1983 U.S. Dist. LEXIS 10461, at \*42 (D.N.C. Dec. 23, 1983); *Seilon, Inc. v. Lamb*, No. C 83-314, 1983 U.S. Dist. LEXIS 15163, at \*71–\*72 (N.D. Ohio July 27, 1983) (holding that defendant must “cease and desist from any and all actions” until thirty days after the court approves the Schedule 13D); *Saunders Leasing Sys., Inc. v. Societe Holding Gray D’Albion*, 507 F. Supp. 627, 636 (N.D. Ala. 1981) (holding that the defendant “is enjoined from making any more purchases of [the corporation’s] stock until [the] amended Schedule 13D is filed”); *W.A. Krueger Co. v. Kirkpatrick, Pettis, Smith, Polian, Inc.*, 466 F. Supp. 800, 806 (D. Neb. 1979) (enjoining the defendant from any action until he complies with § 13(d)); *Jewelcor Inc. v. Pearlman*, 397 F. Supp. 221, 253 (S.D.N.Y. 1975) (enjoining the violator until a Schedule 13D is filed).

183. See, e.g., *CSX Corp. v. Children’s Inv. Fund Mgmt. (UK) L.L.P.*, 562 F. Supp. 2d 511, 573–74 (S.D.N.Y. 2008) (“[P]laintiff is entitled to a permanent injunction restraining future violations of §13(d). . .”).

184. See *supra* note 180 and accompanying text. Indeed, one judge has remarked that the “scope of properly permissible relief” for a § 13(d) violation consists of “the prompt filing of an adequate Schedule 13D, followed, perhaps, by a cooling-off period and other limited, specific relief adapted carefully, cautiously, and expeditiously to the individual facts of the particular case.” *Seilon, Inc.*, 1983 U.S. Dist. LEXIS, at \*31.

185. *Gen. Aircraft Corp. v. Lampert*, 556 F.2d 90, 97 (1st Cir. 1977).

186. See *Bath Indus. v. Blot*, 427 F.2d 97, 113 (7th Cir. 1970) (affirming a preliminary injunction despite defendants’ contention that it was “overly broad”); *Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050, 1064 (D. Del. 1982) (noting the court’s power to disenfranchise a corporation’s ability to direct a vote). But see *Hubco, Inc. v. Rappaport*, 628 F. Supp. 345, 354 (D.N.J. 1985) (“[I]t is difficult to imagine circumstances in which the extreme remedies of rescission or sterilization of shares would be equitably warranted.”); *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413, 419 (S.D.N.Y. 1982) (finding no reason to enjoin voting when the vote was not scheduled to occur for eight months).

share sterilization, which is the disenfranchisement of those shares acquired in violation of § 13(d).<sup>187</sup> Although rarely employed, courts have long recognized the potential availability of such a remedy.<sup>188</sup> Further, at least one other court has acknowledged that it “theoretically has the equitable power to set aside . . . [a] shareholders’ meeting if it finds violations of the federal securities laws,”<sup>189</sup> which would effectively constitute an ex-post sterilization of shares.

The disconnect between the wide range of relief potentially available to plaintiffs and the narrow range of relief ordinarily afforded is a function of two factors: (1) the traditional grounds upon which equitable relief will be granted; and (2) a misreading of the lead Supreme Court case on the subject, *Rondeau v. Mosinee Paper Corp.*<sup>190</sup>

### III. RONDEAU V. MOSINEE PAPER CORP.

With regard to the Williams Act, the importance of *Rondeau v. Mosinee Paper Corp.* cannot be overstated. *Rondeau* is the seminal Supreme Court case interpreting § 13(d) and remedies for its violation. *Rondeau*, and perhaps its misreading, has stymied the availability of more stringent injunctive relief as a remedy for Williams Act violations, thereby undermining the objectives of the Act.

#### A. *Rondeau and Its Reinterpretation*

The 1975 Supreme Court decision in *Rondeau* continues to supply the most authoritative guidance with regard to the propriety and purpose of

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187. See, e.g., *CSX Corp.*, 562 F. Supp. 2d at 568 (discussing, but not granting, share sterilization); *Med. Imaging Ctrs. of Am., Inc. v. Lichtenstein*, No. 96-0039-B, 1996 U.S. Dist. LEXIS 22362, at \*14-16 (S.D. Cal. Feb. 29, 1996) (diluting, but not completely sterilizing, the § 13(d) violator’s voting rights).

188. See *Bath Indus.*, 427 F.2d at 112 n.8 (delaying the disenfranchisement of defendant-shareholders); *Med. Imaging Ctrs. of Am., Inc.*, 1996 U.S. Dist. LEXIS at \*13-14 (noting that courts have the power “to subsequently ‘fix’ any damage caused by an illegitimate change in control,” but that such is not the preferable remedy if other circumstances exist); *Marshall Field & Co.*, 537 F. Supp. at 419 (noting that sterilization of the shares could be granted after certain events occur); *Jacobs*, 549 F. Supp. at 1064 (noting the court’s power to disenfranchise a corporation). But see *Hubco, Inc.*, 628 F. Supp. at 354 (implying that few situations, if any, warrant share sterilization). Interestingly, in *Drobbin v. Nicolet Instrument Corp.*, share sterilization was ordered as a remedy to state law violations, thereby mooted the request for share sterilization as a remedy to an accompanying § 13(d) violation. 631 F. Supp. 860, 913-14 (S.D.N.Y. 1986); see also *Podesta v. Calumet Indus., Inc.*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,433, at 96,560 (N.D. Ill. 1978) (sterilizing defendant’s shares on account of a breach of the “primary duty of fairness and honesty,” but not on account of the accompanying § 13(d) violation).

189. *MTD Serv. Corp. v. Weldotron Corp.*, [1994-1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,395, at 90,710 (S.D.N.Y. Aug. 19, 1994).

190. 422 U.S. 49 (1975).

remedies for Williams Act violations.<sup>191</sup> That this short decision of a divided Court<sup>192</sup> remains tremendously influential is unfortunate for a variety of reasons. First, the case is filled with dicta that misstates the Williams Act's legislative history and fails to fully appreciate the harms that the Act was directed to protect against.<sup>193</sup> Second, subsequent case law has largely misconstrued *Rondeau*, reading the case to more aggressively curtail the use of equitable relief than is necessary.<sup>194</sup> Third, and most importantly, *Rondeau* rested, in part, upon a presumption that no longer holds—a presumption that aggrieved investors have recourse to a suit for damages—thus calling into question whether *Rondeau* even remains good law.<sup>195</sup> For these reasons, *Rondeau* can legitimately be distinguished from most other cases, or alternatively, it may largely be set aside.

The lawsuit in *Rondeau* was brought by Mosinee Paper Corporation (Mosinee), which sought an award of substantial equitable relief against Mr. Francis Rondeau on account of Rondeau's violation of § 13(d) of the Securities and Exchange Act of 1934.<sup>196</sup> Although Rondeau acquired more than five percent of Mosinee's common stock by May 17, 1971, he did not file the requisite Schedule 13D until August 25, 1971, approximately three months beyond the ten-day deadline set by the Williams Act.<sup>197</sup> By the time he filed his Schedule 13D on August 25, 1971, Rondeau had accumulated approximately 7.5% of Mosinee's common stock.<sup>198</sup>

In his Schedule 13D, Rondeau disclosed that, although he originally acquired shares in Mosinee for investment purposes, as of August 25, 1971, he decided to "acquire additional common stock . . . in order to obtain effective control" of Mosinee.<sup>199</sup>

Mosinee alleged that Rondeau's tardy filing of his Schedule 13D harmed investors "who had sold shares without the information which defendants were required to disclose" and who therefore "lacked information material to their decision whether to sell or hold."<sup>200</sup> Consequently, Mosinee

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191. See, e.g., *CSX Corp.*, 562 F. Supp. 2d at 569–70 (S.D.N.Y. 2008) (discussing the impact of *Rondeau* on the availability of injunctive relief).

192. Six justices' views were expressed in the majority opinion delivered by Justice Warren E. Burger, from which three justices dissented, Justices William O. Douglas, William J. Brennan, and Thurgood Marshall. *Rondeau*, 422 U.S. at 49, 65. The decision was sixteen pages long. See generally *id.*

193. See *infra* text accompanying notes 230–31.

194. See *infra* text accompanying notes 237–44.

195. See *infra* text accompanying notes 269–75.

196. *Rondeau*, 422 U.S. at 51–55.

197. *Id.* at 51–53.

198. *Id.* (noting that Rondeau had purchased sixty thousand of Mosinee's eight-hundred thousand shares of stock).

199. *Id.* at 53 (internal quotation marks omitted).

200. *Id.* at 54–55 (internal quotation marks omitted).

sought an injunction prohibiting Rondeau from voting or pledging his Mosinee stock and from acquiring additional stock in Mosinee, as well as to require Rondeau to divest his current holdings of Mosinee stock.<sup>201</sup> Mosinee also sought money damages.<sup>202</sup>

The Seventh Circuit summarizes Rondeau's response as follows:

Rondeau argued that his violation of section 13(d) did not warrant the imposition of any remedy or equitable relief in view of the following circumstances: He unknowingly and unintentionally failed to file a Schedule 13D; his purchase of eight percent of the common stock was for investment purposes, not control; he did not formulate an intention to seek control of Mosinee Paper until after he was informed by his attorney . . . of the filing requirement under section 13(d); and he filed a Schedule 13D within a reasonable time after learning of his duty to file.<sup>203</sup>

Upon this record, the district court denied injunctive relief.<sup>204</sup> In doing so, the district court applied the traditional standards for determining the appropriateness of injunctive relief and exercised its discretion.<sup>205</sup> Finding no scienter on the part of Rondeau, and no damages to Mosinee or its shareholders, the district court granted summary judgment in favor of Rondeau.<sup>206</sup>

On appeal, however, the Seventh Circuit reversed, reasoning that the district court's findings in fact showed harm to Mosinee.<sup>207</sup> Moreover, the Seventh Circuit held that Mosinee

need not show irreparable harm as a prerequisite to obtaining permanent injunctive relief in view of the fact that as issuer of the securities it is in the best position to assure that the filing requirements of the Williams Act are being timely and fully complied with and to obtain speedy and forceful remedial action when necessary.<sup>208</sup>

The Supreme Court took issue with the Seventh Circuit's decision, granted certiorari, and reversed.<sup>209</sup> In so doing, the Court properly described the issue before it as a "narrow" one,<sup>210</sup> and, accordingly, its

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201. *Id.* at 55.

202. *Id.*

203. *Mosinee Paper Corp. v. Rondeau*, 500 F.2d 1011, 1015 (7th Cir. 1974), *rev'd*, 422 U.S. 49 (1975).

204. *Rondeau*, 422 U.S. at 56.

205. *Id.* at 61-62.

206. *Id.* at 55-56.

207. *Id.* at 56-57.

208. *Mosinee Paper Corp.*, 500 F.2d. at 1017.

209. *See Rondeau*, 422 U.S. at 65.

210. *Id.* at 57.

holding should be similarly interpreted as “narrow.” More specifically, its holding should be limited to its own articulation of why it granted certiorari in the first place: “[w]e disagree with the Court of Appeals’ conclusion that the traditional standards for extraordinary equitable relief do not apply in these circumstances . . . .”<sup>211</sup> Put differently:

[T]he District Court here was entirely correct in insisting that [Mosinee] satisfy the traditional prerequisites of extraordinary equitable relief by establishing irreparable harm. Moreover, the District Judge’s conclusions that [Rondeau] acted in good faith and that he promptly filed a Schedule 13D when his attention was called to this obligation support the exercise of the court’s sound judicial discretion to deny an application for an injunction . . . .<sup>212</sup>

The Court’s holding is difficult to interpret “narrowly” because of the broad dicta that was included. Indeed, the trouble starts almost immediately when the Court misstates the very issue before it as “whether this record supports the grant of injunctive relief, a remedy whose basis ‘in the federal courts has always been irreparable harm and inadequacy of legal remedies.’”<sup>213</sup> As discussed, that is not exactly the issue to be decided; the issue is not whether the record supports the grant of injunctive relief, but rather whether the record—and the law—supports the *reversal of a denial* of injunctive relief.

The Court criticized the Seventh Circuit for conflating “the questions of liability and relief,”<sup>214</sup> and held that the existence of a private right of action under § 13(d) of the Securities Exchange Act does not dispense with the requirement that parties “satisfy the traditional prerequisites of extraordinary relief by establishing irreparable harm.”<sup>215</sup> The Court explained that, on the record before it, such traditional prerequisites were lacking.<sup>216</sup> As the Court observed:

[Rondeau] has not attempted to obtain control of [Mosinee], either by a cash tender offer or any other device. Moreover, he has now filed a proper Schedule 13D, and there has been no suggestion that he will fail to comply with the Act’s requirement of reporting any material changes in the information contained therein. On this record, there is no likelihood that [Mosinee’s] shareholders will be disadvantaged should petitioner make a

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211. *Id.*

212. *Id.* at 61–62.

213. *Id.* at 57 (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959)).

214. *Id.* at 64.

215. *Id.* at 61.

216. *Id.* at 59.

tender offer, or that respondent will be unable to adequately place its case before them should a contest for control develop.<sup>217</sup>

Although the Court's holding is facially unproblematic, its application creates some unfortunate and unnecessary difficulties.

With regard to the holding's application, the Court seriously downplayed the harms of inadequate disclosure per se, and fixated on tender offers as "the principal object of the Williams Act"<sup>218</sup> to the exclusion of secretive open-market stock accumulations.<sup>219</sup>

Indeed, the Court went so far as to state that "none of the evils to which the Williams Act was directed has occurred or is threatened in this case."<sup>220</sup> Admittedly, not *all* of the evils to which the Williams Act was directed occurred as there was no subsequent tender offer or change in control, but whether *none* of the evils inspiring the Williams Act occurred is a different matter. The Court's hyperbole here leads to error. As previously discussed, the Williams Act was enacted so that "shareholders and potential investors can adequately evaluate a tender offer or *the possible effect of a change in substantial shareholdings*."<sup>221</sup> Information regarding a group or individual's acquisition of a five-percent stake or greater in a company is important to shareholders regardless of whether a tender offer or change of control actually transpires because of the effect that this information has on stock prices.<sup>222</sup>

In attempting to understand the Court's approach, it would help to bear in mind that *Rondeau* was decided thirteen years before *Basic v. Levinson*, which announced the Court's approval of the efficient capital-markets hypothesis.<sup>223</sup> This could partly explain the Court's failure to fully appreciate the importance of the requisite disclosures mandated by the Williams Act. Perhaps the Court would not opine similarly today.

Judge Parker captured the essence of the Williams Act well in his 1988 opinion in which he observed that "[s]ection 13(d) serves a vital public function to alert the marketplace to every large, rapid aggregation or

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217. *Id.* (internal citation omitted).

218. *Id.* at 60.

219. Recall the words of Senator Harrison A. Williams, who stated that the Act's purpose was "to require the disclosure of pertinent information . . . when a person or group of persons seek to acquire a substantial block of equity securities of a corporation by a cash tender offer or *through the open market or privately negotiated purchases*." *Bath Indus., Inc. v. Blot*, 427 F.2d 97, 102 (7th Cir. 1970) (emphasis added) (quoting 113 CONG. REC. 24,664 (1967) (statement of Sen. Harrison A. Williams, Jr.)).

220. *Rondeau*, 422 U.S. at 59.

221. *Section 13(d) and Disclosure*, *supra* note 31, at 862 (emphasis added) (quoting *S. 510 Hearing*, *supra* note 42, at 2-3).

222. *See supra* text accompanying notes 51-53.

223. 485 U.S. 224, 246 (1988). The hypothesis was that "the market price of shares traded on well-developed markets reflects all publicly available information." *Id.*

accumulation of securities, *regardless of technique employed*.”<sup>224</sup> He appropriately contextualized the Act as follows:

The Supreme Court reaffirmed only recently that a fundamental purpose of the Securities Exchange Act of 1934, as amended, was “to protect investors against manipulation of stock prices” and to implement a “philosophy of full disclosure.” In delivering the ruling, Justice Blackmun was addressing problems of false statements and materiality under section 10(b) of the Act. The same underlying principle applies to litigation arising under section 13(d) of the Act which imposes strict disclosure requirements where there are large scale accumulations of equity securities affecting corporate control.<sup>225</sup>

The Court in *Rondeau* also erred when it declared that “the principal object of the Williams Act is to solve the dilemma of shareholders desiring to respond to a cash tender offer.”<sup>226</sup> Certainly, that was *an* object of the Williams Act, but not the *only* object.<sup>227</sup> Indeed, one could argue that there are two parts to the Williams Act, one concerning tender offers, and another concerning open-market stock accumulations.<sup>228</sup> Although these parts can be and often are interconnected, the Court in *Rondeau* focused solely on the former at the expense of the latter.<sup>229</sup>

Moreover, the Court gave no credit to the argument that the mere failure to comply with the Williams Act gives rise to a *prima facie* case of harm.<sup>230</sup> Instead, the Court declared that “the fact that respondent is pursuing a cause of action which has been generally recognized to serve the public interest provides no basis for concluding that it is relieved of showing irreparable harm and other usual prerequisites of injunctive relief.”<sup>231</sup>

The Court’s explanation of the “traditional equitable principles” pertaining to injunctive relief only aggravates the issue.<sup>232</sup> On two occasions the Court made a point of admonishing that injunctions were historically “designed to deter, not to punish.”<sup>233</sup> Rather than highlight

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224. SEC v. First City Fin. Corp., Ltd., 688 F. Supp. 705, 725 (D.D.C. 1988) (emphasis added).

225. *Id.* at 707 (quoting *Basic*, 485 U.S. at 230) (internal citations omitted).

226. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975).

227. See *supra* notes 218–19 and accompanying text.

228. See *supra* note 219.

229. See *Rondeau*, 422 U.S. at 59–60 (analyzing the case solely in regards to control through tender offers).

230. See generally *Rondeau*, 422 U.S. at 49.

231. *Id.* at 64–65.

232. *Id.* at 60.

233. *Id.* at 61–62 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)) (internal quotation marks omitted).

broad discretionary powers of courts in this area, the Supreme Court stressed the need for equitable relief to reflect “[f]lexibility rather than rigidity” as well as “mercy and practicality,” and it also noted that an injunction should be “[an] instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.”<sup>234</sup> This is certainly not incorrect, but it is an important choice of emphasis.

*B. Problems with Interpretation of Rondeau and the Potential Solution*

Arguably, much of the Court’s language constitutes dicta. For at its heart, *Rondeau* is a case about “the exercise of the [trial] court’s sound judicial discretion to deny an application for an injunction.”<sup>235</sup> The Seventh Circuit was wrong to override the district court’s exercise of this discretion, and it was doubly wrong to impose a different standard for the adjudication of prayers for injunctive relief.<sup>236</sup>

But Supreme Court dictum is important and influential.<sup>237</sup> “Commentators frequently stress the need for lower courts to give substantial deference even to Supreme Court dicta,”<sup>238</sup> and that appears to be what they are doing with respect to *Rondeau*. Rather than reading and applying *Rondeau* narrowly, the lower courts have been reading and applying *Rondeau* broadly.<sup>239</sup> Instead of standing for the proposition that injunctive relief under the Williams Act is subject to the traditional elements that always inform the availability of injunctive relief, *Rondeau* has been interpreted to hold that “[t]he mere failure to file a timely Schedule 13D cannot in itself amount to irreparable injury sufficient to justify equitable relief.”<sup>240</sup> Indeed, the mainstream reading of *Rondeau* is

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234. *Id.* at 61 (quoting *Hecht Co.*, 321 U.S. at 229–30).

235. *Id.* at 61–62.

236. *See id.* at 60–62 (holding that the Seventh Circuit’s disregard for the traditional requirement of irreparable harm was inaccurate).

237. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1084 & n.422 (2005) (“Supreme Court dicta may have substantial persuasive influence on lower courts.”).

238. *Id.* But see Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1274 (2006) (arguing that Supreme Court dicta is not binding and that lower courts must adjudicate issues themselves).

239. *See supra* text accompanying note 190.

240. *Hubco, Inc. v. Rappaport*, 628 F. Supp. 345, 354 (D.N.J. 1985); *accord* *Gen. Aircraft Corp. v. Lampert*, 556 F.2d 90, 96 (1st Cir. 1977) (citing *Rondeau*, 422 U.S. at 60–65) (“In *Rondeau*, the Supreme Court explicitly rejected the argument that a violation of the Williams Act, without more, justifies the issuance of an injunction; in accordance with traditional equitable principles a showing of irreparable harm must be made.”); *Condec Corp. v. Farley*, 573 F. Supp. 1382, 1386 n.3, 1387 (S.D.N.Y. 1983) (explaining that, though the plaintiff claimed that irreparable harm results from “any change in corporate management which is effected by unlawful means,” the court “believe[d] that the teaching of *Rondeau* is to the contrary”).

such that one Williams Act defendant was emboldened to “contend that . . . injunctions are never proper remedies for 13(d) violations, by characterizing the law as ‘a technical reporting rule.’”<sup>241</sup>

This attitude is seriously problematic because it results in a reduced incentive for corporate insurgents to make full and timely disclosures as the Act requires.<sup>242</sup> In fact, in the event of a Williams Act violation, the usual outcome is dismissal after the violator belatedly files a Schedule 13D, which renders the case moot.<sup>243</sup> The Seventh Circuit recognized the seriousness of the absence of an incentive in *Bath Industries v. Blot*:

The purpose of the [Schedule 13D] filing and notification provisions is to give investors and stockholders the opportunity to assess the insurgents’ plans *before* selling or buying stock in the corporation. It additionally gives them the opportunity to hear from incumbent management on the merit or lack of merit of the insurgents’ proposals. *If the defendant-appellants’ late filing is sufficient, then no insurgent group will ever file until news of their existence and plan leaks out and prompts a law suit.*<sup>244</sup>

A minor, and likely justifiable, interpretive shift can aid tremendously in remedying this situation. The shift results from recognizing the difference between asserting that a Williams Act violation relieves a plaintiff from showing irreparable harm, as the Seventh Circuit held, to arguing that a Williams Act violation gives rise to merely a rebuttable presumption of irreparable harm. It is upon this difference that this Article’s suggested reinterpretation of *Rondeau* is founded.

In reinterpreting *Rondeau*, this Article starts from the proposition that courts have “broad discretion to evaluate the irreparability of alleged harm.”<sup>245</sup> Accordingly, there is a degree of latitude in determining the nature of a § 13(d) violation. Indeed, the *Rondeau* Court explicitly conceded this, observing that “we have not hesitated to recognize the

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241. SEC v. First City Fin. Corp., 688 F. Supp. 705, 725 (D.D.C. 1988) (citation omitted).

242. See *supra* note 180 and accompanying text (stating that relief will be denied if a Schedule 13D has been filed after the action is brought, thus the violator is neither deterred nor punished).

243. See *supra* text accompanying note 184; see also CSX Corp. v. Children’s Inv. Fund Mgt. (UK) L.L.P., 562 F. Supp. 2d 511, 569–70 (S.D.N.Y. 2008) (“*Rondeau* . . . make[s] clear that a prerequisite to [injunctive] relief is a showing of irreparable harm. . . . Second Circuit cases go so far as to suggest, in *dicta*, that irreparable harm can not be established once corrective disclosure is made.”).

244. *Bath Indus., Inc. v. Blot*, 427 F.2d 97, 113 (7th Cir. 1970) (second emphasis added). *Bath Industries, Inc.* was decided in 1970, five years before *Rondeau* was handed down. See *id.* at 97; see also *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 49 (1975).

245. *Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1271 (1st Cir. 1996) (quoting *K-Mart Corp. v. Oriental Plaza Inc.*, 875 F.2d 907, 915 (1st Cir. 1989)).

power of federal courts to fashion private remedies for securities laws violations when to do so is consistent with the legislative scheme and necessary for the protection of investors.”<sup>246</sup>

As discussed,<sup>247</sup> the traditional standard for assessing whether an injury is irreparable is whether “the damages occasioned are estimable only by conjecture, and not by an accurate standard.”<sup>248</sup> A § 13(d) violation should be irreparable under a broad range of circumstances, for example if it was discovered too close to the date of an annual meeting or after corporate control had changed hands.<sup>249</sup> SEC Regulation 13D suggests that ten days is the minimum amount of time before an annual meeting for a § 13(d) violation to be cured without a finding of irreparable injury.<sup>250</sup> Given the complexities and uncertainties of the marketplace, a § 13(d) violation cured earlier than ten days could be irreparable on account of the countless number of individual shareholder decisions that might have been made differently but for the violation. Indeed, courts have expressed concern over the voting or purchasing of shares during an ongoing proceeding involving a § 13(d) violation, and have sometimes enjoined such activity, including the holding of an annual shareholders’ meeting, until the violation was cured.<sup>251</sup> Armed with this understanding, courts could readily adopt a rebuttable presumption of irreparability when confronted with a § 13(d) violation.<sup>252</sup> Making this presumption rebuttable, and acknowledging that certain extenuating circumstances could cause a § 13(d) violation to be reparable, conforms this general rule to *Rondeau*.

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246. *Rondeau*, 422 U.S. at 62.

247. See *supra* text accompanying note 167.

248. *Johnson v. Mansfield Hardwood Lumber Co.*, 143 F. Supp. 826, 835 n.3 (W.D. La. 1956) (quoting 28 AM. JUR. *Injunctions* § 48, at 244–45 (1940)).

249. See *Bath Indus.*, 427 F.2d at 110 (“The Williams Act is clearly related to the proxy provisions and should be construed to operate in harmony with them.”); 18 AM. JUR. 2D *Corporations* § 943, at 964 (2004) (“If a material misrepresentation is shown in connection with the solicitation of proxies, courts will ordinarily declare the proxies invalid, possibly altering or rescinding the outcome of any vote for which the proxies were used. After an election, losers may be successful in seeking to overturn the results.” (footnotes omitted)); see also *MTD Serv. Corp. v. Weldotron Corp.*, [1994–1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,395, at 90,711 (S.D.N.Y. Aug. 19, 1994) (denying injunctive relief because stockholders received all material information, a new board of directors was elected, and control of the defendant corporation changed); *supra* notes 179–83 and accompanying text.

250. 17 C.F.R. § 240.13d-1(e)(2) (2010) (declaring that “until the expiration of the tenth day from the date of the filing of the Schedule 13D . . . that person shall not: (i) Vote or direct the voting” of recently acquired shares).

251. See *supra* notes 181–82 and accompanying text.

252. See, e.g., *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413, 416 (S.D.N.Y. 1982) (noting that there is irreparable harm when the public and shareholders trade in an arena that does not have requisite information needed to make safe and informed decisions). This is one articulation of a situation in which a rebuttable presumption of irreparable harm could be appropriate.

This approach also guards against incumbent management using § 13(d) to its advantage.

Whereas the Seventh Circuit's position, which the Court reversed in *Rondeau*, would have precluded a defendant from arguing that its violation of § 13(d) was harmless or otherwise not irreparable, this Article's proffered reinterpretation of *Rondeau* does not preclude this defense.<sup>253</sup>

This reinterpretation is consistent with *Rondeau*'s holding and, as such, does not change the result of the case. The factual predicate in *Rondeau* was the district court's decision not to provide injunctive relief for violations of the Williams Act that were "inadvertent" and coupled with "immediate steps to rectify."<sup>254</sup> At issue was the correctness of the subsequent Seventh Circuit conclusion that Mosinee's "claim was not to be judged according to traditional equitable principles, and that the bare fact that petitioner violated the Williams Act justified entry of an injunction against him."<sup>255</sup> This aggressive and broad position proffered that, as a matter of law, a Williams Act violation warranted injunctive relief.<sup>256</sup> In response, the Supreme Court took a much narrower view, one which stated that the traditional rules governing injunctive relief—including its discretionary nature—remained applicable.<sup>257</sup>

Because of the particulars of the *Rondeau* case, this Article posits that *Rondeau* does not preclude a plaintiff from arguing, nor a court from concluding, that *barring extenuating circumstances*, a § 13(d) violation, without more, does indeed result in irreparable injury. The only argument and conclusion precluded by *Rondeau* is that a § 13(d) violation *automatically* results in irreparable harm. In other words, a *rebuttable presumption* of irreparable harm flowing from a § 13(d) violation remains a legitimate interpretation of *Rondeau*.<sup>258</sup>

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253. The defendant in *Rondeau* unsuccessfully made this very argument to the Seventh Circuit. *Mosinee Paper Corp. v. Rondeau*, 500 F.2d 1011, 1016 (7th Cir. 1974), *rev'd*, 422 U.S. 49 (1975) ("[Defendant] contends that it would be improper to grant plaintiff's claim for equitable remedies in view that [plaintiff] has suffered no harm, let alone irreparable harm by reason of his violation of Section 13(d)."). In the last paragraph of the *Rondeau* decision, the Supreme Court declared that a § 13(d) claimant is not "relieved of showing irreparable harm and other usual prerequisites for injunctive relief." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 65 (1975). This can be fairly construed as dicta, however, as the holding of *Rondeau*, strictly speaking, is the reversal of the Seventh Circuit's decision to forgo the traditional analysis of injunctive relief. *Id.* Regardless, *Rondeau* does not explicitly forbid a minimalist approach to showing irreparable injury in the context of a § 13(d) violation; the only thing it explicitly forbids is dispensing with this showing and analysis altogether.

254. *Rondeau*, 422 U.S. at 60.

255. *Id.*

256. *See id.*

257. *Id.* at 61–62.

258. In keeping with this reading of *Rondeau*, the Seventh Circuit erred in holding that a § 13(d) violation gave rise to an *irrebuttable* presumption of irreparable harm. *See Mosinee*

Such an interpretation of *Rondeau* would further the objectives of the Williams Act by more properly incentivizing potential violators to comply with § 13(d). These potential violators would no longer be assured of a “free pass” through which a violation could readily be cured by merely doing that which they were obliged to do in any event: file a Schedule 13D. Accordingly, accumulators of more than five percent of a company’s stock would recognize that failure to follow the Act’s requirements comes with potentially serious consequences.

Concerns over “flexibility,” “mercy,” and “practicality” can all be quelled by precluding stringent, equitable relief under circumstances in which the violation was unintentional and insignificant—indeed, such are the exact the Supreme Court noted in *Rondeau*.<sup>259</sup> Such an approach would strike a “nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims”<sup>260</sup> by: (1) safeguarding the investing public and corporate shareholders from trading stock without accurate knowledge of the potential for a change in corporate control; (2) protecting insurgents who unintentionally violated § 13(d) in situations where their violations were inconsequential; and (3) promoting compliance with, and private enforcement of, the Williams Act.

Finally, the distinction between “punishment” and “deterrence”—a traditional consideration in awarding injunctive relief as highlighted by the Court in *Rondeau*<sup>261</sup>—should not be overstated. Stringent, equitable relief, although punitive in nature, would certainly serve to deter both the defendant in a Williams Act suit, and others similarly situated, from failing to file the requisite Schedule 13D in the future.<sup>262</sup>

### C. Legislative Intent and Its Reinterpretation

Compounding the common (mis)reading of *Rondeau* is the lower courts’ misunderstanding of the Williams Act’s legislative intent. The Act as ultimately passed was carefully crafted to avoid “tipping the scales either in favor of management or in favor of the person making the takeover bids.”<sup>263</sup> Although recognizing that “[t]he discretion of a district court to

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Paper Corp. v. *Rondeau*, 500 F.2d 1011, 1016–17 (7th Cir. 1974), *rev’d*, 422 U.S. 49 (1975) (finding any filing is enough to show irreparable harm).

259. *Rondeau*, 433 U.S. at 61 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944)).

260. *Id.* (quoting *Hecht Co.*, 321 U.S. at 329–30).

261. *See id.* (quoting *Hecht Co.*, 321 U.S. at 329–30) (“The historic injunctive process was designed to deter, not to punish.”).

262. *See infra* text accompanying notes 281–85.

263. *Gearhart Indus., Inc. v. Smith Int’l, Inc.*, 741 F.2d 707, 715 (5th Cir. 1984) (quoting *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 31 (1977)); *see supra* notes 47–49 and accompanying text.

fashion remedies in this area is broad”<sup>264</sup> in order to “preserv[e] the integrity of the requirements of the securities laws and preventing violators from profiting by the violation,”<sup>265</sup> courts have interpreted the legislative history of the Williams Act as “militat[ing] against injunctive remedies . . . that go beyond correction of past violations and unduly favor incumbent management.”<sup>266</sup> As a result, in practice the courts “generally have refused requests for more extensive or long-lasting relief.”<sup>267</sup>

What the courts have overlooked, however, is the difference between the operation of compliance with § 13(d) and the violation of § 13(d). If complied with, the Act is largely neutral in its effects. If violated, any remedy imposed would, inevitably, function to the disadvantage of the party committing the breach. Such a consequence should not be read as violating the intended neutrality of the Act. In short, the intended neutrality of the Act’s reporting provisions should not constrain the courts in fashioning a remedy in the event of the Act’s breach.<sup>268</sup>

#### D. *Rondeau Is Bad Law*

The continued influence of the *Rondeau* decision is regrettable for one final, important reason: *Rondeau* rested upon a presumption that no longer holds. Specifically, in response to the argument that “an injunction is necessary to protect the interests of . . . shareholders who either sold their stock . . . at predisclosure prices or would not have invested had they known that a takeover bid was imminent,”<sup>269</sup> the Court, after first wondering whether “the type of ‘harm’ identified . . . is redressable” under the Williams Act,<sup>270</sup> stated that “[i]n any event, those persons who allegedly sold at an unfairly depressed price have an adequate remedy by way of an action for damages, thus negating the basis for equitable relief.”<sup>271</sup>

As previously discussed, cases decided after *Rondeau* have proven this presumption wrong.<sup>272</sup> Plaintiffs do not have an action at law for damages

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264. *Bath Indus. v. Blot*, 427 F.2d 97, 113 (7th Cir. 1970).

265. *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413, 418 (S.D.N.Y. 1982).

266. *ICN Pharm. v. Khan*, 2 F.3d 484, 491 (2d Cir. 1993).

267. *See* *Conti et al.*, *supra* note 143, at 336–37.

268. Notably, the Second Circuit explicitly counseled against stringent remedies on the ground that they too would “unduly favor incumbent management.” *ICN Pharm.*, 2 F.3d at 491. However, this conflates the effect of compliance with the effect of violation.

269. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 59 (1975).

270. *Id.* at 60. The Court made this statement in light of its reading of the “principal object of the Williams Act” as addressing “the dilemma of shareholders desiring to respond to a cash tender offer.” *Id.* This reading is narrow and incomplete. *See supra* text accompanying notes 226–29.

271. *Rondeau*, 422 U.S. at 60.

272. *See supra* text accompanying notes 150–55.

in the event that someone violates the Williams Act by failing to file a Schedule 13D.<sup>273</sup> Thus, contrary to the Court's conclusion in *Rondeau*, the basis for equitable relief is not negated in these situations.<sup>274</sup> This casts significant doubt on the continued viability of *Rondeau* as precedent.<sup>275</sup>

#### IV. ADDITIONAL CORRECTIVES

Due largely to a misinterpretation of *Rondeau* and the misreading of legislative history, courts over the last thirty-five years have failed to properly remedy violations of the Williams Act.<sup>276</sup> In fact, the current regime of remedies for Williams Act violations undermines the objectives of the Act by encouraging gamesmanship and, in some instances, discouraging disclosure.<sup>277</sup>

A reinterpretation of *Rondeau* would incentivize insurgents to take more seriously their disclosure obligations under the Williams Act. Additional correctives are also possible, however.

##### A. Incentivizing Management

Individual shareholders are highly unlikely to spot a Williams Act violation and, therefore, are unable to effectively police § 13(d). Further,

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273. See *supra* text accompanying notes 145–46. Plaintiffs only have an action at law for damages if someone files a misleading Schedule 13D. See *supra* text accompanying notes 145–46; see also *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 619–20 (2d Cir. 2002) (“[T]here is no private damages remedy for issuers under § 13(d).”); *Rosenbaum v. Klein*, 547 F. Supp. 586, 591 (E.D. Pa. 1982) (discussing, in part, the reasoning behind prohibiting “a cause of action for damages by shareholders who do not allege detrimental reliance . . . on misrepresentation in reports filed”); *Berman v. Metzger*, Fed. Sec. L. Rep. (CCH) ¶ 97,857, at 90,294 (D.D.C. 1981) (“[T]his Court concludes that in section 13(d) Congress expressed no intent to create a private right of action for damages.”).

274. See *Rondeau*, 422 U.S. at 60.

275. See Thomas J. Long, *Deciding Whether Conflicts with Supreme Court Precedent Warrant Certiorari*, 59 N.Y.U. L. REV. 1104, 1107 (1984) (“[C]onflict may also arise from a lower court’s assertion that applicable Supreme Court precedent is no longer authoritative.”). Of course, the ability of lower courts to disregard *Rondeau* is a controversial question beyond the scope of this Article. See, e.g., Bradley Scott Shannon, *Overruled by Implication*, 33 SEATTLE U. L. REV. 151, 151 (2009) (noting the Supreme Court’s ability to overrule its precedents, but observing that “some have suggested that lower courts should have some ability to disregard Supreme Court precedent”). But even if *Rondeau* is not outright disregarded, the suggestion that it is no longer good law counsels in favor of reading the case narrowly and confining it to its specific facts and procedural context.

276. See *supra* Part III.

277. See *Conti et al.*, *supra* note 143, at 335 (“An acquiror could simply ignore or violate the reporting requirements under the Williams Act until a court orders it to make curative disclosure, at which time it would make such a curative filing with little concern for other sanctions.”). But see *Macey & Netter*, *supra* note 37, at 137 (referring to the usual remedies for a Williams Act violation as “draconian” and noting that the “very costly” nature of an injunction creates a “strong incentive” for compliance with the Act’s provisions).

the SEC has not made a priority of enforcing § 13(d)'s filing requirements.<sup>278</sup> As such, the incumbent management of a target corporation is the party best positioned to catch and litigate a Williams Act violation because it has both the ability and wherewithal to find and confront Williams Act violators.<sup>279</sup> Additionally, incumbent management has an incentive to do so—changes in corporate control often result in new management.<sup>280</sup>

Thus, one might expect incumbent management to actively ferret out and pounce upon Williams Act violators, thereby mitigating the lack of voluntary compliance with § 13(d).<sup>281</sup> However, in light of the remedies currently available to management, there is little incentive to do this. In fact, given the stringent approach courts have taken regarding the issue of “irreparable harm,”<sup>282</sup> there is every incentive for management to not report its knowledge of a § 13(d) violation until a cure would no longer be possible, such as shortly before an annual meeting.<sup>283</sup> Only under those

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278. In fact, applicable research has unearthed only one decided case that the SEC brought, and it was predicated solely on a defendant's failure to file a Schedule 13D. *SEC v. First City Fin. Corp.*, 688 F. Supp. 705, 707–08 (D.D.C. 1988). In every other case the SEC brought involving a defendant's failure to file a Schedule 13D, that particular violation is one of a long list of additional, more serious securities-law violations that typically involved fraud. See, e.g., *SEC v. Prousalis*, [Transfer Binder 2004–2005] Fed. Sec. L. Rep (CCH) ¶ 93,140, at 95,799 (S.D.N.Y. Feb. 8, 2005) (describing the charges brought against the defendant including violations of §§ 10(b), 17(a), and 13(d)(1)); *SEC v. World-Wide Coin Inv., Ltd.*, 567 F. Supp. 724, 754–56 (N.D. Ga. 1983) (noting multiple violations of the Williams Act); *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1312 (D.C. Cir. 1981), *overruled in part* by 292 F. App'x 391 (5th Cir. 2008) (describing multiple alleged violations of the Williams Act); *SEC v. Diversified Indus., Inc.*, 465 F. Supp. 104, 106–07 (D.D.C. 1979) (noting the seven counts in the complaint, including the § 13(d) violation); *SEC v. Gen. Refractories Co.*, 400 F. Supp. 1248, 1250–51 (D.D.C. 1975) (acknowledging the multiple claims that the SEC filed in addition to the § 13(d) claim). The other case somewhat on point is *SEC v. Palmer Financial Corp.*, which was a case brought by the SEC that ordered a defendant to show cause when his failure to file a Schedule 13D along with certain other documents had violated the provisions of a pre-existing, permanent injunction entered against him. No. 88-305, 1988 U.S. Dist. LEXIS 9216, at \*5–6 (D.D.C. Aug. 18, 1988). This record of cases marginalizes the deterrent effect of criminal liability for failing to file a Schedule 13D, a topic on which there are apparently no decided cases. The case that comes closest to addressing this concept is *SEC v. Prousalis*, a case against Thomas Prousalis which was “based on the exact same facts, and charging essentially identical violations” as an earlier criminal case brought against him. [Transfer Binder 2004–2005] Fed. Sec. L. Rep (CCH) ¶ 93,140, at 95,799 (S.D.N.Y. Feb. 8, 2005).

279. See *supra* text accompanying notes 141–44.

280. See Jessica Jackson, Note, *Much Ado About Nothing? The Antitrust Implications of Private Equity Club Deals*, 60 FLA. L. REV. 697, 707 (2008); Jonathan R. Macey, *Market for Corporate Control*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2008), <http://www.econlib.org/library/Enc/MarketforCorporateControl.html>.

281. See *supra* text accompanying notes 243–44.

282. See *supra* text accompanying notes 245–58.

283. See *Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050, 1063–64 (D. Del. 1982).

circumstances could management hope for a judicial remedy with real bite.<sup>284</sup> Such a strategy frustrates § 13(d)'s timely disclosure requirement.<sup>285</sup>

The first reaction to such gamesmanship may be that such a course of conduct would cause a court to find that management had waived its right to object to the § 13(d) violation, or that management could not maintain a claim because it comes with unclean hands.<sup>286</sup> However, courts have correctly noted that these arguments hold little water; § 13(d) exists to protect investors, not management, and management's mistakes or connivings should not preclude enforcement of the statute.<sup>287</sup> As one court explained:

To bar equitable relief on the grounds that management has also acted improperly would ignore the rights of the true party in interest and add to the information withheld from investors and shareholders. While existing management may have ulterior motives in seeking injunctive relief for alleged violations of Section 13(d), such relief will be granted only to protect shareholders and the investing public from irreparable harm that results when the Section is violated. The alleged "unclean hands" on the part of the plaintiff is not a bar to the injunctive relief sought in this case.<sup>288</sup>

If *Rondeau* is reinterpreted as suggested, it would contribute much in the way of incentivizing incumbent management to swiftly report Williams Act violations. After all, the current reluctance to report emanates from the lack of a strong remedial regime, which itself stems from the *Rondeau* decision. But even if *Rondeau*'s effects have been muted, the presumption of harm remains rebuttable. Thus, gamesmanship on the part of management would persist; its time frame would simply change. That is, management would still have little incentive to report a § 13(d) violation if it learns of the violation at an early point in time when the assertion of irreparable harm could most likely be rebutted.

Thus, to rectify the possibility that management will intentionally delay reporting of Williams Act violations, and to address the fact that *Rondeau*

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284. See *supra* notes 120, 145, 249.

285. See *supra* text accompanying note 53.

286. See DAN B. DOBBS, LAW OF REMEDIES §2.4(2), at 68 (1993) ("One who comes into equity must come with clean hands." (internal quotations omitted)).

287. See *Indiana Nat'l Corp. v. Rich*, 712 F.2d 1180, 1185 (7th Cir. 1983) ("Section 13(d) was not intended to protect incumbent management or to discourage take over bids. Its sole purpose was the protection of shareholders." (internal citations omitted)); *K-N Energy, Inc. v. Gulf Interstate Co.*, 607 F. Supp. 756, 770 (D. Colo. 1983) ("The purpose of Section 13(d) . . . is not to protect the existing management of the issuer, but to provide material information to the shareholders of the issuer as well as to potential investors and the market as a whole.").

288. *K-N Energy, Inc.*, 607 F. Supp. at 770.

may continue to be interpreted and followed as it has been, courts should readily recognize shareholders' claims for a breach of fiduciary duty against an incumbent management that learns of, but fails to report, a § 13(d) violation.

Under corporate law, directors and officers of a corporation have a fiduciary relationship with the corporation's shareholders,<sup>289</sup> which gives rise to the duties of care and loyalty.<sup>290</sup> The duty of care demands that "directors . . . conduct themselves as ordinarily prudent persons managing their own affairs."<sup>291</sup> The duty of loyalty is violated, in relevant part, "[w]here directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities."<sup>292</sup>

Thus, management's failure to act upon knowledge of a § 13(d) violation can be viewed as either a breach of the duty of care or the duty of loyalty, depending on the circumstances. As such, management would be vulnerable to a shareholder derivative lawsuit for this breach.<sup>293</sup> Although it may be difficult for shareholders to prevail in such a suit for a variety of reasons, such as the business judgment rule,<sup>294</sup> the mere specter of this litigation would certainly create some disincentive for management to withhold information regarding a § 13(d) violation for later strategic use. In fact, it may encourage management to take greater vigilance in identifying and reporting violations.

### B. Governmental Prioritization

There are a range of measures that either Congress or the SEC could potentially take to remedy the problems identified in this Article. Congress could amend the Williams Act in such a way that overrules *Rondeau*. More specifically, Congress could add a provision declaring that the Act's violation creates a rebuttable presumption of irreparable injury, thereby triggering the availability of injunctive relief.

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289. See *United States v. Byrum*, 408 U.S. 125, 138 (1972) ("[T]he directors . . . have a fiduciary duty to promote the interest of the corporation."); *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 599 (1921) (describing the relationship of directors to the corporation as being fiduciary in nature).

290. See *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239–40 (Del. 2009) (discussing the fiduciary duties that directors owe to the corporations they serve).

291. Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 40 (2005).

292. *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

293. See E. Taylor Stukes, In Re Wachovia Shareholders Litigation: *The Case for the Common Benefit Doctrine*, 84 N.C. L. REV. 2066, 2069–70 (2006) (explaining a derivative suit); see also *Fl. Comm. Banks v. Culverhouse*, 772 F.2d 1513, 1519 (11th Cir. 1985) (noting that shareholders may make a claim of waste against management and receive the typical remedies if successful).

294. See Stukes, *supra* note 293, at 2071–72.

As discussed, with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress amended 21C of the 1934 Act, enabling the SEC to levy monetary penalties for Williams Act violations regardless of the violator.<sup>295</sup> The SEC could use this to fine Williams Act violators in administrative proceedings.

Lastly, the SEC could more aggressively pursue Williams Act violators in general. As discussed, such actions appear quite rare, at least when brought solely because of a failure to file a Schedule 13D.<sup>296</sup> Prioritizing this would be significant because of the SEC's newly acquired ability to levy fines in administrative proceedings against any Williams Act violator, as well as the SEC's long-standing absolution from the need to prove irreparable injury when seeking injunctive relief in civil actions.<sup>297</sup> Accordingly, this allows the SEC to avoid the obstacles *Rondeau* places in the path of other private litigants.<sup>298</sup> Additionally, accompanying greater SEC scrutiny would be the possibility of criminal liability for those cases the SEC deemed egregious enough to warrant criminal prosecution at the hands of the Department of Justice.

## V. CONCLUSION

It is beyond reasonable dispute that judicially crafted remedies to Williams Act violations should promote of the aims of the Act. Thus, these remedies should effectuate the informational disclosures mandated by the Williams Act. In order to accomplish this, these remedies must create a set of incentives that encourage potential violators to comply with the Act and that urge those in the best position to monitor compliance—namely, incumbent corporate management—to readily report violations. The current remedial regime, which is marked by undue leniency, fails to provide such incentives; indeed, the current remedial regime is arguably counterproductive in that it discourages both strict compliance with § 13(d) and prompt reporting of violations.

By increasing the severity of the available relief, potential Williams Act violators will be more likely to comply, and issuers who fear potential takeover bids will be more likely to readily report noncompliance because of the increased possibility to obtain significant injunctive relief at an earlier date. Such a remedial approach would better protect investors from

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295. See *supra* text accompanying notes 95–98, 106–10.

296. See *supra* note 278. Even the SEC's recent enforcement action against the Wyly brothers is only partially predicated upon alleged Williams Act violations; the action in large part concerns securities fraud in violation of § 10(b)-5 and the other antifraud provisions of the securities laws. See Complaint and Demand for Jury Trial at 55–57, 63–69, SEC v. Wyly, No. 10-CIV-5760 (S.D.N.Y. July 29, 2010).

297. See *supra* text accompanying notes 106–10, 124–26.

298. This may contribute to a greater success rate for the SEC in Schedule 13D litigation. See *supra* note 179.

trading on inaccurate or incomplete information—an interest that is as compelling today as it was when Congress first passed the Williams Act.

